

THE LEAVE ALLIANCE

Flexcit

**A plan for leaving the
European Union**

Dedicated to Peter Troy

21 November 2021 v.10

Foreword

On 23 June, in an historic referendum on whether the UK should remain a member of the EU or leave, "leave" voters delivered 17,410,742 votes, against the "remains" with 16,141,241 votes. So was delivered a majority vote to leave the European Union, with a margin of roughly 52 to 48 percent.

This brought the referendum campaigns formally to a close. There are now no "leavers" or "remainers". Technically, we are all leavers, now engaged in the mighty task of securing an orderly withdrawal from the European Union.

With the UK now having formally exited the EU, this document is now effectively redundant, although Brexit, as a long-term process, is hardly complete. Thus, elements of the plan are still valid, while other parts of it serve as a comparison of what is and what could have been.

Thus, in this tenth version and with 160,000 downloads already registered, we will progressively re-write the work to take account of the post-exit reality. We offer it as a template to inform and fuel the ongoing debate on how we left the European Union, and what still needs to be done.

Our vision

Prior to the referendum, we offered a vision of a self-governing United Kingdom, a self-confident, free-trading nation state, releasing the potential of its citizens through direct democratic control of both national and local government and providing maximum freedom and responsibility for its people.

The history of Britain for a thousand years has been as a merchant and maritime power playing its full role in European and world affairs while living under its own laws. It is our view that the UK can flourish again as an independent state trading both with our friends in the EU and the rest of Europe, while developing other relationships throughout the world as trading patterns evolve.

For an age, the United Kingdom has freely engaged as an independent country in alliances and treaties with other countries. It has a long history of entering into commercial agreements and conventions at an inter-governmental level. We wish to uphold that tradition.

The ability of the people of the United Kingdom to determine their own independent future and use their wealth of executive, legislative and judicial experience to help, inspire and shape political developments through international bodies, and to improve world trade and the wellbeing of all peoples will only be possible when they are free of the undemocratic and moribund European Union.

The prosperity of the people depends on being able to exercise the fundamental right and necessity of self-determination, thus taking control of their opportunities and destiny in an inter-governmental global future with the ability to swiftly correct and improve when errors occur.

Within the United Kingdom, our vision is for a government respectful of its people who will take on greater participation and control of their affairs at local and national level. Our vision fosters the responsibility of a sovereign people as the core of true democracy.

Summary

Leaving the EU will have significant geopolitical and economic advantages. But we believe it is unrealistic to expect a clean break, immediately unravelling forty-three years of integration in a single step. Therefore, we have set out a process of phased separation and recovery.

In all, we identify six phases. The first deals with the legal process of withdrawing from the EU, with the aim of concluding an agreement within the initial two-year period allowed in the Article 50 negotiations. In this, we seek continued participation in the EU's Single Market.

The six phases involve both short-term and longer-term negotiations, to achieve a measured, progressive separation. In the first phase, there are three possible options. One is by rejoining the European Free Trade Association (EFTA) and trading with the remaining EU member states through the European Economic Area (EEA) – the so-called Norway Option. Another is the "shadow EEA" and the third we call the "Australian process".

As part of the first phase, we would repatriate the entire body of EU law applicable to the UK, including that pertaining to agriculture and fisheries. This would not only ensure continuity and minimise disruption – and reduce what would otherwise be massive burdens on public and private sector administrations – but also buy time for a more considered review of the UK statute book.

We would continue co-operation and co-ordination with the EU at political and administrative levels, where immediate separation of shared functions is neither possible nor desirable in the short term.

These would include the framework research programme (Horizon 2020), the Single European Sky and the European Space Programme, certain police and criminal justice measures, joint customs operations, third country sanitary and phytosanitary controls, anti-dumping measures, and maritime surveillance. Such issues are in any event best tackled on a multinational basis, and there is no value in striking out on our own just for the sake of it.

Thus, the first phase is limited to a smooth, economically neutral transition into the post-exit world. It lays the foundations for the UK to exploit its independence, without trying to achieve everything at once. Subject to a referendum to approve the initial exit agreement, the basic withdrawal framework could be in place within two years of starting negotiations.

Even before exit, we would initiate a second phase – the regularisation of our immigration policy and controls. This will include action at a global level to deal with the 1951 Geneva Convention on the Treatment of Refugees, and the 1967 Protocol, as well as at a regional level, modifying or withdrawing from the European Convention on Human Rights.

We then propose a third phase, which involves breaking free of the Brussels-centric administration of European trade, building a genuine, Europe-wide single market, with common decision-making for all parties. This will be fully integrated into the global rule-making process, through existing international bodies.

The aim is a community of equals in a "European village", rather than a Europe of concentric circles, using the Geneva-based United Nations Economic Community Europe (UNECE). It would become the core administrative body, on the lines proposed by Winston Churchill in 1948 and again in 1950. Thus, the exit from the EU becomes the start of an ongoing process, the means to an end, not the end itself.

Simultaneously, we identify and explore some key areas where independent policy development is required. In phase four, we make a start on this, the work eventually leading to divergence from the EU and the emergence of unique UK policies.

Phase five comprises a coherent programme to define our wider global trading relations. This comprises eight separate initiatives. The withdrawal settlement has now receded, having served its purpose as the launch pad. The way is now open for the UK to break out of the EU *cul-de-sac* and rejoin the world.

Sixth, and finally, we embark on a series of domestic reforms, by introducing elements of direct democracy and the other changes embodied in The Harrogate Agenda – the immediate aim being to prevent ever again a situation where our Parliament hands over our powers to an alien entity without the permission of the people.

In its totality – the sum of the parts being greater than the whole - we call our exit plan Flexcit, standing for a flexible response and continuous development. This market solution to leaving the EU is a process, not an event. It provides a template for the next twenty or so years of our national development.

Contents

Foreword	2
Our vision	3
Summary	4
Contents	6
1.0 Introduction	11
2.0 The negotiating framework	15
2.1 Media operations.....	16
2.2 Public information	18
2.3 Departmental responsibility for negotiations.....	20
2.4 An independent Advisory Council	21
2.5 Third country treaties	23
2.6 Steps towards independence	25
2.7 Article 50 and the legal framework	27
2.8 Protecting the Single Market	31
2.9 Duration of the negotiations	31
Phase One: Withdrawal	
3.0 Withdrawal options	37
3.1 The unilateral WTO option.....	41
3.2 The bilateral (Swiss/Turkey) options.....	48
3.3 The "off-the-shelf" solutions.....	51
3.4 EFTA+bilaterals.....	59
4.0 Options compared	63
4.1 The Swiss option and "deregulation"	64
4.2 Fax democracy	65
4.3 Norwegian/EFTA spheres of influence	68
4.4 Maintaining sovereignty	70
4.5 "Influence" in perspective.....	72
5.0 The mechanics of leaving	76
5.1 Border control	77
5.2 Co-operation through the EEA	81

5.3 Inter-agency co-operation	82
5.4 The Single European Sky	83
5.5 Police and criminal justice measures	86
5.6 Joint customs operations	89
5.7 Sanitary & phytosanitary controls	91
5.8 Anti-dumping measures	93
5.9 Maritime surveillance	94
5.10 The financial settlement.....	97

Phase Two: Immigration and Asylum

6.0 Freedom of movement & immigration	100
6.1 The EEA solution.....	103
6.2 Swiss problems	112
6.3 The British dilemma	114
6.4 Illegal immigration	115
6.5 Addressing the core issues	116
6.6 Devil in the detail: workers' remittances.....	120
6.7 Reducing "push" factors	121
6.8 Reducing "pull" factors.....	123
6.9 A comprehensive immigration policy.....	129
7.0 Asylum policy	132
7.1 The framework of international law	134
7.2 The EU system.....	136
7.3 The Dublin Regulation.....	139
7.4 The European Convention of Human Rights.....	141
7.5 The British system	142
7.6 The search for solutions	145
7.7 A post-EU policy	152

Phase Three: A genuine European Single Market

8.0 Regulatory issues.....	159
8.1 Replacement and removal of existing law	162
8.2 Better regulatory systems.....	164
8.3 Two-tier regulation	168
8.4 Two-tier regulation and the WTO	170
8.5 Trade mandated regulation	172
8.6 Repatriating EU law.....	174
8.7 Regulatory convergence	175
8.8 Absorptive capacity	176
8.9 Systemic adjustments.....	177
9.0 The role of global governance.....	180
9.1 The EU role in global governance	181
9.2 The "hidden hand" of global governance.....	185
9.3 An example of the system in action.....	189

9.4 The role of the World Trade Organisation.....	190
9.5 ISO – an arm of global governance	193
9.6 International Regulatory Cooperation (IRC)	196
9.7 The UK's global role	198

10.0 UNECE	202
10.1 Breaking away from Brussels	203
10.2 Potential regional structures.....	206
10.3 UNECE – the hierarchical solution	209
10.4 Preparing for a post-exit strategy	211
10.5 A community of equals	212

Phase Four: Policy reconstruction

11.0 Foreign and defence policy	215
11.1 The European Union dimension	215
11.2 The need for realignment	216
11.3 Levels of co-operation	218
11.4 Foreign policy mechanisms	219
11.5 Neighbourhood policy	221
11.6 Soft power dynamics	223
11.7 Overseas Aid.....	226
11.8 Defence cooperation	228

12.0 Agriculture	235
12.1 Immediate post-exit trading arrangements	237
12.2 WTO: transitional arrangements.....	239
12.3 Post-exit agricultural policy	242
12.4 Continuing policy development.....	244
12.5 Withdrawal from specific sectors	245
12.6 Rural development.....	247
12.7 Multifunctional policy	248
12.8 Landscape and tourism	250
12.9 A policy of incrementalism.....	251
12.10 Longer-term options	252

13.0 Fisheries	254
13.1 Background.....	256
13.2 The legal framework.....	258
13.3 UK and international coordination.....	259
13.4 The fundamentals of the management system.....	259
13.5 Management structures and operations.....	262
13.6 Scientific services	262
13.7 Enforcement, monitoring and sanctions	263
13.8 The policy in context	266

14.0 Environment policy.....	268
14.1 The complications of policy	269

14.2 Further developments in EU policy	273
14.3 The growth of internationalism.....	274
14.4 Identifying the national interest	275
14.5 Equalising the national debate	277
14.6 Reframing environmental policy	279
14.7 The implications for EU withdrawal	282
15.0 Climate change and energy	284
15.1 Energy policy	286
15.2 UK policy preferences	289
15.3 Demand management	291
15.4 Energy efficiency	296
15.5 Policy alternatives.....	298
15.6 Combined heat and power (cogeneration)	298
15.7 Integrated systems: deep building renovation	303
15.8 Small modular nuclear reactors	304
15.9 The four-pillar policy	306
16.0 Financial services	310
16.1 An opaque process	311
16.2 Global dimensions	313
16.3 The Global Legal Entity Identifier (LEI).....	315
16.4 Accounting standards.....	317
16.5 Passporting.....	318
16.6 Free movement of capital and payments	319
17.0 The Digital Market	321
17.1 The Regulatory Framework	322
17.2 A global industry	329
17.3 The post-exit scenario.....	331
17.4 UNECE - WP.6 and a new way of regulating	334
17.5 Escape from "little Europe"	336
Phase Five: Global trading	
18.0 Trading with the rest of the world	339
18.1 The Commonwealth.....	341
18.2 Transatlantic trade relations.....	344
18.3 Enforcement and dispute resolution	349
18.4 Unbundling	350
18.5 Transnational organised crime.....	352
18.6 Immigration and trade policy.....	354
18.7 Integrating agreements.....	358
18.8 The eight-point programme	360
Phase Six: Domestic reform	
19.0 Domestic reform.....	365

19.1 Recognising the people's sovereignty	367
19.2 Improved local democracy	367
19.3 Separation of powers	371
19.4 The people's consent	372
19.5 No taxation or spending without consent	376
19.6 A constitutional convention	378
19.7 Progressing the Agenda	379
20.0 Discussion and conclusions	381
20.1 The essence of the plan	381
20.2 The withdrawal dividend	385
20.3 A different approach	388
20.4 Conclusion	389

Appendices

Appendix 1 - Abbreviations	392
Appendix 2 - Globalisation of Regulation.....	394
Appendix 3- Article 50 text	402
Appendix 4 - EU-Swiss Relations	403
Appendix 5 - The 1975 Alternative	407

Index

As an electronic document, there is no need for an index. The document is fully searchable, using the Ctrl-F function.

1.0 Introduction

It is now not enough to simply bemoan the failings of the EU, the first priority for all Eurosceptics should be to find a superior and realistic alternative, and to actively and constructively work towards it.

Ben Harris-Quinney, Bow Group
24 October 2013¹

The original purpose of this book was to set out mechanisms the UK might employ in leaving the European Union. It was thus intended as an aid to managing the separation process which would eventually lead to us resuming our status as an independent state.

As a "roadmap", it was intended to assist the EU Referendum campaign, demonstrating that an orderly exit and separation was plausible, practical and largely risk-free. Now that the referendum is over and the majority have voted to leave the EU, we partially updated the work to reframe it as a template for withdrawal, specifically to fuel the long-overdue national conversation that must now ensue.

Events in many respects have overtaken the original purpose, especially as the Government has closed down the option of remaining in the Single Market via the EEA, even if that option remains obstinately on the table. To that extent, our narrative becomes a review of what might have been, rather than will actually happen.

When first looking at the issues, there was considerable debate as to whether the UK should avail itself of the procedures set out in Article 50 of the Treaty of the European Union (set out in Appendix 3). On 29 March 2017, however, Mrs May formally notified the European Council of our intention to leave, invoking Article 50 and so triggering the two-year negotiating period that will end up in our departure from the EU on 29 March 2019.

In this book, we anticipated to use of Article 50 and, with that as its base, the book follows a fairly straightforward structure. We first look at the negotiating framework which defines and constrains the development of the plan. In those Chapters, we also deal with some important preliminary matters - matters

¹ <http://www.bowgroup.org/policy/if-you-brexit-you-own-it>, accessed 18 April 2014.

extraneous to the main negotiations which we thought would have to be dealt with before negotiators could sit down to the substantive talks. Events have almost completely overtaken this Chapter, but we have kept it as a historical reference.

Then, as we move into the core of the plan, the six separate phases are offered. The very essence of the plan is that it is split into phases – it is a multi-phasic extraction plan. We do not consider and have never considered it possible or even desirable to resolve all the issues arising from forty years of political and economic integration in one set of talks, or in a single step. The UK (and the other EU Member States) arrived at this degree of integration via nine main treaties, over many decades. And if we arrived by a series of graduated steps, it makes absolute sense that we should withdraw in the same way.

In the first phase, we assess the different exit options, both individually and in combination. In our view, there are three broad options – the World Trade Organisation (WTO) and the "Swiss" (bilateral) options, and options aimed at protecting the Single Market in the immediate aftermath of withdrawal. There are also three of these: the so-called "Norway" or Efta/EEA option, the "Shadow EEA" option and what we call the "Australian process". There are also hybrid options to consider and then, despite our thinking that it was untenable, there is the customs union option, which has occupied an unnecessary and disproportionate amount of time.

Before going any further though, we must make a point that we made right from the inception of this book. There is no best option. There is no magic wand or easy path that will allow us to separate instantly from the EU. What is superficially attractive may not be realistic and what looks to be sub-optimal can be tolerable as a temporary expedient. What is unacceptable in isolation can prove acceptable as part of a larger package. Therefore, it is always possible to point out the shortcomings of any option. What matters is the comparative balance of advantage.

With this in mind, we must also recall that membership of the EU involves much more than trade. A huge range of cooperative activities is involved, extending from student exchanges to reciprocal agreements on commercial access to airspace, and much else. Before committing to a final agreement, these activities have to be identified and decisions made on whether to continue them, and under what terms.

Some areas of cooperation are defined in the European Economic Area (EEA) Agreement. If the UK remains within the EEA (one of the options on offer), it will be required to participate in the areas so defined. We look at these, and then at projects such as the Single European Sky, certain aspects of police and criminal justice policy, joint customs operations and third country sanitary and phytosanitary controls. These are all examples of where post-exit co-operation might be advantageous.

Pulling together the preliminaries, the appropriate exit option and the areas of post-exit co-operation is enough to form the basis of an exit agreement. But this is only the start of a longer process restructuring a post-exit Britain. The next priority will be to confront the freedom of movement provisions, which many or may not be amenable to negotiation as part of the exit settlement.

There certainly appears to be much more flexibility than we originally thought, in terms of limiting the free movement of persons yet continuing our participation in the Single Market. Potentially, by staying within the EEA and adopting the so-called Liechtenstein solution, based on the "safeguard measures" of Article 112 of the EEA Agreement, there is scope for negotiation.

Nevertheless, immigration and the associated mass migration is a global phenomenon. Successful control relies on understanding the drivers and dealing with the underlying issues. A full chapter is devoted to exploring these, affording a more detailed appreciation of how the problems can be managed. We do the same in a further chapter on asylum policy, the two chapters forming the second phase of the strategy.

Phase three deals with end game at European level. Assuming that Phase One is an interim stage, we look at how we can break free from the Brussels-centric Single Market and develop a genuine European single market, encompassing the entire continent.

As a precursor to this, we have a chapter which explores regulatory issues, looking at the generalities of regulation which define the Single Market as a common regulatory area. We assess the possibility of establishing and maintaining a two-tier code, and look at trade-mandated regulation and regulatory convergence. We also consider the problem of absorptive capacity and identify the adjustments needed to our administrative systems, for them to function in a post-exit environment.

On leaving the EU, we will be rejoining the global trading system as an independent player. The UK's horizons will no longer stop at Brussels, but will be fully engaged on the global stage where regulations for the Single Market originate. Working at this level, the UK will be helping to dictate the global agenda. A chapter is thus devoted to this "global governance", how it affects the EU and how the UK will benefit by taking a greater part in it.

The greater global influence notwithstanding, we still have to deal with a European trading system dominated by Brussels, in what has been described as a Europe of concentric circles. As long as Brussels remains at the centre and the UK is seen to be on the periphery, its position will be subordinate or inferior. This cannot be acceptable in the longer term so in the following chapter we look at ways of securing a more stable continent-wide market.

This is followed by the fourth phase, where we allocate several chapters to dealing with the restoration of independent policy. We start with a chapter on

the *haute politique* of foreign and defence policy, moving on to look at the oldest established policies of agriculture and fisheries. Each of these is given a separate chapter.

Because of its importance and impact on so many areas of economic activity, we also look at environment policy, and then have a chapter to the linked subjects of climate change and energy. We conclude with a chapter on financial services and the so-called "digital market", including a detailed evaluation of how the immensely complicated skein of telecommunication policies might be adapted to ease our withdrawal from the EU.

The fifth phase, building on the earlier work, then suggests a new framework for our global trade policy, with an evaluation of areas that are ripe for improvement and exploitation.

This brings us to our sixth phase and another massively important issue. There is little point, many say – or instinctively feel – in securing the UK's withdrawal from the EU if the outcome is simply to return powers to a dysfunctional parliament which was responsible, by act or default, for giving them away in the first place. Any settlement must be accompanied by measures which resolve the democratic deficit which allowed politicians to give away the nation's powers. It must also ensure that any future government is not able to repeat the process.

Thus, we devote a chapter to examining ways of restoring democracy to this nation, making both central and local governments more accountable to the people, thereby bringing them back under control.

Pulling the threads together, we explain how leaving the EU becomes a flexible process requiring continuous development. That is our concluding message, a repetition and emphasis of our central point: leaving the EU is not a single event, but a multi-phasic process. It is one that will take many years to complete, as we arrange for a steady, measured divergence of policies rather than a "big bang" separation. The aim will be to keep the best of our agreements with the EU, while freeing the remaining Member States to follow their own path towards political integration, a route which we have no intention of following.

In short, by leaving the EU, we are not ending a relationship with EU Member States. We are redefining it. This is not isolation but an agreement to travel alongside each other, choosing different paths when these better suit our different needs.

2.0 The negotiating framework

... we were helped by the fact that, towards the end of the negotiations, journalists in Brussels had become thoroughly bored with the multiplicity of highly technical subjects still under discussion and were ready to be content with fairly superficial information.

Sir Con O'Neill

Britain's entry into the European Community –
report on the negotiations of 1970-1972.

Before the UK is able to start formal negotiations, there are a number of preliminary steps that must be taken. These are not incidental to the process but will define and shape the negotiations and strongly affect their outcome.

In the first instance, the government will need to prepare a formal Article 50 notification for despatch to the European Council. It will also need to agree an outline negotiation schedule. Already, we have seen the publicity response to the referendum result. The event itself was expected to trigger significant reaction in the financial markets, but so far this seems to have been contained. Monitoring the market and responding to it will form a continuous backdrop to the negotiations.

Of more general and longer-term concern will be the atmosphere in which the talks are conducted. Should mistrust and hostility dominate, then negotiations are unlikely to succeed. Every effort should be made to foster cordial relations, with attempts made to frame the talks in a positive light. A suitable theme might be that the negotiations are part of the process of improving "Europe", seeking a better and more stable relationship between the UK and EU Member States.

If there are overt expressions of hostility from Member State governments, and the EU institutions, they should not be reciprocated. The UK will have to recognise that politicians will need to address their own domestic audiences, and that the UK will not always be cast in a complimentary light. Rather than respond to any hostility in like manner, one might expect a "charm offensive", possibly with a programme of reassurance visits to European capitals by senior politicians, and even members of the Royal Family.

In an attempt to reduce hostile sentiment expressed by former partners, attempts might be made to present the withdrawal in a positive light. Here, one recalls the views expressed by Michel Rocard, a former French prime minister who served under Francois Mitterrand. Recently, he identified Britain as the source of all the EU's problems, declaring that it had "blocked any further integration". Commenting on the possibility of the UK leaving the EU, he said: "If they go, it becomes possible to respond to the needs of governing in Europe. Even Germany realises this and demands it. I hope for it a lot because they have prevented it from developing, they killed it".²

Presenting Brexit as permitting other member states to pursue political integration without the encumbrance of the UK – together with a commitment to future cooperation - can turn a negative into a positive, positioning all parties as partners in a co-operative venture from which all stand to benefit. Co-operation rather than confrontation becomes the ethos.

2.1 Media operations

An effective communication strategy will be an essential part of the exit process. Media relations must not be treated as an add-on but as an integral part of the negotiating process. Bad publicity has the potential to wreck negotiations, while effective management can do much to smooth the way for important, deal-making initiatives.

During the 1970-1972 entry negotiations, the view was taken by the British government that, given the open character of the Community and the fact that virtually all its developments and disputes became public knowledge with the minimum of delay, negotiations would have the same character. It would thus be difficult to conceal the substance of discussions, so it was assumed that everything of importance would inevitably become public knowledge. Therefore, the decision was taken that it would be better tactics to assist the process and thereby ensure that the British version of events, rather than a version slanted in a different direction or simply garbled, became available.

The greatest problem might simply be media inertia, combined with the extraordinarily low level of knowledge and understanding exhibited by most journalists. As recalled in the epigraph to this section, negotiators in 1970-1972 were helped by the fact that, towards the end of the negotiations, journalists in Brussels had become thoroughly bored with the multiplicity of highly technical subjects still under discussion and were ready to be content with fairly superficial information. The problem, therefore, may not be one of concealing information from journalists but in getting them interested and motivated enough for them to report it.

² *The Daily Telegraph*, 29 April 2014, "'UK should get out of the EU,' says former French PM". <http://www.telegraph.co.uk/news/worldnews/europe/eu/10797036/UK-should-get-out-of-the-EU-says-former-French-PM.html>, accessed 2 May 2014.

A very special problem will be the conduct of the BBC as the UK's monopoly public broadcaster. Already it has played an important part in covering the referendum, and its coverage of the negotiations will be crucial in shaping public opinion. Whether reporting will be impartial, objective and effective – much less accurate - remains to be seen. As it stands, the signs are not good.

In the autumn of 2004, the BBC's governors set up a supposedly independent "impartiality" review panel under pressure from the anti-EU lobby – to look at its coverage of EU affairs. Even then, its mandate and starting point was far from impartial, tasking the panel to investigate whether the BBC was too Europhile and gave too little space to anti-EU voices. However, it also looked at issues of accessibility and understanding of the EU. The review panel reported at the end of January 2005.³

Amongst the issues identified by the panel was the failure of the BBC to take the EU seriously as a major ongoing policy issue and organisation, and its inadequate training and inadequate use of correspondents at its disposal. EU coverage showed a "tendency to polarise and oversimplify issues, a measure of ignorance of the EU on the part of some journalists and a failure to report issues which ought to be reported, perhaps out of a belief that they are not sufficiently entertaining". The BBC World Service, by contrast, was given a generally good bill of health: "There is a disparity of quality and quantity of coverage between the World Service and domestic programmes", the panel found.

The problem in BBC coverage of the EU lay in its domestic output – i.e., in the output vital for shaping British public information and interest. The panel went on to say that, "all external witnesses pointed out that the BBC News agenda understates the importance and relevance of the EU in the political and daily life of the UK". At the time, the main EU issue to hand was coverage of the European Constitution and, in a key reference to this, the panel found: "In all the coverage of the Constitution that we watched and listened to there was little, if any, explanation of what the Constitution contained".

In its concluding 12 recommendations, the panel argued that "the problem of ignorance among BBC journalists on the EU issue must be addressed as a matter of urgency". Then, in a first response from the BBC governors, they stated "on the evidence of the MORI research that informed the Panel's report, the BBC is not succeeding in providing basic accessible information on the topic of Europe and urgent action is needed".⁴

During the exit negotiations, such problems will be magnified, not only by the complexity of the issues but the workload and the duration of the talks. In a media which prefers personality politics and has a poor grasp of the subject matter, journalists and editorial staff will be struggling to maintain any level of coherent coverage. They may, therefore, need more than the usual level of

³ " BBC News Coverage of the European Union" (2005) Independent Panel Report

⁴ "BBC News Coverage of the European Union". Statement by the Board of Governors, January 2005.

assistance from government sources, with the establishment of a dedicated office, staffed by an experienced team able fully to exploit new communication technologies.⁵ Key members of this team might be recruited from outside government.

Without in any way seeking to interfere with or undermine the freedom of the press, the government might invite media organisations, including news agencies and especially the BBC, to appoint specialist staff to report the negotiations. Special "deep background" workshops might be offered to these personnel, in an attempt to improve their knowledge and understanding.

Although content will have to be tactfully delivered, course delivery will have to address a profound ignorance on the part of the media that extends even to the basics. By no means all journalists are fully aware of the distinctions between different types of EU legislation, very few understand the legislative procedures – and especially the co-decision (now ordinary legislative) process – and fewer still are able to describe properly the EU institutions. This is an industry, after all, which commonly refers to meetings of the European Council as "summits", and even senior journalists frequently confuse the Council of Europe with the European Union. One might even suggest that, to gain official accreditation, individuals might be required to attend one or more workshops.

Ongoing efforts should concentrate on background and technical briefings of greater depth than are normally available from government services, but there should also be an effective rapid-response capability. Specifically, this should be tied in to the use of the social media where, because of the rapid rate of information dissemination, substantial resources should be allocated.

2.2 Public information

Acceptance of a formal exit agreement will depend in part (and most probably to a very great extent) on an informed public, and in particular on knowledgeable opinion-formers. It is difficult to appreciate, however, the depth of ignorance as to the detailed workings of the EU, not only amongst the ordinary public, but amongst those who might be regarded as the educated élite.

As to the public, the problem goes way back. In 1971, an NOP poll asked 1,867 respondents to name the members of the then EEC. Only 13 percent got all six countries right.⁶ Then, 43 years later in early April 2014, just over a month before the European Parliament elections, a *YouGov* poll found that only 16

⁵ Numerous studies have been made on the role of the media and diplomacy, and of the use of new technology. See, for instance, Archetti, Cristina (2010), *Media Impact on Diplomatic Practice: An Evolutionary Model of Change*, American Political Science Association (APSA) Annual Convention, Washington, DC, http://usir.salford.ac.uk/12444/1/Archetti._Media_Impact_on_Diplomatic_Practice._An_Evolutionary_Model_of_Change.pdf, accessed 7 January 2014.

⁶ Anthony King (1977), *Britain Says Yes, The 1975 Referendum on the Common Market*, American Institute for Public Policy Research, pp.23-24.

percent of respondents could correctly name the date of the coming elections. A clear 68 percent did not know and 16 percent chose the wrong date altogether. Some 77 percent admitted they did not know the number of MEPs to which the UK was entitled. Only seven percent got the figure right. Some 93 percent could not even name one of their MEPs. Only 20 percent of respondents knew how many countries there were in the EU, a mere 44 percent of people knew that Norway was not a member, 27 percent thought Ukraine was, and 30 percent believed Turkey was in the Union.⁷



Figure 2: a graphic taken from a cartoon strip produced by Anglia Ruskin University and the Euclid Network, highlighting the low level of information on the EU amongst young people, and the mechanisms needed to get them involved.⁸

In a separate survey carried out by the *Opinium* polling company, just 27 percent of UK voters could name José Manuel Barroso, then President of the

⁷ YouGov Survey, fieldwork 6-7 April 2014.
http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ex3h6e8mn8/YG-Archive-Pol-Sun-results-070414-EUMEPs.pdf, accessed 10 February 2015.

⁸
http://www.anglia.ac.uk/ruskin/en/home/microsites/cyri/our_research/esrc_festival_of_social.Maincontent.0008.file.tmp/eu1%20copy.pdf, accessed 25 April 2014.

European Commission, while 19 percent said the job was filled by Angela Merkel, the German chancellor.⁹

Results of an online survey aimed at young people, by Anglia Ruskin University and the Euclid Network, produced similarly poor results. Only seven percent admitted they knew "a lot" about the EU and just 12 percent felt that the EU impacted on their lives "very much". Only a third of the respondents (34 percent) claimed to know the difference between the European Parliament, the European Commission, the European Council and the European Union.¹⁰

The degree to which ignorance of this principle pervades the "expert" and the political communities is quite staggering. Yet compulsory re-education is probably out of the question, and possibly of questionable effect when the former Prime Minister David Cameron still believes he cast a veto at the 2011 European Council to block a fiscal treaty.¹¹

Nevertheless, nine parts of the solution is recognising that there is a problem and then identifying it. Those in a position of influence need to be self-aware and self-critical and, with their peers, need to be especially conscious of the need to get their facts right. Government, on the other hand, might do more to ensure that the public at large are better informed about the basics of the EU, and be more critical of the media when they get it wrong.

2.3 Departmental responsibility for negotiations

The official media operation can only work within the broader structures set by government. Successful management of the negotiations will be a major undertaking, requiring cooperation from most Whitehall departments, political commitment and the allocation of sufficient resources. It will also demand a shift in thinking to deal with what amounts to a fundamental change in national strategy, of which existing departments are simply not capable.¹² As such, it may well be wise to by-pass the Foreign and Commonwealth Office (FCO), which would otherwise be the lead department in relations with the European Union.

⁹ *The Observer*, 11 May 2014, Voters can't name their MEPs as poll highlights disengagement with EU, <http://www.theguardian.com/politics/2014/may/10/voters-cant-name-their-mep>, accessed 11 May 2014.

¹⁰ See: <http://www.channel4.com/news/young-brits-european-elections-union-parliament-commission> and http://www.anglia.ac.uk/ruskin/en/home/microsites/cyri/our_research/esrc_festival_of_social.html, both accessed 26 April 2014.

¹¹ There was, of course, no treaty to veto and, therefore, no veto. See: <http://www.eureferendum.com/blogview.aspx?blogno=70020>, accessed 28 May 2014.

¹² The official history of the UK and the European Communities (Milward, Alan S, 2002) is entitled: *Rise and fall of a national strategy 1945-1963*, signalling the change from being opposed to entry to the European Communities to a policy of actively seeking membership. Withdrawal from the EU represents no less a change in national strategy and will probably require a similar timescale.

The Cabinet Office might be a suitable alternative with the negotiating team led by the Chancellor of the Duchy of Lancaster. This would permit the appointment of a senior and respected person from outside party politics, as the post-holder can be a member of the House of Lords.

A good negotiating atmosphere will be vitally important. This must not be left to chance. It will require specific actions early on in the process, with the emphasis on presenting the talks as a co-operative exercise. An early appointment of a person committed to the success of the negotiations would send a positive message and would help set the tone.

Given that one of the most powerful complaints about the EU is the lack of democracy in a structure which is said to be inherently anti-democratic, it will be incumbent on the Government to act in a transparent manner, as far as is compatible with the negotiation process.

In deciding the negotiating policy, there is probably no such thing as a best way. Different people and organisations will have different views. Some positions will be passionately held, but driven by emotion and sentiment rather than hard fact. Others will be based on what is believed to be clinical analysis of economic realities. Nevertheless, sentiment has a place in politics and public opinion must be accommodated. If there is overt public hostility to any particular solution, it may be impossible to implement it. Furthermore, there will be many uncertainties – not only the known unknowns but the unknown unknowns.

To help deal with uncertainty, government should encourage a national debate early on in the negotiations. This should be kept out of the party political sphere and at arms-length from the government. Specific events may be commissioned and "roadshows" arranged, all under the aegis of the department responsible for the negotiations. Parliament should have a supervisory role and the appointment of a joint committee of both Houses for the duration could be something worth considering. This could provide material for periodic parliamentary debates. Ministers should make frequent statements to both Houses on the progress of talks.

2.4 An independent Advisory Council

The appointment of an independent Advisory Council – with expert sub-committees – would be highly desirable. Its initial task should be to structure and assist the national debate, to review and explain options and then to advise Britain's negotiation team.

In many ways, this is the proper, democratic way to identify measures the UK needs to take. One would expect the Council to bear that in mind. To that effect, it would be expected to initiate a range of studies, promoting discussion and debate, modelling various outcomes. It would also be expected to work with government at all levels, while trade associations, NGOs and civil society

generally will want to be involved. And these will have to be consulted if there is to be the widest possible backing for the eventual agreement. Even the best outcome is not a solution unless it has public support.



Figure 3: Palais des Nations, Geneva. Home of the United Nations in Europe. Potential location for the Article 50 negotiations. (photo: Wikipedia Commons)

As to the Article 50 negotiations, the location of the main talks will be crucial. The Justus Lipsius building in Brussels – home of the European Council – would be the obvious choice, but it might engender a hothouse atmosphere which is not conducive to deliberative negotiations.

Further, the sight of British representatives on our television screens trooping off to Brussels might send the wrong signal, positioning them as supplicants rather than as equal partners. The presence of negotiating teams might also interfere with the functioning of EU institutions, causing stress and disruption, adversely affecting the conduct of the negotiations.

In any event, in Brussels, where British staff members are working on secondment to the Council, it might also be impossible to keep EU and negotiating personnel apart, rendering it difficult to prevent "infection" and leakage. A more neutral venue might therefore be preferable, although there are limits to which cities could host such talks. Geneva could be a good choice, using the *Palais des Nations* building. It is home to many UN institutions, the WTO and other international bodies. It has good communications and the

infrastructure to handle international negotiations. The EU maintains a strong presence in the city and would have few logistic difficulties in supporting prolonged talks. The symbolism of conducting talks in neutral Switzerland could also be of value.

2.5 Third country treaties

Although the primary concern of the post-referendum negotiating team is the pursuit of an exit agreement with the EU, the UK may well find itself in the position of having also to renegotiate or renew hundreds of other treaties which are in some way dependent for their functioning or even existence on membership of the EU.

Illustrating the potential scale of the problem, currently the European Union lists 881 bilateral treaties on its treaty database, together with 251 multilateral agreements.¹³ They cover a vast range of subjects from the "Agreement between the European Union and the Republic of Moldova on the protection of geographical indications of agricultural products and foodstuffs" to the "Agreement on fishing between the European Community and the Kingdom of Norway".^{14,15,16} Norway, in fact, is party to 166 agreements, and 215 are listed to which the UK is also party.

There is a further distinction as between treaties made jointly between the European Union and its component Member States, and other parties (whether bilateral or multilateral) – the so-called "mixed" treaties, and those concluded only between the European Union and third parties, such as under the Lisbon Treaty Article 207 powers, known as "exclusive" treaties.

On the face of it, Britain is excluded from all treaties once it leaves the EU. Therefore, it would appear that each treaty will have to be examined and, where necessary, the agreements between Britain and the relevant third countries renewed. The administration and negotiations potentially required in such an event, together with the procedural requirements associated in maintaining treaty continuity, could on the face of it take longer than the Article 50 negotiations, and prove resource intensive.

The burden might be reduced by adopting a general presumption of continuity – as is held to exist by some authorities on international law. This applied in the "velvet divorce" between the Czech Republic and Slovakia, when on 19 January 1993 the two republics were admitted to the UN as new and separate

¹³ <http://ec.europa.eu/world/agreements/searchByType.do?id=2>, accessed 4 March 2016

¹⁴ <http://ec.europa.eu/world/agreements/searchByType.do?id=1>, accessed 20 April 2014.

¹⁵

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=9342>, accessed 4 May 2014

¹⁶

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=38>

states. In respect of international treaties, they simply agreed to honour the treaty obligations of Czechoslovakia.¹⁷

The Slovaks transmitted a letter to the Secretary General of the United Nations on 19 May 1993 expressing their intent to remain a party to all treaties signed and ratified by Czechoslovakia, and to ratify those treaties signed but not ratified before dissolution of Czechoslovakia. This letter acknowledged that under international law all treaties signed and ratified by Czechoslovakia would remain in force. For example, both countries are recognized as signatories of the Antarctic Treaty from the date Czechoslovakia signed the agreement back in 1962.¹⁸

Nevertheless, the UK might be advised to prepare the ground before committing to an Article 50 notification, on the basis that, until alternative arrangements are in place, an exit agreement with the EU member states cannot be properly discussed. In this, the UK will no doubt be guided by the Vienna Convention on Succession of States in respect of Treaties, even though it is not a party to it.¹⁹

The Convention sets out the procedures for carrying over treaties, where all parties agree to their continuation. It allows for the newly independent State – in this case the UK – to establish its status as a party to an existing treaty by way of a formal notification of succession, lodged with the depository of each treaty. Nevertheless, participation in the treaties will normally require the consent of all the parties, and the newly independent State may establish its status as a party to these treaties only with such consent.²⁰ It does not seem likely, though, that many parties will want to withhold consent.

This procedure, however, might not apply to exclusive EU treaties, where the EU as the contracting party concluded the agreement on behalf of its members, without the individual members acting as contracting parties. In this case, the UK has no direct locus and, on withdrawal from the EU might have no part in such treaties. But there again, the principles of the Vienna Convention could be deemed to apply, given the political will. In those cases, where the third country is the beneficiary – as in the Mutual Recognition Agreement on Conformity Assessment between the EU and Australia – it would be irrational for that country to withhold consent.

In any event, there are currently very few exclusive treaties, with the EU treaty database listing only 17 made under Article 207, of which only three relate to trade, of the 250 trade agreements listed in the database.

¹⁷ http://self.gutenberg.org/articles/velvet_divorce, accessed 7 November 2015.

¹⁸ *Ibid.*

¹⁹ http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf, accessed 12 September 2014.

²⁰ *Ibid.*

Nevertheless, there is an option which would avoid the possibility of being held to ransom by third countries which do not consent to an independent UK as a treaty partner. This would involve an agreement with the EU of a treaty giving Britain notional membership status for the strict and exclusive purpose of taking advantage of the third country treaty provisions. Any such arrangement would most certainly be of limited duration, giving time for selective renegotiation and/or re-enactment with the original parties to the third country treaties.

Even if some treaties have to be renegotiated, that is not necessarily a significant problem. Talks may be relatively trouble-free and speedy to conclude. For instance, on third country trade deals with developing and less-developed countries, the UK may be willing to offer more generous terms than were available from the EU, in return for a speedy conclusion of deals.

Where for instance the EU is currently demanding that Kenya (and EAC partners) progressively reduce tariffs on imports, the UK may be more inclined to carry over ACP arrangements in the interests of promoting employment and development, all with a view to reducing migration pressure. With the groundwork already done, draft treaties might be in place long before the Article 50 deadline supervenes.

2.6 Steps towards independence

In addition to these points, which set the boundaries to our plan, the British government also has to look at the bigger picture, and how the UK might fit into the fresh geopolitical and economic landscape that would follow. It needs to identify measures Britain needs to take in the years (and even decades) following formal exit, externally and domestically as well.

A particular complication we deal with is the way that EU law has infiltrated the British system. As Lord Denning put it back in 1974:

The Treaty [of Rome] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.²¹

This "incoming tide" has indeed flowed into the estuaries and up the rivers of the administrative system, yet it is barely appreciated or even recognised for what it is. In many instances, EU provisions are mixed in with and become part of domestic initiatives, without this being realised.

²¹ Lord Denning H.P. *Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418.

But there are added complications which few people even recognise, and even fewer understand. Many EU provisions themselves implement or take into account international law, while the resultant British law also builds in national elements.

As a result, much of the law implemented in the UK is hybrid – an amalgam of international, sub-regional (i.e., EU) and national requirements. When we transpose an EU law, we do not necessarily see just a single strand of EU legislation. And by the time the end product is implemented, its origins can be so obscure that the EU provenance is unrecognisable and sometimes denied, even by the people most affected by it. If we are gradually to detach ourselves from the influence of EU law, we will first have to identify the different influences and then unravel the specific Brussels components, while leaving the rest (if that is desired). This will have to become a major part of any exit plan.

Another consideration might be the extent to which attaining an improved economic position becomes an objective of "Brexit". Yet it is questionable whether that is an objective for the exit, or a consequence of it and the events which follow the exit.

If we see "Brexit" as a process rather than a single event, the act of leaving becomes an enabler rather than an end in itself. In our view, the primary objectives of those managing the withdrawal are to set up the structures and strategies which will provide a sound foundation for the governance and development of a post-exit Britain. Crucially, we also need flexibility to react to change, and deal with the many unknowns that will emerge. For the immediate outcome, and in the years following an exit, we would be satisfied with economic neutrality – neither gain nor loss.

To that effect, many areas of government policy and the overall political economy affected by withdrawal come under our scrutiny. Central to our immediate concern is trade policy but there are many other issues which we examine. Most notably, we look at regulation in general, foreign and defence policies and the wider questions of economic policy. Environmental and labour market regulation, and immigration, are of course highly relevant.

Given the role of the EU in regulating trade, however, it makes sense to treat trade policy as a pivotal issue upon which the broader exit agreement will depend. That being the case, an agreement on trade will have a strong influence on the speed with which an overall agreement can be reached.

In view of the complexities – many of which will be explored in this book - we conclude that there are very few realistic options we can pursue in order to bring negotiations to a rapid conclusion. In the longer term, there seem to be more possible options than have so far entered the general debate. And while there is a tendency for those devising exit solutions to concentrate on the short-term, we consider it essential that planners also keep in mind the longer-term needs. We would even advance a strategy which accepts short-term sacrifices

or less than optimal temporary structures in return for increased gains in the longer-term.

Furthermore, we believe solutions should not be reactive. To achieve a desirable settlement, Britain should take an active role in changing the global landscape, reshaping it and the political architecture. Leaving the EU is an event of such magnitude that it will have a significant effect on the political and economic landscape of the entire world. It might even precipitate a long-overdue re-ordering of global institutions. This would be no bad thing. They have developed in a chaotic fashion and their functioning raises questions not only about their efficiency and value for money, but also the effect they have on national democracies and processes of governance.

In our view, therefore, a coherent exit plan requires something more than perpetuating or expanding existing arrangements, or merely responding to change at a national and sub-regional level. We should embrace the full gamut of opportunities afforded by withdrawal. And it is here that the meat of our plan is to be found. The immediate issues to be resolved in order to secure exit are only short-term solutions. What then assume far greater importance are the measures affecting the longer term.

While the eventual aim is to deliver benefits, uncertainty renders it difficult to estimate the precise effects of specific actions. The effect of withdrawal on trade, for instance, is impossible to gauge accurately. The temptation is to present charts with impressive-looking figures and calculations, and these certainly convey authority and the appearance of certainty. But we are dealing with multiple unknowns in a truly unique situation. We have thus provided only broad ideas of where the future might lie. Just one thing is certain: Britain and the trading nations of the world today are not how they will be in the years after Britain leaves the EU.

2.7 Article 50 and the legal framework

Mindful of the conditions in which the referendum has been fought and the broader political environment in which the Article 50 negotiations will have to be conducted, we are convinced that political factors will trump strictly economic considerations.

One factor in particular could colour the entire negotiations: whether there is any turning back from the process. On this, there are two broad schools of thought. On the one hand, some commentators assert that, once the Article 50 notification has been lodged, the UK could come under pressure from the remaining member states to withdraw its notification. On the other hand, the Praesidium of the European Convention, which examined the original provision, considered that, since many hold that the right of withdrawal exists even in the absence of a specific provision to that effect, the Article has the

effect only of setting a procedure for negotiating and concluding an exit agreement.²²

If the politicians involved in the process choose to believe that the right to leave is not conferred by Article 50, one assumes they will instead rely on the Vienna Convention on the Law of Treaties. A departing country must thereby be exercising its Convention rights in notifying the European Council of its intention to leave. That would affirm the Praesidium view that the subsequent negotiations are conducted only for the purpose of "setting out the arrangements" for the withdrawal of the departing country, and to "give effect to the decision". Furthermore, the conclusion of an agreement does not itself constitute a condition of withdrawal, so negotiations – in theory – are not even necessary.²³

While there is extensive literature on this subject, with widely varying views as to the exact application of international law, it should be appreciated that the law is not the dominating factor in treaty negotiations. It must always be remembered that the decision to leave is a political act, made by politicians. It is not a legal decision drafted by lawyers. One thus calls to mind de Gaulle's famous remark that: "treaties are like maidens and roses, they each have their day".²⁴ In the early days of the negotiations on British entry, de Gaulle was quite prepared to abrogate the Treaty of Rome in order vary the deal on offer. Then, when France first rejected the UK application, the remaining "Five" were prepared to consider abandoning the Treaty in favour of an agreement with the UK, without involving France.

In the Article 50 negotiations, lawyers will undoubtedly be consulted, and the talks will be conducted within the framework of treaty law. But it is at the political level that talks will be held and at which decisions will be taken. As Sir David Edward, the first British Judge of the European Court of First Instance, remarked, while we are entitled to look for legal certainty, all that is certain is that EU law would require all parties to negotiate in good faith and in a spirit of cooperation before separation took place. "The results of such negotiation", he concluded, "are hardly, if at all, a matter of law".²⁵

In any event, legal arguments over arcane constitutional points are unlikely to be entertained by the public or by the politicians engaged in negotiations. In

²² European Convention, CONV 724/03, Annex 2, p.134 <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00724.en03.pdf>, accessed 29 May 2014.

²³ See <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/93/93.pdf>, accessed 20 May 2014.

²⁴ Duchêne, François (1994), *Jean Monnet – The First Statesman of Interdependence*. W W Norton and Co, New York, p. 330.

²⁵ Scotland and the European Union, <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>, accessed 20 September 2014.

practical European politics, treaties have a habit of meaning what the parties intend them to mean.²⁶ The legalities are then brought into line with the reality.

Furthermore, whenever considering legal issues, analysts should not allow themselves to be misled by selective quotations. Such can be used to support virtually any view on the legal niceties of leaving, and there are plenty of well-founded texts on which polemicists can rely – all of which go to show that even the application is not a settled issue. But this is a domain inhabited by theory and countervailing argument, with no absolutes and no agreement even between practitioners.²⁷

What is helpful though, with all the necessary caveats, is one paper produced by the European Central Bank (written in the context of a euro member seeking to leave the common currency). It states – with an admirable degree of understatement - that "the assertion of an implied right of unilateral withdrawal from the treaties, even in exceptional circumstances, would be highly controversial". But it does concede a right to leave, "as a last resort in the event of ... extraordinary circumstances affecting a Member State's ability to fulfil its treaty obligations".²⁸

The conclusion of a referendum in which the electorate instructs its government to withdraw from the European Union, thus removing any mandate to fulfil treaty obligations, would appear to constitute "extraordinary circumstances", within the ambit of Article 61 of the VCLT: "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty".²⁹ Democratic consent, in that context, can be taken as "an object indispensable for the execution of the treaty". The "leave" vote in a referendum, in our view, signifies the removal of democratic consent and fulfils the terms of the Vienna Convention. On that basis, the Article 50 process would become a mechanism to give effect to a decision already made.

Following notification, there is no explicit provision written into the EU treaties for rescinding the decision to leave, or for terminating the negotiations. On the face of it, the procedures, once started, must continue.

²⁶ See for instance:

http://fordhamilj.org/files/2014/02/FILJ_Rieder_TheWithdrawalClauseoftheLisbonTreatypdf.pdf, accessed 20 May 2014.

²⁷ Two extremely useful papers in this context are these:

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers and <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1391&context=californialawreview>, accessed 20 September 2014.

²⁸ European Central Bank, Legal Working Paper Series Number 10, December 2009, <http://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf>, accessed 29 May 2014.

²⁹ Treaty text: <http://www.worldtradelaw.net/misc/viennaconvention.pdf>, accessed 19 June 2014.

However, there is then Article 68 of the Vienna Convention, which does permit a notification to be rescinded.³⁰ Whether parties choose to invoke this provision might depend on whether they wish to rely on the dictum, *ubi lex voluit, dixit; ubi noluit, tacuit* - where the law (treaty) has no wish to regulate a matter, it remains silent. For that to be accepted, another principle comes into play: *lex specialis derogat legi generali* – effectively, specific law overrides general law. If European Union Treaty provisions are taken as overriding Article 68 of the Vienna Convention in the absence of explicit provisions in the Lisbon Treaty, a right to rescind the Article 50 notification cannot be assumed.

This being the case, if no agreement is reached after two years – and there is no extension of time (requiring unanimous agreement) - the treaties will automatically cease to apply. Britain would drop out of the EU without taking any further action. Self-evidently, withdrawal does not depend on the consent of the other parties. The only agreement required relates to the nature of the exit agreement, and then only if one is on the table.³¹

That brings in another line of argument, to the effect that, if there was a facility to rescind the Article 50 notification, allowing matters to continue as before, that might frustrate the intent of the Article, and the options afforded. Such a facility might be used to tactical effect, with the withdrawing country withdrawing its notification, only to re-invoke with immediate effect, Article 50, thereby artificially prolonging the negotiating period. That would further argue against the assumption of such a provision.

Tellingly, Article 50 then states: "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49". This is the full entry process. No concessions are made for previous membership. Rejoining demands completion of the full candidature procedure. This would require a commitment to joining the euro, which does not allow for the inclusion of any previously negotiated opt-outs.³² The juxtaposition, in the same article, can be taken as a deterrent, warning states considering an exit, that there is a great deal at risk.

Given that scenario, there is a case to make that the Article 50 notification is a one-way process, or will be treated as such – as a matter of political expediency, whether or not legally justified. That puts huge pressure on negotiators and their governments to come to a satisfactory resolution.

³⁰ Article 68 of the Convention permits a notification or instrument relating to the intended termination of a treaty to be revoked at any time before it takes effect.

³¹ Hermann-Josef Blanke, Stelio Mangiameli, *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*. Springer-Verlag, Berlin Heidelberg, 2012, p.356.

³² See Appendix 3 for the text of Article 50. For the full text of the consolidated treaties see: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206655%202008%20REV%207>, accessed 20 May 2014.

2.8 Protecting the Single Market

One of the key issues that our negotiators will have to address will be access to the Single Market - and the related matter of protecting Foreign Direct Investment (FDI). It is our view that the immediate Article 50 settlement should include continued access to the Single Market, upon which FDI depends.

2.9 Duration of the negotiations

Already, there is a strong demand for the earliest possible exit from the EU. We thus anticipate that the two years initially set by the Treaty for Article 50 negotiations will be treated as a maximum. Although the period can be extended by unanimous agreement, there will be little tolerance for prolonged talks and none for a process that drags on for many years.

Expectations are creating a political momentum that is difficult to ignore, with pressure to bring talks to a speedy conclusion. In principle, speed is no bad thing. To avoid further market uncertainty and political instability, leaving the EU is best done as quickly as possible – advice which was tendered to nations proposing to leave the euro.³³ Delay in reaching a settlement could be highly damaging.

However, advocates of bilateral deals rarely discuss the time needed to conclude them. Economist Roger Bootle, for instance, argues for a Swiss-style bilateral agreement, and posits that many British people imagine that the UK would not be able to negotiate free trade agreements because it is small and insignificant. To counter this, he asserts that the size of the UK economy ensures that we will be able to negotiate satisfactory trading arrangements".³⁴

But the question is not whether or not the UK *could* negotiate satisfactory arrangements, but *how long* it would take to do so. Given unlimited time, the UK would be able to negotiate a different deal than if having to negotiate under time constraints. Yet, in the Article 50 scenario, the presumption must be that time is limited to two years.

As to what can be achieved in various time periods, we can look to the past for guidance. We can start with the relatively straightforward Greenland exit from the EEC in 1985. This arose after the Danish electorate had decided to accede to the EEC in 1973, alongside the UK. The people of Greenland opposed entry but were forced to follow because they were part of Danish territory. There followed a form of devolution, in which powers were transferred to Greenland, culminating in an exit referendum in 1982. The request to "withdraw",

³³ Leaving the euro: A practical guide, Capital Economics Limited, <http://www.policyexchange.org.uk/images/WolfsonPrize/wep%20shortlist%20essay%20-%20roger%20bootle.pdf>, accessed 6 December 2013

³⁴ Without reform, it would be best for Britain to leave EU, The Daily Telegraph, 30 April 2014, <http://www.telegraph.co.uk/finance/comment/rogerbootle/10793681/Without-reform-it-would-be-best-for-Britain-to-leave-EU.html>, accessed 30 April 2014.

however, was not made by Greenland but by Denmark, in the form of a request for it to renegotiate the application of the Treaties to its territory.³⁵

Negotiations were relatively simple, covering only a limited span of issues dealing with a country's economy that relied almost exclusively on fish. Nothing of substance had to be changed in the Treaties and hardly anything had to be put in place to govern the post-exit relations of Greenland with the EU. As before, Greenland's interests continued to be represented via Denmark. Yet, despite all that, the negotiations still took two years.^{36,37}

As might be expected, when it comes to establishing trade agreements with more complex economies, more time has been needed. The current round of EU-Swiss talks – which are taken as the basis for many of the exit models proposed for the UK - started in 1994 and took 16 years to conclude.³⁸

When considering the nature of the UK's exit negotiations, one must assume that any clean-sheet or "bespoke" negotiations on the lines of agreements would take at least as long as the Swiss, if not longer. Generally, as time progresses, international negotiations are taking longer to conclude. This is evidenced by the length of successive GATT/WTO rounds (Table 1 below).³⁹

For the EU, prolonged negotiations are the norm. One example is the Mexico-EU FTA: preliminary talks started in 1995 and finished on 24 November 1999, the agreement coming into force on 1 July 2000, taking nearly five years to complete.⁴⁰ The Colombia-Peru deal was launched in June 2007 and provisionally applied in the first trimester of 2013, also taking nearly five years.⁴¹ Its 2,605-page length, with 337 articles and dozens of schedules, give clues as to the complexity of the task confronting negotiators.⁴²

Work on the EU-Canadian Comprehensive Economic and Trade Agreement (CETA) started in June 2007 and it took until October 2013 for its key elements

³⁵ See:

http://fordhamilj.org/files/2014/02/FILJ_Rieder_TheWithdrawalClauseoftheLisbonTreatypdf.pdf, accessed 20 May 2014.

³⁶ The exit referendum took place in 1982 but the treaty changes which gave effect to the withdrawal did not come into force until 1 February 1985. See:

http://en.wikipedia.org/wiki/Greenland_Treaty, accessed 27 August 2013.

³⁷ http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf, accessed 15 May 2014.

³⁸ European Parliament, Directorate General for Internal Policies, Internal Market beyond the EU: EEA and Switzerland,

<http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf>, accessed 3 December 2013.

³⁹ Moser, Christoph & Rose, Andrew K (2012), Why do trade negotiations take so long? Centre for Economic Policy Research, <http://faculty.haas.berkeley.edu/arose/ON1111.pdf>, accessed 17 January 2014.

⁴⁰ See: <http://intl.econ.cuhk.edu.hk/rta/index.php?did=30>, accessed 12 December 2013.

⁴¹ European Services Forum: <http://www.esf.be/new/esf-eu-trade-policy/eu-free-trade-agreements/eu-peru-colombia-andean/>, accessed 16 November 2013

⁴² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:354:0003:2607:EN:PDF>, accessed 16 November 2013.

to be agreed, a period of just over five years.⁴³ Negotiations on the EU-South Korea FTA started in 2006 and the final agreement entered into force on 1 July 2011.⁴⁴ However, this was only the last stage of a process which had started in 1993.^{45,46} Delivery of the current 1,336-page trading agreement, alongside a broader-ranging 64-page framework agreement on political co-operation, had taken almost 18 years.⁴⁷

Round	Initiated	Completed	Participants	Duration
Geneva	Apr-1947	Oct-1947	23	6 months
Annecy	Apr-1949	Aug-1949	13	4 months
Torquay	Sep-1950	Apr-1951	38	7 months
Geneva II	Jan-1955	May-1956	26	16 months
Dillon	Sep-1960	Jul-1962	26	22 months
Kennedy	May-1964	Jun-1967	62	37 months
Tokyo	Sep-1973	Nov-1979	102	74 months
Uruguay	Sep-1986	Apr-1994	123	91 months
Doha	Nov-2001		153	>123 months

Table 1: GATT/WTO rounds, 1947-2001, time taken to complete negotiations

In an example of unsuccessful negotiations, the EU-India free trade negotiations were launched in 2007 and have still to come to a conclusion seven years later. An agreement may not be signed until 2015 or even later, the 2014 Indian general election having changed the political order and introduced new uncertainties.^{48,49}

⁴³ See: <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/> and <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/>, accessed 16 November 2013.

⁴⁴ Ministry of Foreign Affairs, Republic of Korea: FTA status of ROK: http://www.mofa.go.kr/ENG/policy/fta/status/effect/eu/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_6, accessed 16 November 2013

⁴⁵ European Commission website: Taxation and Customs Union – Korea: http://ec.europa.eu/taxation_customs/customs/policy_issues/international_customs_agreements/korea/index_en.htm, accessed 16 November 2013

⁴⁶ http://en.wikipedia.org/wiki/South_Korea%E2%80%93European_Union_relations, accessed 16 November 2013.

⁴⁷ See also: http://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf, and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:en:PDF>, accessed 16 November 2013.

⁴⁸ See: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/>, accessed 11 December 2013.

⁴⁹ *The Asian Age*, 18 January 2014, "EU hopes to see FTA with India", <http://www.asianage.com/india/eu-hopes-see-fta-india-716>, accessed 18 January 2014.

The putative EU-Mercosur agreement has an even more chequered history.⁵⁰ Negotiations were launched in September 1999 but, despite a re-launch in May 2010 and nine further negotiation rounds, no agreement has been reached after more than ten years.⁵¹ Talks floundered over European agricultural subsidies and the opening of Mercosur industries to competition from Europe. So substantial are the differences that, in June 2014, EU External Action Service Director Christian Leffler declared: "There is no sense in holding discussions if both sides are not ready".⁵² Despite intervention from German Chancellor Angela Merkel, there were by mid-June 2014 no dates set for a meeting between EU and Mercosur negotiators.⁵³

Then there is the trade agreement with the East African Partnership, being negotiated under the aegis of the Africa Caribbean Pacific (ACP) European Union Economic Partnership Agreement (EPA) negotiations. The talks were launched in 2002 under the Cotonou Partnership Agreement (CPA) where parties agreed to conclude WTO-compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to the CPA.

Early agreement proved elusive, leading to the signing of an interim agreement in 2007, running to 487 pages.⁵⁴ That brought duty-free, quota-free access for some products exported to the EU but, after 12 years of negotiations, the remaining contentious issues were unresolved. The latest round of talks was concluded at the 39th session of the ACP-EU Council of Ministers in Nairobi, Kenya on 19 June 2014, without an agreement being reached.⁵⁵

Even more limited pacts can take many years. Negotiations for the Turkish readmission agreement – allowing for the return of illegal immigrants entering EU member state territories via Turkey – started in November 2002, but the agreement was not signed until 16 December 2013 – an interval of 11 years.⁵⁶

On this basis, it is highly improbable that a *de novo* bilateral agreement under the aegis of Article 50 could be concluded in two years. Five years is probably

⁵⁰ Argentina, Brazil, Paraguay, Uruguay and Venezuela.

⁵¹ See: <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/#h2-2>, accessed 16 December 2013.

⁵² Mercopress, EU waiting for a signal from Mercosur for the trade deal, says Brussels official, <http://en.mercopress.com/2014/06/10/eu-waiting-for-a-signal-from-mercocor-for-the-trade-deal-says-brussels-official>, accessed 16 June 2014.

⁵³ <http://www.euractiv.com/sections/trade-industry/merkel-wants-hurdles-removed-eu-mercocor-free-trade-pact-302811>, accessed 14 June 2014.

⁵⁴ http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145792.pdf, accessed 28 June 2014.

⁵⁵ <http://www.acp.int/content/address-president-kenya-he-uhuru-kenyatta-39th-session-acp-eu-council-ministers-19-june-2014>, accessed 29 June 2014.

⁵⁶ European Commission, COM(2012) 239 final, 22 June 2012, concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0239:FIN:EN:PDF>, accessed 16 December 2013.

more realistic. Whatever their attractions in theory, the bilateral options seem hardly viable, purely on the grounds of the time needed to negotiate them. To bring home an agreement within a reasonably short time, a different strategy will have to be considered.

PHASE ONE

Withdrawal

3.0 Withdrawal options

I felt certain that it would be far better for everybody to bring the matter to an issue and not allow it to drag on indefinitely ... I am sure we have now reached a point where merely going on with uncertainty would injure rather than benefit the life and strength of the free world.

Harold Macmillan
House of Commons, 31 July 1961

Legal withdrawal from the EU comprises the first phase of this plan, a process which will started with the UK lodging a formal Article 50 notification with the European Council, which it did on 29 March 2017. For the other 27 Member States as well as Britain, this was a major event. The negotiations have imposed considerable demands on their diplomatic services and the resources of the EU institutions, and on the UK.⁵⁷

There is strong pressure on negotiators to reach a timely accommodation. Article 50 requires the Union to conclude an agreement with the departing state, "taking account of the framework for its future relationship with the Union". Additionally, Articles 3, 8 and 21 (TEU) variously require the Union to "contribute to ... free and fair trade" and to "work for a high degree of cooperation in all fields of international relations, in order to ... encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade".

EU negotiators must, therefore, entertain reasonable attempts to reduce trade restrictions, in accordance with treaty provisions. Moreover, their actions are justiciable. If EU negotiators departed from these legal provisions, or if they or any member states sought to impose trade restrictions or other sanctions in order to increase leverage, the UK would have the option of lodging a

⁵⁷ The importance of this is set out in the paper by Tim Oliver on "Europe without Britain. Assessing the Impact on the European Union of a British Withdrawal", published by the German Institute for International and Security Affairs (September 2013). He argues that exit could be traumatic to the EU as well as the UK. http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2013_RP07_olv.pdf, accessed 11 February 2014.

complaint with the European Court of Justice (ECJ), thereby blocking the action taken.⁵⁸

In this context, the UK is able to rely on its continued membership of the EU. As long as the Article 50 negotiations continue, the UK remains a member of the EU with full rights and privileges. It is excluded from the European Council only when matters directly pertaining to the negotiations are being considered, and from votes in the Council of the European Union and Parliament in similar circumstances. Furthermore, should action contrary to treaty provisions be taken against the UK by any other Member State, the European Commission itself might be obliged to step in and commence infringement proceedings against the offender(s).

What applies to other member states, though, applies to the UK. EU member states and institutions can hardly be expected to work within the treaty and international law in general if the UK refuses to do likewise. It cannot, therefore, expect to step outside the Article 50 framework without repercussions.

Even up to the point where Mrs May formally invoked Article 50, some commentators were still suggesting that this Article and related treaty articles could or should be ignored. Instead, they argued that the UK should rely on the Vienna Convention of the Law of Treaties (VCLT), specifically Articles 65-68 which deal with the ending of treaties.⁵⁹ By this means, it was held, the restrictive provisions of the EU formal negotiations could be by-passed and the UK could dictate the terms and conduct of the proceedings.

In fact, this was never a realistic option. Whenever two or more laws or treaty provisions deal with the same subject matter, priority goes to that which is more specific. This is the principle of *lex specialis derogat legi generali* (special law repeals general law), which is regarded as a fundamental tenet of international law.⁶⁰

Constitutional lawyers also argue on the basis of *Van Gend en Loos* that the EU is a "new legal order of international law" and that internally the relations of the Member States and their peoples in matters covered by the European treaties are governed by European law, as determined ultimately by the ECJ, and not by general international law.⁶¹ In that event, there is a strong argument for Article

⁵⁸ <http://europa.eu/about-eu/institutions-bodies/court-justice/#case4>, accessed 25 November 2013.

⁵⁹ For the official text, see: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, accessed 13 April 2014.

⁶⁰ There are numerous treatments of this principle, which is a standard, uncontroversial provision in international law, of very long standing. See for instance: Mark Eugen Villiger (1985), *Customary International Law and Treaties*, Kluwer Academic Publishers, Alphen aan den Rijn, Netherlands.

⁶¹ Opinion: Referendum on the Independence of Scotland – International Law Aspects, by Professor James Crawford SC and Professor Alan Boyle,

50 and related provisions applying throughout the negotiations. Arguably, the Vienna Convention could only be relied upon as a fallback, should talks break down and there is clear evidence of bad faith on the part of EU negotiators.

Even if it worked entirely within the remit of the treaties, though, the EU has some flexibility as to the nature of the trade agreement(s) it is prepared to discuss with the UK. It could take the view that conformity with the WTO framework is sufficient to satisfy treaty obligations. There is nothing in the treaties that explicitly requires a free trade agreement with Britain to be concluded.

Nevertheless, the idea that the Union might refuse outright to negotiate and then unilaterally impose trade barriers lies beyond the realm of practical politics. The greater concern might be that EU negotiators will not necessarily embrace outcomes most favourable to Britain. That possibility was advanced by John Bruton, former Irish Prime Minister (Taoiseach) and then EU ambassador to the US. He warned that the EU is built on compromise and allowing Britain to retain all associated privileges outside it would set a dangerous precedent.⁶²

The matter came up in the aftermath of the Swiss referendum on immigration - about which we write in detail later - where German Foreign Minister Frank-Walter Steinmeier observed of its relations with the EU, "I believe that Switzerland has harmed [itself] with this result even more". Speaking in Brussels at the beginning of deliberations of the EU foreign ministers, he added: "Switzerland needs to know that "cherry-picking can be no lasting strategy in relation to the EU".⁶³ And echoing precisely those sentiments, an interview of Commission President Barroso on the Swiss referendum by Reuters carried the headline, "Switzerland can't have it both ways on migration".⁶⁴

This makes it very necessary, not only to pick the right option for a post-exit UK, but one acceptable to all parties. This author has heard many times, in Brussels and elsewhere, the view that international agreements are founded on the principle of equal misery. As long as all parties are unhappy with a proposal, it can be agreed by all. The moment one party sees an advantage and supports it on that basis, it is immediately opposed other parties who see

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf. See: Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=EN>, both accessed 12 September 2014

⁶² *Open Europe*, exit simulation, 11 December 2013.

<https://twitter.com/search?q=%23EUwargames&src=hash>

⁶³ *Der Spiegel*, 10 February 2014, Criticism from Berlin: Merkel sees "significant problems" arising from the Swiss vote,

<http://www.spiegel.de/politik/ausland/merkel-sieht-probleme-nach-schweizer-votum-zur-zuwanderung-a-952533.html>, accessed 11 May 2014.

⁶⁴ Reuters, 12 February 2014, <http://uk.reuters.com/article/2014/02/12/us-eurozone-summit-switzerland-idUKBREA1B0FG20140212>, accessed 11 May 2014.

themselves as losers. Cynical though that might be, there is an element of truth in it. No agreement will ever be approved if it appears to give one party an advantage at the expense of some or all of the others. Treaty concessions are unlikely to be accepted if they favour only one party, to the detriment of others.

With that in mind, we can look at the broad possibilities for agreement, of which there are considered to be three, with variations. The first is the "free-for-all" (WTO). The second is the "bilateral" option, involving either a Swiss-style agreement based on multiple bilateral accords, the adoption of a single free trade agreement on the lines of the South Korean FTA, with its parallel accord on political co-operation, or a Turkish-style customs union. Thirdly, the UK can re-adopt the entire Single Market *acquis* in order to retain its market access.

One way of doing this is through rejoining Efta and, through that, remaining in the EEA – the so-called "Norway Option". In the remainder of this chapter, we look at the first two options, and then some of the problems associated with them. Then we look at the continued Single Market participation, concluding with a look at the dynamics of the UK joining EFTA without also participating in the EEA, a variation on the "Swiss option", sometimes known as EFTA+bilaterals.

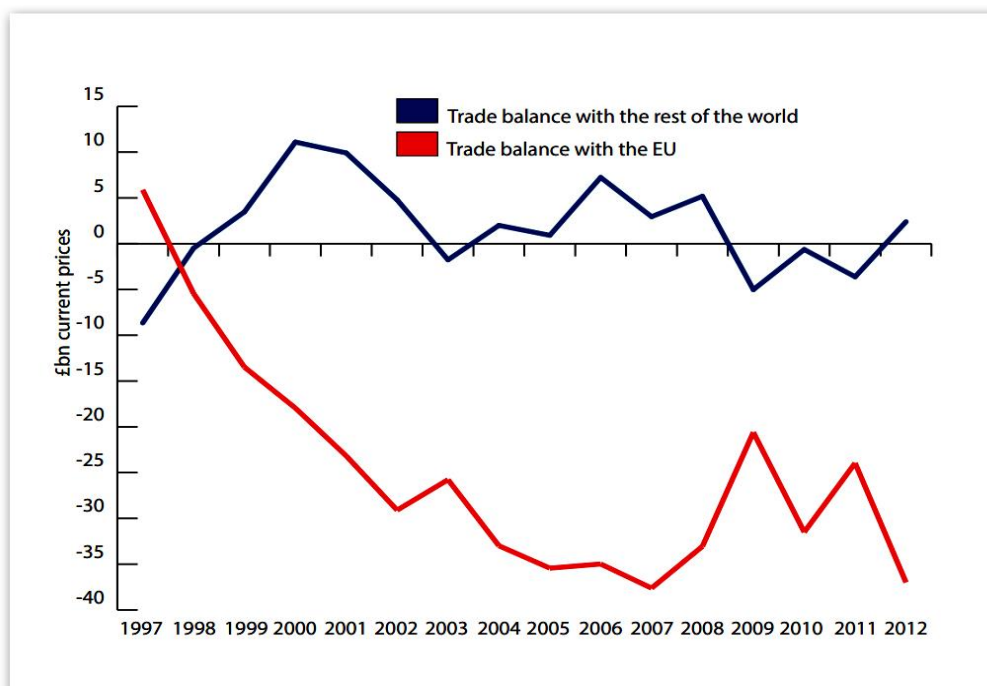


Figure 5: The UK trade balance with the EU and the rest of the world (Source: UK Office of National Statistics, via CER)⁶⁵

⁶⁵ Springford, John & Tilford, Simon (2014), *The Great British Trade-off. The impact of leaving the EU on the UK's trade and investment*, Centre for European Forum, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_britishtrade_16jan14-8285.pdf, accessed 20 January 2014.

At this point we must emphasise that none of the options set out in this Chapter is ideal. None is an acceptable long-term solution. The three overarching options (with their variations) can only be considered as interim solutions, pending a longer-term resolution of Britain's relationship with the EU and the rest of the world.

3.1 The unilateral WTO option

This option eschews negotiations with the EU. Instead, it relies exclusively on the GATT/WTO framework to facilitate trade. It suggests that there should be no specific agreements with the EU and that trade relations should be regulated solely by reference to the diverse agreements made under the aegis of the WTO.

This option had considerable support within the some of the more extreme Eurosceptic community, now morphed into leavers who, because of their extreme views, have come to be labelled "ultras". For them, it has been an article of faith that the EU would be willing to trade under these terms, and that it would be advantageous to the UK.⁶⁶ The trade imbalance with the EU, it has been argued, would preclude any predatory action (see: Figure 5 above).⁶⁷ Whether this is a strong argument, though, is questioned by the Centre for European Reform (CER). It recognises that the EU buys half of the UK's exports while the UK only accounts for around ten percent of EU exports. Additionally, half of the EU's trade surplus with the UK is accounted for by just two member states: Germany and the Netherlands. Most EU member states do not run substantial trade surpluses with the UK, and some run deficits with it. Those in deficit might seek to block UK imports.⁶⁸

Nevertheless, the supporters of the free-for-all" option argue that residual tariffs are minimal and there would be no risk of discriminatory tariffs, where the EU would maintain low tariffs with some third countries and impose higher rates on the UK. These, it is asserted, are "illegal under the provisions of the WTO". The EU could not thus impose higher tariffs on an independent Britain than it could other countries.⁶⁹ Further, because the WTO system relies on the principle of progressive liberalisation, it is argued that the imposition of new tariffs on a departing Britain would also be prohibited.⁷⁰

The reality, though, is more complicated. In the first instance, if the UK left the EU and did not negotiate a regional free trade agreement with the EU, it would

⁶⁶ See, for instance, Global Britain, A Global Britain: the Recommended "Brexit" option. Leading the World to Tariff-Free Trade, <http://www.globalbritain.co.uk/sites/default/files/GB%20Brexit%20Position%20Paper.pdf>, accessed 31 March 2015.

⁶⁷ Thus argues the Global Britain, pointing out that the eurozone surplus on goods, services, income and transfers currently stands at €63 billion in 2012. Global Britain Briefing Note 86, <http://www.globalbritain.org/BNN/BN86.pdf>, accessed 5 December 2013.

⁶⁸ Springford & Tilford, *op cit*

⁶⁹ Global Britain, *op cit*.

⁷⁰ See: <http://newalliance.org.uk/trade.htm>

acquire by virtue of its membership of the WTO the status of Most Favoured Nation (MFN) with the EU. In accordance with the rules of the WTO trading system, and especially the rules of equal treatment, the EU would then be obliged to impose the same tariffs under the same conditions as all the other countries that enjoyed MFN status.⁷¹ That would include tariffs on a wide range of industrial goods.⁷² Britain would not even qualify for reduced tariffs under the Generalised Scheme of Preferences (GSP).⁷³

Currently, in trading with the rest of the world, Britain as an EU Member State benefits from tariff concessions negotiated by the EU. The differential rates it enjoys discriminate against parties which do not have trade agreements with the EU, but this is permitted under the rules concerning regional trade agreements.⁷⁴ On leaving the EU, Britain would lose the protection of these rules, and be faced with MFN tariffs. The EU would have no choice in this. It must obey WTO rules.⁷⁵

It must be understood that this means the restoration of the *status quo ante*, arising from the withdrawal of concessions specific to regional trade agreement membership. That is permitted.⁷⁶ Perversely, if Britain sought to retaliate, the WTO's rules on equal treatment, and thus the prohibition of discrimination, would kick in. Tariffs imposed by the UK on goods from EU member states would have to be applied to similar goods from all other countries with which it did not have formal trade agreements.

A duty on cars from the EU, for instance, would have to be matched by the same levy on cars from all other trading partners, including Japan and Korea. This cannot even be by-passed by imposing discriminatory domestic taxes, as indicated currently by action being taken against Brazil, where WTO proceedings are being initiated after a special tax was levied on imported cars.⁷⁷

⁷¹ WTO website: principles of the trading system,

https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed 8 April 2015.

⁷² The general duty on motor cars is ten percent. For prevailing rates of duty, see:

http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/customs_tariff/, accessed 5 December 2013.

⁷³ That is now restricted to LDCs and other low and lower-middle income countries. See: European Commission, Revised EU trade scheme to help developing countries applies on 1 January 2014, 19 December 2013, http://europa.eu/rapid/press-release_MEMO-13-1187_en.htm, accessed 19 December 2013.

⁷⁴ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, http://www.wto.org/english/tratop_e/region_e/regatt_e.htm#understanding. See also: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, both accessed 5 December 2013.

⁷⁵ http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149622.jpg, accessed 13 January 2014.

⁷⁶ Article XXVII of the 1994 GATT Agreement,

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_10_e.htm#1071, accessed 13 January 2014.

⁷⁷ European Commission, EU requests WTO consultations over Brazil's discriminatory taxes, 19 December 2013, http://europa.eu/rapid/press-release_IP-13-1272_en.htm, accessed 20 December 2013.

Then, on the other hand, if the UK decided to remove tariffs from EU products, it must do the same with all other WTO members.

As it stands, trade-weighted average tariffs for EU Member States are 2.6 percent.⁷⁸ This leads some to argue that the UK could absorb the extra costs in increased efficiency and by developing new markets. However, as the CER points out, tariffs would have a disproportionate effect on some of Britain's poorer regions.⁷⁹

Non-tariff barriers

What also needs to be stressed is that the imposition of tariffs is only one of the disadvantages of the WTO option, and possibly the least of them. Tariff reductions globally have been one of the successes of the international system. Even full-rate tariffs in most sectors present relatively modest barriers to trade.

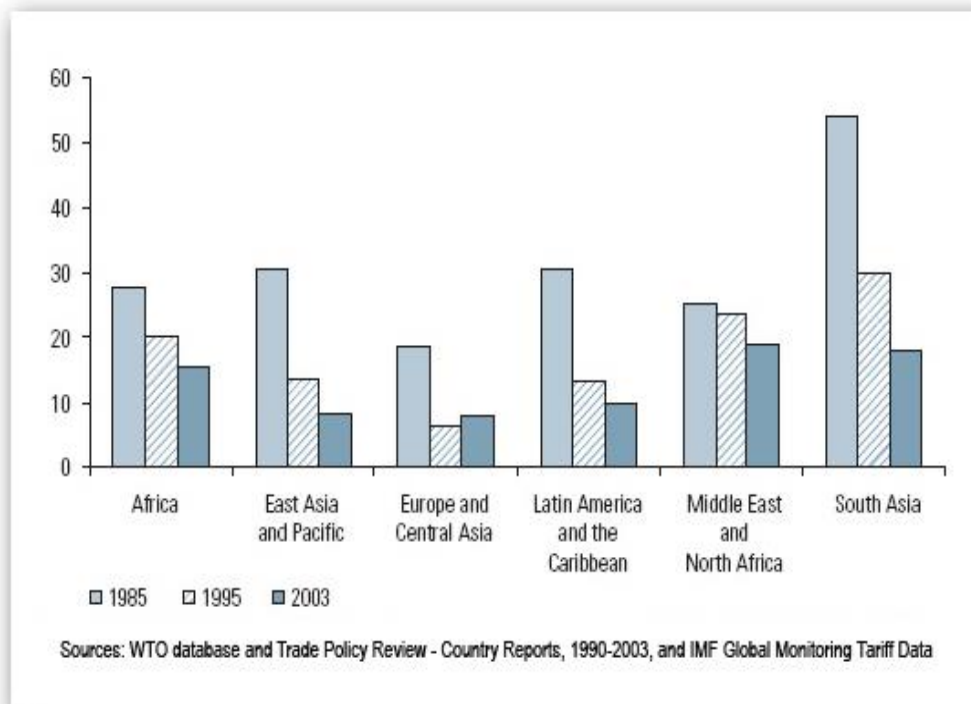


Figure 6: Trends in tariff rates by regions (simple averages, as percentages)

However, the process of tariff reduction has been described as like draining a swamp: the lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away. Furthermore, after thirty years of swamp draining, the stumps have started to grow. Decades of ever tighter

⁷⁸ https://www.wto.org/english/res_e/statis_e/statis_maps_e.htm, accessed 8 April 2015.

⁷⁹ Disunited Kingdom: Why 'Brexit' endangers Britain's poorer regions, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2015/disunited_kingdom_by_john_springford-10855.pdf, accessed 8 April 2015.

regulation of goods, mostly adopted for purely domestic policy aims, have escalated regulatory protection and made international trade more difficult.⁸⁰

These so-called Non-Tariff Measures (NTMs) or Technical Barriers to Trade (TBTs) have become far more important than tariffs.^{81,82} This is something readily acknowledged by the British government. These obstacles, it says, often stem from domestic regulations, which are enacted primarily to achieve valid domestic goals. Therefore, unlike tariffs they cannot be removed simply.⁸³ Furthermore, they are a growing problem. In 1995, the WTO received 386 formal notifications of TBTs. By 2013, this had risen to 2,137.⁸⁴ Overall, they are estimated to add more than 20 percent to the costs of international trade.⁸⁵

As a member of the EU, the UK is part of a common (harmonised) regulatory system, the purpose of which is to remove technical barriers to trade within the Community. This is asserted as one of the main achievements of the Single Market. Outside the EU and without benefit of trade agreements, the UK's main fall-back would be WTO provisions, including the agreement on Technical Barriers to Trade (the TBT Agreement) and the parallel Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement).^{86,87}

The UK, therefore, would be committing itself to a multilateral system that has not been entirely successful, reflected in a lack of progress since the launch of the Doha round of WTO talks in November 2001.⁸⁸ In essence, WTO agreements are imperfect provisions. Without the reinforcement of bilateral agreements, sometimes styled as "beyond WTO", they are difficult to enforce –

⁸⁰ Ronald Baldwin, cited in Baldwin, Richard E (2000), Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System, *Brookings Trade Forum* 2000, 237-280, http://muse.jhu.edu/journals/brookings_trade_forum/v2000/2000.1baldwin.html#FOOT1, accessed 14 January 2014.

⁸¹ The WTO Agreements Series: Technical Barriers to Trade, http://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf, accessed 18 November 2014,

⁸² Anon (2005), Looking Beyond Tariffs - The Role of Non-Tariff Barriers in World Trade, OECD, http://www.keepeek.com/Digital-Asset-Management/oecd/trade/looking-beyond-tariffs_9789264014626-en#page18, accessed 29 December 2013.

⁸³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32467/12-533-regulatory-cooperation.pdf, accessed 24 April 2015.

⁸⁴ WTO, World Trade Report 2014, http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep14_e.pdf, accessed 18 November 2014.

⁸⁵ Anon, Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis, ECORYS Nederland BV, 11 December 2009, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf, accessed 27 December 2013.

⁸⁶ http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm, accessed 29 December 2013.

⁸⁷ https://www.wto.org/english/docs_e/legal_e/15-sps.pdf, accessed 9 November 2015

⁸⁸ BBC website, The death of the WTO's Doha talks, 25 July 2006, <http://news.bbc.co.uk/1/hi/business/5215318.stm>; and Lloyd, P. (2012). Multilateralism in Crisis. ARTNeT Working Paper No. 114, June, Bangkok, ESCAP; www.artnetontrade.org, accessed 2 January 2014.

and especially where dispute settlement is less than optimal.⁸⁹ For instance, proceedings in the long-running dispute between Airbus and Boeing were lodged in 2004 and are still ongoing, while the resolution of the so-called "banana war" took 20 years.^{90,91} Unsurprisingly, therefore, restrictive measures are increasing (figs 5&6).⁹² Within the WTO system, trade is still a long way from free and, since the global crisis, is becoming even less so.⁹³

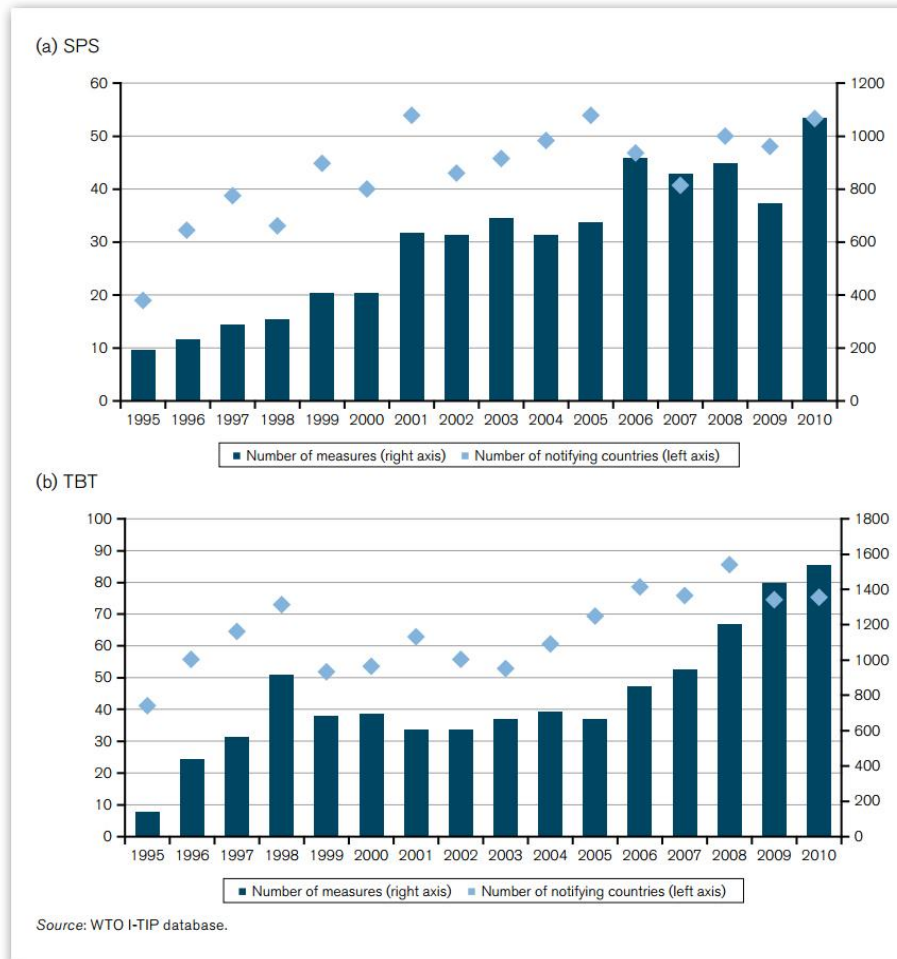


Figure 7: Notifications of non-tariff measures (SPS/TBTs), 1995-2010 (number of notified measures and notifying countries per year). Source: WTO secretariat.

⁸⁹ Iida, Keisuke (2004), Is WTO Dispute Settlement Effective? *Global Governance* 10, 207–225.

⁹⁰ WTO, European Communities - Measures Affecting Trade in Large Civil Aircraft, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm, accessed 2 January 2014.

⁹¹ BBC, Banana war ends after 20 years, 8 November 2012, <http://www.bbc.co.uk/news/business-20263308>, accessed 2 January 2014.

⁹² WTO, World Trade Report 2012, http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf, accessed 27 December 2013.

⁹³ Marc Bacchetta, Cosimo Beverelli, Non-tariff measures and the WTO, 31 July 2012. <http://www.voxeu.org/article/trade-barriers-beyond-tariffs-facts-and-challenges#fn>, accessed 29 December 2013.

Access to the EU Member State markets

Manufactured goods exported to the EU can only be placed on the market if they meet all the applicable requirements. However, conformity alone is not sufficient. If costly checks and delays on entry are to be avoided, evidence must be supplied that the goods have undergone the appropriate conformity assessment procedures at the point of production, before they enter into circulation.⁹⁴ This can be certified by testing bodies which have been approved by the EU or by systems in originating countries where domestic systems are recognised, usually in conjunction with the international standards body ISO.⁹⁵ Recognition is either built into free trade agreements or, where Mutual Recognition Agreements (MRAs) on conformity assessment are in force.⁹⁶ These enable the exporters to rely on their own domestic systems to produce the appropriate certification which will permit goods to enter without conformity checks at the borders.

Australia, Canada, Japan, New Zealand, the USA, Israel and Switzerland all have MRAs on conformity assessment with the EU.

China formalised a different kind of MRA on 16 May 2014, covering "trusted traders".⁹⁷ This, and other agreements on Customs co-operation, considerably eases the flow of trade between China and the EU.⁹⁸ However, the UK without the benefit of such agreements and working exclusively under WTO rules would not have conformity assessment verification in place. It would, therefore, have considerable difficulty in securing uninterrupted trade flows.

In fact, this is something of an understatement. Shippers presenting goods to the customs authorities at entry points to the EU (or EEA members) will find that they no longer have valid certification documentation, without which loads will be refused entry. The option is either to return the load to the point of origin or to agree to its detention pending the procurement of valid certification. The latter is expensive. The goods must be physically inspected and samples obtained under official supervision to send to an approved testing house. Container inspection is typically about £700 and detention costs about £80 a day. Ten days or more may be required to obtain results and secure customs release, the cumulative costs adding up to £2,000 to deliver a shipping container into the EU.⁹⁹

⁹⁴ http://ec.europa.eu/growth/single-market/goods/building-blocks/conformity-assessment/index_en.htm, accessed 18 April 2015.

⁹⁵ http://www.iso.org/sites/cascoregulators/03_considerations.html, accessed 22 April 2015.

⁹⁶ http://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements/index_en.htm, accessed 18 April 2015.

⁹⁷ http://europa.eu/rapid/press-release_IP-14-555_en.htm, accessed 18 April 2015.

⁹⁸ http://europa.eu/rapid/press-release_MEMO-14-353_en.htm, accessed 18 April 2015.

⁹⁹ For typical UK charges, see here:

<http://www.pdports.co.uk/Documents/Navigational%20Information/Dues-and-Charges/PD%20Teesport%20%20Schedule%20of%20Charges%201st%20January%202015.pdf>, accessed 26 June 2015.

Apart from the costs, the delays are highly damaging. Many European industries are highly integrated, relying on components shipped from multiple countries right across Europe, working to a "just in time" regime. If even a small number of consignments are delayed, the system starts to snarl up. Any supply chain disruption can be highly damaging, as was found in the 2011 Japanese tsunami, when delays in the production and export of vehicle components caused closures in vehicle manufacturing plants as far afield as the United States and Europe.¹⁰⁰

Even the loss of one key supplier can cause an entire system to break down. An example is cited of a fire in the plant owned by Aisin Seiki, a Japanese supplier that produced more than 99 percent of Toyota's brake valves. Most of the 506 machines used to produce the valves were inoperable. Toyota maintained only a 4-hour supply of the valve, thus causing the world's largest car maker to shut down its production lines. This resulted in Toyota losing production of 70,000 cars, before an alternative supply could be arranged.¹⁰¹

In the case of the WTO option applying, the effects would be far more damaging, applying to the whole continent, and the UK. As European ports buckled under the unexpected burden of thousands of inspections and a backlog of testing, a huge range of loads would build up while test results and clearance was awaited. The system would grind to a halt. It would not just slow down. It would stop. As has been seen with Channel port disruptions in the past, trucks waiting to cross the Channel would be backed up the motorways nearly to London.¹⁰²

The problem would be exacerbated by the system in force for products of animal origin. For third countries (as would be the UK), without reciprocal arrangements, the EU specifies the port of entry for such products, under the so-called Border Inspection Post (BIP) system. This is to ensure sufficient facilities for inspection are available.¹⁰³ This could have a devastating effect on the flow of British exports to EU Member States, especially as there are no facilities for handling the volume of goods that are currently involved. By contrast, Britain is already well equipped to check imported goods and, with a decentralised system of inland container ports, would not be under the same constraints as its European equivalents. For the UK, therefore, to impose similar conditions at the point of entry would breach WTO rules.

¹⁰⁰ See: <https://www.fas.org/sgp/crs/misc/R41831.pdf> (United States) and <http://businesstheory.com/reducing-risk-automotive-supply-chain-2/>, both accessed 26 June 2015.

¹⁰¹ Business theory, *ibid*.

¹⁰² *The Daily Mail*, "Operation Stack turns M20 into lorry park and tailbacks stretch 20 MILES as Channel Tunnel travel chaos enters sixth day", 22 January 2015, http://www.dailymail.co.uk/travel/travel_news/article-2921376/Channel-Tunnel-power-supply-crisis-enters-SIXTH-day-Eurostar-delays-20-mile-tailbacks-M20-turned-lorry-park.html, accessed 26 June 2015.

¹⁰³ Commission Decision of 28 September 2009 drawing up a list of approved border inspection posts. (2009/821/EC), accessed 5 December 2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:296:0001:0058:EN:PDF>

In all respects, therefore, a strategy based on an expectation that Britain can rely solely on WTO rules, without securing any direct agreements with the EU – an in particular without securing an MRA on conformity assessment, would not be well founded. Britain would struggle to maintain its current levels of external trade and there would be a profound adverse effect on daily life and employment. Far from a potential three million job losses, with the knock-on effects to UK production, that number could easily double and then be exceeded by a substantial margin.

3.2 The bilateral (Swiss) option

This brings us to the second of the options, the idea of concluding one or a series of bilateral agreements with the EU, covering aspects of our trading relations. To the extent that the Swiss experience provides some guidance for the UK outside the EU, following this route is often described as the Swiss option, or model, or less formally as a "Swiss-style relationship".¹⁰⁴

The Swiss option stems from the country's refusal in 1992 to ratify the EEA agreement, following a "no" vote in its referendum. As such, it is not a conscious, studied arrangement, but a series of *ad hoc* responses to the rejection, amounting to uncoordinated bilateral agreements. Some 120 are in place, including the Schengen Association Agreement, of which 20 are decisive for joint relations.¹⁰⁵ The agreements are subject to what is known as a "guillotine" clause, whereby if one part of the deal falls, the whole package is voided. To that extent, despite its separate components, this is an "all or nothing" arrangement. If one agreement falls, they all fall.

The supposed advantages to this option have been rehearsed widely by a variety of commentators.¹⁰⁶ However, around 40 percent of Swiss legislation is said to derive from EU rules, characterising the arrangements as a means of moving closer to the EU. Access to European capital markets necessitates continuous updating of Swiss law, absorbing the greater part of the workload of the federal legislature. Overall, the Swiss approach – which is regarded as unique to the country – is thus seen as an exception, rather than a formal model.¹⁰⁷

¹⁰⁴ Ruth Lea and Brian Binley MP, in *Britain and Europe: a new relationship*, (Global Vision, 2012) refer to "Swiss-style relationship".

<http://www.europarl.org.uk/resource/static/files/global-vision-paper-lr.pdf>

¹⁰⁵ European Parliament, Directorate General for Internal Policies, *Internal Market beyond the EU: EEA and Switzerland*,

<http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf>, accessed 3 December 2013.

¹⁰⁶ Not least here: Speech to the Bruges Group by Ruth Lea, *Britain and Europe: A New Relationship*, <http://www.brugesgroup.com/SpeechbyRuthLea.pdf>, accessed 27 November 2013.

¹⁰⁷ *Switzerland's approach to EU engagement: a Financial Services perspective*, report prepared for the City of London corporation by the University of Kent Centre for Swiss Politics, April 2013. <http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/research-2013/Switzerlands-approach-to-EU-engagement.pdf>, accessed 11 December 2013

Nor, it would seem, is the example readily transferable to the UK. MPs from the House of Commons Foreign Affairs Committee in a visit to Berne in 2013 were told that the EU did not wish it to continue. The agreements were regarded as too complex and time-consuming to administer. More importantly, the EU considered that, without any provision for Switzerland's automatic adoption of new legislation in areas covered by its agreements, and without any dispute settlement mechanism, the current system created "legal uncertainty".¹⁰⁸

This approach certainly did not meet with the approval of the Council of the European Union. In a 2010 study, it reported that the arrangement did not ensure "the necessary homogeneity in the parts of the internal market and of the EU policies in which Switzerland participates". It reiterated the point that the arrangement had resulted in "legal uncertainty", affecting "authorities, operators and individual citizens".¹⁰⁹

In respect of Swiss sovereignty and choices, the report continued, the Council had come to the conclusion that "while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond the system, which has become complex and unwieldy to manage and has clearly reached its limits". The general and consistent view was that the Swiss option was unlikely to be repeated.¹¹⁰

Two years later in another report, the Council noted that negotiations on Switzerland's further participation in parts of the Internal Market had been "marked by a stalemate, partly due to unresolved institutional issues". While the Council welcomed the continuation of intensive and close cooperation, successful conclusion of further negotiations on the Internal Market were "dependent on solving the institutional issues outlined in the Council conclusions of 2008 and 2010".¹¹¹

In May 2013, the EEA Joint Parliamentary Committee published a report on "the future of the EEA and the EU's relations with the small-sized countries and

¹⁰⁸ HoC, Foreign Affairs Committee, The future of the European Union: UK Government policy. First Report of Session 2013–14. Volume I, p.76 *et seq.*, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/87/87.pdf>, accessed 19 December 2013.

¹⁰⁹ Council conclusions on EU relations with EFTA countries, 3060th GENERAL AFFAIRS Council meeting, Brussels, 14 December 2010. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf

¹¹⁰ See also Appendix 4: text of the press release following the Swiss Referendum of 9 February 2014. Note specifically, the reminder that: In the Council Conclusions on relations with EFTA countries of December 2012, Member States reiterated the position already taken in 2008 and 2010 that the present system of "bilateral" agreements had "clearly reached its limits and needs to be reconsidered".

¹¹¹ Council conclusions on EU relations with EFTA countries, December 2012, http://eeas.europa.eu/norway/docs/2012_final_conclusions_en.pdf, accessed 5 May 2014.

Switzerland".¹¹² In setting out their expectations for future agreements, they listed four main requirements. These were: "dynamic adaptation" of the agreement to enable it automatically to adjust to the evolving *acquis*; structures and institutions in place that would ensure the homogeneous interpretation of the agreement; independent surveillance of compliance and judicial enforcement mechanisms; and dispute settlement procedures.

Following a referendum on 9 February 2014 on immigration issues, Swiss president Didier Burkhalter feared the arrangements were so fragile that, in an interview published in May by the German-language weekly *NZZ am Sonntag*, he warned that there would have to be a referendum on the basic relationship between the EU and Switzerland. "The decision will be at the end of a long process that has only just begun", he told the magazine, adding: "Until then there is still a tough obstacle course ahead of us".¹¹³

In a BBC report at that time, the question of offering free trade without free movement to a non-member was described as presenting "a huge political risk - perhaps prompting countries like Britain, which have made their doubts about free movement clear, to see life outside the union as more attractive". The report cited Ivo Scherrer, founder of a new political group called Operation Libero, who said: "I don't think we will be able to square this circle".

"Our [current] strategy makes us vulnerable," he said, adding that: "Switzerland is bound to lose access to European markets and institutions". Pondering on whether the Swiss strategy was one to recommend to "big member states with big doubts about the EU", he concluded: "Britain would have to decide for itself whether such an isolationist strategy is worth the cost. I personally think it's not".¹¹⁴

A contribution was also aired by the *Financial Times*, which relied on Alexis Lautenberg, Switzerland's ambassador to the EU from 1993 to 1999. Such uncertainty underscores the complications of the Swiss-EU relationship, Lautenberg said. "When you look at the difficulty that one vote can cause for the whole construction of Swiss-EU relations, it doesn't give the impression of a perfect model for others to copy". Patrick Emmenegger, a professor at the University of St Gallen, agreed: "A solution as complex as the Swiss one would never work for bigger economies, such as the UK", he opined.¹¹⁵

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<http://www.europarl.europa.eu/document/activities/cont/201305/20130531ATT67141/20130531ATT67141EN.pdf>, accessed 7 July 2016.

¹¹³ *The Local*, Swiss "likely to vote on EU ties in two years", 4 May 2014, <http://www.thelocal.ch/20140504/swiss-likely-to-vote-on-eu-ties-in-two-years>, accessed 5 May 2014.

¹¹⁴ BBC website: Swiss migration quotas: Rift with EU grows, 3 May 2014. <http://www.bbc.co.uk/news/world-europe-27244959>, accessed 5 May 2014.

¹¹⁵ *Financial Times*, Switzerland: Change in the air, 4 May 2014, <http://www.ft.com/cms/s/0/07c06746-ba59-11e3-8b15-00144feabdc0.html#axzz30mdGniEU>, accessed 4 May 2014.

Given this level of uncertainty and the reluctance of the Council to accept a continuation of the Swiss arrangements, it is difficult to assert that the "Swiss option" is viable, even for the Swiss people. As a model for the UK, there are too many barriers and problems for it to be treated seriously.

As to the Turkish model, this is a limited customs union, covering a range of goods and services, but not agricultural products. Turkey is bound by the EU's common tariff and unable to negotiate its own external deals but is allowed to retain the income from duties collected.¹¹⁶ As such, the "model" is included for the sake of completeness only. It is unlikely to be attractive to the UK or offer any lessons that can be brought to the negotiating table.

With both models, though, we consider that their broader utility cannot be assessed solely (or at all) by reference to their inherent merits, however slight they might be. Greater regard must be given to the nature of the Article 50 negotiations and the political environment in which they will be conducted. In particular, expected demands for an early exit and the need to protect the Single Market must be given sufficient prominence when evaluating the utility of any exit option.

3.3 The EEA solutions

Putting together the various negotiating constraints, and the objectives which negotiators must meet, it would seem that the best way, if not the only way of securing a speedy resolution to ongoing Single Market participation is to adopt an "off-the-shelf" solution. Apart from the wholly unsatisfactory Turkish customs union, or perhaps the association agreements available to the Eastern Partnership, the most obvious and accessible way to achieve this is through continued membership of the European Economic Area (EEA) Agreement.

A relationship with the EU based on the EEA Agreement is often known as the "Norway Option", because Norway is now the largest nation within the non-EU EEA group. The Norwegian view of the EEA agreement is set out in a White Paper, recently translated from the Norwegian.¹¹⁷ It is much more than a trading agreement. For the Norwegian Government, not only does it link Norway with the EU's internal market, it forms the foundation of the country's European policy.

Nevertheless, since the two other non-EU parties to the EEA Agreement are the EFTA states of Iceland and Liechtenstein, the Norway Option could just as easily be called the NIL or the EFTA/EEA Option. However, any such deal applied to the UK might have elements which make it unique. Calling it the "Norway Option" is misleading. We are not copying Norway. Rather, we are seeking an "off-the-shelf" solution that will protect the UK's participation in the

¹¹⁶ For a full analysis of the Turkish Customs Union, see: MEDPRO Technical Report No. 9/March 2012, www.ceps.be/ceps/dld/6731/pdf, accessed 17 November 2013.

¹¹⁷ http://www.eu-norway.org/Global/SiteFolders/webeu/MeldSt5_UD_ENG.PDF

Single Market. In all, we look at three possible ways this can be achieved. These three ways are grouped together in this section.

As to the EEA Agreement, Britain is already a contracting party, so the technical measures are already in place. But, as the EEA Agreement is an agreement between EU and EFTA members, outside the EU, it is assumed that membership of the European Free Trade Association (EFTA) will be necessary.

There is then the unresolved question of whether Britain, on leaving the EU would automatically cease to become party to the Agreement and would have to re-apply. This is not clear as the text of the Agreement does not specifically exclude continued membership, possibly because, prior to the Lisbon Treaty, there was no provision for any member to leave the EU. When we asked the EFTA secretariat for their views on this, they told us there was no definitive answer. They suggested that political discussions with all parties concerned would be needed to resolve the issue.¹¹⁸

EFTA membership for the UK would have its own advantages, allowing it to tap into extensive consultation arrangements with the EU, without having to develop entirely new structures. If desired, it would also give it access to the free trade areas to which the Association is party. Furthermore, the result would be a significant trading group, putting it fourth in the world league after China (\$3,642bn) and ahead of Japan (\$1,678bn). What might be termed, "EFTA-plus UK" would be a significant global player (Table 2 below).¹¹⁹

Background to the EEA

The genesis of the EEA is very relevant to its utility as a basis for facilitating the UK's exit from the EU. Its starting point can be taken as a summit of the then EFTA states in Vienna on 13 May 1977, the objective being to develop trade and economic co-operation with the EC on a "pragmatic and practical basis".¹²⁰

As another illustration of how long such things take, it was not until another five years, in 1982, that there were more meetings, culminating two years later in the Luxembourg Declaration of 1984. This was a formal declaration of intent to "broaden and deepen" cooperation between the EC and EFTA.

The 1985 Commission White Paper on the completion of the internal market further intensified discussions, as EFTA countries feared marginalisation and

¹¹⁸ Personal communication, Georges Baur, Assistant Secretary General, EFTA, 14 June 2013.

¹¹⁹ WTO data, online database, Figures from 2011.

http://www.wto.org/english/res_e/statis_e/looking4_e.htm#summary, accessed 19 December 2013.

¹²⁰ European Parliament, Working Papers, Agreement on the European Economic Area, Background and Contents,

http://www.europarl.europa.eu/RegData/etudes/etudes/join/1993/457099/EXPO-JOIN_ET%281993%29457099_EN.pdf, accessed 18 March 2015.

trade diversion effects from a more developed EC market.¹²¹ But it still took a speech by then European Commission President, Jacques Delors on 17 January 1989 to the European Parliament, to get the process fully moving, with a proposal for a "more structured partnership with common decision-making and administrative institutions". The President's vision, at the time, was of a "European village", in which he saw a house called the "European Community". "We are its sole architects; we are the keepers of its keys", he said, "but we are prepared to open its doors to talk with our neighbours".¹²²

What is so relevant to the current debate is that, at this point, the Community (now EU) was seen by Delors as one "house" in a village, alongside the EFTA "house", with which decision-making could be shared. An EFTA ministerial meeting on 20 March 1989 sought to bring this vision to life, with the establishment of a joint High Level Steering Group, which concluded its meetings in the October.

This event was followed by a meeting between the EU and EFTA in the December, when ministers decided to open formal negotiations on expanded cooperation in the first half of 1990, with a view to concluding them as rapidly as possible.¹²³ However, by then, the Berlin Wall had fallen. The newly liberated Soviet satellites of central and eastern Europe were in flux, their relationship with the EU yet to be defined. One possibility was a long-term association agreement. Another was Delors' preferred option – full Community membership. Association agreements, with the facility of common decision-making, could have tilted the balance in favour of associations, reducing the appeal of EU membership.¹²⁴

¹²¹ COM(85) 310 final, 14 June 1985,

http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf, accessed 18 March 2015

¹²² http://www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable_en.pdf, accessed 18 March 2015

¹²³ European Parliament, Working Papers, *op cit*.

¹²⁴ For instance, see *Two Tiers Or Two Speeds?: The European Security Order and the Enlargement of the European Union*, edited by James Sperling, p 82, *et seq*, (Patrick H. O'Neil), <http://tinyurl.com/qjkfp85>.

Rank	Country	Total trade (bn USD)
1	European Union	11,009
2	United States	3,746
3	China	3,642
4	EFTA plus UK	1,879
5	Japan	1,678
6	Republic of Korea	1,080
7	Hong Kong China	967
8	Canada	915
9	Russian Federation	846
10	Singapore	775
11	India	767
12	Mexico	711
13	Chinese Taipei	590
14	Australia	514
15	Saudi Arabia	496
16	Brazil	493
17	United Arab Emirates	490
18	Thailand	457
19	Malaysia	455
20	Indonesia	377
21	Turkey	376
22	South Africa	218
23	Vietnam	204
24	Islamic Republic of Iran	194
25	Nigeria	171
	Total of above	33,050
	World	33,693

Table 2: EFTA+UK as a leader in world merchandising trade (source WTO).

This was a possibility the Community was clearly not prepared to entertain. On 17 January 1990, therefore, exactly a year after he had spoken to the European Parliament, Delors rescinded his offer on common decision-making. "There will have to be some sort of osmosis between the Community and EFTA, to ensure that EFTA's interests are taken into account in major Community decisions", he said. "But this process must stop short of joint decision-making, which would imply Community membership and acceptance of the marriage

contract. This would serve the interests of neither party, so a delicate balance will have to be struck during the negotiations".¹²⁵

This U-turn delayed the start of negotiations until June 1990, when a High Level Negotiating Group took control of the talks. In March 1991 the Council adopted an additional negotiating directive which gave the mandate to agree on the free movement of goods. A truncated agreement on decision-making was finally made, limited to EFTA experts being given an equal opportunity of consultation in the preparation of new EC legislation, on matters of relevance to the EEA.¹²⁶ This cleared the way for the final agreement in May 1992, in which the EFTA states agreed to take over 80 percent of the legislation relating to the four freedoms and flanking policies.¹²⁷

The final outcome was described as a "dynamic and open concept" from which existing members could withdraw and to which others could accede. The original signatories were Austria, Finland, Iceland, Norway, Sweden and Switzerland, who concluded the Agreement on 2 May 1992 in Oporto. The agreement entered into force on 1 January 1994, by which time the Swiss people in a referendum had voted against it and dropped out. That was in December 1992 and the country has since maintained and developed its relationship with the EU through bilateral agreements. On 1 January 1995, Austria, Finland and Sweden participated in the EEA as EU Member States. Liechtenstein became a full participant, via EFTA, on 1 May 1995.¹²⁸

The immediate point which emerges from this is that, effectively, the agreement took just short of eighteen years from inception to coming into force. Should the UK seek to re-adopt it, there is no prospect of substantive change to the core agreement. To entertain that would open the negotiations up and risk extending the timescale. On these grounds alone, an "EEA-lite" agreement, which involves cherry-picking aspects of the agreement and rejecting others, is unrealistic.¹²⁹ Unless there are as few changes as is possible to the core agreement, negotiators must be prepared for the long haul.

Guidance can be taken from the EEC entry negotiations which lasted from June 1970 to the signing of the UK accession treaty in January 1972. For these - which had hitherto started in 1961 and failed after vetoes by de Gaulle - to have succeeded so swiftly was in large part due to the precept adopted by the British negotiations in respect of the Community treaty provisions. Famously summarised by lead negotiator, Con O'Neill, he described his strategy as:

¹²⁵ http://europa.eu/rapid/press-release_SPEECH-90-1_en.htm?locale=en, accessed 19 March 2015

¹²⁶ European Parliament, Working Papers, *op cit*.

¹²⁷ *Ibid*.

¹²⁸ See: http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/FS_EEA.pdf, accessed 4 December 2013.

¹²⁹ *The Sunday Telegraph*, 1 December 2013, "EU: Britain is moving closer to the exit", David Campbell Bannerman, <http://www.telegraph.co.uk/comment/10485773/EU-Britain-is-moving-closer-to-the-exit.html>, accessed 1 December 2013.

"Swallow the lot, and swallow it now".¹³⁰ The treaty, he said, represented a compromise between competing interests. "Open it up at any point", he wrote, "and the whole laborious basis of the compromise will fall apart".

That is the principle which must drive the Article 50 negotiations if an agreement is to be concluded with any speed. The UK will have to adopt an "off-the-shelf" solution and the best is the EEA agreement. To prevent it falling apart, the UK will have to "swallow the lot". Attempt to open it up could leave us still sitting at the table five years later – or even longer.

The next point is that the EEA agreement has been considered as the first step towards membership for EFTA states determined to join the EU – an "apprenticeship" serving as preparation for membership. It should also be noted, incidentally, that the EEA can also provide a basis for a long-term relationship with the Community for states with no ambition to join.¹³¹

Crucially, if EEA membership can be a halfway house for countries wishing to join the EU, it could serve equally well in reverse. It would not be, as pro-EU Wolfgang Münchau points out, a means by which the UK could be economically "better off out".¹³² Rather, membership would protect its position, more or less guaranteeing that withdrawal would be economically neutral, with little if any adverse effect on Foreign Direct Investment or any other economic activity.

In any event, the effect of Single Market participation on FDI is often overstated. Additional reasons cited for investors' enthusiasm include the English language and English law in business operations. Moreover, while the EU in 2012 reported a steep decline of 42 percent in FDI (with France falling by 35 percent and Germany declining by 87 percent), the UK secured an increase of 22 percent. Clearly, participation in the Single Market is not in itself sufficient to secure high levels of inflow.¹³³

Overall, to keep Britain trading on the current basis, only a few changes, such as those needed to accommodate rules of origin (ROO), would be needed, creating space for negotiations on the longer-term issues.¹³⁴ Some companies will bear additional costs as a result of imported materials caught by ROO provisions, while there will be additional paperwork requirements for declarations of origin. However, changes coming into force on 1 January 2017,

¹³⁰ Con O'Neill (2000), *Britain's Entry into the European Community*, London: Whitehall History Publishing in association with Frank Cass; p40.

¹³¹ *Ibid.*

¹³² *Financial Times*, *op cit.*

¹³³ See: HM Government, UK Trade & Investment, *Inward Investment Report 2012/13*, <http://www.ukti.gov.uk/investintheuk/investintheukhome/item/553980.html>, accessed 20 January 2014.

¹³⁴ See: http://unctad.org/en/PublicationsLibrary/itcdtsbmisc25rev3add1_en.pdf and <http://www.unctad.info/en/Trade-Analysis-Branch/Key-Areas/Non-Tariff-Measures/>, both accessed 30 December 2013.

together with revised "cumulation" arrangements, will reduce both financial and administrative burdens.

From a public perspective, the indications are that this option could attract majority public support. According to a *Survation* poll carried out for the Bruges Group, a majority of voters (71 percent) expressed a preference for membership of EFTA.¹³⁵

Alternatives to the "Norway option"

There is a possibility, though, that an EFTA member could veto British accession, blocking the direct participation in the EEA. In response, Britain could retain the EEA component of the *acquis*, including the four freedoms, allowing it to adopt a "shadow EEA" without formally subscribing to the agreement.¹³⁶ Perforce, it would not then benefit from EFTA's consultation arrangements, so provision would have to be made for bilateral consultations on new legislation.

This arrangement would affectively amount to a agreement to adopt the entire Single Market *acquis*, shadowing the EEA in all respects, without being a formal party to the agreement. The UK would adopt dynamic mechanisms for the incorporation of new laws, so that there would be no divergence once the arrangement was in place.

In practice, one might expect joint EU/UK committees, to progress consultation and harmonise administration, and also to facilitate agreement of common positions, where appropriate. This then leaves the way open for a later re-application to join EFTA, as there is no bar to the UK making multiple attempts to become an EFTA member, after an initial veto.

The Australian process

If, for whatever reason the "shadow EEA" option is deemed unacceptable, there is a further option, adopting the process used by the Australian government in 1997 to secure a trade agreement with the European Union. This had two main elements: a joint declaration on EU-Australian relations and, two years later, a Mutual Recognition Agreement on conformity assessment.^{137,138}

Resort to a political declaration rather than a binding agreement gives more flexibility, but it is anchored by the MRA, which is a formal treaty. The scope exists for the UK to do likewise, making a commitment, by way of the declaration, to continued regulatory harmonisation. This full commitment would be akin to the shadow EEA agreement, only made unilaterally and

¹³⁵ Bruges Group, 17 July 2013, <http://www.brugesgroup.com/eu/71-said-they-would-prefer-britain-to-leave-the-eu-and-join-efta.htm?xp=comment>, accessed 29 April 2014.

¹³⁶ Internal Market Directives adopted as at 01.10.2013, http://ec.europa.eu/internal_market/score/docs/relateddocs/im-directive_en.pdf, accessed 2 December 2013.

¹³⁷ http://eeas.europa.eu/delegations/australia/documents/more_info/timeline.pdf and http://eeas.europa.eu/australia/docs/australia_joint_declaration_en.pdf, accessed 26 June 2015.

¹³⁸ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=771>, accessed 26 June 2015.

without the binding effect of a treaty. It would not need assent from EU member states, while the MRA would come within the competence of the EU and would not need Member State ratification. With it agreed, the UK would then be in a very strong position to insist on access to the EU Member State markets, invoking WTO non-discrimination rules.

Completing the process, the UK would then negotiate an agreement on tariffs plus a series of bilateral agreements on programme participation. Collectively, these agreements and declarations would give a rough equivalence to the EEA Agreement. Carried out under the aegis of Article 50, the negotiations would be given a formal framework. As long as the UK did not seek access to Member State markets on better terms than were available to a full member, there would seem to be no serious obstacles to concluding the exit settlement.

EEA costs and contributions

Part of the EEA package is a provision for a range of financial contributions. Included in these are "Norway Grants", made by Norway to eastern enlargement countries to help with their post-Communist economic rehabilitation. In the period 2009-14, these voluntary grants amounted to €804 million, supporting 61 programmes in 13 countries in Europe including the member countries that joined in 2004 and 2007.¹³⁹ The money is not paid to the EU but is administered separately, under the aegis of the Norwegian Ministry of Foreign Affairs. Norway also provides 95 percent of the funding to the EEA Grants, which with the Norway grants brings the total to €1.8bn (€1.71bn paid by Norway).^{140,141}

As to the budget for the EU programmes with EFTA/EEA participation, over the 2007-2013 multi-annual period, total spending was around €70 billion, of which the estimated EFTA contribution was in the order of €1.7 billion – averaging approximately €250 million a year. Norway carried 95.77 percent of that cost (€1.63bn).¹⁴²

As of 2014, Norway participated in twelve programmes, including Horizon 2020, Erasmus+, the Consumer and the Copernicus programmes. It also has a bilateral arrangement for participation in interregional programmes under the EU's Regional Policy and takes part in the activities of 27 EU agencies. These include the Education, Audiovisual and Culture Executive Agency (EACEA), the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), the European Agency for Safety and Health at

¹³⁹ See: Norway Grants website: <http://eeagrants.org/Who-we-are/Norway-Grants>, accessed 7 June 2014.

¹⁴⁰ See: EEA Grants website: <http://eeagrants.org/>, accessed 7 June 2014.

¹⁴¹ <http://www.eu-norway.org/news1/Norway-the-EEA-Agreement-and-Norways-other-agreements-with-the-EU/#.VHJiS9KsWNM>, and http://www.eu-norway.org/Global/SiteFolders/webeu/MeldSt5_UD_ENG.PDF, both accessed 24 November 2014.

¹⁴² EFTA Bulletin, Guide to EU programmes, December 2010.

<http://www.efta.int/sites/default/files/publications/bulletins/bulletin-programmes-2010.pdf>, accessed 15 May 2014.

Work (EU-OSHA), the European Chemicals Agency (ECHA), the European Defence Agency (EDA), the Executive Agency for Health and Consumers (EAHC), the Research Executive Agency (REA) and the European Police College (CEPOL).¹⁴³

Over the last financial period, however, the funding was not one-way. Norwegian beneficiaries were paid €1.01bn from EU funds, making the seven-year net contribution in the order of €620m, or about €90 million net per year. If the same *pro-rata* basis was applied to the UK after it had left the EU, it might be expected to find about €2.5bn annually in gross contributions, of which about 70 percent would be devoted to the EU's research programme.

In the Seventh Framework Programme, more than 2,350 Icelandic and Norwegian participants, including many small and medium-sized enterprises (SMEs), were involved. Icelandic researchers contributed to 217 projects, receiving funding of nearly €70 million. The Norwegians took part in more than 1,400 projects, receiving €712 million. Both Iceland and Norway signed up to the successor programme, Horizon 2020.¹⁴⁴

Budgetary costs attributed to EFTA run to 22,360,000 Swiss Francs (about £16 million), of which 55 percent is borne by Norway. This includes categories defined as EEA related activities, EFTA/EU statistical co-operation and EU/EFTA cooperation programmes. That, strictly, is the cost of Single Market Access which, on a *pro-rata* basis, would cost the UK less than £200 million per annum.¹⁴⁵

3.4 Efta+bilaterals

Before moving on, there is a hybrid option which has been discussed. This involves Efta membership without participation in the EEA, and a bilateral agreement with the EU. Not uncommonly, we see this cast as a variation on the Swiss option. Sometimes it is presented as representing the definitive version of that option.

Nevertheless, it should be noted that Efta membership is not required to pursue the "Swiss option". The Association played no role in the agreements between Switzerland and the EU. For the Swiss, the advantage of the bilateral route was that it allowed them to make their own agreements without being bound by the Efta framework.¹⁴⁶ Thus, there would be no necessity for the UK to join in

¹⁴³ http://www.eu-norway.org/eu/Cooperation-in-programmes-and-agencies/#.VR2GJ_zF-NM, accessed 2 March 2015.

¹⁴⁴ European Commission Press Release 14 May 2014, http://europa.eu/rapid/press-release_IP-14-566_en.htm, accessed 15 May 2014.

¹⁴⁵ <http://www.efta.int/about-efta/efta-budget> and <http://www.eu-norway.org/eu/Financial-contribution/#.VR1ohPzF-NM>, both accessed 2 April 2015.

¹⁴⁶ René Schwok, EFTA 1960 – 2010: Elements of 50 Years of European History, Chapter 6, Specificities of Switzerland's relations with EFTA and EEA, p.112, <http://www.nupi.no/content/download/221845/790938/file/Schwok-EFTA%2060th.pdf>, accessed 12 May 2014.

order to negotiate bilateral agreements with the EU. The "Swiss option" in this context, therefore, is not "Efta + bilaterals" but simply "a free trade area with additional bilateral intergovernmental agreements".¹⁴⁷

Despite "EFTA + bilaterals" rarely being presented in general literature, this route was proposed by all six of competition finalists in the 2013 Brexit competition organised by the Institute of Economic Affairs.¹⁴⁸ A necessary condition is membership of Efta, so existing members would have to admit the UK to their Association. But, as pointed out in the previous section, any member could exercise a veto. Yet, few attempts seem to have been made to explore the views of Association members as to whether they would accept the UK and, if so, under what terms.

The absence of any recognition of possible difficulties is particularly manifest in the paper by Murray and Broomfield. They wanted the British government to consider "whether the UK should use as its negotiating position a proposal to re-enter the Efta alongside Norway, Iceland, and Liechtenstein" – without, incidentally, any reference to Switzerland.¹⁴⁹ There was not the slightest hint that Efta membership was anything other than an entitlement. Nonetheless, they proposed: "that HMG should reject any option of joining the EEA".

Hewish, another IEA finalist, took the position that "UK future trade policy should not hide behind the EEA or have a complex arrangement like the Swiss".¹⁵⁰ He thus believed that the UK should look for "a completely separate bilateral deal". In his submission, Efta membership became a "vital and rapid tool for the UK to secure FTAs with third parties". He wrote:

We see it as a gateway to join exciting [sic] FTAs that Efta already has as a quickstep solution within our three-year plan. For the UK to conduct its own separate deal with all of Efta current FTA partners (which has taken them over 20 years to craft) would take considerable time. By joining EFTA, the UK would inherit trade deals under Article 56 (3) of the EFTA Convention.¹⁵¹

In this submission, though, there is a recognition that EFTA membership is "first and foremost a political matter and would need to be discussed at the highest political levels and between all nations involved". There is also an acknowledgement that a UK application "may be subject to increased difficulty due to its perceived size economically, politically, and in terms of population".

¹⁴⁷ Ruth Lea and Brian Binley MP (2012): "Britain and Europe: a new relationship, Global Vision". See: <http://www.europarl.org.uk/resource/static/files/global-vision-paper-lr.pdf> , accessed 18 April 2014.

¹⁴⁸ IEA Brexit competition, first prize winner: *A Blueprint for Britain: Openness not Isolation*, (p-9), Institute of Economic Affairs: http://www.iea.org.uk/sites/default/files/publications/files/Brexit%20Entry%20170_final_bio_web.pdf, accessed 13 April 2014.

¹⁴⁹ Second prize winners: *op cit*, p.8.

¹⁵⁰ Third prize winner.

¹⁵¹ *Op cit*, p.54.

That is somewhat closer to reality, indicating entry is not necessarily automatic. This author, from visits to both Norway and Iceland, would concur. Indeed, having had the opportunity to discuss Efta membership with a wide range of politicians and activists in both countries, it would appear that entry would be far from automatic. Responses to an application would depend on many factors. The political colour of the governments in power, their current relationships with the EU, and the attitudes of the European institutions and Member States to UK membership, could all be relevant.

Over and above these, there is possibly one over-riding factor which will shape the response. In Iceland and Norway there are varying degrees of dissatisfaction with the EEA agreement, tempered by a realisation that the three Efta/EEA members are not powerful enough to force the EU to renegotiate. British membership is seen as advantageous, but only inasmuch as it could strengthen the power of the bloc and force the hand of the EU. This much is acknowledged officially in an Efta publication.¹⁵² Increasing the number of Efta members, it declares (without explicitly referring to Britain), "would reinvigorate the tradition of a common platform of negotiations with the European Union and other countries". The increase in membership, the publication goes on to say,

... would reinforce the standing of Efta vis-à-vis the European Union, within the WTO and with other international organisations. An extended membership would also increase the potential for concluding substantial FTAs with third countries and for finding solutions in latching on appropriately to future systems of preferential trade, encompassing major markets.

That new members would be expected to act proactively to increase the standing of the Association is clearly stated. Should Britain merely seek to join Efta for its own selfish reasons without being prepared to do some of the "heavy lifting", its application would not be looked upon favourably.

Yet another possible option is the UK joining Switzerland to negotiate joint bilaterals, securing a better deal than Efta/EEA members. This combination has been called "Britzerland", creating "a new outer tier of the European Union".¹⁵³ A British application to Efta would then be welcome, as it would assist Efta to improve its relationship with the EU. In summary, a Britain willing to increase the leverage of Efta within the EEA would be welcomed. Britain seeking to join Efta as a camouflage for something else would create political problems within the organisation.¹⁵⁴

¹⁵² EFTA Bulletin, EFTA Free Trade Relations, December 2013, <http://www.efta.int/sites/default/files/publications/bulletins/EFTA-Bulletin-2013.PDF>, accessed 1 May 2014.

¹⁵³ *The Guardian*, 21 December 2012, "Boris Johnson in Britzerland", <http://www.theguardian.com/commentisfree/2012/dec/21/boris-johnson-in-britzerland?INTCMP=SRCH&guni=Article:in%20body%20link>, accessed 18 April 2014.

¹⁵⁴ Björn Bjarnason, personal communication, 14 April 2014.

On that basis, Efta membership, deemed to be part of the "Swiss option" or adopted alongside that route – while rejecting EEA participation - is a non-starter. If the ambition is simply to seek bilateral trade agreements with the EU, it simply creates an extra hurdle. It is an unnecessary complication.

4.0 Options compared

... we do get to influence the position ... most of the politics is done long before it [a new law] gets to the voting stage.

Mrs Anne Tvinnereim
former Norwegian State Secretary

Notwithstanding the disadvantages of the "Swiss option", against the "Norway option", its supporters argue that there are three main grounds for favouring it.

Firstly, the "Norway Option" requires adoption of the four freedoms, including free movement of people, with the implied loss of control over immigration policy. Secondly, while the Norway option requires adoption of the entire Single Market *acquis*, applying internally as well as externally, the "Swiss option" allows for EU regulation to apply only to exports to the EU, with home-grown regulation still applying to the domestic market.

Thirdly, by remaining in the Single Market outside the EU, it is held that the UK government would be obliged to adopt EU laws with no influence over their formulation. In the Swiss option, the UK government can decide on a case-by-case basis whether to adopt the law. Each new law then has to be approved by Parliament.

However, the flexibility with regard to the four freedoms, implicit in the Swiss option, is a red herring, especially the case with the movement of people. In April 2002 the Swiss government signed with the EU joint declarations on the free movement of persons.¹⁵⁵ The effect of these has been that 23.3 percent of the 8,039,060 Swiss population is now foreign, compared with 13 percent (7.5 million) in England and Wales. We deal with these issues in more detail in Chapter 6 but, clearly, being outside the EEA confers no advantage to Switzerland in this respect.

¹⁵⁵ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22002A0430\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22002A0430(01):EN:HTML); see also http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/em0025_en.htm, both accessed 20 April 2014.

4.1 The Swiss option and "deregulation"

The great advantage claimed for the Swiss option is that it permits EU law to be repealed. Any necessary law required to ensure EU obligations are met can then be selectively re-enacted as UK law.

The think-tank *Open Europe* argued that replacing EU law with UK law would, in itself, yield considerable financial savings.¹⁵⁶ It came to this conclusion from a study which found that every pound spent on EU law delivered £1.02 of benefits, a cost-benefit ratio of 1.02. The ratio for UK law was 2.35. When the two ratios are compared, this supposedly gives a 2.5 times advantage to UK law, which had *Open Europe* arguing that it is more cost effective to regulate nationally than it is to regulate via the EU.

This theory falls for the very simple reason that very different legislation is being compared – as is demonstrated by examples taken from the period 2008/9.

In a sample of UK legislation, there was the Estate Agents (Redress scheme) Order 2008 and Estate Agents (Redress Scheme) (Penalty Charge) Regulations 2008, giving consumers access to independent redress from estate agents and penalising estate agents for non-membership of redress schemes. There was the Local Transport Act, which gives local authorities strengthened powers to deliver a local transport system best suited to local needs; and the Street Works (Charges for Unreasonably Prolonged Occupation of the Highway) (England) Regulations 2009, designed to reduce the number of occasions when works by highway undertakers take longer than agreed. To conclude the sample, there was the Pensions Act 2008, which introduced measures aimed at encouraging greater private pension saving.

In a sample of EU legislation from the same period, we have Directive 2008/105/EC of 16 December 2008 on environmental quality standards in the field of water policy (amending and subsequently repealing several other directives). We have Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed. Then there was Directive 2008/28/EC of 11 March 2008 amending Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using products. To conclude the EU sample, we have Directive 2008/68/EC of 24 September 2008 on the inland transport of dangerous goods.

Clearly evident from this small sample is the very obvious fact that the two legislatures are operating in completely different domains. Even if the sample was expanded, it would still be evident that very different legislation sets were involved, covering completely different subjects.

¹⁵⁶ <http://www.openeurope.org.uk/Content/documents/Pdfs/stilloutofcontrol.pdf>, accessed 21 April 2014

Thus, while the UK government may deliver a better cost/benefit ratio for the legislation it produces, there is no good reason for suggesting that it would deliver those ratios if it assumed EU competences and re-enacted EU law without changing its substance. The same laws, covering the same issues, will have the same outcomes, regardless of their origins. In any event, the cost of legislation stems from its implementation and enforcement. Whether EU or nationally derived, enforcement is the responsibility of national bodies. Therefore, the idea that changing the origin will automatically reduce the costs of implementation is absurd.

Oblivious to the flaws in the *Open Europe* work, however, when Capital Economics consultancy in February 2014 produced a NExit (Netherlands Exit) plan for Geert Wilders's *Partij voor de Vrijheid*, it argued for a version of the "Swiss option", relying on the think-tank's ideas to deliver reduced regulatory costs.¹⁵⁷ The consultancy argued that, for every regulation transferred from Brussels to the Dutch legislature, costs could be reduced "in line with the difference in the benefit to cost ratios". It then estimated the number of EU laws that could be repatriated and re-enacted as domestic law and claimed savings of €326 billion (2013 prices) over the period 2015-2035.

Such a scheme, however, is no more likely to provide savings for the Dutch than it would for the British. Effectively, it cannot be argued, *per se*, that "deregulation" of the nature afforded by the Swiss option would yield any significant financial benefits.

4.2 Fax democracy

Adopting the Norway Option necessarily and by definition continues Single Market participation. That accords with current government objectives, but its official line is to reject the arrangements currently adopted by Norway. Its official view is that it "does not think this [the Norway Option] is a suitable situation for the UK, in view of the UK's size and global influence".¹⁵⁸ David Cameron believes there are overwhelming disadvantages to following in Norway's footsteps.

Mere access to the Single Market is not sufficient, he says. "We need a say in the rules of that market". It is not in the national interest to be like Norway, where we: "just accept all the rules of the Single Market, pay for the privilege of being part of it and, as it were, be governed by fax rule".¹⁵⁹ Norway, he was later to aver, "has no say at all in setting its rules: it just has to implement its directives".¹⁶⁰

¹⁵⁷ <https://www.capitaleconomics.com/data/pdf/NExit.pdf>, accessed 20 April 2014.

¹⁵⁸ Personal communication, Nick Saunders, Future of Europe Department, Foreign and Commonwealth Office. Undated – in response to communication of 7 January 2013.

¹⁵⁹ BBC Radio 4, *Today* Programme. 14 January 2013, Author's transcript.

¹⁶⁰ Speech, 23 January 2013, *op cit*.

This pessimistic view is shared by many others, including Wolfgang Münchau. Even a House of Commons library briefing note asserts that: "Norway has little influence on the EU laws and policies it adopts".¹⁶¹ The Commons Foreign Affairs Committee also agrees with the government. Neither the Norway nor the Swiss options, it argues, would be appropriate: they oblige Britain to adopt some or all of the body of EU Single Market law with no effective power to shape it. If it is in Britain's interest to remain in the Single Market, the Committee argues. It should either stay in the EU or seek radical institutional change in Europe to give decision-making rights in the Single Market to all its participating states.¹⁶²

In 2005, the then state of the art was summed up by MEP Daniel Hannan as: "The Efta states have to assimilate thousands of EU laws over whose drafting they have had no say", whence he referred to the so-called "fax diplomacy" argument, so called because "EFTA states are obliged to adopt several single market measures, their lawmakers are portrayed as sitting next to their fax machines waiting for the directives to come from Brussels".¹⁶³

This phenomenon is also called "fax democracy", a label coined by Norwegian Prime Minister, Jens Stoltenberg, in February 2001.^{164,165} He was seeking to promote full EU membership to his reluctant countrymen, who had already twice rejected membership.¹⁶⁶ Later, Foreign Minister Espen Eide, another EU-enthusiast, took up the theme, complaining that Norway in the EEA had "limited scope for influence". His country, he said, was "not at the table when decisions are made".¹⁶⁷ Nevertheless, he was hardly a neutral commentator. During the 1994 referendum on Norwegian EU membership, Eide worked in the European Movement for the "yes" campaign. He held senior positions as project manager and acting Secretary General. He is a prominent campaigner for Norwegian EU membership, despite nearly 80 percent of his voters opposing entry.

The claimed lack of influence was disputed by Anne Tvinnereim, former State Secretary for the Ministry of Local Government and Regional Development, and a member of the rival Centre Party (pictured next page). "It is true that we are not there when they vote", she said, "but we do get to influence the

¹⁶¹ "Norway's relationship with the EU", <http://www.parliament.uk/briefing-papers/SN06522>, accessed 10 October 2013.

¹⁶² HoC, *The future of the European Union*, *op cit*.

¹⁶³ The Case for EFTA, Bruges Group 16 November 2005. Note that he elides EFTA/EEA membership to just the single reference to EFTA. See: <http://www.brugesgroup.com/mediacentre/index.live?article=10488>, accessed 17 April 2014.

¹⁶⁴ <http://www.euromove.org.uk/index.php?id=6509>

¹⁶⁵ Kjell A. Eliassen & Nick Sitter, *Ever Closer Co-operation? The Limits of the "Norwegian Method" of European Integration*. http://www.researchgate.net/publication/229642591_Ever_Closer_Cooperation_The_Limits_of_the_Norwegian_Method_of_European_Integration/file/60b7d52d327f2d59d7.pdf, accessed 17 April 2014.

¹⁶⁶ Referendums in 1972 and 1994 both recorded "no" majorities.

¹⁶⁷ BBC Radio 4, *World This Weekend*. 24 December 2012. Author's transcript.

position". In international relations, "most of the politics is done long before it [a new law] gets to the voting stage".¹⁶⁸ We "totally disagree" with Eide's position. "He does not represent the Norwegian debate".¹⁶⁹



Figure 8: Mrs Anne Tvinnereim, former Norwegian State Secretary: "... we do get to influence the position ... most of the politics is done long before it [a new law] gets to the voting stage". (photo: author's collection)

Mrs Tvinnereim is supported by her own Foreign Ministry. It explains, in respect of Council discussions on Schengen-relevant legislation, that it does not have the right to vote at any stage of the decision-making process and does not participate in the formal adoption of legislation. But in practice, it says, "experience has shown that this is less important than the opportunities we have to influence other countries by putting forward effective, coherent arguments".

The most important time for influencing the development of Schengen legislation is early in the Council's decision-making process. This influence is expressed in working groups and committees under the Council, immediately after the Commission has put forward a proposal for a legal act". Schengen member states, including Norway, it adds, participate by providing expert input in the fields concerned. The extent to which the efforts of each of the countries have an impact depends largely on the quality of the expertise provided and the

¹⁶⁸ See: <http://www.regjeringen.no/en/dep/ud/documents/propositions-and-reports/reports-to-the-storting/2012-2013/meld-st-5-20122013/2/4/1.html?id=732554>, accessed 12 January 2014.

¹⁶⁹ Interview by the author: Oslo, 31 July 2013

arguments used. Norway has the same opportunities to promote its views as the EU member states.

Mrs Tvinnereim asserts that people such as Eide are protecting their own positions. They need British EU membership to continue as "Brexit" would weaken the Norwegian establishment and vastly strengthen the No2EU campaign, especially if Britain joined EFTA.¹⁷⁰ Senior Icelandic politicians agree with Mrs Tvinnereim. There, similar dynamics exist, with the "elites" seeking EU membership despite popular opposition.¹⁷¹

4.3 Norwegian/EFTA spheres of influence

The view of Hannan on the limitations of influence within the EEA is that, while it is certainly true that Norway, Iceland and Liechtenstein have to apply a number of single market regulations, these tend to be technical in nature. They are limited to a clearly defined part of their economy.

Few of these rules, he asserts, were important enough to need legislation in those countries: the 3,000 legislative acts adopted have required fewer than 50 parliamentary statutes in the Norway's Storting and Iceland's Althing. They deal with such matters as the correct way to list ingredients on a ketchup bottle; they do not tell the Norwegians and Icelanders what to tax, where to fish, whom to employ or what surplus to run. And it is not true that the EEA states have no say over these rules, Hannan acknowledges. There are formal consultation mechanisms built into the EEA accord.

As to the specifics, Norwegian/EFTA influence stems from a complex and subtle system of decision-shaping, facilitated by formal Efta consultative structures and by informal bilateral measures.¹⁷² At the heart of these is the so-called two-pillar system. Through this, there are multiple EU-Efta contacts, particularly at the early stages of the legislative process.¹⁷³ Illustrated in Figure 9 below, these allow formalised consultation and participation. This includes a ministerial-level EEA Council, the EEA Joint Committee of senior officials, and subcommittees and working groups of officials and experts. There is also the EEA Joint Parliamentary Committee and the EEA Consultative Committee.

Despite this, the House of Commons library, in its briefing note on "Norway's relationship with the EU", is still able to state that: "Norway has little influence on the EU laws and policies it adopts".¹⁷⁴ The CBI has also been a major player in the argument, with a publication of its own stating much the same.¹⁷⁵

¹⁷⁰ *Ibid.*

¹⁷¹ Björn Bjarnason, Interview by the author, Reykjavík 28 January 2014.

¹⁷² This is EFTA 2013, <http://www.efta.int/sites/default/files/publications/this-is-efta/this-is-efta-2013.pdf>, accessed 19 December 2013.

¹⁷³ <http://www.efta.int/~media/Files/Publications/Bulletins/eeadecisionshaping-bulletin.pdf>, accessed 18 December 2013.

¹⁷⁴ <http://www.parliament.uk/briefing-papers/SN06522>

¹⁷⁵ http://www.cbi.org.uk/media/2133649/doing_things_by_halves_-_lessons_from_switzerland_and_norway_cbi_report_july_2013.pdf

Taken literally, it is true that Norway's influence is "limited". Kåre Bryn, the current Secretary General of EFTA readily acknowledges that. No sensible person would disagree.¹⁷⁶ He nevertheless points to the elaborate institutional framework set in place to manage the Agreement. Through this, there are multiple contacts at all stages of the legislative process, from the very earliest pre-proposal to the final approval.

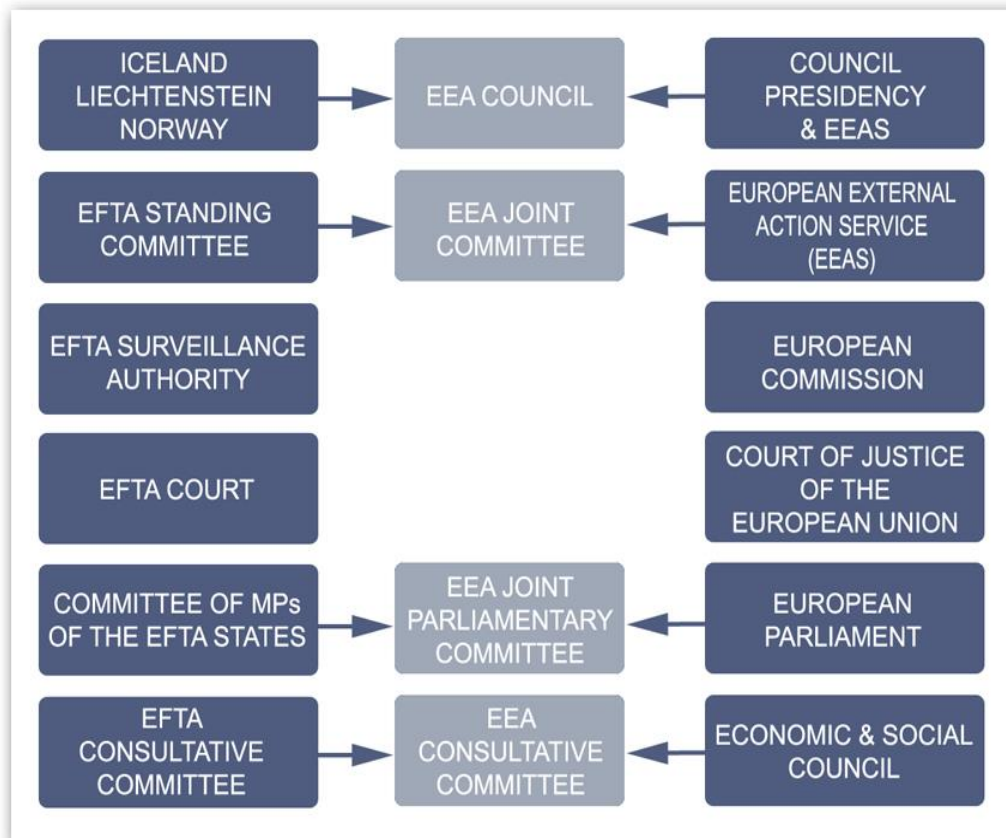


Figure 9: Two-pillar consultation structure under the EEA Agreement. The left pillar shows the EFTA States and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle. (Source EFTA)

Although comprehensive, this is indeed limited. But then, any institution short of an absolute dictator bestowed with omnipotent powers is going to be limited in some way or other, as is the influence of every country limited. But, in the case of Norway, the lack of influence is being linked with the lack of a "seat at the table" when decisions are taken by EU institutions – the Council of Ministers, the European Council and the European Parliament. In the final stages of the legislative processes, Norwegian representatives are not able to vote on new laws.

It is misleading, though, to assert that this lack equates with Norway being at a disadvantage when compared with the influence exerted by full EU members.

¹⁷⁶ <http://www.efta.int/~media/Files/Publications/Bulletins/eeadecisionshaping-bulletin.pdf>

Such a claim presents a distorted view of the way Single Market rules are made. In fact, Norway exercises very considerable influence on EU legislation, to the extent that it sometimes sets the agenda. It also retains a veto – more accurately termed a "right of reservation" – set out in Article 102 of the EEA Agreement.¹⁷⁷ EFTA countries in the EEA thus have the right to opt out of new EU legislation, a right that EU countries do not have.¹⁷⁸

4.4 Maintaining sovereignty

As an independent state, Norway is still capable of acting unilaterally to protect its national and economic interests. In January 2013, for instance, the Commission was complaining that Norway was "failing to live up to its obligations as a member of the European Economic Area", not least by imposing extra taxes on EU products and by not implementing more than 400 directives. Some 427 acts remained to be incorporated in Norway by October 2012, after the required date of implementation. The Commission also complained that the Norwegian government had refused to implement the latest postal directive.^{179,180}

Another example was in oil and gas production, a major and valuable contributor to the Norwegian economy. There, when on 27 October 2011 the EU proposed regulations to cover offshore drilling, the Norwegians refused to implement them. By so doing, they rejected the Commission classification of "EEA relevance", intending that they should apply to Norway.¹⁸¹ The stance was explained by a report from the EEA Joint Parliamentary Committee on 27 November 2012, which stated: "The Norwegian government has taken the view that the proposed regulation by the European Commission falls outside the geographic and substantive scope of the EEA agreement".^{182,183}

This, incidentally, made for an interesting contrast with the UK, where Oil and Gas UK, "the voice of the offshore industry", complained:

Oil & Gas UK is extremely concerned by the European Commission's proposals for EU Regulation of offshore safety. While we will always support proper moves to improve safety standards, this proposal to dismantle the UK's world-class safety regime which is built on decades of

¹⁷⁷ <http://www.efta.int/~media/Documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>

¹⁷⁸ http://www.neitleu.no/articles_in_foreign_languages/the_eea_alternatives#1

¹⁷⁹ *EurActiv*, 30 January 2013, EU threatens to punish Norway for breaching EEA agreement, <http://www.euractiv.com/consumers/eu-threatens-punish-selfish-norw-news-517431>, accessed 10 February 2015.

¹⁸⁰ European Commission, 7 December 2012, Commission Staff Working Document, A review of the functioning of the European Economic Area, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017626%202012%20INIT>, accessed 10 February 2015.

¹⁸¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0688:FIN:EN:PDF>

¹⁸² http://www.efta.int/~media/Documents/advisory-bodies/parliamentary-committee/jpc-reports/EEA_JPC_Report_Energy_Policy.pdf

¹⁸³ http://ec.europa.eu/energy/oil/offshore/standards_en.htm

experience and replace it with new centralised EU Regulation, is likely to have exactly the opposite effect. We are encouraged by the fact that the UK Government is of the same position and has signalled its intention to oppose the Regulation in the best interests of safety.¹⁸⁴

On the one hand therefore, the UK, a full member of the EU, was concerned about a debilitating new EU law which it opposed, but was likely to be approved by Qualified Majority Voting (possibly as a directive), over which it had no veto and thus no means of blocking. On the other hand Norway, as an EEA member, was able to resist the proposal.

Nor was this by any means the first time that Norway, as a member of EFTA, had disagreed with the European Commission's view of the application of the agreement. The EFTA Secretariat has so far identified more than 1,200 EU acts marked as EEA relevant by the European Commission that had been contested by experts from the EEA/EFTA Member States. An analysis by the Liechtenstein Institute concluded that these rejections were quite consistent with the EEA Agreement because most of the measures had been excluded for technical reasons.¹⁸⁵

Furthermore, Norway has other means of protecting its interests. In respect of the EU directive on postal services, in 2011, the Norwegian government formally notified the EU that it was rejecting it. Foreign Minister Jonas Gahr Støre had to accept his Labour Party veto on the directive which would have deregulated Norway's postal system along with others in Europe. It would have required the Norwegian postal service (*Posten*) to give up its monopoly on letters weighing less than 50 grams, putting this segment of the business out to competitive bid.

Ironically, Støre and other leaders of his Labour Party wanted Norway to adopt the EU directive, but a grass-roots movement within the party forced a vote on the issue at a national party meeting in April. They won, and Labour leaders like Støre and Prime Minister Jens Stoltenberg lost.¹⁸⁶

It should be noted, incidentally, that the EFTA/EEA is not just Norway, but also Iceland and Liechtenstein as well. And it was Iceland that was responsible for one of the biggest rejections of the EU there has ever been by an EEA member. The dispute related to the collapse of the Icesave bank's online savings account in 2008 which prompted the UK to invoke terrorist legislation against it.

Crucially, when Icesave collapsed, EU countries, notably the UK and the Netherlands, attempted to force Iceland to fulfil obligations set out in EU law. Two legal arguments were invoked: that the Icelandic government was obliged

¹⁸⁴ <http://www.oilandgasuk.co.uk/ProposedEURegulation.cfm>

¹⁸⁵ <http://www.efta.int/~media/Files/Publications/Bulletins/EFTA-Bulletin-2012.pdf>

¹⁸⁶ <http://www.newsenglish.no/2011/05/23/historic-no-to-an-eu-directive/>, accessed 9 May 2014

to guarantee at least the first €20,000 in Icesave accounts and that actions relating to the collapse of the Icelandic bank *Landsbanki* were discriminatory against non-Icelandic creditors.

The first challenge came under EU Directive 94/19/EC, which was incorporated into Icelandic law in 1999. The second was that Iceland was in breach of its obligations under Article 4 of the EEA Agreement, prohibiting discrimination on grounds of nationality.

Currently, Iceland, via the EEA, is contesting both charges, with the dispute ongoing amid complex legal arguments after four years and two referendums. Thus, Iceland - a small country with a population of circa 313,000; fewer people than the London Borough of Croydon – has the resilience, influence and the ability to say no to the EU.

But the final word on "influence" must go to Helle Hagenau, International Officer of Norway's "No-to-EU" campaign. Being outside the EU, she told this author, "Norway has kept its political independence both nationally and internationally". This, she said, has been:

... especially valuable in dealing with the United Nations. When the Norwegian government decides to promote a certain point of view at the UN General Assembly, we just do it. There is no need to negotiate with numerous other countries and an EU Commission, resulting in a watered down version of that message.

Hagenau described an experience, about which we had also heard from Norwegian State Minister, Anne Tvinnereim. She recalled how, when she was a member of the official Norwegian delegation to the UN General Assembly in New York, she had both the Swedish and Danish delegations tell her that they had asked the Norwegians to present their case to the UN. They had been unable to do so themselves, constrained as they were by the "common position" within the EU.¹⁸⁷

4.5 "Influence" in perspective

No assessment of the "limited" influence of EFTA/EEA members could be complete without comparing it with the position of EU members. It is here that the status of Norway compares very favourably.

Britain, for instance, within the maw of the EU, has nothing like the same freedom as EFTA members. It has no rights to conduct its own international trade agreements. Negotiations are conducted by the European Commission after agreeing a "common position" with Member States via the Council.¹⁸⁸ Britain is also represented by the EU on international standards-setting bodies

¹⁸⁷ Interview with this author in Oslo, 2 August 2013.

¹⁸⁸ European Commission: Trade Policy. <http://ec.europa.eu/trade/policy/policy-making/>, accessed 8 December 2013.

which means that the EU decides on the [soft] law which its own (and EFTA/EEA) members will have to adopt. It also contributes to the global law-making process.

As to Britain's voting power within the EU, most often agreements are reached by consensus. Where a vote is called, qualified majority voting (QMV) applies to the Council of the European Union (formerly the Council of Ministers). There, Britain has 29 out of 352 votes, representing eight percent of the vote (Figure 10). A qualified majority is 252 votes (73.9 percent).¹⁸⁹ In the European Parliament, the situation is little better. There are 73 UK MEPs, and these represent a mere 9.7 percent of the 751 elected MEPs (post-2014 election). Given the party splits, this level of representation is notional. UK MEPs rarely vote together as a single bloc. Even if they did, they could never muster the 376 votes needed for a majority.

Furthermore, the powers of the Parliament and the Council are limited in important but poorly recognised ways. The increasing number of laws come into being via international standards and these are most often implemented by the EU as delegated legislation (Commission Regulations) using the comitology procedure.¹⁹⁰ Every year, more than 2,500 measures are processed via this route, passing through one or more of the 200-300 committees set up for the purpose. That is approximately 30 times more measures than are processed via the mainstream ordinary legislative procedure. The committees themselves are populated by anonymous officials from the member states, but they have no powers to amend or reject Commission proposals. They can either approve them, or refer them to the Council if they disagree with them.¹⁹¹

At Council, though, 70-90 percent of decisions are made by officials in the 160-plus preparatory bodies.^{192,193} These are known as "A-points" – colloquially the "A-list" – which are adopted by Ministers without discussion or a vote.¹⁹⁴

¹⁸⁹ Council of the European Union – voting calculator, <http://www.consilium.europa.eu/council/voting-calculator?lang=en>, accessed 2 January 2014.

¹⁹⁰ European Commission, Comitology Register, <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home>, accessed 18 December 2013.

¹⁹¹ Blom-Hansen, Jens (2008), The EU Comitology System: Who Guards the Guardian? Paper presented at the Fourth Pan-European Conference on EU Politics organised by the ECPR's Standing Group on the European Union, 25-27 September 2008, Riga, Latvia. <http://www.jhubc.it/ecpr-riga/virtualpaperroom/085.pdf>, accessed 2 January 2014.

¹⁹² Council of the European Union. List of Council preparatory bodies, <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%205581%202013%20INIT&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F13%2Fst05%2Fst05581.en13.pdf>, accessed 2 January 2014.

¹⁹³ Olsen, Ingvild (2010), The Council Working Groups – Advisors or *de facto* Decision Makers? Paper presented at the Fifth Pan-European Conference on EU Politics, Porto, Portugal - 23-26 June 2010. <http://www.jhubc.it/ecpr-porto/virtualpaperroom/100.pdf>, accessed 2 January 2014.

¹⁹⁴ http://www.eu-oplysningen.dk/euo_en/spsv/all/42/, accessed 2 January 2014.

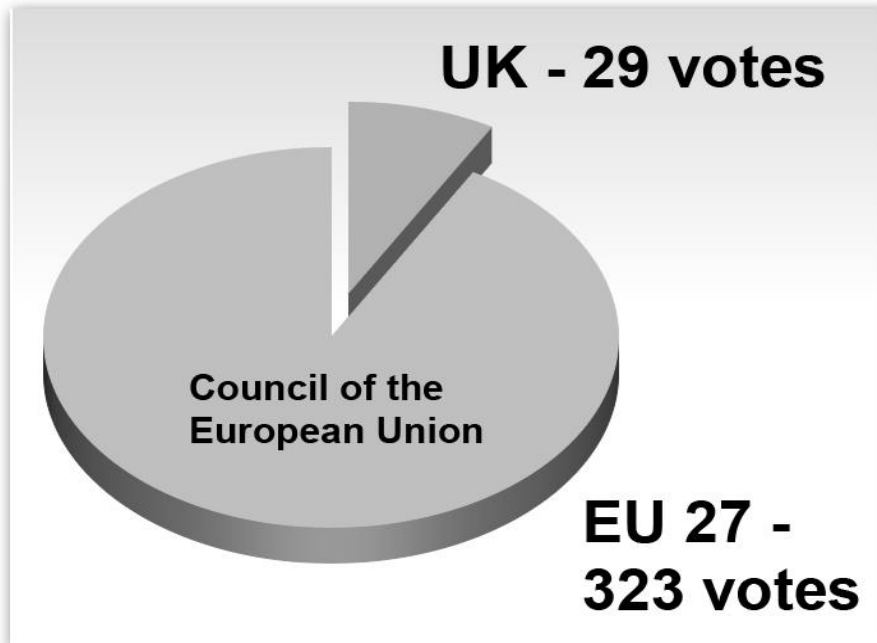


Figure 10: Council of the European Union: qualified majority voting – national vote weighting. (source: Consilium)

With Regulations made under acts passed before the Lisbon Treaty, the Council or Parliament can veto measures on certain grounds.¹⁹⁵ However, with Regulations made under legislation approved post-Lisbon, the veto no longer applies. The Commission is only required to "review" proposed regulations if there are objections, but it has no obligation to change them.¹⁹⁶ And, via the REFIT programme, the Commission is updating pre-Lisbon legislation, allowing it to eliminate the veto altogether.¹⁹⁷ Britain (and Member States generally), with already limited power, are thereby weakened even more.

Compared with the limitations of Mr Cameron's EU top table, the post-Brexit contrast is remarkable. Alongside Norway and other EFTA/EEA members, Britain resumes its place on the global and regional "top tables", and would be able to argue its own positions.

When it comes to a vote, if the UK objects to a measure, it can either veto proposed standards or opt out of them. A 27-member EU, once the UK has left, would cast as many votes on international councils, but would have only one

¹⁹⁵ Regulatory Procedure with Scrutiny (RPS), Art. 5a, Council Decision 1999/486/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1999D0468:20060723:EN:PDF>, accessed 18 December 2013.

¹⁹⁶ Art. 11, Regulation (EU) No 182/2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF>, accessed 18 December 2013.

¹⁹⁷ European Commission, COM(2013) 685 final, 2.10.2013, Regulatory Fitness and Performance (REFIT): Results and Next Steps, http://ec.europa.eu/commission_2010-2014/president/news/archives/2013/10/pdf/20131002-refit_en.pdf, accessed 18 December 2013.

veto – giving the UK an exact equivalence with the EU. Long before they come to the voting stage in the European Union, therefore, the UK could block proposals and make sure they never become law.

Only if proposals get past this filter, and then have a mutually accepted Single Market relevance, would Britain - as an EEA member – have to consider adopting them. Even then, the States can also refuse to adopt EU law that they consider to be against their national interests.^{198,199} This would put Britain in a relatively powerful position, far more so than it is within the EU where refusal to implement EU law would eventually trigger a reference to the ECJ, with the possibility of substantial fines.

¹⁹⁸ <http://www.efta.int/~media/Files/Publications/Bulletins/EFTA-Bulletin-2012.pdf>, accessed 19 December 2013.

¹⁹⁹ EFTA/EEA countries retain a "veto" – more accurately termed a "right of reservation" – set out in Article 102 of the EEA Agreement. EFTA countries in the EEA thus have something EU countries do not have - the right to opt out of new EU law. See: <http://www.efta.int/~media/Documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> and http://www.neitleu.no/articles_in_foreign_languages/the_eea_alternatives#1. Both accessed 22 December 2013.

5.0 The mechanics of leaving

My first guiding principle is this: willing and active cooperation between independent sovereign states is the best way to build a successful European Community. To try to suppress nationhood and concentrate power at the centre of a European conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve.

Margaret Thatcher
Speech to the College of Europe ("The Bruges Speech")
20 September 1988²⁰⁰

Politics aside, there is a myriad of practical issues to settle on leaving the EU, from the management of our borders to how we work with our neighbours.

One of the first realities which will have to be addressed was that the UK will have recovered its own borders, creating a new set of problems and opportunities, especially in terms of the land border between Northern Ireland and Ireland.

From the security of those borders, the UK will then be looking at many different forms of administrative co-operation. Some of the higher profile include working with Europol and with Eurocontrol on the development of Single European Sky. There was also the question of continued membership of intergovernmental bodies such as the European Space Agency, and whether the UK will want to run with projects such as the Galileo global positioning system, in which Britain has a heavy financial investment. On an entirely different level, there were matters such as continued involvement in the Erasmus student exchange programme, and the framework research programme, together with the European Research Area.

As might be imagined, these activities, programmes and bodies represent only a fraction of the areas in which the EU and its member states work together. Crucially, EFTA/EEA states are permitted (and in some cases required) to take part in these programmes. Some, such as Galileo satellite positioning system, welcome partner nations which have few other formal ties with the EU. Thus, there is no objection in principle to the UK continuing to cooperate with the EU over a wide range of issues, even after full membership has ended.

²⁰⁰ <http://www.margaretthatcher.org/document/107332>, accessed 15 May 2014.

What will present considerable difficulties, though, is deciding on the scale and extent of cooperative activity. At one end of the scale, the likes of the billion-euro research programme, currently the Horizon 2020 programme, are easy to discuss but, at the other extreme, there are hundreds of relatively minor programmes that are truly the domain of the specialist. Most often, these are known only to those directly concerned with them. Relative obscurity, though, does not mean a programme is unimportant or, necessarily, that it should be abandoned.

An example of the obscure end of the spectrum is the Interoperability Solutions for European Public Administration (ISA) programme, which manages collaboration between public sector departments beyond e-borders and sectors.

Administrative procedures, the Commission says, have the reputation of being lengthy, time-consuming and costly. Electronic collaboration between public administrations can make these procedures quicker, simpler and cheaper for all parties concerned, in particular when transactions need to be done cross-border and/or cross-sector. Thus was born the ISA programme, where the European Commission facilitates such transactions through more than 40 actions with a budget of some €160 million.²⁰¹

This might be a programme that we might wish to continue, based perhaps on an evaluation of its utility, cost and the willingness of the EU to allow continued participation. Those parameters might apply to the evaluation of other programmes, to which effect it might be useful to set up a specific body to identify and review areas of potential co-operation, to make recommendations on the areas we should seek to retain.

While evaluating all possible areas of co-operation is beyond the scope of this book, it is nevertheless useful to sample the areas to look at the sort of issues that might need to be discussed, and to illustrate the nature of the options which might be available to negotiators.

5.1 Border control

The re-establishment of a border between the UK and the EU opens the way to the possibility of there being physical border checks on trade, especially as the UK will be outside the external border defining the territories of the EU Member States. Certainly, the Government policy paper on the implications of leaving the EU warns that there would be a return of customs checks at the borders. For the Northern Ireland land border with Ireland, there are fears of the re-establishment of border posts border, with huge queues as trucks wait to cross.²⁰²

²⁰¹ <http://ec.europa.eu/isa/>, accessed 15 May 2014.

²⁰²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf, accessed 17 April 2016

In terms of transit of goods from Ireland to other Member States, via Northern Ireland and the rest of the UK, there are well established arrangements which pre-date the Treaty of Rome, going back to 1949 when the United Nations Economic Commission for Europe (UNECE) launched a scheme to remove cross-border checks of goods in transit.²⁰³

This system, known as the *Transports Internationaux Routiers* (TIR) was so successful that it led to the negotiation of a TIR Convention which was adopted in 1959 by the UNECE Inland Transport Committee and entered into force in 1960. It has since been updated and revised, currently standing as the 1975 Convention, as amended.

At the heart of the system is a document known as the TIR carnet, issued to registered transport operators for each truck journey, listing the details of the consignments, which have to be kept in secure load compartments and sealed for the duration of the journey. The specially marked vehicles are given free passage across borders, with any tariffs or other taxes becoming payable only when the final destination is reached.

Currently, three million carnets are issued each year, equating to 10,000 trucks a day making 50,000 TIR border crossings daily. And the system has since 2003 been undergoing simplification and computerisation, to become the e-TIR system, on its way to developing into a paper-free operation.²⁰⁴

Provided that the UK was prepared to re-enact the Community Customs Code and other flanking legislation to which EU recognition of the TIR system is tied, this would allow for the relatively free movement of goods. If goods were subject to tariffs, these could be collected electronically, while conformity inspections could be carried out beyond the border.²⁰⁵

Where unloading has to be supervised and inspections have to be carried out, there is already an established system of what are known as "inland ports" or "inland clearance depots", where checks can be carried out, before delivery. Often, these coincide with break-bulk facilities, allowing operations to be combined.²⁰⁶

As well as the TIR system for transit traffic, the EU has a system known as the Community Transit System.²⁰⁷ By this mechanism, goods travelling between Ireland and other EU Members States can use the system, passing though

²⁰³ <http://www.unece.org/tir/system/history/tir-history.html>, accessed 17 April 2016

²⁰⁴ <http://www.unece.org/trans/bcf/etir/background.html>, accessed 17 April 2016

²⁰⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R2913&from=EN>, accessed 17 April 2016

²⁰⁶ <http://www.bifa.org/library/freight-business/services/customs/customs-at-import>, accessed 17 April 2016

²⁰⁷ http://ec.europa.eu/taxation_customs/resources/documents/annex_i_transit_brochure_en.pdf, accessed 17 April 2016

Northern Ireland, if necessary, and other parts of the UK, without customs checks or any physical inspection.²⁰⁸

Should the UK go further than the bare minimum provision, relying on TIR, and join Efta, it could then take advantage of the Convention on a Common Transit Procedure, as amended, which was initially agreed in 1987. This again allows cross-border movement without the need for border checks.²⁰⁹ Within the EU, the UK currently adopts a harmonised procedure, implementing a substantial body of EU legislation, and it would also be open to the UK to re-enact this body of law, and agree to maintain a harmonised system.^{210,211} This would have to be settled via the Article 50 negotiations.

Failing all that, there is even the possibility of signing off a special, one-off deal, which is exactly what happened in 2004 with Cyprus to facilitate trade between the divided Greek and Turkish zones. Similar in many respects to the TIR and Community Transit System, this could certainly provide a partial model for Irish trade, between the North and South. Within this system, however, there is very little provision for the movement of foodstuffs.²¹²

Where checks on goods being moved across border are necessary, for customs or security purposes, there is increasing reliance on technology, which can remove or reduce the need for physical inspections and document checks at the borders. For instance, on the Finnish-Russian border the e-Clearance Vehicle Reservation Border Pass (VRBP) is being trialled. This has trucks equipped with radio frequency ID (RFID), dedicated short-range communication transponders (DSRCs), unique number container tags and unique e-Seals. Russia-bound vehicles will thus be able to undergo a series of pre-clearance automated inspections and a final automatic-reader drivers' passport check, without the drivers even have to leave their cabs.²¹³

Early pioneers of automated border clearance systems were the United States and Canada. In 1997, they were testing a system known as the "North American Trade Automation Prototype" (NTAP).²¹⁴ The system simplified cross-border shipping by combining all data into one standardized set of documents, then

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http://ec.europa.eu/taxation_customs/customs/procedural_aspects/transit/common_community/index_en.htm, accessed 17 April 2016

²⁰⁹ [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01987A0813\(01\)-20150701&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01987A0813(01)-20150701&from=EN), accessed 17 April 2016

²¹⁰ <https://www.gov.uk/government/publications/uk-trade-tariff-community-and-common-transit-outwards/uk-trade-tariff-community-and-common-transit-outwards>, accessed 17 April 2016

²¹¹ http://ec.europa.eu/taxation_customs/common/legislation/legislation/customs/index_en.htm, accessed 17 April 2016

²¹² http://ec.europa.eu/cyprus/documents/turkish_community/l_27220040820en00030010.pdf, accessed 17 April 2016

²¹³ <http://www.russiasupplychain.com/finnish-investment-maybe-a-game-changer/>, accessed 17 April 2016

²¹⁴ http://www.joc.com/automated-border-clearance-system-gets-mixed-reviews_19970629.html, accessed 17 April 2016

allowing exporters to send data via the web to Customs officials in both countries and their corresponding importers. And, with 10,500 trucks crossing daily at Detroit and half that number in Buffalo, that speed was important.

The system is now set to be replaced by a new International Trade Data System known as the "automated commercial environment", or ACE.²¹⁵ This is a "single, electronic portal" which will allow importers and exporters to share trade documents with government agencies. Carriers have the option of equipping their trucks with a designated transponder technology that transmits RFID signals directly to Customs Officials.

Almost on the other side of the world, similar developments are afoot, with UNECE and the IRU (International Road Transport Union) signing an MoU on the computerisation of the TIR procedure (eTIR) in support of a pilot project between Iran and Turkey.²¹⁶

This was followed by Georgia and Turkey creating eTIR links and the enlistment of Pakistan in the TIR system.^{217,218} For Pakistan, this provided a legal framework for traffic in transit of goods across borders among the contracting parties without involving payment of customs duties and taxes. It would facilitate trade with Economic Cooperation Organisation (ECO) countries and China through land routes, avoiding having to pay transit fees to countries such as Afghanistan, which had been demanding guarantees of 101 percent.

However, the application of technology will require considerable planning and investment, and the use of systems that are still at an experimental state. Furthermore, no technology can deal with circumstances where physical inspection is required. In the event of the UK removing itself from the Single Market (Efta/EEA), there will most certainly be requirements for sanitary and phytosanitary checks at the border, requiring permanent installation of Border Inspection Posts (BIPs) or Designated Points of Entry (soon to be replaced by Border Control Posts).

Given the high volume of traffic carrying animals or plants, or goods of animal or plant origin, including foodstuffs, this could have considerable implications for the land border between Ireland and Northern Ireland, and for cross-Channel traffic.

²¹⁵ http://www.joc.com/regulation-policy/customs-regulations/us-customs-regulations/us-customs-chief-single-window-still-agency%E2%80%99s-top-priority_20150601.html, accessed 17 April 2016

²¹⁶ <http://www.unece.org/info/media/presscurrent-press-h/transport/2015/unece-and-iru-sign-mou-on-the-computerization-of-the-tir-procedure-etir/unece-and-iru-sign-mou-on-the-computerization-of-the-tir-procedure-etir.html>, accessed 17 April 2016

²¹⁷ <http://www.unece.org/info/media/news/transport/2016/georgia-and-turkey-create-digital-link-with-etir/doc.html>, accessed 5 April 2016

²¹⁸ <http://tribune.com.pk/story/1031365/custom-free-trade-pakistan-to-enforce-tir-convention-for-transit-goods/>, accessed 5 April 2016

5.2 Co-operation through the EEA

Should the UK decide to rejoin (or remain in, as the case may be) the EEA, there is another area of co-operation which will have to be entertained. Provisions written into the Agreement and its protocols extend the agreement beyond trade, setting out areas where the Contracting Parties, of which the UK will be one, will "strengthen and broaden co-operation" in certain fields of Community activity.²¹⁹ These areas are defined in separate articles of Protocol 31 of the EEA Agreement and encompass: research and technological development; information services; the environment; education, training and youth; social policy; consumer protection; small and medium-sized enterprises; tourism; the audiovisual sector; and civil protection.

Article 87 of the Agreement permits cooperation to be broadened even further, "where such cooperation is considered likely to contribute to the attainment of the objectives of the Agreement, or is otherwise deemed [...] to be of mutual interest". Other articles have therefore been added to Protocol 31. These cover: trade facilitation; transport and mobility; culture; energy programmes and environment-related energy activities; employment; public health; telematic interchange of data; exchange between administrations of national officials; and reduction of economic and social disparities.

Even this is not a static list. Whenever the EU adopts a new programme in any of the fields above, the decision often provides for Efta/EEA participation.²²⁰ Thus the Contracting Parties agree to strengthen the dialogue between them "by all appropriate means" with a view to identifying areas and activities where closer cooperation could "contribute to the attainment of their common objectives" in the fields specified. They are required to exchange information and, at the request of a Contracting Party, hold consultations within the EEA Joint Committee in respect of plans or proposals for the establishment or amendment of framework programmes, specific programmes, actions and projects in those fields.

At project level, institutions, undertakings, organisations and nationals of Efta States have the same rights and obligations in Community programmes as their equivalents in EU Member States. They also have the same rights and obligations with regard to dissemination, evaluation and exploitation of results. Therefore, the UK could, without prejudice, undertake the same range of co-operative ventures with the EU, as is currently under the Efta/EEA umbrella.

On the other hand, while certain areas of co-operation may be welcome and desirable, others may be less so. Therefore, in anticipation of future intentions, negotiators may need to set priorities, setting out policy areas where active co-

²¹⁹ Part VI Cooperation outside the four freedoms, Arts 78-79. EEA Agreement, <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>

²²⁰ <http://www.efta.int/eea/eu-programmes/application-finances/background>, accessed 15 May 2014.

operation is intended, and limits where there is less enthusiasm for joint action. In the latter event, it may suffice to set out the position of the parties in a memorandum of understanding, or it may be necessary to negotiate an amendment to Protocol 31 of the Agreement, or an additional, country-specific protocol.

5.3 Inter-agency co-operation

Much of the work of the EU is undertaken by over forty agencies and decentralised bodies, ranging from the European Police College, the European Aviation Safety Agency (EASA), the European Chemicals Agency, to the Office for Harmonization in the Internal Market (Trade Marks and Designs).²²¹ Therefore, it is unlikely that co-operation at administrative and to an extent policy level will be fully effective without engaging with European Agencies and other bodies.

Without specific arrangements, relationships between UK agencies and their EU equivalents, and with the agencies of EU Member States, might be limited to the diplomatic level. There would be few direct contacts with agency staff. However, it is already the case that the founding regulations of many of the EU agencies and other bodies instruct the agencies to co-operate as closely as possible not only with specialised institutes, foundations and bodies in the Member States, but also with those at international level.²²²

Collaboration varies from co-operation in training to the organisation of common events such as workshops, conferences, research and capacity building. Of more substance, it can comprise development of common procedures, the exchange of confidential information and personal data, and co-operation in joint operations.²²³

Much of this is facilitated by inter-agency agreements. For instance, the European Centre for Drugs and Drug Addiction (EMCDDA) has signed a Memorandum of Understanding with the United Nations Office on Drugs and Crime (UNODC). On specific assignments, this agency works with the Joint United Nations Programme on HIV/AIDS UNAIDS and the World Health Organisation (WHO).²²⁴ Using this as a model, there is scope for direct interaction between, say, the UK's Environment Agency and the European Environment Agency and between the UK's Medicines and Healthcare Products Regulatory Agency and the European Medicines Agency – the latter on the marketing authorisation of medicines – all without direct government intervention.

²²¹ For a full list, see: http://europa.eu/epso/success/recru/contacts/agencies_list_cast_en.pdf, and http://europa.eu/legislation_summaries/glossary/eu_agencies_en.htm, both accessed 16 July 2014.

²²² Centre for the Law of EU External Relations, EU agencies and their international mandate: A new category of global actors? http://www.asser.nl/upload/documents/20140106T113002-cleer_13-7_web.pdf, accessed 16 July 2014.

²²³ *Ibid.*

²²⁴ *Ibid.*

Within the political framework set by the overall Article 50 Agreement, therefore, it makes sense to explore the desirability and scope of inter-agency co-operation, and to lay down the broad parameters for establishing agreements, including financial arrangements. It seems that the ubiquitous Memorandum of Understanding is an appropriate instrument, allowing agreements to be concluded speedily, without too much formality.

5.4 The Single European Sky

Coming from the general to a more detailed issue, one area where continued co-operation will be absolutely essential will be in the commercial aviation sector. Making satisfactory arrangements will be an important feature of the Article 50 negotiations as, since 2004 and the advent of a generic policy known as the Single European Sky (SES), Member States have given the EU authority to manage airspace over their territories, and in particular air traffic management (ATM) of commercial air transport. This authority will have to be recovered.

As it currently stands, the stated objective of the policy is "to reform ATM in Europe in order to cope with a sustained air traffic growth and air traffic operations under the safest, more cost- and flight-efficient and environmentally friendly conditions". Amongst other things, the EU has been seeking to defragment European airspace – i.e., detach it from national control – thereby reducing delays, increasing safety standards and flight efficiency. It also seeks to reduce the aviation "environmental footprint" and reduce costs related to service provision.²²⁵

Formerly dealt with on an exclusively intergovernmental basis, through Eurocontrol, governance of airspace within EU member state territories has now been absorbed into the Community method, vesting the power of initiative in the European Commission (EC), which is also charged with monitoring of the compliance of the Member States. It is assisted by a specialist regulatory Committee comprising representatives from Member States, known as the Single Sky Committee.

The SES legislative framework originally consisted of a series of four "basic" regulations covering the provision of air navigation services (ANS), the organisation and use of airspace and the interoperability of the European Air Traffic Management Network (EATMN).²²⁶ These four were revised and extended in 2009 - the so-called SES II Package - aiming at increasing the overall performance of the air traffic management system in Europe.²²⁷ This framework also includes more than 20 Implementing Rules and Community

²²⁵ European Commission website: Single European Sky, http://ec.europa.eu/transport/modes/air/single_european_sky/index_en.htm, accessed 8 July 2014.

²²⁶ Nos 549/2004, 550/2004, 551/2004 and 552/2004.

²²⁷ Regulation (EC) 1070/2009, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R1070&from=EN>, accessed 8 July 2014.

Specifications ("technical standards") adopted by the European Commission starting from 2005 with a view to ensuring interoperability of technologies and systems.

The SES framework has been supplemented by an integrated approach to safety by the extension in 2009 of the competencies of the EASA in the field of aerodromes, air traffic management (ATM) and air navigation services, and through the establishment in 2007 of a joint undertaking (JU) on research & development, the SESAR JU (SESAR standing for the Single European Sky ATM Research).

However, it is very much to the advantage of the UK that there should be coordinated control over European airspace. Post-withdrawal, therefore, the UK is unlikely to want to detach itself from SES or damage its functioning. Furthermore, it will undoubtedly wish to remain within Eurocontrol. In this it is aided by the ambitions of the EU itself, which is seeking to apply SES beyond the external borders of EU Member States. Therefore, there are already established procedures for extending SES to neighbouring third countries, integrating them into the EU legal framework. This currently extends to 37 states, including the EU-28.

Since the SES framework is based on EU regulations rather than directives, the legislation has direct effect and does not require transposition into national law. But, insofar as it applies to the UK, it will cease to have effect upon the withdrawal from the EU unless appropriate measures are taken. These will include the re-enactment of any relevant legislation, to ensure continuity of operations and maintain regulatory convergence.

Re-integration into the system will be assisted by provisions of the Lisbon Treaty. Through this, the EU has committed itself to developing a special relationship with neighbouring countries (Article 8 TEU) – and a "neighbouring country" is precisely what the UK will have become. The Treaty also provides that the Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks (Article 171, par.3 TFEU).

In the aviation sector, closer integration with the EU's neighbours is driven by these provisions and by the objective of creating a wider European Common Aviation Area (ECAA). This is intended to cover territories inhabited by one billion people in the EU and all neighbouring countries on its southern and eastern borders. There would, however, be no technical issues in extending the ECAA to the northern fringe. With regulatory convergence already assured, there should be no great difficulty in retaining the UK block as part of the integrated ATM system, via a comprehensive air services agreement appended to the Article 50 exit agreement.²²⁸

²²⁸ European Commission, Brussels, 7 July 2011, COM(2011) 415 final, The EU and its neighbouring regions: A renewed approach to transport cooperation, <http://eur->

Completion of an agreement here would ensure continued access of UK aircraft to the rest of European airspace, and the normal flow of traffic into UK airspace. Without a suitable agreement, though, commercial air services would be seriously disrupted and, as between the UK and continental Europe, possibly terminated. The object thus is to replicate as much of the pre-exit arrangements as possible to ensure that traffic continues uninterrupted, thus illustrating one mode of co-operation agreement, and re-emphasising the need to ensure seamless ongoing co-operation.

External Aviation Policy

A different order of problem is the EU's External Aviation Policy, which manages access to airspace outside EU member state territories, in a series of agreements with third countries.

The current batch of agreements stem from the ECJ's so-called "open skies" judgements of 5 November 2002, which clarified the demarcation of powers between the EU and member states in the regulation of international air services. The court had ruled that Member States could no longer act in isolation when negotiating international air services agreements. Specifically, it affirmed that nationality clauses in bilateral agreements were contrary to EU law, thus requiring member states to allow any "EU carrier" to fly from their country to a third country.

The judgement and subsequent Regulation (EC) No 847/2004 required the amendment of some 1,500 bilateral agreements between member states and third countries in order to have the "EU nature" of air carriers recognised. In pursuit of this, the European Commission negotiated 45 Horizontal Agreements, amending all the bilateral agreements between given third countries and all EU member states with which those countries had bilateral agreements.²²⁹

The effect of EU intervention is that the UK no longer negotiates agreements with third countries independently but as an EU member state acting with the other member states. An example is the agreement with the United States, which grants reciprocal rights for US and EU member state carriers to access each other's airspace. This is drawn up between the member states as "parties to the Treaty establishing the European Community and being Member States of the European Union".²³⁰ Arguably, this agreement – and those like it, as between other member states – falls once the UK withdraws from the EU.

lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0415:FIN:EN:PDF, accessed 9 July 2014.

²²⁹ European Commission website, External Aviation Policy, http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/index_en.htm, accessed 6 July 2014.

²³⁰ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=9021>, accessed 6 July 2014.

Notwithstanding the strict terms of the agreements, they apply in respect of the EU to "Community airlines". Where substantial ownership and effective control of an airline is not vested in a Member State or States, nationals of such a State or States, or both, or the airline is not licensed as a Community airline or does not have its principal place of business in the territory of the European Community, the third country "may revoke, suspend or limit the operating authorisations or technical permissions or otherwise suspend or limit the operations" of the airline.²³¹ In as much as UK enterprises will no longer be "Community airlines" (or even "Community air carriers" – see footnote), they may be excluded from EU-third country agreements.

However, this problem should not arise if the UK remains within the EEA. The common rules for the operation of air services in the community, which include provision for licensing air carriers, have EEA application. As long as the relevant regulation is adopted, and the requisite administrative requirements are maintained, UK licensed operations will remain Community airlines.²³²

Nevertheless, as regards third country agreements, while a covering treaty of association, however framed, may give temporary cover and thereby afford UK air carriers unchanged access rights, the UK may wish to modify some rights afforded to other EU member states. In the event that agreement with the EU cannot be reached, the renegotiation of all third country air transport agreements may be required.

5.5 Police and criminal justice measures

A different example of ongoing co-operation comes with cross-border cooperation on policing and criminal justice matters. Co-operation here is an essential element in tackling security threats such as terrorism and organised crime in the twenty-first century. To that effect, the EU has built up a significant body of law, and hosted a substantial number of initiatives devoted to such matters.

However, there are significant sovereignty issues in agreeing full co-operation, should UK and EU systems be fully merged. The model, when it comes to UK participation, is one of partial co-operation on selected issues. As to the extent of any collaboration, the Article 50 negotiators might rely on the provision in the Lisbon Treaty (protocol 36) permitting the UK to opt out of all the 133 police and criminal justice measures agreed prior to the coming into force of the Treaty in 2009, with a further provision that it could apply to rejoin selected measures (an "opt-back-in") by 31 May 2014. The decision would take effect

²³¹ *Ibid.* See Art 5. Similar terminology is seen in other agreements. In the Indian agreement, the reference is to "Community air carriers". See <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12987>, accessed 6 July 2014.

²³² Regulation (EC) No 1008/2008 of 24 September 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:293:0003:0020:en:PDF>, accessed 6 June 2014.

on 1 December 2014, whence all 133 provisions would cease to apply to the UK, barring those which the government had elected to rejoin.²³³

Indicative of the complexity of the issues involved, and the scale of the task confronting UK negotiators charged with securing an exit agreement, the government's options were examined by the House of Lords EU Sub-Committee on Justice, Institutions and Consumer Protection and the EU Sub-Committee on Home Affairs, Health and Education, which conducted a joint inquiry into the issues, with a 151-page report published on 23 April 2013. The inquiry was re-opened on 18 July 2013 and a follow-up report was published on 31 October 2013. Both reports were debated in the House of Lords on 23 January 2014.²³⁴

In the event, the government chose to rejoin 35 measures, in a decision published in July 2013 running to 155 pages.²³⁵ On 26 July 2013, the government formally notified the presidents of the justice and home affairs councils of its decision to exercise the block opt-out.²³⁶ Then, by 16 June 2014, the Commission had notified the Council of the European Union (Council of Ministers) in a "non paper" on the state of play of the discussions between the Commission and the United Kingdom on the application of Protocol 36, noting that the "opt-back-in" number had been reduced by two, to 33.²³⁷

In addition to the notorious European Arrest Warrant, measures to which the UK government had opted back in included Council Decision 2000/375/JHA to combat child pornography on the internet, Council Decision 2002/348/JHA (and amendment) concerning security in connection with football matches with an international dimension, and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.^{238,239,240}

²³³ House of Lords, European Union Committee, 13th Report of Session 2012–13, EU police and criminal justice measures: The UK's 2014 opt-out decision, <http://www.publications.parliament.uk/pa/ld201213/ldselect/lducom/159/159.pdf>, accessed 5 July 2014.

²³⁴ Select Committee opt-out webpage, <http://www.parliament.uk/2014opt-out>, accessed 5 July 2014.

²³⁵ UK Command Paper "Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union" (Cm 8671), <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/homeofficeem1-5.pdf>, accessed 5 July 2014.

²³⁶ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012750%202013%20INIT>, accessed 5 July 2014.

²³⁷ Council of the European Union, Brussels, 16 June 2014, 10168/14, Article 10 of Protocol 36 to the Treaties, <http://www.statewatch.org/news/2014/jun/eu-council-uk-prot-36-opt-out-in-10168-14.pdf>, accessed 5 July 2014.

²³⁸ <http://www.coe.int/t/dghl/standardsetting/childjustice/EU%20framework%20decision%20sexual%20exploitation%20of%20children.pdf>

The latter provision sets out the procedure for the implementation of the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983. Under that Convention, sentenced persons may be transferred to serve the remainder of their sentence only to their state of nationality and only with their consent and that of the States involved. There is also an Additional Protocol to that Convention of 18 December 1997, which allows transfer without the person's consent, subject to certain conditions.²⁴¹

Clearly, this and other provisions are very much to the advantage of the UK. For instance, the agreement relating to the transfer of prisoners, so that convicted criminals from other member states can serve their sentences in their home countries, reduces overcrowding and saves us the costs of looking after them. But, in that the Council Framework Decision which enables this provision to take effect simply implements a Council of Europe Convention – which would remain in force after the UK had left the EU – the UK would doubtless wish to carry it over after it had left the EU. And for diverse and several reasons, the UK would most probably wish to secure the continuation of most of the other measures after its withdrawal.

The mechanism for achieving this continuation might be a specific bilateral treaty, dedicated solely to police and criminal justice matters, allowing for flexibility in adopting additional provisions as and when the need to adopt them arises. Since this would include the formal participation in Europol, with an estimated annual cost to Britain of £10.5 million, any treaty would have to include a commitment to an ongoing contribution to the running of this institution, plus any other contributions to the maintenance of registers and databases associated with the opt-in provisions.²⁴²

This notwithstanding, the 33 opt-back-in measures are not the full extent of the putative UK involvement in police and criminal justice matters. There will be other issues, such as the decision as to whether to take part in the Prüm convention, a treaty on the exchange of police information, whereby some EU member states have granted each other access rights to their automated DNA analysis files, automated fingerprint identification systems and vehicle registration data.²⁴³ This was not originally an EU measure, but started life as a separate treaty agreed in 2005 by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria and implemented in 2008.²⁴⁴

²³⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0348:EN:HTML>, accessed 5 July 2014,

²⁴⁰ http://www.coe.int/t/dghl/standardsetting/prisons/Framework_decisions/FD-Transfer%20of%20Prisoners.pdf, accessed 5 July 2014.

²⁴¹ *Ibid.*

²⁴² <http://www.publications.parliament.uk/pa/ld201314/ldselect/lddeucom/69/6915.htm>, accessed 5 July 2014.

²⁴³ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010900%202005%20INIT>, accessed 5 July 2014.

²⁴⁴ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/prum-decision/index_en.htm, accessed 5 July 2014.

The EU has now adopted the measure as its own, bringing it into the police and criminal justice acquis via Council Decision 2008/615/JHA of 23 June 2008, making it one of the 133 provisions from which the UK subsequently decided to opt out.²⁴⁵ The decision was made to avoid infraction proceedings costing many millions for a measure which the government felt unable to implement.²⁴⁶ For this reason, the UK decided not to exercise its immediate opt-back-in option, but was nevertheless asked whether it intended to re-join at some time in the future.

While there were obvious advantages for UK law enforcement agencies in having automatic access to the databases of other member states, there were also technical and administrative problems associated with joining the scheme, as well as serious human rights and data protection issues. The UK government thus reserved its position and would not commit to a decision until December 2015.²⁴⁷ Of some significance, though, was the response of the Commission to the UK's position, stating that, for as long as the UK had not joined Prüm, "it shall have no access to EURODAC for law enforcement purposes".²⁴⁸

EURODAC is a database of fingerprints of applicants who have applied in any member state for asylum, and illegal immigrants who have been picked up within EU member state territories.²⁴⁹ It is an essential tool in making the Dublin Regulation work – the regulations which establishes which member state is responsible for examining applications for asylum. Without this, the UK cannot effectively detect and then deport asylum seekers (see also Chapter 8).²⁵⁰ Thus, the UK was placed in a position where effective action on illegal immigrants and asylum seekers was made dependent on the UK signing up to participation in an EU-wide DNA database, with widespread implications for the entire justice system.

This conditionality, applied to the UK while a full member of the EU, may be a harbinger for the stance taken by Article 50 negotiators, where the process of bargaining will determine the final outcome. It will be neither predictable nor optimal for any of the parties engaged.

5.6 Joint customs operations

Another form of co-operation is illustrated by the EU system for the surveillance of the flow of counterfeit products entering the European customs area. This is carried out routinely, in addition to which member state customs authorities, sometimes in association with non-member countries, carry out

²⁴⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0615&from=EN>, accessed 5 July 2014.

²⁴⁶ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/683/68318.htm>,

²⁴⁷ Doc 10168/14, *op cit*.

²⁴⁸ *Ibid*.

²⁴⁹ <https://secure.edps.europa.eu/EDPSWEB/edps/Supervision/Eurodac>, accessed 5 July 2014.

²⁵⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0343&from=EN>, accessed 5 July 2014.

regular joint customs operations, in cooperation with the European anti-fraud office, OLAF. These operations are coordinated and targeted actions of a limited duration with the aim of combating the smuggling of sensitive goods and fraud in certain risky areas and/or on identified trade routes.²⁵¹

Eight such operations have been recorded recently, the latest called Operation ERMIS, in which 70,000 counterfeit items were seized in 634 different seizures. The goods varied in nature from mobile phones, sunglasses, and small vehicle spare parts, to medicines and pharmaceutical products. Most were found to have come from the Far East.²⁵²

These activities have an obvious value, but the UK will cease to be part of the system on exit from the EU, although there is provision for the mutual exchange of information with the competent authorities in third countries, which the UK would become.²⁵³ To that extent, OLAF has a system for signing up "judicial parties" in third countries. No formal treaty arrangements are required, as the cooperation is facilitated by administrative agreements signed between institutions.²⁵⁴ Institutions from some 20 countries, including the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have concluded agreements with OLAF.²⁵⁵ As with its arrangements for working with EU agencies, the UK government might be expected to broker a similar administrative agreement between relevant law enforcement agencies in the UK and OLAF.

Another Joint Customs Operation (JCO) was Operation Warehouse, during which almost 45 million smuggled cigarettes, nearly 140,000 litres of diesel fuel and about 14,000 litres of vodka were seized. This was carried out in October 2013 by the Lithuanian Customs Service and the Lithuanian Tax Inspectorate in close cooperation with OLAF, and with the participation of all 28 EU member states. According to preliminary estimates, the action prevented the loss of about € 9 million in customs duties and taxes.²⁵⁶

Operation Snake, carried out from February to March 2014, was another example of this type of operation. In this case, it involved the Anti-smuggling Bureau of the General Administration of China Customs, the first time it had done so.²⁵⁷ The action targeted the undervaluation of imported goods which

²⁵¹ European Commission website, Joint Customs Operations, (JCO) http://ec.europa.eu/anti_fraud/policy/joint-customs-operations/index_en.htm, accessed 9 July 2014.

²⁵² http://europa.eu/rapid/press-release_IP-14-776_en.htm, accessed 9 July 2014.

²⁵³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:248:FULL:EN:PDF>, accessed 7 July 2014.

²⁵⁴ See http://ec.europa.eu/anti_fraud/policy/international-cooperation/index_en.htm and http://ec.europa.eu/anti_fraud/documents/international-cooperation/aca_third_countries_and_dp_annex_en.pdf, accessed 9 July 2014.

²⁵⁵ http://ec.europa.eu/anti_fraud/documents/international-cooperation/list_signed_acas_en.pdf, accessed 9 July 2014.

²⁵⁶ http://europa.eu/rapid/press-release_IP-14-37_en.htm, accessed 14 September 2014.

²⁵⁷ http://europa.eu/rapid/press-release_IP-14-1001_en.htm, accessed 14 September 2014.

causes huge losses to public revenue every year. Over a one month period, OLAF and participating customs authorities detected more than 1,500 containers where the declared customs value had been heavily undervalued. This included false descriptions of goods, false weights and quantities, and counterfeit goods. In addition, customs authorities succeeded in identifying several so-called missing traders and non-existent importers, triggering criminal and administrative investigations in several countries.

Separately, but not unrelated, are operations conducted jointly with national authorities, Interpol and Europol, in relation to the trafficking of illegal goods and counterfeiting programmes. Operation Opson is an ongoing example.²⁵⁸ The first operation of this name, mounted in 2011 and lasting one week, saw the seizure of 13,000 sub-standard bottles of olive oil, 12,000 bottles of sub-standard wine, 30 tons of fake tomato sauce, 77 tons of counterfeit cheese, five tons of sub-standard fish and 30,000 counterfeit candy bars. The UK would be expected to continue this cooperation.

5.7 Sanitary & phytosanitary controls

Announced in March 2014 was an EU ban on the import of Indian mangoes and four other foods and vegetables, on "fears that shipments contain a pest that could destroy British tomato and cucumber crops".²⁵⁹ A media report noted that the ban had been introduced because some mango shipments had contained tobacco whitefly which could affect Britain's £320-million-a-year salad industry.²⁶⁰

This triggered a system of import control, based on sophisticated surveillance and inspection of food products, aimed at detecting and dealing with third-country failures to comply with import standards. The surveillance system connects Plant Health Authorities of the EU Member States and Switzerland, the European Food Safety Authority and the Directorate General for Health and Consumers of the European Commission. Data collected feeds into an online database called Europhyt - the "European Union Notification System for Plant Health Interceptions".²⁶¹ It costs over €1 million to administer and is one of ten such databases which, collectively, cost €11 million a year.²⁶²

²⁵⁸ <http://www.ipo.gov.uk/ipenforce-opson.pdf>, accessed 9 July 2014.

²⁵⁹ European Commission press release: 26 March 2014, Plant Health: ban on import of five fruits and vegetables from India endorsed by Member States. http://europa.eu/rapid/press-release_MEX-14-0326_en.htm, accessed 1 May 2014.

²⁶⁰ *Mail on Sunday*, 28 April 2014, <http://www.dailymail.co.uk/news/article-2614138/Bang-mangos-EU-bans-16million-India-amid-fears-theyre-pest-ridden.html>, accessed 1 May 2014.

²⁶¹ http://ec.europa.eu/food/plant/plant_health_biosafety/europhyt/index_en.htm, accessed 1 May 2014.

²⁶² Commission Implementing Decision of 28 February 2014 on the financing of the 2014 work programme on IT tools in the field of food safety, animal health, animal welfare and plant health <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2014:072:FULL>, accessed 1 May 2014.

Through the Europhyt system, pest infestations had been found in 207 consignments of fruit and vegetable from the sub-continent. This triggered a country inspection by inspectors from DG Sanco's Dublin-based Food and Veterinary Office (FVO). Inspectors visited sites in India in 2013 and produced a report highly critical of the production and storage standards.²⁶³

Based on this, the Commission framed a proposal for a ban relying on Council Directive 2000/29/EC.²⁶⁴ This in turn relied on the International Plant Protection Convention (IPPC) of 6 December 1951 concluded at the FAO in Rome. Thus, the EU was effectively implementing an international agreement, its proposals then being approved by the Plant Health Standing Committee (comprising Member State delegates) as part of the comitology process.²⁶⁵

This was a classic example of the Single Market in action at its best, providing a service at a European level that could not be managed as efficiently (or at all) by individual member states. Of nearly 7,000 Europhyt notifications (2012), the UK made fewer than 1,400, so the magnifier effect is evident. Most notifications came from Germany, on which the UK would not be able to rely if it was outside the system.²⁶⁶ Then, FVO officials carry out inspections in India and elsewhere in the world, which UK officials would have to carry out independently (and fund directly) if it no longer took part in the EU system.

Before joining the EU, the UK did have its own network of overseas inspectors. On leaving the EU, it would have to make a choice. It could either reinstate something like its original system, and its own notifications database, or seek to remain part of the EU system. Clearly, it would be far more expensive to take the independent route, and without the more extensive data collecting capability, the UK could not match the EU's capability. Logically, therefore, the UK might look to continued participation in this and allied programmes.

Longer term, the EU might be prevailed upon to transfer the functional architecture and resource expended on third country monitoring to another agency (such as UNECE - of which more later). In the interim, the UK might have little choice but to work with the EU.

²⁶³ http://ec.europa.eu/food/fvo/rep_details_en.cfm?rep_inspection_ref=2013-6818, accessed 1 May 2014.

²⁶⁴ On protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:169:0001:0112:EN:PDF>

²⁶⁵ Agenda, 25-26 March 2014.

http://ec.europa.eu/food/plant/standing_committees/sc_plant_health/docs/ag_20140325-26_en.pdf

²⁶⁶ Food and Veterinary Office, Europhyt Annual Report, 2012, http://ec.europa.eu/food/plant/plant_health_biosafety/europhyt/docs/annual-report_europhyt_2012_en.pdf

5.8 Anti-dumping measures

Another "service" provided by the Commission is in the monitoring and the management of the response to the dumping of goods by third countries, with action being taken if a country exports a product to the EU at prices lower than the normal value of the product (the domestic prices of the product or the cost of production) on its own domestic market.²⁶⁷

The activity is typified by the launch of an investigation by the European Commission at the end of June 2014 into alleged dumping of stainless steel into the EU by Chinese and Taiwanese producers.²⁶⁸ This followed record exports from the world's largest steel producer, China. Despite a domestic slowdown, the country's manufacturing was being boosted to new highs.

The steel industry, represented by EU industry body Eurofer, filed a complaint in mid-May, whence the Commission had 45 days to decide on its action. It could impose provisional duties within nine months, if the complaint was upheld and, after a further six months, EU Member States could agree to extend the period, typically lasting five years.

Putting the issue in perspective, imports of cold-rolled stainless steel sheet into EU member states from China and Taiwan totalled €758 million last year, a 10-fold increase from the value in 2002. EU production in 2012, the last year for which data is available, was worth €23.6bn.

The EU already had in place duties on seven types of steel products from stainless fasteners to welded tubes coming from China but no cases simply involving specific grades of steel. And nor is it on its own. Significantly, the United States had also opened a probe into imports of carbon and alloy steel wire rod from China, confirmed plans for duties on concrete steel rail tie wire from China and Mexico. It claimed that the country had unfairly subsidised high-tech steel. According to China's General Administration of Customs, Chinese exports of steel, including stainless, hit 8.07 million tonnes in May 2014, the highest ever level and an annual increase of 41.5 percent in the year to date.

Meanwhile, China had produced just over half of the world's stainless steel the previous year, despite weak demand and pricing trends. On provisional estimates global output reached record levels in 2013, in excess of 36.3 million tonnes, representing a year-on-year increase of 5.1 percent, the majority of the increase coming from China and India.

²⁶⁷ European Commission website: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index_en.htm. accessed 19 June 2014.

²⁶⁸ <http://uk.reuters.com/article/2014/06/16/uk-eu-china-steel-idUKKBN0ER1J320140616>, assessed 17 June 2014.

The value of the EU's action was readily apparent. Despite the imposition of anti-dumping duties being many months away, the moment the Commission announced its willingness to conduct an investigation, prices were expected to stage a partial recovery.

Although UK production is relatively modest, with total production of all steels at 9.4 million tonnes, in this event there were still jobs at stake and the remnants of an important industry to protect. And therein lies the rub. The European Commission was providing a service to industry, protecting it from predatory dumping, providing what is essentially a WTO-compliant system, with greater facility as it has access to a much wider trading database than any individual member state.

This could be seen as an advantage of EU membership, but it is certainly an issue which needs to be resolved as part of any Article 50 negotiations. The UK's options might include tapping into the EU system, expanding it to encompass a wider region (perhaps through UNECE) or even the entire globe. Alternatively, it could revert to a less efficient national system.

With thousands of products routinely monitored on an EU-wide basis, and the Commission operating a functioning system to deal with this trading abuse, ignoring the problem is not an option, and neither is there a "business as usual" option. This one of those many issues which will have to be addressed if there is going to be a smooth transition to an independent state.

5.9 Maritime surveillance

Since 2007, the European Commission has been working formally on an Integrated Maritime Policy.²⁶⁹ Part of that has been to "take steps towards a more interoperable surveillance system to bring together existing monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, control of external borders and other law enforcement activities".

The parameters were set out in more detail in late 2009, when the aim of the surveillance programme was identified. In short, its purpose was to generate situational awareness of activities at sea "impacting on maritime safety and security, border control, the marine environment, fisheries control, trade and economic interests of the European Union as well as general law enforcement and defence so as to facilitate sound decision making".²⁷⁰

²⁶⁹ European Commission, Brussels, 10 October 2007, COM(2007) 575 final, An Integrated Maritime Policy for the European Union, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF>, accessed 10 July 2014.

²⁷⁰ European Commission, Brussels, 15 October 2009, COM(2009)538 final, Towards the integration of maritime surveillance: A common information sharing environment for the EU maritime domain, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0538:FIN:EN:PDF>, accessed 10 July 2014.

There was, the Commission asserted, a clear need to share maritime surveillance information. Different sectoral authorities dealing with monitoring and surveillance of actions at sea gathered data and operational information so as to establish the best possible maritime awareness picture for their own use. But, for many user communities, this picture did not include complementary information gathered by other sectoral users due to the lack of mutual exchange.

With undeniable logic, therefore, the Commission argued that developing the necessary means to allow for such data and information exchange "should enhance the different users' awareness picture". Such enhanced pictures, it said, "will increase the efficiency of Member States' authorities and improve cost effectiveness". The objective of the programme, therefore, was to set out guiding principles for the development of a common information sharing environment and to launch a process towards its establishment.²⁷¹

In 2010, the Commission published a "roadmap" setting out the functional requirements for what it called the "Common Information Sharing Environment" (CISE) for the surveillance of the "EU maritime domain".²⁷² It stressed the passive nature of the project, declaring that "Integrated Maritime Surveillance" was about "providing authorities interested or active in maritime surveillance with ways to exchange information and data".²⁷³

In June 2014, however, the surveillance programme became part of the EU's Maritime Security Strategy (EUMSS), thus acquiring an identifiable military dimension. The primary objective was to provide a common framework for relevant authorities at national and European levels to ensure coherent development of their specific policies and a European response to maritime threats and risks. A secondary aim was "to protect EU's strategic maritime interests and identify options to do so". It thus significantly strengthened the link between internal and external security aspects of the maritime policy of the EU and civil and military cooperation.²⁷⁴

In a joint communication from the European Commission and the High Representative for external affairs, the purpose of the EUMSS was set out, as ensuring an optimal response to threats, supporting the relevant authorities and agencies at all levels in their efforts to enhance the efficiency of maritime security and to facilitate cross-sectoral and cross-border cooperation among maritime security stakeholders. The strategy was thus intended to position the

²⁷¹ *Ibid.*

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http://ec.europa.eu/maritimeaffairs/policy/integrated_maritime_surveillance/documents/integrating_maritime_surveillance_en.pdf, accessed 10 July 2014.

²⁷³ http://ec.europa.eu/maritimeaffairs/policy/integrated_maritime_surveillance/index_en.htm, accessed 10 July 2014.

²⁷⁴ http://ec.europa.eu/maritimeaffairs/policy/maritime-security/index_en.htm, accessed 9 July 2014.

EU as a credible, reliable and effective partner in the global maritime domain, ready and able to take on its international responsibilities.²⁷⁵

As with the surveillance programme, great stress was placed on a cost-efficient approach to maritime security. The EU's maritime security is largely organised around national systems and sector-specific approaches that potentially render operations more expensive and less efficient. Maritime operations should be made more efficient by improving cross-sectoral cooperation, enabling better communication between national and EU-systems, creating effective civil-military interfaces and by translating results from research and technological development into policy.²⁷⁶

By July 2014, a month after the announcement on the Maritime Security Strategy, the Commission was in a position to set out further views on the surveillance programme, having Maria Damanaki, Commissioner for Maritime Affairs and Fisheries, argue that savings of €400 million per year could be made through increased cooperation and sharing of data. Sharing such information was vital to avoiding duplication of effort. About 40 percent of information was collected several times and 40-80 percent of information was not shared amongst the interested users.²⁷⁷

In pursuit of its plans, the Commission set out eight further steps required to give shape to the CISE, and to bring systems to fruition, culminating by 2018 in the launch of a review process to assess the feasibility of implementation and the need for further action.²⁷⁸

Even then, the Commission was at pains to emphasise that ensuring the effective surveillance of waters under their sovereignty and jurisdiction, and on the high seas if relevant, remained the responsibility of Member States. The operational exchange of maritime surveillance information between national authorities also remained with Member States. The role of EU agencies was to "facilitate and support this process". Untypically, therefore, the Commission averred that "the operational aspects of such information exchange" needed to be "decentralised to a large extent to national authorities in line with the principle of subsidiarity".²⁷⁹

On this basis, CISE as a project seems largely benign, and the timescale is such that it could be coming into effect, after considerable investment and labour, at the time when the UK was seeking withdrawal from the EU. As such, the project would need to be flagged up by Article 50 negotiators, and a joint agreement prepared to protect the UK investment and the integrity of the system.

²⁷⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014JC0009&from=EN>, accessed 10 July 2014.

²⁷⁶ *Ibid.*

²⁷⁷ http://europa.eu/rapid/press-release_IP-14-782_en.htm, accessed 10 July 2014.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

5.10 The financial settlement

The degree of participation would have a bearing on another crucial issue, the financial arrangements in the transitional period and after the final split. An immediate clean break would be unlikely. Within any multi-annual budgetary period, the EU would expect commitments to be honoured, and programme participation to be financially supported. Since these are agreed on a seven-year cycle, Britain might be expected to continue financial contributions for the full contracted period.

Possibly, the commitment may be limited to a sum equivalent to the net contributions it would have paid, for whatever period remained of the seven years, after it had formally withdrawn from the EU.

After the expiry of that period, contributions would, perforce, be considerably less, although the exact amounts will depend on the degree of participation in EU programmes, and whether Britain would choose to channel some foreign aid and solidarity funding through the EU, as does Norway.

Claims made for savings in this respect are often exaggerated, and especially the claim that we send about £350 million to Brussels every week, which "could be better spent on the NHS, schools, and fundamental science research". In fact, none of the current expenditure on EU contributions is likely to be available for redistribution.

Looking at the 2015 figures, for instance, the gross payment before rebate was £17.8 billion. The rebate of £4.9 is normally re-absorbed into the Treasury general fund and is already accounted for. EU funding to support agriculture, rural and regional development, plus other policy areas, bring the "net government contribution" down to £8.5 billion. From this must also be deducted private sector receipts which go straight to the private sector and other non-governmental organisations such as universities. Annually, the figure is about £1.5 billion, bringing the "net contribution overall" down to about £7 billion.

Nor is this end of it. There is also the question of overseas aid. Roughly £1.2 billion of the £11 billion aid budget is managed by the EU and paid as part of the annual contribution.²⁸⁰ Despite that, it goes towards the UK's self-imposed 0.7 percent GDP quota. If the sum was not paid to the EU, it would still have to be allocated to the aid budget. That £1.2 billion, therefore, is not available for redistribution.

Rounded up, that leaves about £6 billion, and only that sum is potentially available for redistribution. However, if the UK is to retain access to the Single Market via the EEA states, there will be a price to pay. According to the

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227443/2901085_EU-Development_acc.pdf, accessed 16 April 2016

Norwegian government's own figures, its total EU mandated payments (gross) are approximately £435 million (€600 million) per annum.²⁸¹ With a population of five million, that is approximately £86 (€120) per head (gross). Net payments are about £340m (€470m) per annum, or about £68 (€94) per head.

At a UK level, with a population of 64 million, our gross contribution (without rebate) is £300 per head. Our equivalent gross payment is £223 per head, and our net *per capita* payment is £153 per annum – more than twice the Norwegian payments.

On the same per-capita basis as Norway, the net cost (which would include the equivalent of EEA/Norway Grants) would be £4 billion, leaving a mere £2 billion potentially available for redistribution, or about £40 million a week. That, effectively, is the maximum saving the UK might expect – at least until a completely new deal has been negotiated.

Even then, to suggest that this might represent an immediate saving is still somewhat optimistic. Currently, for any given Multi-annual Financial Framework (MFF), there are outstanding commitments known as RAL, from the French *reste à liquider*. In 2012, the figure was being reported by an alarmed European Parliament as £217 billion.²⁸²

Together with other liabilities (mostly for purchases and staff pensions) of €103.4 billion excluding borrowings, this required a carry-over into the EU budget for the 2014-2020 Multi-annual Financial Framework (MFF) of €326 billion.²⁸³ Given that the overall budget was trimmed below Commission expectations, yet commitments are escalating, it is hard to see the EU emerging from this current MMF with the liabilities reduced. RAL plus the staff pensions and other payments could exceed €350 billion.

Of any liability as it currently stands, the UK's share runs to about 13 percent of the total debt. In sterling terms, would amount to around £30 billion. How much of that will have to be paid by us will undoubtedly be a matter for discussion during the Article 50 negotiations. If the EU insists on it all being paid but allows staged payments over the MFF period to come, that would amount to about £4 billion a year.

With only a £2 billion surplus available, however, that would mean the UK having to find an extra £2 billion, or £40 million a week – up until 2027 – on

²⁸¹ <http://www.eu-norway.org/eu/Financial-contribution/#.VjEzddLhCHs>, accessed 8 January 2016

²⁸² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%2BCOMPARL%2BPE-489.663%2B01%2BDOC%2BPDF%2BV0%2F%2FEN>, accessed 16 April 2016

²⁸³ <http://www.euractiv.com/section/eu-priorities-2020/news/court-of-auditors-warns-of-multi-billion-eu-budget-gap/> and http://www.eca.europa.eu/Lists/ECADocuments/LR14_02/QJ0614039ENN.pdf, both accessed 16 April 2016.

top of our existing net costs. Even if there are no EEA contributions, overall savings would only be £2 billion as a best-case scenario.

PHASE TWO

Immigration and Asylum

6.0 Freedom of movement & immigration

It cannot come as a surprise to anybody that the principle of free movement exists and that it is applicable throughout the Union, without discrimination, because we don't want citizens of first class and citizens of second class in Europe. Free movement is the result of decades of negotiations and agreements between the Member States and also this Parliament, it is in our law and we should respect our common law.

José Manuel Durão Barroso

President of the European Commission
Strasbourg, 15 January 2014²⁸⁴

In this second phase, in two separate chapters, we look at the crucial elements of freedom of movement and immigration (or migration), and asylum policy.

As to immigration, over the last decade, the House of Commons Home Affairs Committee noted in 2006, governments and intergovernmental organisations have started to refer to the need to address migration as a regional or international issue, and to "manage" rather than "control" migration. The Council of Europe has a migration management strategy, the European Commission is developing a common EU immigration policy. At Kofi Annan's suggestion, a number of interested states have established a Global Commission for International Migration.²⁸⁵

Dr Khalid Koser, senior policy analyst for the Global Commission, suggested to us that "the great contradiction in migration today is that it is a global issue that people try to manage at a national level" and that "the root causes of migration are so powerful - it is about underdevelopment, disparities in demographic processes, in development, and in democracy - that to an extent ... immigration control is treating the symptom rather than the cause".²⁸⁶

²⁸⁴ http://europa.eu/rapid/press-release_SPEECH-14-17_en.htm, accessed 13 May 2014.

²⁸⁵ House of Commons Home Affairs Committee, Immigration Control, Fifth Report of Session 2005–06, Volume I, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775i.pdf>, accessed 9 October 2014.

²⁸⁶ *Ibid.*

These are views that seem to have great validity, to the extent that they should be heavily influential in guiding the approach to Article 50 negotiations, when it comes to immigration, and also to the post-exit discussions, where a longer-term settlement needs to be sought.

A shorter-term problem arises, though, with the UK seeking full participation in the Single Market. The "four freedoms" are fundamental to it and are embedded in the EEA agreement.²⁸⁷ Subject to any variations that might be negotiated, they would have to be incorporated into any "shadow EEA" bilateral agreement and would likewise be a component of any agreement, howsoever arrived at, including the Australian process. That will include free movement of people and the "right of establishment" which permits persons to undertake economic activity and thus to establish permanent residence for that purpose.

These freedoms have given rise to considerable controversy, after the influx of migrants from central and eastern European states following the 2004 enlargement (EU8), and over migrants from Bulgaria and Romania.²⁸⁸

The controversial nature of immigration was illustrated by a poll in December 2013, which had 61 percent of swing voters in an EU referendum (20 percent of the total) seeing intra-EU migration as the most important issue in any renegotiation. By comparison, 34 percent saw freer trade with non-EU countries as important (Figure 11 below).²⁸⁹ A poll in January 2014 reaffirmed the importance of immigration, ranking it first in a list of concerns, scoring 28.9 percent, well above concern over the cost of living which came second with 16.6 percent.²⁹⁰ In May 2014, a poll reported that 56 percent of those who wanted to leave the EU offered as their main reason that it would "allow stronger control of our borders" and thereby reduce migration.²⁹¹ From May to December, immigration was seen as the most important issue facing the country, except for on three occasions when it was tied with the economy.²⁹²

²⁸⁷ EC website: Single Market – General Policy Framework,

http://ec.europa.eu/internal_market/top_layer/index_en.htm, accessed 6 December 2013.

²⁸⁸ The political party UKIP warned that the "floodgates will open", while the pressure group Migration Watch predicted 50,000 arrivals a year from Romania and Bulgaria. In the first three months since visa restrictions were removed, numbers of Romanians and Bulgarians working in Britain fell by 4,000. *The Independent*, 14 May 2014,

<http://www.independent.co.uk/news/uk/home-news/number-of-romanian-and-bulgarian-workers-in-uk-down-since-visa-restrictions-lifted-at-start-of-year-9367046.html>, accessed 1 July 2014.

²⁸⁹ YouGov, EU referendum: the red lines for swing voters, 18 December 2013,

<http://yougov.co.uk/news/2013/12/18/eu-referendum-red-lines-swing-voters/>. For full results, see here: http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/go1cq5ulbg/YG-Archive-131209-The-Sun-Euro-Results.pdf. Both accessed 6 January 2014.

²⁹⁰ Suration poll on immigration, 4 January 2-14, http://suration.com/wp-content/uploads/2014/01/FINAL_New_Years_Immigration_Poll_Weighted_Jan04.pdf, accessed 6 January 2014.

²⁹¹ http://www.tns-bmrb.co.uk/uploads/files/TNSUK_DataTables_2014_May01.pdf, accessed 6 May 2014.

²⁹² <https://yougov.co.uk/news/2014/12/28/5-public-opinion-trends-2014/>, accessed 29 December 2014.

During the May 2014 European Parliament elections, control of immigration featured prominently on some party election leaflets. It also guided attitudes towards any Article 50 negotiations, with some declaring that they would not seek to remain in the Efta or the EEA while those treaties maintain a principle of free movement of labour, which prevents the UK managing its own borders.²⁹³

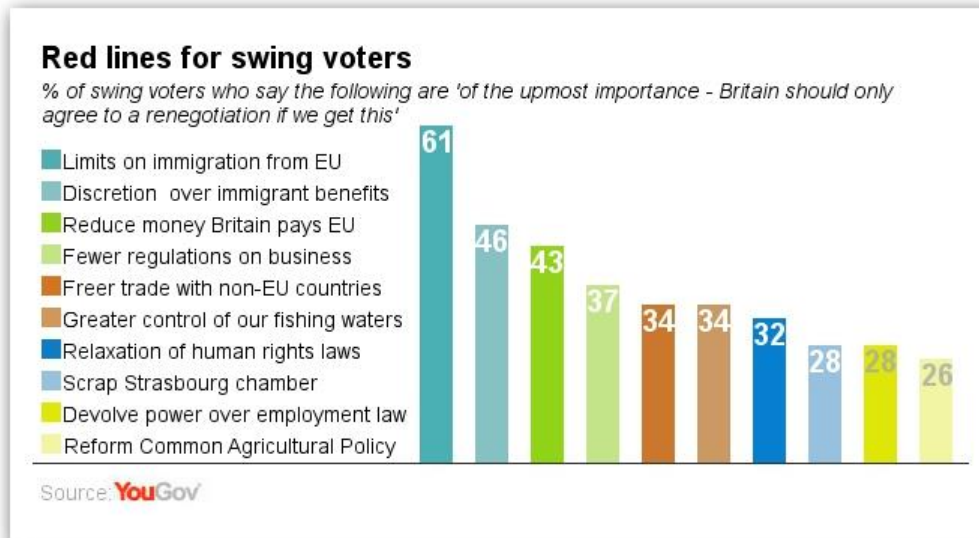


Figure 11: YouGov poll findings: issues of the utmost importance to swing voters in EU renegotiations (Dec 2013).

Notwithstanding that Efta does not have a treaty with the EU, much less one that maintains a principle of free movement with the EU - and that the UK is not currently a member of Efta so it could hardly seek to remain in it - the meaning is clear enough. There is a rejection here of any form of agreement which involves free movement provisions. Despite the difficulties and potential penalties, these is a preference was for what amounts to the WTO option, with ambitions of negotiating a bespoke free trade agreement once the UK had left the EU.

Here, it is unlikely that the EU would settle for any formal free trade agreement without some provision for freedom of movement. Within the EU and the EEA, the EU claims that all its "freedoms" as a non-negotiable part of the Single Market *acquis*. This has been emphasised by the European Commission many times, not least by vice-president Viviane Reding. She stated at the end of 2013: "if Britain wants to stay a part of the Single Market, free movement would continue to apply".²⁹⁴ As a member of the EEA, therefore, it is held that Britain would be obliged to permit free movement of workers from the entire area, with its implicit freedom to granted to all EU citizens to immigrate to the UK.

²⁹³ http://www.ukip.org/policies_for_people, accessed 9 October 2014.

²⁹⁴ *Reuters*, 27 November 2013, <http://www.reuters.com/article/2013/11/27/us-britain-immigration-ec-idUSBRE9AQ0WZ20131127>, accessed 4 December 2013.

However, even if the freedom of movement provisions were adopted in full, that does not entirely remove the ability of member states to exercise control over intra-EU migration. For instance, the right of residence granted to citizens of EU member states for more than three months remains subject to certain conditions. Applicants must either be engaged in economic activity (on an employed or self-employed basis) or have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay.²⁹⁵ Individuals who are demonstrably abusing the system can be deported.

Then, within the EEA, there is a fallback position: Articles 112-3 of the EEA Agreement. These are the "Safeguard Measures" which permit the parties unilaterally to take "appropriate measures" if serious economic, societal or environmental difficulties of a sectoral or regional nature arise and are liable to persist.²⁹⁶ These measures have been invoked by Liechtenstein, an EEA member with less potential influence than Britain.

6.1 The EEA solution

For the forthcoming exit negotiations between the United Kingdom, it is generally regarded as an absolute that the UK's continued participation in the Single Market is dependent on acceptance of all four freedoms written into the EU treaties, including the freedom of movement.

That much was made clear by European Council President Donald Tusk at the informal meeting of the 27 EU Member States (minus the UK) on 29 June 2016. He added: "There will be no single *market à la carte*", thereby adding his name to a long list of EU officials and Member State politicians who have indicated that changes to freedom of movement are "non-negotiable".

This includes Angela Merkel who recently said during a speech at the annual diplomatic corps reception in Meseberg, north of Berlin, that: "... whoever would like to have free access to the European internal market will also have to accept all basic freedoms in return, including the free movement of people".

However, this lack of flexibility may have more to do with political posturing than reality. The European Commission, by its own account, has "always stressed that free movement was a qualified right and not an unconditional one".²⁹⁷

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http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/133152_en.htm, accessed 28 September 2014.

²⁹⁶ *Op cit*, <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>, accessed 29 April 2014.

²⁹⁷ The Guardian, 11 November 2014, *Prime minister warned: no need to alter EU migrant rules after verdict*, <https://www.theguardian.com/world/2014/nov/11/prime-minister-warned-no-need-to-alter-eu-migrant-rules-after-verdict>, accessed 10 July 2016

This was in the wake of the Dano case in the European Court of Justice, but referred back to an earlier case where the Court had declared that the treaties and secondary legislation had "qualified and limited" freedom of movement.²⁹⁸

The point that emerges is that there is nothing absolute, in principle, about freedom of movement. Therefore, there is no legal bar to variations being negotiated, given the political will. Furthermore, it is the case that the Union has been prepared both to negotiate and compromise on this issue.

Specifically, these negotiations lie within the domain of the EEA Agreement, related to (but not necessarily entirely reliant on) the "safeguard measures" set out in Articles 112 and 113. There is thus the possibility of the UK seeking a compromise on Single Market participation which will permit national limitations or restrictions on freedom of movement (i.e., immigration) of citizens from EU Member States.

This could be done within the framework of the EEA Agreement, the best example of which is the so-called "Liechtenstein solution".

The Liechtenstein solution: "sectoral adaptation"

Prior to the principality of Liechtenstein joining the EEA on 1 May 1995, the EEA Council – one of the formal structures set up under the agreement – on 10 March 1995 looked at its vulnerability to excessive migration.

It concluded that this microstate could easily be swamped by immigrants if unrestricted free movement of workers was permitted.²⁹⁹ A territory with a population of 37,000 spread over an area of 61 square miles – less than half the area of the Isle of Wight – would not be able to absorb unlimited numbers.

The Council recognised that Liechtenstein had "a very small inhabitable area of rural character with an unusually high percentage of non-national residents and employees. Moreover, it acknowledged the vital interest of Liechtenstein to maintain its own national identity". It thus concluded that the situation "might justify the taking of safeguard measures by Liechtenstein as provided for in Article 112 of the EEA Agreement".³⁰⁰

With that, it asked the Contracting Parties to "endeavour to find a solution which allowed Liechtenstein to avoid having recourse to safeguard measures". However, no long-term solution was found so a temporary expedient was arranged by way of transitional arrangements which allowed the country to

²⁹⁸ Case No. C-184/99 Rudy Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve <http://curia.europa.eu/juris/document/document.jsf?docid=45696&doclang=EN>

²⁹⁹ See [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21995D0420\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21995D0420(01)&from=EN) and Decision No 1/95 of 10 March 1995: <http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-decisions-of-the-EEA-council/eea-council-no1-95-1995-03-10-liechtenstein.pdf>, accessed 14 June 2016

³⁰⁰ *Ibid.*

impose "quantitative limitations" on immigration until 1 January 1998. These were incorporated into Protocol 15, appended to the Agreement.³⁰¹

Towards the end of 1997, just before the end of the transitional period, there had been no further measures proposed so Liechtenstein unilaterally invoked the Article 112 safeguard measures, thereby continuing to keep the existing immigrations restrictions in place when the transitional period ended.³⁰²

There were further attempts to resolve the situation in 1998, which were unsuccessful.³⁰³ Then, on 17 December 1999 after a further review, the EEA Joint Committee decided that the "specific geographical situation of Liechtenstein" still justified "the maintenance of certain conditions on the right of taking up residence in that country". In order to resolve the situation, though, it came up with the proposal for a longer-term solution, allowing Liechtenstein to introduce a quota system controlling the number of workers allowed to enter the country.³⁰⁴

This decision was given formal status by an amendment to Annex VIII of the EEA Agreement, setting out what were called "sectoral adaptations", cross-referred to Annex V on the free movement of workers.^{305,306}

The decision provided for a new transitional period until 31 December 2006, and introduced a formal amendment to the EEA Agreement, which allowed for the new measures to apply subject to a review "every five years, for the first time before May 2009". After reviews in 2009 and in 2015, it was concluded that there was no need to make any change to the current rules. The Sectoral Adaptations could remain unchanged.³⁰⁷

Under the current arrangement, Liechtenstein issues a limited number (less than 100) of residence permits for economically active persons and a very much smaller number for economically non-active persons.

Half of the totally available permits are decided by lottery, held twice a year. The numbers involved are, of course, small beer, but Liechtenstein is a tiny country. What matters is that a precedent has been set within the framework of

³⁰¹ [http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-](http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol15.pdf)

agreement/Protocols%20to%20the%20Agreement/protocol15.pdf, accessed 14 June 2016.

³⁰² https://www.ceps.eu/system/files/EEA%20Review_Liechtenstein%20Final.pdf, accessed 14 June 2016.

³⁰³ <http://www.efta.int/media/documents/eea/eea-institutions/joint-committee-annual-report-1997.pdf>, accessed 14 June 2016.

³⁰⁴ Decision No 191/99, <http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/1999%20-%20English/191-1999.pdf>, accessed 14 June 2016.

³⁰⁵ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex8.pdf>, accessed 14 June 2016

³⁰⁶ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex5.pdf>, accessed 14 June 2016

³⁰⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0411&from=EN>, accessed 14 June 2016

the EEA Agreement for suspending freedom of movement in respect of a single country, and replacing with a quota system for what amounts to an indefinite period. It matters not that Liechtenstein is a micro-state. It is a fully-fledged contracting party within the terms of the EEA Agreement. What applies to one legally can apply to any or all.

Whatever the EU might declare in terms of freedom of movement being "non-negotiable" for EU Member States, therefore, it is undeniable that it is negotiable within the framework of the EEA Agreement, as it applies to Efta states. Therefore, it would appear that the scope exists to agree modifications to the principle of unrestricted freedom of movement, as did Liechtenstein, or unilaterally invoke Article 112 to achieve the same effect.

Safeguard measures

One important point is emphasis here is that while the EEA "safeguard measures" are a mechanism by which changes to freedom of movement could be secured, they are NOT relied upon by Liechtenstein for its current settlement.

With that caveat, it is worth looking briefly at the nature and application of safeguard measures, in general and specifically in relation to the EEA Agreement.

The point about safeguard measures generally is that, far from being rare and exceptional, they are commonly found in trade agreements. They can be found in the draft agreement with Australia and New Zealand, in the trade agreement with Moldavia and, in 1993, when Hungary signed up to an Association Agreement with the EU, Council Regulation No 3491/93 of 13 December 1993 detailed the procedures for applying safeguard measures.^{308,309,310}

As to the current safeguard measures in the EEA agreement, these are remarkably similar to the arrangements in Council Regulation (EEC) No 2840/72 of 19 December 1972, setting out the Agreement between the European Economic Community and the Swiss Confederation. Quite possibly, the EEA text is based on these provisions.³¹¹

The EEA safeguard measures themselves can be triggered "If serious economic, societal or environmental difficulties of a sectorial (sic) or regional nature liable to persist are arising". And although such measures have to be "restricted with

³⁰⁸ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0064>

³⁰⁹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0364+0+DOC+XML+V0//EN>

³¹⁰ http://ec.europa.eu/competition/international/legislation/ch_1.pdf

³¹¹ http://publications.europa.eu/resource/cellar/7298525f-e6a7-48fe-af72-d4c1c549048a.0008.02/DOC_1

regard to their scope and duration to what is strictly necessary in order to remedy the situation", there is no specific time limitation.³¹²

This contrasts with the only safeguard measures written into Chapter 4 of the Treaty of the European Union (Article 66, TEU) on Capital and payments, which states:

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.³¹³

The comparison is highly instructive. While Article 66 TEU is self-evidently an emergency measure for highly specific situations, the safeguard measures in the EEA Agreement are most emphatically not an "emergency" provision.

The rules for its use, set out in Article 113, state that it cannot normally be used without first giving at least one month's notice. Only in "exceptional circumstances" can immediate action be taken, and then only to the extent "strictly necessary to remedy the situation". Logically, any provision which has within it an "emergency clause", for use only in exceptional circumstances, cannot in itself be an emergency measure.

Furthermore, while Article 66 is restricted to the highly specific issue of movement of capital which might "cause, or threaten to cause, serious difficulties for the operation of economic and monetary union", Article 112 of the EEA Agreement is much more broadly defined. To trigger the Article, the Contracting Party can draw on three areas, defined as: "serious economic, societal or environmental difficulties". These can be of a sectorial (sic) or regional nature and the only limiting qualification is that they must be "liable to persist" – the very antithesis of a short-term crisis situation.

Broader applications of the EEA Safeguard Measures

It has been asserted that the EU has been content to allow "adaptations" to freedom of movement to apply to Liechtenstein only because of its "nature, and the size and the territorial aspects".³¹⁴

However, as is evident from the 1994 Protocol adjusting the EEA Agreement, the original opt-out from freedom of movement provision, implemented under

³¹² <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>

³¹³ http://europa.eu/pol/pdf/consolidated-treaties_en.pdf

³¹⁴ Dougan, M. Evidence, 5 July 2016,

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-uks-future-economic-relationship-with-the-european-union/oral/34854.pdf>

Protocol 15 to the EEA Agreement, applied to both Switzerland and Liechtenstein.³¹⁵

Nor were the safeguard measures confined to freedom of movement. In 1992, when the EEA Agreement was signed, the Final Act records that safeguard measures were invoked by no less than four of the (then) seven Efta members. Austria, Iceland and Switzerland cited the need to protect real estate, capital and labour markets.³¹⁶ The Government of Liechtenstein invoked Article 112 in respect of capital inflows, concerns about access of the resident population to real estate, and "an extraordinary increase in the number of nationals from the EC Member States or the other Efta States, or in the total number of jobs in the economy, both in comparison with the number of the resident population".³¹⁷

It is a matter of record that, after a referendum, the Swiss government was unable to ratify the EEA Agreement and its name was removed from Protocol 15. Had Switzerland not failed to ratify, the likelihood is that both countries would currently enjoy exclusion from freedom of movement. Certainly, unilateral safeguard measures are currently being sought by the Federal Government as a resolution to the 2014 referendum on limiting immigration.³¹⁸

Such a solution has recently been looked-upon favourably by Martin Schulz, President of the European Parliament. He said that the idea of a so-called "safeguard clause", which has been thrown around among members of the Swiss government and parliament as a possible solution, seems promising at first glance. Such a clause, he said, "would introduce quotas after a certain immigration threshold is achieved in specific regions and industries".³¹⁹

As regards Iceland, having recorded its intent to invoke Article 112 in the Final Act, in order to protect its real estate market, it subsequently cast its net much wider in its own domestic legislation.

In Act No 34/1991 on "Investment by Non-residents in Business Enterprises", as amended by Act No. 121 of 27 December 1993 and Act No. 46 of 22 May 1996 – in Article 12 - is the provision that allows the Minister of Commerce to block a particular foreign investment if he "considers it threatens national security, public order, public safety or public health or in the event of serious economic, social or environmental difficulties in particular economic sectors or particular areas which are likely to be of a lasting nature".³²⁰

³¹⁵ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=1377>

³¹⁶ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Final%20Act/FinalAct.pdf>

³¹⁷ *Ibid.*

³¹⁸ <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-59812.html>

³¹⁹ http://www.swissinfo.ch/eng/bern-and-brussels_eu-leader-says-swiss-immigration-solution-is-crucial/42262108

³²⁰ <https://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7448>

In the case of the investment of a resident in a member state of the European Economic Area, it states, "the provisions of Articles 112 and 113 of the Agreement on the European Economic Area shall be observed".³²¹ Then, in response to the 2008 financial crisis, invoked Article 112 safeguard measures in respect of free movement of capital.³²² This author's understanding is that the provision still applies.

Moreover, the use of Article 112 has not been confined to just these four countries – or indeed any specific Member State. On 15 December 1995, via Regulation No 2907/95, the Commission invoked the Article on its own account, making the release for free circulation of salmon of Norwegian origin conditional upon observance of a floor price.³²³

It should not be thought, however, that these applications amount to the full extent of the reach of Article 112. The application of the article is entirely dynamic. In the Accession Treaty for Croatia, Article 37 allows for a response to "difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area", allowing for the application of Article 112 to this provision.³²⁴ Other accession instruments have the same provision.³²⁵

Transition to the EEA

Given that continued membership of the EEA might afford some flexibility in the application of the principle of free movement, there is a possibility that other members states could block the transition of the UK from EU member of the EEA to Efta member – assuming that the UK was able to rejoin Efta.

So far, we have taken our advice from the Efta Secretariat on this, which takes the view that transitional arrangements are nowhere set out in the EEA Agreement, and will thus have to be settled politically.³²⁶ One possibility is that on leaving the EU, the UK also leaves the EEA and thus, after joining Efta (if we are allowed in), has to apply to rejoin the EEA – this requiring the unanimous agreement of all Parties.³²⁷

However, on the basis of previous experience, there is an argument for suggesting that the UK can transition from the EU to Efta while remaining in the EEA. The evidence for this rests with the EEA Agreement of 1992, when Austria, Finland, Sweden and Switzerland were also members of Efta, becoming members of the EEA by virtue of their Efta membership.³²⁸

³²¹ *Ibid.*

³²² [http://www.europarl.europa.eu/RegData/etudes/note/join/2009/410181/EXPO-JOIN_NT\(2009\)410181_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2009/410181/EXPO-JOIN_NT(2009)410181_EN.pdf)

³²³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995R2907&from=EN>

³²⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012J/TXT&from=EN>

³²⁵ <http://www.efta.int/sites/default/files/documents/legal-texts/eea-enlargement/2014/Agreement%2BAnnexes-en.pdf>

³²⁶ <http://www.eureferendum.com/Flexcit.aspx>

³²⁷ Dougan, *op cit.*

³²⁸ Final Act, *op cit.*

Then, in 1995, Austria, Finland and Sweden left Efta to join the EU but were not removed from the list of Efta states in the EEA Agreement until 2004.³²⁹ There was, therefore no issue to deal with on transition. Switching the names from one pillar to the other was dealt with as a minor administrative adjustment.

For the UK and Article 50 talks, this has huge implications. It would appear, on the face of it, that membership of the EEA can continue as long as we join Efta. And, if affirmation of this principle is required, it can probably be secured by agreement not with the EU but with the EEA Council by consensus, which does not even require a formal vote.³³⁰

One might take it that, in view of the positive response from Schultz to the Swiss proposal to introduce unilateral safeguard measures, and the recent statement by French finance minister Michel Sapin, declaring that everything will be on the table in the future talks with the UK, including freedom of movement, there may be some political support for a seamless transition.³³¹

Safeguard measures and the United Kingdom

The outcome of a leveraged deal, using Article 112 as the initial platform would – if the Liechtenstein (and potentially the Swiss) solutions prevail – be formal amendment to the EEA Agreement permitting the UK to impose agreed quotas on immigration from EU Member States,

In relation to the solution preferred by some campaigners, the Australian-style points system, a quota system does not immediately answer the requirement, although it could prove an attractive alternative. The crucial issue here is that the "points system" description is a misnomer. Of the migrants admitted to Australia, only 23 percent are afforded entry as a result of points allocation. The overall limit is an arbitrary quota, set annually – currently at 190,000.³³² This is, by any measure, a quota system.

As to the detail, the essential point – it would seem to this author – is that a fully worked-up case must be made for restrictions, using the Article 112 criteria of "serious economic, societal or environmental difficulties", even if the Article itself is not invoked.

In a 1992 proposal for a Council Regulation (EEC) "concerning arrangements for implementing the Agreement on the European Economic Area", procedures were laid down for implementing Article 112. It thus proposed that, where a

³²⁹ <http://doortofreedom.uk/changing-eea-pillar-eu-to-efta>

³³⁰ <http://www.efta.int/media/documents/eea/eea-institutions/Decision-1-94-of-17-May-1994-adopting-the-Rules-of-procedure-of-the-EEA-Council.pdf>

³³¹ <http://www.theguardian.com/politics/2016/jun/29/everything-will-be-on-the-table-in-brexit-talks-says-french-minister>

³³² <http://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/migration-programme>

Member State requested the Commission to apply safeguard measures, "it shall provide the Commission, in support of its request, with the information needed to justify it".³³³

That should provide a sufficient template for the UK in relation to its Brexit negotiations, permitting a reasoned settlement which is capable of attracting political support. Furthermore, contrary to claims by the Commission and a widespread belief, it is clear that freedom of movement provisions are negotiable, and that a legal base within the EEA Agreement exists for a settlement.

Although based on Article 112, which acts as a longstop, the expectation would be of a formal amendment to the EEA Agreement, brokered through the EEA Council rather than the European Council, outwith the formal framework of the Article 50 (TEU) negotiations – but linked to them.

Should the UK chose to invoke Article 112, the important thing to recognise is that it is not bending or twisting the law. Nor is the Article an emergency provision or a "loophole" – it is a fundamental part of the EEA Agreement. Thus, to enlist it to cap immigration is to use it precisely for the purpose for which it was intended. Given that – for Efta states – its application is unilateral, as an Efta member, the UK would be entitled to invoke it, this being entirely in accordance with the provisions of the treaty, recognised even by the Schuman Foundation.³³⁴

Without the EEA solution, there is the possibility that there cannot be a resolution to the conflict between those who regard the need to limit immigration from EU Member States as paramount, and those who see an overwhelming requirement to protect participation in the Single Market.

Even then, if there is a negotiated immigration quota, there is the issue of enforcement. It is one thing applying quantitative restrictions. It is quite another enforcing limits in a large country (as opposed to Liechtenstein), where illegal immigrants can melt into their own resident communities and disappear.

Those who hold that we must abolish unrestricted freedom of movement, therefore, need to understand that imposition of controls, *per se* – enabled by leaving the EU - does not, in itself, bring immigration under control. Enforcement of immigration controls and a substantial raft of other measures will be required.

Additionally, if the initial exit settlement is only an interim measure, adopted for the purpose of easing our rapid exit from the EU, there is an argument for

³³³ COM(92) 495 final, http://publications.europa.eu/resource/cellar/74fda10e-8c9a-48a8-b5e3-117e9e10b020.0006.02/DOC_1 I can find no evidence that this proposal was implemented.

However, a 1994 Regulation was adopted, albeit with somewhat different content. See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994R2894&from=EN>

³³⁴ <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-399-en.pdf>

accepting a sub-optimal settlement if no other outcome is available. Once we are no longer members, it will be possible to work on a longer-term settlement which deals more satisfactorily with the freedom of movement provisions.

Crucially, it must be stressed, the bulk of these negotiations are not conducted within the framework of the Article 50 negotiations, but via the EEA Council, which will require some deft legal footwork if its actions are integrated with the UK exit settlement. But all in all, the prospect of a managed compromise on trade and free movement of people, via the EEA Agreement, looks to be worth further exploration.

6.2 Swiss problems

Of those who do not agree with the ideas behind our immediate plans for a UK exit, there are some who believe that the "Swiss option" is a better way of dealing with the freedom of movement question. One prominent commentator has asserted that this is: "the only way to regain control of our borders".³³⁵ Unfortunately, any such expectation is as poorly grounded. The Swiss have greater problems with immigration from other EU member states than do even full members of the EU.

Their problems arise from the EU-Swiss Agreement on the Free Movement of Persons of 21 June 1999 (coming into force on 1 June 2002), which was a condition of the EU-Swiss free trade arrangements.³³⁶ It extended the right of free movement to all citizens of EEA Member States and was complemented by the mutual recognition of professional qualifications, the right of immigrants to buy property, and the coordination of social security systems. It also includes provisions for family reunification.³³⁷ The arrangement was typical of the EU's approach to its relations with its close neighbours, where it demanded free movement as a condition of agreeing free trade deals, the so-called "conditionality" approach.

To the concern of the indigenous Swiss, an effect of the agreement has been a massive increase in immigration from EEA states. By the end of 2012, 23.3 percent of the 8,039,060-strong population of Switzerland was of foreign birth, compared with 13 percent (7.5 million) in England and Wales, and 14.9 percent in Norway.³³⁸ Of the 1,869,969 foreigners in Switzerland, 85.1 percent were European and three-quarters were nationals of an EU or EFTA member

³³⁵ *Daily Telegraph*, David Campbell Bannerman, The only way is Swiss: how we can regain control of our borders, 23 December 2013,

<http://www.telegraph.co.uk/news/worldnews/europe/switzerland/10535146/The-only-way-is-Swiss-how-we-can-regain-control-of-our-borders.html>, accessed 23 December 2013.

³³⁶ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=558>, accessed 1 December 2014

³³⁷ Swiss Confederation, Federal Office of Migration, Free Movement of Persons Switzerland – EU/EFTA, https://www.bfm.admin.ch//content/bfm/en/home/themen/fza_schweiz-eu-efta.html, accessed 1 December 2013.

³³⁸ <http://www.ssb.no/en/befolkning/statistikker/innvbef/aar/2014-04-24#content>, accessed 28 September 2014.

state.^{339,340} This was despite additional protocols restricting the movement rights of the 2004 enlargement bloc (EU8), and Romanians and Bulgarians. These protocols introduced a "safeguard clause" that permitted quotas on residence permits. EU8 citizens were granted unrestricted free movement rights only on 1 May 2011 while Bulgarian and Romanians will remain restricted until 31 May 2016.³⁴¹

Such has been the increase in immigration that in 2013, responding to increasing public concern, quotas were reapplied to EU8 citizens and then to nationals of all the other EU states.³⁴² The restrictions were due to last one year but the Swiss People's Party (SVP) forced a referendum, held on 9 February 2014, on whether they should continue. Before the vote, Foreign Minister Didier Burkhalter argued that it "would jeopardise... relations with the European Union" and "test Swiss treaty obligations".³⁴³

Ueli Maurer, president of the SVP, declared that "Switzerland has given up its freedom to be able to determine its own policies".³⁴⁴ On the day, 50.3 percent voted to continue the quotas, putting at risk the entire raft of bilateral agreements under a guillotine clause, actionable if any one agreement was broken.³⁴⁵

These developments have significant implications for British negotiators. Firstly, the original Agreement and protocols demonstrated that flexibility in negotiations from outside the EU is possible: the Swiss obtained a better transitional deal on accession countries than did EU/EEA members. Secondly, as the Swiss were finding, there is a growing mismatch between what governments agree and what their citizens are prepared to accept.

However, at the end of November, the Swiss held their second referendum of the year on immigration, voting on a proposal called "Ecopop". This sought to

³³⁹ The largest group is Italian (15.6 percent), followed by nationals of Germany (15.2 percent), Portugal (12.7 percent) and Serbia (5.3 percent). The proportion of non-European nationals has doubled since 1980 to reach 14.8 percent in 2012. Swiss Confederation website, Migration statistics, <http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/07/blank/key/01/01.html>, accessed 22 December 2013.

³⁴⁰ British figures apply to usual residents of England and Wales: ONS, UK census 2011. <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-international-migrants.html>, accessed 23 December 2013.

³⁴¹ see FAQs: https://www.bfm.admin.ch/content/bfm/en/home/themen/fza_schweiz-eu-efta/faq.faq_0.html#a_faq_0, accessed 29 November 2013

³⁴² *The Local*, EU citizens face Swiss residence quotas, 16 May 2013, <http://www.thelocal.ch/20130516/eu-citizens-face-swiss-residence-quotas>, accessed 23 December 2013.

³⁴³ *Reuters*, 25 November 2013, "Swiss government urges voters to reject immigration quota plan", <http://www.reuters.com/article/2013/11/25/us-swiss-immigration-idUSBRE9AO0IN20131125>, accessed 29 November 2013.

³⁴⁴ *The Local*, *op cit*.

³⁴⁵ *The Local*, 9 February 2014, Swiss voters narrowly back immigration curbs, <http://www.thelocal.ch/20140209/swiss-vote-on-curbing-eu-immigration>, accessed 9 February 2014.

reduce immigration on environmental grounds, capping it at just 0.2 percent of the resident population, reducing inflow from about 80,000 to 16,000 people a year. As against the 50.3 percent of voters who had voted for the immigration cap in February, this time all 26 cantons voted against the measure, with about 74 percent of the electorate rejecting the proposition.³⁴⁶ Reuters reported that the referendum had been seen as a proxy vote on the EU treaties.³⁴⁷ Faced with the prospect of losing their trade agreements, the Swiss people had avoided confrontation.

6.3 The British dilemma

Any final resolution will also have to take accounts of the estimated 1.8 million Britons resident in EU territories, and the estimated 4.5 million nationals of mainland EU member states already resident in the UK.³⁴⁸ They enjoy entitlements known as "executed" or "acquired" rights, embodied in the Vienna Convention (Art 70b). "Withdrawal from a treaty", the Convention states, "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".

This view is confirmed by Lord McNair who concludes that rights established by a treaty will remain in force even if the agreement is terminated by Britain's exit. In law they are considered to be executed by the treaty and "have an existence independent of it; the termination cannot touch them". Their status will be guaranteed as a result of the "well-recognised principle of respect for acquired [vested] rights".³⁴⁹

Nevertheless, rights are one thing. Enforcement is quite another. The good faith of host countries cannot always be taken for granted and it cannot be assumed that British expats would necessarily enjoy a problem-free transition. The situation in Spain has long been a source of friction, where discriminatory rules have forced British citizens to relinquish property rights at considerable financial loss.³⁵⁰ In 2014 it was reported that the Portuguese were applying draconian measures against foreign owners of waterfront properties.

Thus, even within the EU, the British government has found it difficult to protect the interests of overseas property owners, so negotiators are going to be hard put to ensure the necessary safeguards are in place and enforceable. Additionally, they are going to have to look after the needs of business, academia and the tourist trade, all of which contribute substantial amounts to the GDP and rely on freedom of movement.

³⁴⁶ <http://www.bbc.co.uk/news/world-europe-30267042>, accessed 2 December 2014.

³⁴⁷ <http://www.reuters.com/article/2014/11/30/us-swiss-vote-projection-idUSKCN0JE0CZ20141130>, accessed 2 December 2014.

³⁴⁸ <http://migrationobservatory.ox.ac.uk/commentary/eu-shuffle-how-does-freedom-movement-eu-affect-migration-and-uk>, accessed 8 December 2013.

³⁴⁹ Lord McNair, 1961, *The Law of Treaties*, OUP Oxford, pp 531–532.

³⁵⁰ See, for instance, *The Guardian*, 8 May 2011: Spain pushes property sales – but rules out help for land-grab victims, <http://www.theguardian.com/money/2011/may/08/property-spain>, accessed 4 May 2014.

Tourism itself creates significant problems in terms of framing immigration policy. An estimated 34 million international visitors entered the UK in 2014, most of them without visas. Of those, 73 percent came by air. That volume means that any idea of control at the point of entry has been abandoned.³⁵¹ Tighter controls would mean longer queues and more administrative procedures, acting as deterrents in a highly competitive tourist industry worth £22bn to the UK economy.^{352,353} Additionally, education exports were estimated to be worth £17.5 billion in 2011.³⁵⁴ Increased restrictions have the potential to damage this business.

6.4 Illegal immigration

A small but highly visible part of the migration flow is asylum seekers and illegal immigrants making their way across the Channel from France. Understandably, this is grabbing the headlines, but the coverage is disproportionate.³⁵⁵ By far the bulk of illegal immigrants, even in the United States (where we are entirely familiar with the movement of so-called "wetbacks" across the Mexican border) are "regular" entrants. In the US, getting on for half of the "illegals" are visa overstayers, mostly people who enter with tourist or business visas.

Currently, as noted earlier, some 34 million visitors enter the UK each year – the majority without visas - vastly outnumbering the number of immigrants. Restrictions on legal immigration, therefore, might be expected to be matched with a rise in the number of overstayers. Nowhere in the world, except perhaps in totalitarian states such as North Korea, has it been possible to prevent this from happening. Rigorous enforcement would change the very nature of our society – identity cards, random checks of papers, residence permits, dawn raids and the like. Effectively, immigration levels become a compromise between what is acceptable and the tolerance of state intrusion and restrictions required to limit it. There are no absolutes. There is no final or single solution.

In any event, rather than being exercised at the borders, much of the control relies on post-entry administration and enforcement. In the UK, the record is not good. At the time of writing, more than 260,000 foreigners were thought to

³⁵¹ Figures from

<http://www.visitbritain.org/insightsandstatistics/latestinsights/stateofthenation.aspx>, accessed 3 December 2014.

³⁵² http://www.tourismalliance.com/downloads/TA_327_353.pdf, accessed 3 December 2014

³⁵³ <http://www.telegraph.co.uk/news/uknews/immigration/11304524/Border-exit-checks-could-lead-to-queue-chaos-MPs-warn.html>, accessed 28 December 2014.

³⁵⁴ <https://www.gov.uk/government/news/new-push-to-grow-uks-175-billion-education-exports-industry>, accessed 3 December 2014.

³⁵⁵ <http://www.telegraph.co.uk/news/uknews/immigration/11196177/Queuing-at-Calais-the-British-hauliers-on-frontline-against-illegal-immigrants.html>, accessed 1 November 2014.

have overstayed their visas, their whereabouts unknown to the Home Office.³⁵⁶ This builds on an earlier report from the Chief Inspector of Borders and Immigration, picked up by the popular media.³⁵⁷ It recorded that a mere 884 immigrants (0.73 percent), from a group of 120,545 who had overstayed their visas and had been refused permission to extend, had left the country voluntarily. And that was only after being confronted by the firm Capita, which had been contracted by the Home Office to reduce the so-called "Migration Refusal Pool" (MRP).

Taking into account the normal outflow and the inflow as new cases were added to the pool, the Chief Inspector remarked that the enforcement activity – with payments of over £12 million to Capita for 2013-15 – was having no impact on the level of overstayers. It had remained largely static. Furthermore, only a tiny proportion of tip-offs about potential illegal immigrants are investigated by the Home Office, and even fewer lead to offenders being deported. Nearly 49,000 reports were received over nine months about foreigners alleged to be living or working illegally in Britain, but officials looked into only 2,695 of them.³⁵⁸

These failures are especially significant if a clampdown on licit immigration prompts an increase in overstayers. Yet, since the Home Office cannot deal with the burden as it stands, there can be little confidence that it will cope with the more intense pressure that greater numbers would bring if entry requirements were tightened.

6.5 Addressing the core issues

While citizens of EU member states would continue to enjoy freedom of movement, which may or may not be subject to quota restrictions, it should be noted that the greater proportion of immigration still comes from non-EU countries.³⁵⁹ The largest single group comes from India.³⁶⁰ Britain admits

³⁵⁶ <http://www.dailymail.co.uk/news/article-2877936/Number-missing-illegal-immigrants-TWICE-high-previously-thought-files-223-600-foreigners-discovered-lying-unopened.html>, accessed 20 December 2014

³⁵⁷ See: <http://icinspector.independent.gov.uk/wp-content/uploads/2014/12/Overstayers-Report-FINAL-web.pdf> and <http://www.telegraph.co.uk/news/uknews/immigration/11298383/Less-than-1-of-overstaying-immigrants-left-Britain-under-flagship-scheme-report-says.html>, both accessed 20 December 2014.

³⁵⁸ *The Daily Telegraph*, 8 November 2013, "Home Office fails to investigate vast majority of tip-offs about illegal immigrants", <http://www.telegraph.co.uk/news/uknews/immigration/10434062/Home-Office-fails-to-investigate-vast-majority-of-tip-offs-about-illegal-immigrants.html>, accessed 5 November 2014

³⁵⁹ <http://www.independent.co.uk/news/uk/politics/britain-admits-nearly-three-times-more-migrants-from-outside-the-eu-than-any-other-member-state-statistics-show-9815009.html>, accessed 30 October 2014.

³⁶⁰ ONS, Migration Statistics Quarterly Report, November 2013, http://www.ons.gov.uk/ons/dcp171778_335330.pdf, accessed 8 December 2013. For global migration statistics, see: <http://esa.un.org/unmigration/TIMSA2013/migrantstocks2013.htm?mtotals>, accessed 14 July 2014.

almost three times more migrants from outside the EU than any other member state. Nearly 2.4 million resident permits were issued by EU countries in 2013, 30.7 percent of them to people heading for Britain. A total of 724,200 people from outside the EU were given permission to remain in the UK, a 15 percent rise on the previous year.

A significant fraction of the inflow is driven by the family reunification entitlement, where migrants who acquire residential status are able to bring in spouses and close relatives, including parents, grandparents and siblings. The flow under this provision is substantial, accounting for 17 percent of UK totals.³⁶¹ Ostensibly, this is mandated by Directive 2003/86/EC, but the UK has opted out of this provision.³⁶² On the face of it, therefore, the law does not apply, except that the EU is implementing a right recognised in the European Convention of Human Rights (ECHR), to which Britain is a party.³⁶³ Additionally, the European Convention on the Legal Status of Migrant Workers (1977), as well as the United Nations Convention on the Rights of the Child (1989), encourages member states to promote the right to family reunion.³⁶⁴

As a contracting party to the ECHR, the UK is bound by precedents arising from judgements of the court in Strasbourg.³⁶⁵ In order to relieve itself of this obligation, Britain may have to extract itself from membership of the Council of Europe, which is the sponsoring body of the ECHR, or it can denounce the Convention, invoking Article 58.³⁶⁶

This illustrates the need to coordinate domestic and international policies, but there are limits even to this. Migration is by no means a creature of regulation – greater forces trigger population movements and, to an extent, government intervention simply shapes and directs flows. Solutions, therefore, may not lie in the release from treaty obligations but in reducing the impact of factors which give rise to immigration, or steer migrants towards one country rather than another. These are the so-called "pull factors" which attract migrants to specific countries, and the complex "push factors" which drive migrants from their homes.

³⁶¹ Blinder, Scott (2013), Non-European Migration to the UK: Family and Dependents, The Migration Observatory, <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Briefing%20-%20Family%20and%20Dependents.pdf>, accessed 7 January 2014.

³⁶² The UK's Participation in EU Asylum and Immigration Measures, <http://www.publications.parliament.uk/pa/ld201213/ldselect/lducom/91/9116.htm>, accessed 14 June 2014.

³⁶³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. See recital 2. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>, accessed 7 January 2014.

³⁶⁴ <http://www.assembly.coe.int/Communication/amdoc012012FamilyReunificationFinalE.pdf>, accessed 28 September 2014.

³⁶⁵ See: <http://www.migrationonline.cz/en/the-main-principles-of-family-reunification-before-the-european-court-of-human-rights>, accessed 28 September 2014.

³⁶⁶ See: http://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed 9 November 2014.



Figure 12: Election poster for the 2014 European Parliament elections, embodying the "little Englander" approach to immigration control. The white cliffs of Dover iconography represents a throwback to 1940 and Britain's finest hour, when it stood alone against all the odds.

The essence of the problem for Britain – and the EU in general - is that there is little in the way of co-ordinated policy. For instance, the relationship between trade with less developed countries and migration are well known, yet migration is dealt with under one policy head, while third country trade is dealt with entirely separately, without any apparent recognition of the effect of deals on migration and whether they intensify or relieve pressure.

Then, even as between the various players, there is little by the way of co-ordination or common objectives. Controls are expressed variously at national and EU level, with additional levels of international agreements implemented by diverse agencies. And although the EU has been seeking to develop a common immigration policy since the European Council at Tampere in October 1999, it has not yet acquired exclusive powers – or the capabilities - to manage immigration throughout the member state territories.³⁶⁷

Furthermore, while collective policies implemented by member states and the EU have been effective in reducing legal immigration to Europe, this has been accompanied by a sharp rise in the number of asylum seekers and illegal immigrants, and by the growth of smuggling and trafficking.³⁶⁸ This is a classic effect of uncoordinated policy. Apparent solutions in one area simply create problems in another, with no overall gain.

³⁶⁷ Presidency Conclusions, Tampere European Council, 15 And 16 October 1999, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm, accessed 9 January 2014.

³⁶⁸ European Commission, António Vitorino, Towards a common migration policy for the European Union, Conference "Migrations. Scenarios for the 21 century", Rome, 12 July 2000, http://europa.eu/rapid/press-release_SPEECH-00-267_en.htm, accessed 9 January 2014.

As a result, while EU policy is publicly focused on framing immigration issues in the context of political, human rights and development issues in countries and regions of origin and transit, with a view to mitigating the effects of push-pull factors, intentions and outcomes are often very different.³⁶⁹ Rather than concrete achievements, we see a succession of headline-grabbing policy initiatives that actually achieve very little.

Thus, from 2005 onwards, EU political leaders proclaimed the "Global Approach to Migration" as a response to the desperate attempts of immigrants to cross the EU's southern frontiers. This was then redefined in 2011 as the "Global Approach to Migration and Mobility", by which time there were an estimated 214 million international migrants worldwide and another 740 million internal migrants. There were 44 million forcibly displaced people and an estimated 50 million living and working abroad with irregular status.³⁷⁰

Worse still, such policy tools as are available to the EU - whether third country trade deals or aid programmes – are managed or co-ordinated by the European External Action Service (EEAS). In June 2014, this organisation was the subject of a coruscating report from the EU's Court of Auditors, which found that the EEAS did not treat as a priority the development of an overarching strategic framework for EU foreign policy, and did not adopt an internal strategy. In view of a rapidly evolving international situation, it said, the EEAS has favoured ad-hoc approaches instead of proposing an overarching foreign policy strategy.³⁷¹

Nor did member states go without criticism. Whenever strategic guidelines are missing, the CoA reported, the EEAS consults with EU institutions and the member states to prepare the EU's responses. The resulting *ad-hoc* strategies are the outcome of intense debates before being formally adopted by the commission and endorsed by the Council. This process, it adds, does not facilitate timely action.

But the most damning criticism was reserved for the EEAS. "It has not yet adopted an internal strategy or management plan... it has neither established nor developed detailed criteria to assess the achievement of its priorities". And it has not developed a comprehensive planning framework, so each department decided how to plan its own activities. These defects, the CoA considered,

³⁶⁹ For instance, see Commission Staff Working Paper of 16 May 2007, accompanying document to the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2007/sec_2007_0604_en.pdf, accessed 1 July 2014.

³⁷⁰ European Commission Communication: The Global Approach to Migration and Mobility, COM(2011) 743 final, Brussels, 18 November 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0743:FIN:EN:PDF>, accessed 9 January 2014.

³⁷¹ The Court of Auditors, Special Report, The establishment of the European External Action Service, June 2014, http://www.eca.europa.eu/Lists/ECADocuments/SR14_11/SR14_11_EN.pdf, accessed 1 July 2014.

hampered "the EEAS's overall efficiency, as tasks and resources do not necessarily follow top-level objectives". In addition, it concluded, "the lack of a comprehensive planning framework makes it difficult to integrate its activities within the wider context of the Commission's annual work programme".

On this basis, even if the EU had the powers and its general policy objectives were directed at reducing external immigration, the capacity in the field is demonstrably lacking. Thus, while it is often argued that the UK is more powerful as part of the EU-28 than when it is acting on its own, the reality, though, is that as a collective, the EU is underperforming. It is less than the sum of its parts. Arguably, as has been indicated by Norway, focused action from individual nations can often yield better results than any collective action.

6.6 Devil in the detail: workers' remittances

Another example of how varied the solutions to the migration problem can be is the issue of "workers' remittances". This is money sent by guest workers to their families in their home countries, forming an important source of development aid that is not always fully acknowledged.

These remittances involve significant cash transfers. Between 1965 and 1990, when migrant flows had increased from 75 to 120 million, remittances to some countries exceeded foreign aid. Official remittances amounted to less than \$2 billion in 1970 but had increased to \$73 billion per year. The total value of remittances, including those via informal channels, was likely to be at least twice as high.³⁷² Thus, by 2005, the reported figure was \$167 billion globally, dwarfing all forms of international aid combined.³⁷³

In 2012, the total for the EU-27 was estimated at €38.8bn, almost three quarters of which (€28.4bn) went outside the bloc.³⁷⁴ Migrants in the UK sent nearly \$4bn in remittances to India in 2011, compared with the \$450m in UK aid it received that year. Bangladesh received \$740m in remittances from the UK in 2011; its aid amounted to \$370 million. In 2012, global transfers had topped \$530 billion (£335 billion), according to the World Bank.³⁷⁵

Inasmuch as they are an effective, targeted form of aid, remittances perform a valuable role in economic development, narrowing the gap between host and

³⁷² Making the best of Globalisation: Migrant Worker Remittances and Micro-Finance, 20-21 November 2000, ILO, Geneva, <http://migracion-remesas.hn/document/making.pdf>, accessed 21 June 2014.

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http://www.un.org/esa/population/migration/hld/Text/Report%20of%20the%20SG%28June%2006%29_English.pdf, accessed 9 July 2014.

³⁷⁴ FOCUS News Agency, 11 December 2013, Bulgarians working abroad transferred EUR 490 billion to Bulgaria in 2012, http://www.focus-fen.net/?id=n320805&utm_content=buffer00fc1&utm_source=buffer&utm_medium=twitter&utm_campaign=Buffer, accessed 11 December 2013.

³⁷⁵ *The Guardian*, 30 January 2013, Migrants' billions put aid in the shade, <http://www.theguardian.com/global-development/2013/jan/30/migrants-billions-overshadow-aid>, accessed 23 June 2014.

recipient countries. Then, as a by-product of worker migration, they have the almost perverse effect – potentially at least - of reducing further migration. Even without that effect, though, they help stabilise less developed economies. In Senegal, they account for 11 percent of GDP. Disrupting these transfers can cause instability and economic hardship, potentially requiring direct and more expensive intervention in terms of international aid and even military action.

However, several reports attest to significant market failures in transmitting funds to recipients, ranging from high transactional costs to the lack of banking facilities. In West Africa, charges on remittance transfers, levied by what amounts to a "duopoly" of money transfer operators, are the highest in the world at around 12.3 percent of sums remitted. If what is termed a "remittance super tax" on Africa was reduced to the global average of 7.8 percent, it could save the region \$1.4-2.3bn a year. If reduced to the G8/G20 suggested level of five percent, the reduction would generate an additional \$900 million.³⁷⁶

Applied to constructive uses, this could send 14 million children to school, almost half the region's out-of-school population, give eight million people access to improved sanitation, or give 21 million people access to safe water. Yet, reports have been highlighting the excessive charging and other constraints on transfers for over a decade and despite repeated calls for urgent action, little has been done to remedy the problems. Arguably, this represents another failure (in part) of the EU and of the UK as part of the EU system. An independent UK might be better prepared to promote a more effective policy, taking into account known issues such as these, which appear to have fallen through the policy gaps.

6.7 Reducing "push" factors

In 2006, there was widely reported a massive wave of migration from west African nations to the Canaries, latterly attributed to the effects of predatory third country fishing agreements, which were depriving Africans of their livelihoods.³⁷⁷ Policy or physical factors which intensify pressure on migration are known as "push" factors. They range from natural disasters – droughts, floods, earthquakes, tsunami – which render environments uninhabitable, to civil war, political repression and economic stress.

If the presence of "push" factors increases migration pressure, then reducing or eliminating them can be expected to have the reverse effect. In the case of the African fisheries, the obvious answer was to stop stealing the fish, to scrap the third country deals and help countries develop their own fishing industries,

³⁷⁶ See: http://www.eib.europa.eu/attachments/country/femip_workers_remittances_en.pdf and http://africaprogresspanel.org/wp-content/uploads/2014/05/APP_AR2014_LR.pdf, accessed 21 June 2014.

³⁷⁷ *New York Times*, Europe Takes Africa's Fish, and Boatloads of Migrants Follow, 14 January 2008, http://www.nytimes.com/2008/01/14/world/africa/14fishing.html?pagewanted=all&_r=0, accessed 22 June 2014.

including processing facilities which give added value and create more employment opportunities.

The problem of fisheries deals and their role as "push" factors had been highlighted much earlier when, in the year 2000, journalist Kim Willsher fronted for Channel 4 a revealing film about the depredations of the "EU fishing fleet" in Mauritania.³⁷⁸ Also cited was Dr Callum Roberts of York University, one of the world's leading experts on marine reserves. His view was: "Foreign trawlers are strip-mining African waters of their fisheries resources. It's a scandal. It's almost international piracy. Having seriously mismanaged its home fisheries, [the EU] is now exporting the problem elsewhere and robbing people of their future".

Thus, over a decade ago, there was evidence that the EU was responsible for activities which could only have increased pressure on migration. To contain the problem required a concerted effort to deal with such "push" factors. By June 2014, though, the *Guardian* was again highlighting the same issues, with the headline: "Why illegal fishing off Africa's coast must be stopped". Sadly, it was rehearsing exactly the same issues that Kim Willsher had been addressing more than a decade previously.³⁷⁹

Said the *Guardian*: "The livelihoods and nutrition of millions of people in Africa are being put at risk by foreign fishing fleets in their waters". Pointing out that up to a quarter of jobs in the region were linked to fisheries, it noted that the EU (alongside Russia, China, S. Korea and other countries) not only took "obscene quantities of fish", via the European Maritime and Fisheries Fund, but was also paying €6.5 billion from 2014 to 2020 (up from €4.3 billion in the previous period) to subsidise the fisheries sector.³⁸⁰ A very large proportion of that (more than a quarter) was paid to Spain to stave off unemployment in its politically sensitive fishing industry. Hence, taxpayers' money was being paid to reduce European unemployment, only to export it to Africa.³⁸¹

More generally, losses in West Africa from illegal fishing have been put at \$1.3 billion annually and, in Senegal alone, at around \$300 million in 2012. That is equivalent to around two percent of GDP.³⁸² The supposedly "legal" fishing, though – described as a "licence to plunder" - costs much more.

It takes very little, therefore, to hunt out and understand these issues and their

³⁷⁸ The programme was reviewed by *The Guardian* on 9 November 2001, Mauritians rue EU fish deal with a catch, <http://www.theguardian.com/environment/2001/nov/09/fish.food.9> November 2001. The film is available on YouTube:

<https://www.youtube.com/watch?v=GzFR2mjH6Zo>. Both accessed 23 June 2014.

³⁷⁹ <http://www.theguardian.com/global-development/poverty-matters/2014/jun/19/why-illegal-fishing-africa-must-be-stopped>, accessed 21 June 2014

³⁸⁰ http://ec.europa.eu/fisheries/cfp/eff/index_en.htm, accessed 22 June 2014.

³⁸¹ <http://fishsubsidy.org/ES/>, accessed 22 June 2014

³⁸² http://africaprogresspanel.org/wp-content/uploads/2014/05/APP_AR2014_LR.pdf, accessed 22 June 2014.

role as "push" factors. For an independent UK, the opportunity would arise to optimise policy on immigration reduction. The logical option would be to assist in building up local fishing fleets and, in particular, onshore processing, which not only adds value but creates considerable employment and yields tax income and export revenue. Local assistance to build up fisheries management expertise is also important, including the development of surveillance and enforcement systems.

Here, there is some sense in ensuring close linkage between this policy objective and overseas aid. Again, an independent Britain is best able to decide its own priorities, to ensure that national interests are served.

6.8 Reducing "pull" factors

Collectively, those issues which serve to reduce the attraction of immigration in general, or reduce the attractiveness to immigrants of one country relative to another, are the polar opposite of "push" factors and are thereby known as "pull" factors. Within the limitations of "freedom of movement" provisions that would attend participation in the EEA, there is considerable scope for reducing these factors, at several levels.

Not least, there is the tendency of some employers actively to recruit foreign workers, either to fill temporary gaps in staff establishments, or as a straightforward cost-cutting exercise. A particularly egregious example of the latter dynamic came with a report in late December 2014, revealing that the number of NHS nurses recruited overseas had risen "significantly".³⁸³ Data from 103 English NHS hospital trusts indicated that 5,778 nurses had been recruited from overseas in the 12 months to September 2014. The largest numbers had come from Spain, Portugal, the Philippines and Italy.

The NHS employs more than 1.7 million people, of whom 370,327 are nurses, with about 20,000 training places on offer each year.³⁸⁴ Yet, up to 60 percent of nurses in some health care organisations comprise Internationally Recruited Nurses (IRNs).³⁸⁵ Against that, up to 80,000 British students each year cannot find places on nursing courses. As it costs the NHS £70,000 to train a nurse, for which sum it could hire three qualified foreigners for a year, the suspicion is that the Service is resorting to immigration as a cost-cutting exercise.³⁸⁶

Also in the health service, there have been reports of paramedics recruited from Poland in an attempt by UK ambulance trusts to relieve a nationwide shortage

³⁸³ <http://www.telegraph.co.uk/news/politics/11297761/Four-in-five-new-NHS-nurses-are-from-overseas.html>, accessed 20 December 2014.

³⁸⁴ <http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx>, accessed 20 December 2014.

³⁸⁵ http://www.rcn.org.uk/___data/assets/pdf_file/0010/78625/002445.pdf, accessed 20 December 2014.

³⁸⁶ <http://www.dailymail.co.uk/news/article-2878312/80-000-UK-students-told-t-train-nurse-Thousands-t-courses-despite-four-five-new-NHS-workers-foreign.htm> accessed 20 December 2014.

of 3,000 staff – around 15 percent of the national establishment of 20,625.^{387,388} South Central Ambulance Service, which covers Berkshire, Buckinghamshire, Hampshire and Oxfordshire, was hiring 290 staff members from abroad - 220 paramedics and technicians and 70 emergency care assistants. Poland was particularly attractive because staff qualifications, skills and experience are very similar to our own and "meet our own high standards".

London Ambulance Service announced that it had hired 175 Australian paramedics to start in January because of the small number of local applicants. A recruitment team spent ten days in Australia in September interviewing and assessing staff in Sydney, Adelaide, Melbourne and Brisbane, having previously launched a campaign entitled "London, No Ordinary Challenge" to encourage front line medics to leave Australia and work in London. Richard Webber from the College of Paramedics complained that there were insufficient people being trained and recruited, owing to the lack of university training programmes. "It is a lack of workforce planning", he said.

Paramedics in England and Wales work 37.5 hours a week, starting on a salary between £21,388 and £27,901 a year which can rise to £34,500. Yet in Poland they earn between £4,872 and £6,600 a year for a 37-hour week, although many work twice as many hours and some even triple hours to boost their pay. For a Polish worker, prepared to tolerate poor living conditions for a while, the British salary can look extremely attractive – not so for an indigenous worker looking to make a life in London, getting a mortgage and starting a family, although there are prospects for advancement within the discipline.

But the idea that this mid-rank, degree-entry profession, should be reliant on foreign recruits to keep it functioning is absurd. Webber had it: a lack of workforce planning, otherwise known as incompetence. And that, increasingly, appears to be one of the drivers of immigration.

Another important driver is the disparity in wage levels between the UK and the newly joined eastern and central European countries, making the higher wages in the UK a major "pull" factor for migrants. This was reflected in a local authority survey on reasons for migration, which included higher wages, alongside migrants wishing to better themselves, coming for the adventure and wanting to make some money to send home to Poland. Intriguingly, it was reported to be cheaper to come to the UK than it was to go to some parts of Poland.³⁸⁹

This latter finding might seem perverse, as the UK is a high-cost country. The "pull" should be considerably weakened by the high cost of accommodation and other living expenses. Many migrants, however, were able to compensate

³⁸⁷ <http://www.dailymail.co.uk/news/article-2885843/Paramedics-recruited-Poland-Ambulance-bosses-forced-look-abroad-amid-nationwide-shortage-3-000-staff.html>, accessed 24 December 2014.

³⁸⁸ <http://www.hcpc-uk.org.uk/aboutregistration/theregister/stats/>, accessed 24 December 2014,

³⁸⁹ http://www3.hants.gov.uk/migration_report_-_copy_for_web.pdf, accessed 9 October 2014.

for these costs by accepting sub-standard conditions, exploited by practices which verged on criminality.³⁹⁰ Specifically, migrants tend to gravitate to the bottom end of the private rental market, with poor quality, overcrowded accommodation.³⁹¹ Another local authority found that nearly 60 percent of migrant workers in its area lived in houses in multiple occupation (HMOs).³⁹² Almost 14 percent lived in homes shared between seven and ten residents. In one house, raided in June 2015, 25 adults and one child were found. At least seven tenants were found to be living in the cellar of the property, which was accessible only via steep concrete steps from the back garden.³⁹³

Immigrants are often allowed to congregate in squalid, overcrowded housing, with the local authorities rarely taking action, thus creating conditions where they are able to undercut the settled population, often then being paid – illegally – less than the minimum wage.³⁹⁴ And when illegal immigrants are caught working contrary to the law and their employers are fined, the fines are often not collected.^{395,396} The problem thus lies with the government failing to create a "hostile environment" for illegal workers.

If existing statutory overcrowding limits were applied, with fire protection and basic fitness standards enforced, densities would be reduced and individual rents would increase substantially, reducing the economic gain from employment in the UK. This would have the effect of reducing the longer-term "pull" from low-wage countries such as Poland.

Dealing with the so-called "beds in sheds" epidemic would have a similar effect, where tenants can find accommodation for as little as £20 per week.³⁹⁷ In areas such as Ealing, in the western suburbs of London, unscrupulous landlords are creating homes in garden sheds, garages and makeshift outbuildings and charging untaxed rent – sometimes up to £600 a month – from largely migrant workers looking for somewhere cheap to live. Pockets of the country are beginning to resemble shanty towns.

³⁹⁰ *The Guardian*, Wisbech: the end of the road for migrant workers, 8 October 2014, <http://www.theguardian.com/uk-news/2014/oct/08/wisbech-migrant-workers-exploited-gangmasters-eastern-europe>, accessed 9 October 2014.

³⁹¹ *The Daily Telegraph*, 3 July 2013, Immigrants create overcrowding and fuel tensions, report finds, <http://www.telegraph.co.uk/news/politics/10158678/Immigrants-create-overcrowding-and-fuel-tensions-report-finds.html>, accessed 10 October 2014.

³⁹² <http://www.insidehousing.co.uk/immigrant-workers-forced-into-overcrowded-homes/1447730.article>, accessed 10 October 2014.

³⁹³ *The Guardian*, 25 June 2015, Housing raid finds 26 people living in three-bedroom east London home, <http://www.theguardian.com/society/2015/jun/25/overcrowding-housing-raid-26-living-three-bedroom-east-london>, accessed 21 July 2015.

³⁹⁴ <http://www.theguardian.com/society/2014/oct/24/cowboy-landlords-council-crackdown>, accessed 30 October 2014.

³⁹⁵ <http://www.bbc.co.uk/news/uk-23535938>, accessed 30 October 2014.

³⁹⁶ <http://www.theguardian.com/uk/2010/nov/18/employers-illegal-workers-report>, accessed 30 October 2014.

³⁹⁷ <http://www.dailymail.co.uk/news/article-2674921/Welcome-Shanty-Town-Britain-Desperate-Britons-paying-20-week-landlords-renting-beds-sheds-UKs-housing-crisis-spirals.html>, accessed 29 December 2014.

Slough Borough Council estimates that up to 3,000 people are living illegally in the town. After sending up an aircraft with thermal-imaging cameras to detect heat being emitted from outbuildings, it identified 210 suspected illegal dwelling in a two-hour flight. The London Borough of Ealing, which is one of nine to have been allocated £2.5 million from the Department for Communities and Local Government to tackle rogue landlords, has carried out nearly 4,500 site inspections in the two-year period from October 2011 in addition to unannounced fortnightly raids.

But outbuildings often do not require planning permission if they comply with size restrictions and are not used for sleeping accommodation. Landlords are able to claim they are gyms or playrooms. Under the Housing Act, councils must give 24 hours' notice before inspections, meaning evidence is often destroyed and tenants simply moved on. Even if a fine is eventually imposed, the penalties (a maximum of £5,000 for letting a property in a hazardous condition) are far outweighed by the untaxed profits landlords make.³⁹⁸

This notwithstanding, the London Borough of Newham has taken a multi-agency approach involving multiple departments within its own organisation, the Metropolitan Police, the Department for Communities and Local Government, the UK Border Agency and HM Revenue and Customs, apparently with some success. This suggests that if all local authorities adopted the practices of the most successful, the stock of sub-standard, ultra-cheap accommodation would be substantially reduced.³⁹⁹

Of many other issues, one is the failure of police to enforce re-registration of foreign-registered cars once they have been in the country for more than six months, or after several shorter visits in any one 12 month period. For some immigrants, vehicle tax and insurance has become optional and often unpaid, again reducing costs and increasing the draw. This gives immigrants another economic advantage, enabling them to tolerate relatively low wages and still benefit financially. This loophole is now to be closed, thus reducing the power of another "pull" factor".⁴⁰⁰

Plans for new offences have also been discussed, making it illegal for employers to cram migrants into mobile homes to cut accommodation costs and undercut domestic workers. With stronger enforcement of the national minimum wage – including prosecutions and the doubling of fines – and extended action against gangmasters employing illegal migrants in the social

³⁹⁸ *The Daily Telegraph*, 26 June 2013, Blighted by an epidemic of "beds in sheds", <http://www.telegraph.co.uk/news/uknews/immigration/10143697/Blighted-by-an-epidemic-of-beds-in-sheds.html>, accessed 28 December 2014.

³⁹⁹ Planning Resource, 1 November 2013, How we did it - Tackling rogue landlords and beds in sheds, <http://www.planningresource.co.uk/article/1218790/--tackling-rogue-landlords-beds-sheds>, accessed 29 December 2014.

⁴⁰⁰ *The Daily Telegraph*, Foreign drivers' tax loophole to close, 9 October 2014, <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/11149851/Foreign-drivers-tax-loophole-to-close.html>, accessed 9 October 2014.

care, hospitality and construction industries, the idea was "to create a fair framework that benefits domestic workers, prevents exploitation of foreign labour and reduces the demand for it". This was an opposition approach intended to tackle the factors that attract low-skilled migrants to Britain.⁴⁰¹

On the other hand, there are more formal measures that can be taken, specifically aimed at curbing immigration, such as the policy initiatives announced in July 2014 by Prime Minister David Cameron.⁴⁰² The focus included dealing with abuses, such as new arrivals claiming to be students enrolling at bogus English language colleges. In one of these, inspectors had found no students at all; supposedly they had all gone on a field trip to the British Library. "Radical action" had been taken to shut down more than 750 of these colleges, in addition to which the colleges were required to make checks on their students. Their licenses were to be withdrawn if ten percent of those recruited were refused visas.

Also recognised was the difficulty of controlling illegal immigration simply by applying border controls, to which effect the importance of "action inside the country" was recognised, with restrictions imposed on illegal immigrants renting flats, opening bank accounts and acquire UK driving licences. Crucially, once illegal immigrants have been identified, deportation will be easier, with a policy of "deport first, appeal later", so foreign criminals would be deported first and their appeals heard once they have arrived in their home country.

An option explored earlier has been the application of Article 8 of the ECHR – the right to a family life. Too many judges had treated this as an unqualified right. They were to be required to consider the British public interest as well.

Next in line is a new visa system for graduate entrepreneurs and the exceptionally talented, and establishing a much more robust system that accepts immigrants with the right skills, setting a cap on economic migration from outside the EU. Then, the "magnetic pull" of Britain's benefits system was being addressed. Migrants would be refused immediate out-of-work benefits, and have to wait at least three months before qualifying, while the time for which people could claim benefits was cut from six to three months. Additionally, local authorities could add applicants to housing waiting lists only once they had lived in the area for two years.

The government was also banning overseas-only recruitment, requiring agencies to advertise in English in the UK. Additionally, vacancies posted on the EU-wide jobs portal were to be massively restricted. Efforts were to be

⁴⁰¹ *The Guardian*, 5 March 2013, Labour plans crackdown on employers exploiting migrants, <http://www.theguardian.com/law/2013/mar/05/labour-crackdown-employers-exploiting-migrants>, accessed 9 October 2013.

⁴⁰² *The Daily Telegraph*, 29 July 2014, <http://www.telegraph.co.uk/news/uknews/immigration/10995875/David-Cameron-Were-building-an-immigration-system-that-puts-Britain-first.html>, accessed 29 July 2014.

made to train British people, to enable them better to compete for jobs that might otherwise be taken up by migrants, while benefit caps were to be introduced, reducing the number who could obtain higher incomes on benefits than from gainful employment.

In this, David Cameron was talking about "building a different kind of Britain – a country that is not a soft touch, but a place to play your part, a nation where those who work hard can get on". Carefully and painstakingly, he said, "we are building an economy that has real opportunities for our young people; an education system that encourages them to do their best; a welfare system that encourages work; and an immigration system that puts Britain first".

From politicians, one must expect a degree of rhetoric, but it is not wrong to emphasise a "careful" and "painstaking" approach. Immigration policy does not necessarily benefit from grand gestures. Making numerous small policy initiatives may be a better approach, aligned with efforts to change the perception of our country to putative immigrants, discouraging entrants who have little or nothing to offer.

Some of those changes were to become apparent in a speech at the end of November 2014, when Mr Cameron expressed a determination to negotiate a cut to EU migration and "make welfare reform an absolute requirement in renegotiation".⁴⁰³ This formed a central part of his renegotiation package with the EU, aimed at removing the financial incentives that attract migrants to Britain – effectively weakening the "pull" factors that attracted workers and their families from EU member states.

His plan removed in-work benefits for migrants until they had been in the UK for four years. Also, were prevented from qualifying for social housing until they had been resident for the same period. Additionally, child benefits and tax credits were not to be paid for children living elsewhere in Europe, no matter how long parents had paid taxes in the UK. EU jobseekers were not to be supported by UK taxpayers; and they were to be removed if they had not obtained jobs within six months.

Mr Cameron claimed that, together with other measures, this would deliver the toughest system on welfare for EU migrants anywhere in Europe, returning free movement to a more sensible basis – the position before a European Court judgement in 1991 when Member States had the right to expect workers to have a job offer before they arrived - and a return to rules put in place by Margaret Thatcher in the 1980s.

The "other measures" were to include the abolition of the system where EU migrants could bring family members from outside the EU without any restrictions. There were to be tougher and longer re-entry bans for rough

⁴⁰³ <http://press.conservatives.com/post/103802921280/david-cameron-speech-on-immigration>, accessed 2 December 2014

sleepers, beggars and fraudsters, and there would be stronger arrangements for deporting EU criminals and stopping them coming back. Furthermore, there was to be no access to the labour market for nationals of new Member States joining the EU until their economies have converged more closely with current members.

The Prime Minister argued that these changes should apply to the whole of the EU, but should that not prove possible, he would negotiate them in a UK-only settlement. He would then reiterate his determination to secure "reform" and make it clear that, "if the concerns of the British public fall on deaf ears", then "he rules nothing out". "People", he said, "want Government to have control over the numbers of people coming here and the circumstances in which they come, both from around the world and from within the European Union".

In recent years", he added, "it has become clear that successive Governments have lacked control. People want grip. I get that...They don't want limitless immigration and they don't want no immigration. They want controlled immigration. And they are right".

Setting out the framework, he reaffirmed that Britain supported the principle of freedom of movement of workers and accepted that it was key to being part of the Single Market. Thus, he said that the UK did not want to destroy that principle or turn it on its head. But freedom of movement has never been an unqualified right, and we now need to allow it to operate on a more sustainable basis in the light of the experience of recent years. His objective is "simple". He intended to make our immigration "system fairer and reduce the current exceptionally high level of migration from within the EU into the UK".

This speech, then, underlined what was emerging as a general strategy - addressing specific "pull" factors. A government that understands this is more likely to succeed than one wedded to gesture politics. From this, the point we expect to see emerge is that, increasingly, the government will be able to re-assert sufficient control over the flow of migrants to give us breathing space to engineer an exit plan that is agreeable to all parties.

6.9 A comprehensive immigration policy

Putting the arguments in the chapter together, two separate themes emerge. Firstly, there is the issue of intra-EU "freedom of movement", mandated by EU treaties and then either a condition of the Single Market participation, whether through the EFTA/EEA route ("Norway Option"), via the "shadow EEA" approach or the Australian process.

We retain the view that the interim stratagem facilitates our expeditious withdrawal from the EU. Short-term compromise on freedom of movement provisions is an acceptable price to pay, especially if the alternative is continued membership of the EU, which would also require longer term implementation of freedom of movement provisions.

This notwithstanding, we have also argued that leaving the EU, *per se*, will not solve our immigration problems. Control requires effective policy, and the resources allocated to its execution. However, when it comes to political parties, we see aspirations rather than policies. The core failure is the lack of any connection between what they want to happen, and the means of making those things happen in such a way that one can be assured that the outcomes are deliverable. This confusion between aspiration and policy means that there is often a lack of coherence in the debate from this quarter.

Party supporters, on the other hand (and not entirely unreasonably), point to the similar inadequacies of the established parties. But this simply highlights the further failure to understand the nature of politics. It is for the challengers, with no track record, to demonstrate their capabilities. Conventionally, this is done through the mechanism of policy statements.

Where we see a failure is in the ability to realise that "controlling our borders" is not a policy, *per se*, but an aspiration – and a wholly unrealistic one at that. As long as the UK admits high numbers of visitors each year – the majority without visas – it has effectively ceded perimeter control. The system must then rely on other stratagems. The party might be better off calling for control over immigration policy, an altogether more realistic and focused aspiration. But the act or process of "controlling" or even "managing" borders is exactly that - an act or process - a means to an end. In policy terms, it is meaningless without declared objectives and then the detail of how the controlling and managing would be done.

Nor indeed does it help having anyone telling us that they will extend to EU citizens the existing points-based system for time-limited work permits. That does not begin to constitute a policy. Nor even is this, in itself, a component of a policy. To have the makings of a policy, the statement would have to be directed to, and linked with, a specific objective or outcome. It would then have to be couched in such terms as to make it clear that it could contribute to the declared objective – whatever that might be. Any system or process, as such, is blind – and has as much a capability to obstruct as support any particular policy line.

Any effective policy, though, must be properly coordinated with other policy areas, as in "joined up policy". The "perfect" policy is one thing, but it can deliver less than optimal overall results when consequential effects in other policy domains are taken into account. For instance, a defence policy might look well rounded in isolation but less than adequate when foreign policy delivers enemies the nation didn't want, and the military didn't expect and can't fight.

To ignore the interplay between policy domains is rank amateurism. There can be no advantage in neglecting policy and declaring only the aspiration of "managing" borders. Nor is it sensible to abandon a proven and workable trade

relationship because it interrupts an indeterminate process aimed at producing an undefined effect, with no specified outcome.

On the one hand, the bulk of our immigration is not mandated by the EU. Apart from that which is controlled by domestic legislation, applying to third country nationals, it is determined by the ECHR and, to an extent, the UN convention on refugees and other international agreements – plus an element of customary law. Further, if we are simply blocking immigration, while admitting tourists and business travellers at the current rate of well over 34 million per annum, the end result could be an increase in illegal immigration. Essentially, if potential migrants are denied legal routes of entry, many will seek alternatives, as long as migration pressures dominate.

Thus, irrespective of EU membership, it is necessary to deal with the "push" and "pull" factors. To that extent, we wholeheartedly agree with Dr Khalid Koser, cited at the beginning of this chapter, accepting that migration itself is not the problem – it is the symptom of multifarious (and very different) problems. Thus, to deal with migration, the specific problems have to be identified and picked apart. No single solution will work, so it is a question of chipping away at the edges, with different policies and enforcement strategies, in the hope (and reasonable expectation) that overall migration will decline.

This was mirrored by Elizabeth Collett, director of the Brussels-based Migration Policy Institute Europe. "Migration is a multidimensional policy area", she said. "It touches on everything from foreign policy, through to maritime policy, social affairs and employment," adding: "It is by its very nature, a crosscutting area, and to deal with migration effectively you have to take a comprehensive approach".⁴⁰⁴

On that basis, any policy seeking solely to reduce immigration by restricting entry is not only flawed but unduly pessimistic, in failing to recognise that there are other ways of reducing flows. Strategies for dealing with inflows could achieve better results, even with the freedom of movement provisions in place, than could an insistence on leaving the EU, in the absence of any coherent policies on how to manage the continuing inflow of migrants. Against a general background of administrative incompetence and inadequate enforcement – and the absence of three-dimensional policy-making - leaving the EU, *per se*, might have little effect on the volume of immigration.

⁴⁰⁴ <http://www.dw.de/eu-to-help-italy-rescue-migrants-at-sea/a-17886939>, accessed 1 January 2015.

7.0 Asylum policy

We should say to people who come into Dover from Calais and who claim refugee status, "I'm sorry, you've applied at the wrong country, you've got to go back to France". And that is what we should be doing".

Nigel Farage, Ukip leader.⁴⁰⁵

In practical and legal terms, foreign nationals coming to this country intending to claim asylum, will be seeking protection as refugees under international law. As such, they belong to a distinct category of immigrant. In the previous editions of this document, we noted that they were often described – and treated – as illegal immigrants, then suggesting that they were not.

However, technically, in seeking entry to the country in contravention of entry rules, they are committing illegal acts. But, once immigrants rely (or seeking to rely) on international law, host states asylum seekers agree not to take sanctions for illegal entry against those who are granted refugee status. As refugees, they are effectively taken out of the criminal arena, at which point they are better described as "irregular migrants" until their status has been properly defined through examinations of their circumstances.

The policy response, therefore, needs to be different from that applied to other categories of immigration – licit and overtly illegal (where there is illegal entry and no intention to seek asylum). That response forms the basis of this second chapter, within the overall framework of Phase Two.

For the EU as a whole, asylum seekers are a significant and growing problem, although of variable effect. In 1994, some 329,000 persons applied for asylum in Europe, but that was 40 percent less than the 1993 figure (553,000). Then, as now, Germany received the bulk of applications, almost 40 percent of those coming to Europe (127,200).⁴⁰⁶ In 2008, the level dropped to 226,330 but in 2013 rose to 436,125 (EU-28), effectively doubling in five years. The current (2013) figure constitutes a 30 percent increase on 2012. And in contrast to 2012, when there were a high number of repeat applicants, it is estimated

⁴⁰⁵ <https://www.youtube.com/watch?v=PcP83tSeWgA>, accessed 1 November 2014.

⁴⁰⁶ UNHCR CDR Background Paper on Refugees and Asylum Seekers from Azerbaijan, 1 September 1994, <http://www.refworld.org/docid/3ae6a6490.html>, 1 February 2015.

around 90 percent were new applicants.⁴⁰⁷ In the first half of 2014, 216,300 asylum claims were registered, a 23 percent increase compared to the corresponding period of 2013 (176,200). The 28 EU states together accounted for 82 percent of all new asylum claims registered in Europe.

Currently, the Syrian Arab Republic is the main country of origin. Provisional UNHCR data indicate that 48,400 Syrians requested refugee status in the first half of 2014, significantly more than during the first half or the second half of 2013 (18,900 and 37,500). Iraq came next (21,300 claims), followed by Afghanistan (19,300 claims), Eritrea (18,900 claims), and Serbia and Kosovo (12,300 claims). Persons from these five countries together accounted for 120,100 applications or 37 percent of all asylum claims submitted to industrialised countries.⁴⁰⁸

One of the more recent migration triggers has been the "Arab Spring" movement. More generally, migration pressure has escalated from diverse sources, resulting in humanitarian crises and creating sustained pressure on the receiving countries' governments and local authorities, in particular in the countries closest to the conflict areas. Conflict in Libya has led to a massive displacement of people (800,000) to neighbouring countries, in particular Tunisia and Egypt. Since 2011, the conflict in Syria has created a wave of refugees in the region (2.9 million), especially in Jordan (604 000), Lebanon (1.1 million), Turkey (795 000), Egypt (138,000) and Iraq (220,000).⁴⁰⁹

For the majority coming to Europe (EEA), the first countries of entry are Greece, Italy, Malta and Spain. The largest number then gravitates to Germany, where (according to Eurostat) 126,995 asylum applications were recorded in 2013 (29.08 percent of the total). France took 66,265 (15.17 percent) and Sweden 54,365 (12.45 percent). The number of people claiming asylum in the UK is relatively modest - 30,820 (6.89 percent) in 2013.⁴¹⁰

Many of those entering the UK do so via Dover, either by gaining access to commercial lorries in the French port of Calais, in the boots of private cars, or hidden in transport containers, sometimes with the aid of people smugglers. Of those that seek asylum, many lack papers and some conceal their identities and countries of origin, in order to prevent their return. Others, once in the country,

⁴⁰⁷ See Eurostat data table:

<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1>, and http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf, accessed 1 January 2015.

⁴⁰⁸ See <http://www.unhcr.org/5423f9699.html>, and

<http://www.unhcr.org/pages/49c3646c4d6.html>, both accessed 3 January 2015.

⁴⁰⁹ <http://cor.europa.eu/en/activities/arlem/Documents/draf-report-migration-en.pdf>, accessed 27 December 2014.

⁴¹⁰ Eurostat, *op cit*,

<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1>, accessed 1 January 2015.

acquire forged papers which enable them to work. Many do not formally claim asylum at the point of entry or immediately they have entered.⁴¹¹

7.1 The framework of international law

The centrepiece of international refugee protection is the United Nations Convention relating to the Status of Refugees, adopted in 1951. Grounded in Article 14 of the Universal Declaration of Human Rights 1948, which recognises the right of persons to seek asylum from persecution in other countries, it entered into force on 22 April 1954. As a post-Second World War instrument, the Convention was originally limited to those fleeing as a result of events occurring before 1 January 1951 and within Europe. It has since been amended by a 1967 Protocol, signed in New York, which removed the geographical and temporal limitations.⁴¹²

In contrast to earlier international refugee instruments, which applied to specific groups of refugees, the 1951 Convention endorsed in Article 1 a single definition of the term "refugee", making it applicable to someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.⁴¹³

It must be applied without regard to race, religion or country of origin and, subject to specific exceptions, refugees must not be penalised for their illegal entry or stay. This latter provision recognises that seeking asylum can require refugees to breach immigration rules. Prohibited penalties include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum. Importantly, the Convention also contains various safeguards against expulsion, known as the principle of *non refoulement* (non-return). This is so fundamental that no reservations or derogations may be made. Those accepted as refugees cannot be expelled or returned against their will, in any manner whatsoever, to a territory where they fear threats to life or freedom.

Finally, the Convention lays down minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment. This includes access to the courts and, where relevant, to primary education, to work, and the provision of documentation, including a refugee travel document in passport form, known as a Convention Travel Document.⁴¹⁴ Most State parties to the Convention issue this document, which has become as widely accepted as the former "Nansen passport", an identity document for refugees devised by the first Commissioner for Refugees, Fridtjof Nansen, in 1922.

⁴¹¹ <http://www.dailymail.co.uk/news/article-2891311/Forgers-one-Britain-s-biggest-fake-ID-scams-sold-thousands-counterfeit-passports-driving-licences-little-50.html>, accessed 29 December 2014.

⁴¹² <http://www.unhcr.org/3b66c2aa10.html>, accessed 27 December 2014.

⁴¹³ *Ibid.*

⁴¹⁴ <http://www.unhcr.org/3ae68cce14.html>, accessed 9 February 2015.

As to the 1967 Protocol, apart from expanding the definition of a refugee, it obliges States to comply with the substantive provisions of the 1951 Convention, applying it to all persons covered by the refugee definition without any limitation of date. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to parties to the original Convention.

Nevertheless, under both the Convention and Protocol, there is a particular role for the United Nations High Commissioner for Refugees (UNHCR). States undertake to cooperate with the UNHCR in the exercise of its functions, which are set out in its Statute of 1950 along with a range of other General Assembly resolutions. UNHCR is tasked with, among other things, promoting international instruments for the protection of refugees, and supervising their application.

The "enduring relevance" of the Convention and the Protocol was reaffirmed in 2001 – the fiftieth anniversary of the original Convention. State parties also recognised that the core principle of *non-refoulement* had become so well-established that it had acquired the status of customary international law, applicable to all countries, whether or not they had signed and ratified the Convention.⁴¹⁵

Responses on the high seas are regulated by the UN Convention on the Law of the Sea as well as by the Safety of Life at Sea (SOLAS) and Search and Rescue (SAR) Conventions. These instruments contain a duty to render assistance and rescue persons in distress at sea. Ship's captains are then obliged to deliver those rescued at sea to a "place of safety". In this context, one of the most controversial issues is where to disembark rescued asylum seekers.⁴¹⁶

In an attempt to deal with people smuggling, the UN General Assembly in the year 2000 adopted the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime. Also referred to as the Smuggling Protocol, it entered into force on 28 January 2004 and has been ratified by all EU Member states except Ireland.⁴¹⁷ To implement the Protocol, an International Framework for Action was published in 2011.⁴¹⁸

⁴¹⁵ <http://www.unhcr.org/3e637b194.html>, accessed 22 January 2015.

⁴¹⁶ Handbook on European law relating to asylum, borders and immigration Edition 2014, http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf, accessed 4 January 2015.

⁴¹⁷ https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf, accessed 16 January 2015

⁴¹⁸ http://www.unrol.org/files/Framework_for_Action_Smuggling_of_Migrants.pdf, accessed 16 January 2016.

7.2 The EU system

The current EU system stems from the mid-1980s and the Schengen Agreement that established common rules regarding visas, the right to asylum and checks at external borders. An implementing agreement was signed in 1990 and took effect in 1995. The Agreement was initially concluded outside the EU Treaty framework between five Member States.

The early 1990s brought an influx of refugees to the EU, especially Germany and France, following the conflicts in the Balkans and the collapse of the communist regimes in Eastern Europe.⁴¹⁹ This brought a larger number of governments, including the UK, again outside the Treaty framework, to negotiate a Convention aimed at clarifying responsibilities for handling asylum applications. Its goal was to prevent the phenomenon of "asylum shopping" whereby asylum seekers made sequential application claims in different Member States following their rejection in another state. This led to the Dublin Convention which was signed in 1990 and entered into force in 1997.

EU Member States also launched a number of non-binding cooperation initiatives. These were the so-called "London Resolutions" (1992) consisting of two resolutions and one conclusion. They dealt with the issue of "safe third countries" and introduced a common definition of "manifestly unfounded asylum" claims, for dealing with which they established an accelerated examination procedure. The conclusion defined "safe countries of origin" and established a harmonised approach to applications from such countries. These were to be considered as "manifestly unfounded" unless asylum seekers could demonstrate that their homelands were not safe in their particular cases.

The Schengen Convention and the Dublin Agreement were incorporated into the EU *acquis* by the Treaty of Amsterdam in 1999. Implementation was given initial effect by the Tampere European Council on 15-16 October 1999, which declared the objective of establishing a Common European Asylum System (CEAS). In June 2000 the Portuguese Presidency organised a European conference on the issue, from which many of the current initiatives have evolved.⁴²⁰

Then, under the Lisbon Treaty, the EU Charter of Fundamental Rights acquired legal status. This locked into the EU *acquis* the right to asylum (Article 18) and the prohibition of *refoulement* (Article 19). Article 78 of the TFEU reaffirmed the original Amsterdam provisions for the creation of a CEAS and built in States' obligations under the 1951 Geneva Convention.⁴²¹

⁴¹⁹ <http://www.ecre.org/topics/areas-of-work/introduction/194.html>, accessed 23 January 2015.

⁴²⁰ European Commission, 22 November 2000, COM (2000) 755 final, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0755:FIN:EN:PDF>, accessed 22 January 2015.

⁴²¹ Handbook, *op cit*.

In the first phase of the CEAS, Member States agreed a number of instruments. These were the Temporary Protection Directive, on minimum standards for providing temporary protection in the event of a mass influx of displaced persons (July 2001); the Reception Conditions Directive, laying down minimum standards for the reception of asylum seekers (January 2003); an amended Dublin Regulation (Dublin II), determining which Member State has jurisdiction to examine and decide asylum applications (February 2003); the Qualification Directive, laying down minimum standards for qualification and status as either a refugee or a beneficiary of subsidiary protection (April 2004); and the Asylum Procedures Directive, laying down minimum standards for procedures on granting and withdrawing international protection (December 2005).⁴²²

Another essential part of the system is the Eurodac database, for which fingerprints of asylum seekers are taken. These are made available to other Member States for them to check whether multiple applications have been made.

While the EU harmonisation exercise established only minimum standards and leaves Member States considerable leeway to pursue their own standards, writing refugee law into EU law brings with it other EU law doctrines and (since Lisbon) entails a full role for the ECJ in asylum law and policy. A second phase of the CEAS has now been agreed and is in the process of being implemented. Essentially, this amounts to an upgrade of earlier legislation, but with no significant changes.

The EU asylum *acquis* only applies when an individual crosses a border, including territorial waters and transit zones, whence the provisions of the original Dublin Convention, now recast as a Regulation, apply.⁴²³ Article 3 (1) of the Regulation requires that EU Member States examine any application for international protection and that such application be examined by one Member State. The policy is currently under development and is far from complete. As it stands, the European Commission claims that it shares responsibility for asylum seekers with Member States. One of the crucial requirements is that asylum cases are examined to uniform standards so that - in theory, although rarely borne out in practice - no matter where applicants lodge their claims, the outcomes will be similar.⁴²⁴

While the Charter guarantees the right to asylum, there is a major lacuna in EU treaty law, in that it does not provide for any formal means by which asylum

⁴²² HM Government, Review of the Balance of Competences between the United Kingdom and the European Union Asylum & non-EU Migration, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279096/BoC_AsylumImmigration.pdf, see Annex D, accessed 4 January 2015.

⁴²³ European Commission, Regulation (EU) No. 604/2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>, accessed 4 January 2015.

⁴²⁴ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm, accessed 27 December 2014.

might be sought. Individuals desirous of asylum in the EU are primarily nationals of countries requiring a visa to enter the EU. As these individuals often do not qualify for an ordinary visa, many are forced to cross the border in an "irregular" manner.⁴²⁵ In other words, although EU law gives third country nationals rights of asylum, they effectively have to break the law by entering the territories of EU Member States illegally in order to exercise those rights.

Nevertheless, these people are not illegal immigrants, and should not be confused with them. Not only does the 1951 Convention explicitly remove any criminal liability from actions taken directly in the pursuit of asylum, Article 9 (1) of the Asylum Procedures Directive (2013/32/EU) provides that the asylum seekers' presence in the territory of an EU Member State is lawful. It further states that asylum seekers are "allowed to remain in the Member State" for the purpose of the procedure until a decision by the responsible authority has been made. Some exceptions exist, notably for subsequent applications.

Community funding

Community finance is allocated to the immigration/asylum policy. The primary mechanism is the European Refugee Fund, which set out €700 million over the period 2007–2013 "to support Member States' efforts in receiving refugees and displaced persons, and guaranteeing access to consistent, fair and effective asylum procedure". Then there is the Integration Fund, with a budget of €825 million for the period 2007–2013. It is dedicated to supporting EU and Member States' initiatives for integrating third-country nationals into European societies.

Additionally, there is the Return Fund, a sum of € 676 million (for the period 2008–2013) allocated "to provide support to the efforts made by Member States to improve the management of return". The fund specifically seeks to encourage the development of co-operation both between EU countries, and with countries of return. Closely linked to this goal was: "support provided for actions assisting the reintegration process of the returnee".

Finally, there is the External Borders Fund. This establishes "financial solidarity" by supporting those countries "with a heavy financial burden to implement the common standards for control of the EU's external borders". It also finances actions of Frontex, the EU's border agency, aiming for "practical cooperation of EU countries' police forces, border guards, and judicial and customs authorities". Actions for building a common EU visa policy, in order to facilitate legitimate travel while tackling irregular border crossings and visa fraud, are also supported by the fund. Overall, €1,820 million was allocated over the period 2007–2013.⁴²⁶

The Turkish problem

⁴²⁵ *Ibid.*

⁴²⁶ http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/eu_funding_for_home_affairs_en.pdf, accessed 22 January 2015.

There is a significant problem dealing with refugees passing through Turkey, which only affords refugee status to people coming from Europe. Those coming from Syria, Iraq and points outside Europe are treated as "guests", which means the provisions of the 1951 UN Convention provisions do not apply. In European terms, once forced migrants have transited through Turkey to countries such as Greece, the Turks are reluctant to accept their return.⁴²⁷

In this, the EU is seeking bilateral discussions with Turkey, brokering agreements to accept the return of migrants, in exchange for visa-free entry of Turkish citizens to the territories of EU member states.⁴²⁸ Even outside the EU, Britain might be expected to work with EU member states on such deals, which might reasonably expect contributions towards joint measures. Thus British taxpayers might be asked to defray costs of migrants' shelters and border security in Turkey, and might even be asked to accept a quota of Turkish migrants.

7.3 The Dublin Regulation

The Dublin Regulation is a key tool in the Common European Asylum System (CEAS).⁴²⁹ Its essence is that the processing of every asylum seeker should be to a common standard, so that outcomes should be the same, irrespective of country. Yet, standardisation is far from being achieved.⁴³⁰

This is principally illustrated by the huge discrepancies between Member States in recognition rates, particularly with regard to asylum applications from the same country of origin. According to Eurostat data, the overall protection rate at first instance in the EU 28 was at 34 percent. For final decisions on appeal the recognition rate was 18 percent. The highest recognition rates for first instance decisions were in Bulgaria (87 percent), Malta (84 percent), Romania (64 percent), Italy (61 percent) and the Netherlands (61 percent). Belgium, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland and Slovenia all had an overall recognition rate that was lower than the EU average in 2013. France had 17 percent, while Greece and Hungary had the lowest recognition rates with four and eight percent respectively.⁴³¹

⁴²⁷ Syrian Refugees in Turkey: A Status in Limbo, October 2011, http://www.euromedrights.org/files/Rapport_Migration_2011_EN_283244356.pdf, accessed 1 July 2014.

⁴²⁸ European Commission press release, Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey, 16 December 2013, http://europa.eu/rapid/press-release_IP-13-1259_en.htm?locale=en, accessed 16 December 2013.

⁴²⁹ https://www.pravo.unizg.hr/images/50006643/Peers_Legislative%20Update-EU%20Immigration%20and%20Asylum%20Competence%20and%20Decision-Making%20in%20the%20Treaty%20of%20Lisbon.pdf, accessed 10 January 2015.

⁴³⁰ *Op cit*, http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf.

⁴³¹ <http://ec.europa.eu/eurostat/documents/4168041/5948933/KS-QA-14-003-EN.PDF/3309ae42-431c-42d7-99a3-534ed5b93294>, accessed 7 January 2015.

Of all those granted a protection status, Syrian nationals were in the lead (2013), accounting for over a quarter of approvals. Afghanistan came next (12 percent) and Somalia (7 percent). Recognition rates for Syrian asylum seekers are generally high in the EU, in line with UNHCR's position that persons fleeing Syria require international protection. While a number of EU countries, including Bulgaria and Malta, granted international protection to all Syrians in the first instance in 2013, the number of negative decisions was still high in Italy (51 percent recognition rate), Greece (60 percent) and Cyprus (62 percent).

This spread, however, is relatively homogenous compared with asylum applications of Somali nationals in the EU. Recognition rates at first instance in eleven European countries vary from 17 percent in France and 38 percent in Sweden to 90 percent in the Netherlands and even 96 percent in Italy (see map below).

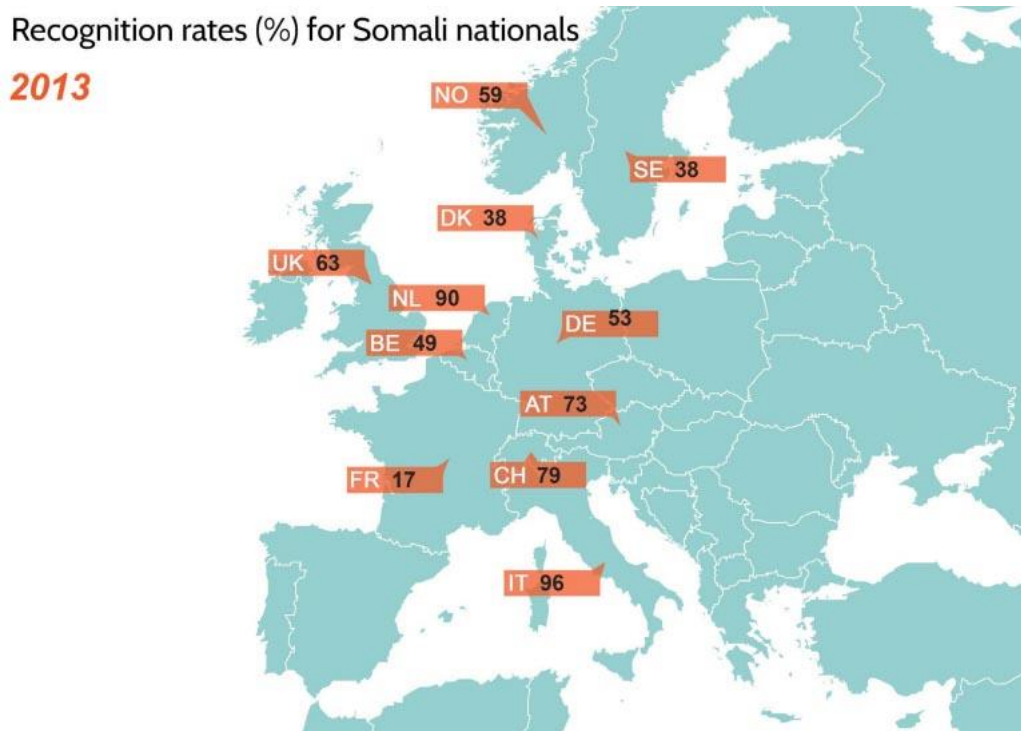


Figure 13: All rates are for all types of protection status granted (refugee status, subsidiary protection or humanitarian protection and at first instance only). Source Eurostat.

In countries where there were over 100 asylum applications by Russian citizens, the recognition rate at first instance varied for the most part between two percent in Germany and 41 percent in the United Kingdom. Germany was the main country of destination for asylum seekers from Russia in 2013 with 15,475 applicants registered, making up over 37 percent of all applications for international protection made by Russian nationals in the EU 28 that year.

Transfer rates

The second fundamental of the Dublin Regulation is that asylum seekers who present themselves to EU Member States other than those where they first arrived in EU Member State territory should be transferred back to those countries where they arrived. Yet data show that requests for a Member State to "take charge" or "take back" asylum applicants reached on average 35,000 annually during the period 2008-2012. Only about 25 percent – roughly 8,500 persons a year – were transferred, again indicating that the Dublin Regulation was failing to meet its objectives.

The variation in recognition rates among Member States, together with the uneven distribution of caseloads across the EU, continues to be one of the major challenges in establishing a Common European Asylum System and illustrates once more that the premise upon which the Dublin system is built, namely that protection standards are the same in EU Member States, remains fundamentally flawed.⁴³²

The European Parliament study

An extensive study by the European Parliament found that the Dublin Regulation fell short of ensuring compliance with the principle of *non-refoulement*, generating instead risks of *refoulement*. This, it averred, was the result of two concomitant problems. The first was that sufficient guarantees against *refoulement* and ill-treatment were not always available in the responsible State. On the one hand, the interplay of the Dublin system with procedural rules (e.g. interruption in case of withdrawal) has demonstrably prevented asylum seekers from accessing a meaningful asylum procedure in the responsible State. On the other, there were persistent concerns that the practices of some Member States fell short of ensuring fair asylum procedures and dignified standards of living.

The second problem was that the second line of protection was also performing well below the standard of a full and inclusive application of the *non-refoulement* principle. Thus, Dublin procedures fall short of basic standards of fairness. Effective remedies against transfers are not always available in the sending state. Furthermore, in several Member States, national administrations and courts are neither able nor willing, meaningfully to scrutinise the risks incurred by the asylum seeker in the responsible state, leading to an over-reliance on safety presumptions and an underestimation of the actual risks incurred by individual asylum seekers.⁴³³

7.4 The European Convention of Human Rights

The treatment of asylum seekers in Europe is also governed by the European Convention of Human Rights (ECHR), under the aegis of the Council of

⁴³² *Op cit*, http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf.

⁴³³ http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf, accessed 15 January 2015.

Europe, and comes within the jurisdiction of the Court of Human rights in Strasbourg. Rights afforded to citizens of Council of Europe members are also afforded to asylum seekers, and also to those who have had asylum claims rejected. Notwithstanding the UN Convention, deporting such persons is prohibited if so doing would be in breach of their human rights as defined by the ECHR and interpreted by the courts.

This can have perverse results. For instance, the UK can no longer return asylum seekers to France, as a result of a case determined in 2000 by the UK Court of Appeal. The court found that France and Germany were not "safe places" to send refugees, who faced persecution "from forces other than the state".⁴³⁴ The then Home Secretary had acted unlawfully in ordering three asylum seekers to be returned to France and Germany, the effect of which was to prevent Britain deporting thousands of failed asylum seekers.^{435,436} The government could no longer rely solely on the provisions of the 1951 Convention or EU law.⁴³⁷ With this, and other cases, the "Dublin system" is under great stress.^{438,439} Subsequently, Austria and Greece have been added to the UK list of "no return" countries.^{440,441} As a result, just one migrant a week is being returned to Calais.⁴⁴²

7.5 The British system

The UK adopted the full provisions of the first CEAS *acquis* on a voluntary opt-in basis.⁴⁴³ And since the EU has written the Refugee Convention into EU law, it has created a status for some of those who are currently non-removable under the UK's obligations under human rights law.⁴⁴⁴ However, the UK government chose not to participate in the second "recast" phase of the CEAS,

⁴³⁴ http://news.bbc.co.uk/1/hi/uk_politics/401968.stm, accessed 1 November 2014

⁴³⁵ <http://www.theguardian.com/uk/1999/jul/24/immigrationpolicy>, accessed 1 November 2014.

⁴³⁶ <http://www.independent.co.uk/news/more-asylum-seekers-to-come-to-uk-1108199.html>,

⁴³⁷ [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=EN), accessed 2 November 2014.

⁴³⁸ http://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf, accessed 1 November 2014.

⁴³⁹ <http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminar/Asylum%20Law%20Seminar%2012-13%20December%202013/CostelloNSMENote2012.pdf>, accessed 1 November 2014.

⁴⁴⁰ <http://www.dailymail.co.uk/news/article-2077127/Britain-ordered-send-asylum-seekers-Greece-debt-ridden-countrys-appalling-facilities.html>, accessed 2 November 2014.

⁴⁴¹ <http://www.dw.de/still-no-sign-of-a-common-asylum-policy-in-the-eu/a-16512690>, accessed 2 November 2014.

⁴⁴² <http://www.dailymail.co.uk/news/article-2912098/Hundreds-migrants-determined-reach-Britain-arrive-new-Calais-welcome-centre-funded-UK-taxpayers.html>, accessed 18 January 2015.

⁴⁴³ HM Government, Review of the Balance of Competences between the United Kingdom and the European Union Asylum & non-EU Migration, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279096/BoC_AsymylumImmigration.pdf, see Annex D, accessed 4 January 2015.

⁴⁴⁴ <http://migrationobservatory.ox.ac.uk/policy-primers/uk-common-european-asylum-system-and-eu-immigration-law>, accessed 4 January 2015.

with the Home Office stating: "We do not judge that adopting a common EU asylum policy is right for Britain".⁴⁴⁵

The government expressed "grave concerns" about allowing asylum seekers to work after six months in the absence of a decision (nine in the final adopted version); restrictions on the ability to detain asylum seekers in exceptional circumstances; and limits to fast-track (deportation) procedures. The UK government originally argued that if it did not opt in to the recast measure, then the original first phase measure would cease to apply in the UK following the entry into force of the recast. The House of Lords EU Committee doubted the cogency of this claim, and the Government has now accepted the continuing application of the first phase where it has not opted in to the recast.⁴⁴⁶

Despite its reservations, the UK has also opted in to the current version of the Dublin Regulation (known as Dublin III), which purports to address some of the problems outlined in earlier versions. In particular, the new version provides for crisis-prevention and cooperation measures between Member States. It places limits on detention of asylum seekers and prevents transfer of a person where there is a real risk of violating a fundamental right. The UK has also adopted the recast Eurodac Regulation.⁴⁴⁷

Part VI of the Immigration and Nationality Act 1999 and the Asylum Support Regulations 2000 set out the regime of support for destitute asylum seekers in the UK. The Home Office retains overall responsibility for their reception, whilst local authorities support unaccompanied asylum-seeking children. They also support asylum seekers with special needs, such as illness and disability. The legislation allows asylum seekers who are, or are about to become, destitute to apply for support in the form of accommodation and/or a cash allowance to cover essential living needs.⁴⁴⁸

Whilst awaiting the outcome of an application for support, asylum seekers may be temporarily housed in one of six Initial Accommodation (IA) centres. These have bed spaces for 1,200 and are located in London (two sites), Birmingham, Liverpool, Wakefield, Cardiff and Glasgow. These are full-board facilities where no cash allowances are provided. Asylum seekers may spend around two to three weeks in IAs.

⁴⁴⁵ Official Report (Hansard), 13 October 2010: Column WA65, <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101013w0001.htm>, accessed 4 January 2015.

⁴⁴⁶ <http://www.parliament.the-stationery-office.co.uk/pa/ld200910/ldselect/ldecom/6/603.htm>, accessed 5 January 2015.

⁴⁴⁷ http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/com_2012_254_final_1_en_act_part1_v13_en.pdf, accessed 10 February 2015.

⁴⁴⁸ http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/27.united_kingdom_national_report_receptionfacilities_en_version_jan2014_final.pdf, accessed 30 December 2014.

Those who are provided support are dispersed throughout the UK in private accommodation in the community and/or offered an allowance. As at 31 December 2012, there were 17,594 persons supported in long term dispersal accommodation in 8,500 accommodation units. The UK does not pay for privately arranged accommodation but asylum seekers choosing this option may apply for subsistence if they are unable to fund their essential living needs. Again as at 31 December 2012, there were 2,588 asylum seekers in receipt of what is called "subsistence-only support". This compares with the end of September 2003 when there were 51,810 asylum seekers, including dependants, supported in accommodation across the UK. At the same date, a further 33,895 were in receipt of subsistence-only support.⁴⁴⁹

Currently, the provision of accommodation is contracted out to private companies, local authorities or housing associations or a combination thereof. In March 2012, the Home Office awarded new accommodation and transport contracts for asylum support services. These are known as Compass (commercial and operational managers procuring asylum support services) contracts. They are paid a fixed fee per person per night, and the agreement places the obligation on the contractor to respond to changing demand, sourcing and providing additional properties as necessary.

Core provision for Initial Accommodation is via a number of dedicated hostels but there is "demand-led" flexibility in the system, which means that local hotels can be used when numbers outstrip demand, with no increased cost to the taxpayer. However, this has led to some significant abuses: one contractor had six hundred asylum seekers crammed into a 98-bedroom London hotel.⁴⁵⁰

Once processed, those asylum seekers who are deemed to qualify for refugee status are granted limited leave to remain for five years. Towards the end of that period, the status is reviewed and Indefinite Leave to Remain (ILR) is given to those who are still considered eligible to remain in the UK at the end of their five-year period.

Failed asylum seekers

The bulk of asylum seekers, on review of their cases, do not qualify for refugee status. As a result, they acquire the status of "failed asylum seekers". That does not necessarily mean that they are obliged to leave the country, or will be forced to do so – or even that assistance will be discontinued. Essentially, they may still claim support if they are able to show that there is a barrier preventing them from leaving the UK and returning home. The criteria are set out in UK regulations.

⁴⁴⁹ <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmhaff/218/21810.htm>, accessed 31 December 2014.

⁴⁵⁰ *The Daily Telegraph*, 18 September 2014, Six hundred asylum seekers crammed into 98-bed hotel, <http://www.telegraph.co.uk/news/uknews/immigration/11103415/Six-hundred-asylum-seekers-crammed-into-98-bed-hotel.html>, accessed 12 January 2015.

Essentially, they qualify for support if they are taking all reasonable steps to leave the UK, including complying with attempts to obtain a travel document to facilitate departure; or if they are unable to leave by reason of a physical impediment to travel or for some other medical reason; or if there is (in the official view) no viable route of return available, then leave to remain is given. A stay is also given if they have successfully applied for judicial review, or "if the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998".⁴⁵¹ To get financial support, they must show that they are destitute, in which event support continues until the barriers to leaving the UK, upon which the support relies, are resolved.

The majority of those supported are single persons or persons who had children after their applications for asylum were refused. Around 20 percent are failed asylum seekers. Because they had children at the time their application for asylum was refused, they remain on support in order to safeguard the welfare of the children.

Failed asylum seekers considered suitable for removal are handled according to the Detained Fast-Track (DFT) procedure, and are detained at one of four Immigration Removal Centres (IRC). There are three centres for single males: Colnbrook, Harmondsworth and Campsfield House and one for single female applicants and some families: Yarl's Wood. These prison-like "secure hostels" have been the subject of considerable controversy and have acquired some notoriety.⁴⁵² Campsfield House, for instance, has seen complaints from women inmates saying that they are treated like "animals", subjected to "routine bullying and sexual abuse".⁴⁵³

7.6 The search for solutions

While the diverse and varied provisions grant rights to potential asylum seekers, nothing in law requires Member States to permit those seeking asylum to gain legal access to their territories in order to claim those rights. However, once asylum seekers have established a physical presence on the territory of a particular Member State, the authorities of that state are obliged to deal with them according to law. A major part of asylum policy, therefore, has focused on preventing people gaining access to Member State territories.⁴⁵⁴

⁴⁵¹ Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, see Regulation 3.
http://www.legislation.gov.uk/ukxi/2005/930/pdfs/ukxi_20050930_en.pdf, accessed 2 January 2015.

⁴⁵² [http://www.corporatewatch.org/sites/default/files/Cry%20Freedom%20-%20Campsfield%20Nine%20-%20Corp%20Watch%201999\(1\).pdf](http://www.corporatewatch.org/sites/default/files/Cry%20Freedom%20-%20Campsfield%20Nine%20-%20Corp%20Watch%201999(1).pdf), accessed 18 January 2015

⁴⁵³ <http://www.independent.co.uk/news/uk/women-held-at-yarls-wood-immigration-removal-centre-treated-like-animals-says-report-9976225.html>, accessed 14 January 2015.

⁴⁵⁴ http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf, accessed 1 January 2015.

One option is to build physical barriers in order to prevent entry, one invoked by Spain for its two enclaves in North Africa, where Ceuta in 1993 and Melilla in 1996 started constructing border fences. They eventually comprised parallel 4m wire fences, topped with razor wire with a tarmac strip running between patrolled by the *Guardia Civil*, all monitored by video cameras, infrared and acoustic sensors, and helicopters.⁴⁵⁵

This option has also been adopted by Greece, which in 2012 commissioned the construction of a four-metre-high barbed-wire fence along part of its land border with Turkey. Although the works cost more than €3 million, they had considerable local success in deterring migrants.^{456,457} Bulgaria thus followed with the construction of a security fence on a 20-mile stretch of the country's 170-mile border with Turkey (Figure 14).⁴⁵⁸ A 50-mile extension was announced in January 2015, at an estimated cost of €46 million, after the number of asylum seekers successfully crossing the border had been cut from around 11,000 in 2013 to 6,000 in 2014.⁴⁵⁹

However, rather than reduce overall the number of migrants seeking to enter the territories of EU Member States, the effect of "fortress Europe" barrier policies has been to displace flows, and to increase the costs and risks for asylum seekers. In particular, as land routes have become blocked or made more difficult, asylum seekers have resorted to using sea routes. Because of its long coastline, Italy is particularly vulnerable to migrants entering from this route, but migrants also take advantage of the 1990 "Martelli law", under which most illegal immigrants are given 15 days to leave the country before any action is taken against them.⁴⁶⁰

⁴⁵⁵

http://digital.csic.es/bitstream/10261/64154/1/Poland%20Report%20_Immigration%20control%20_2009.pdf, accessed 25 January 2015.

⁴⁵⁶ http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_17/12/2012_474782, accessed 3 January 2015.

⁴⁵⁷ *Op cit*, <http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf>

⁴⁵⁸ <http://rt.com/in-motion/bulgaria-fence-border-turkey-472/>, accessed 1 January 2015.

⁴⁵⁹ <http://www.focus-fen.net/news/2015/01/15/360195/hurriyet-turkey-bulgaria-to-extend-border-fence-against-migrant-influx.html>, accessed 15 January 2015.

⁴⁶⁰ <https://migration.ucdavis.edu/mn/more.php?id=665>, accessed 18 January 2015.



Figure 14: Part of the anti-migrant border fence between Bulgaria and Turkey.

Effectively, and in defiance of the Dublin Regulation, Italy deals with its asylum seekers, in part, by facilitating their passage into adjoining countries, where they become someone else's problem. Thus, Italy passes on asylum seekers to France where some of them travel (via Calais) to England, or to Austria from whence they migrate to Germany or Sweden. This comprises a crude form of informal burden sharing.

An alternative or complementary stratagem is to conclude agreement with "sending countries", as in 2008 when Italy concluded a "Friendship Agreement" with Gaddafi's Libya. Gaddafi agreed to step up border controls and to accept "expelled foreigners" from Italy, all in exchange for \$5 billion in infrastructure projects over 25 years. In May 2009, Italy then began unilaterally interdicting boat migrants on the high seas and returning them summarily to Libya, followed by joint Italian-Libyan naval patrols in Libyan territorial waters, whence about 500 migrants were summarily returned to Libya. The result was a dramatic curtailment in the number of boats attempting the journey from Libya.⁴⁶¹

Irregular boat migrants to Sicily (including Lampedusa, the tiny Italian island just off the North African coast) and Sardinia fell by 55 percent in the first six months of 2009 compared to the same period the previous year. The migrant detention centres of Lampedusa in January 2009 had been filled beyond capacity, holding nearly 2,000 people, with migrants sleeping on the floors. For a time in early June, they had been completely empty of migrants.⁴⁶²

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

The actions brought immediate protests from human rights groups and were eventually declared in breach of the ECHR by the court in Strasbourg.^{463,464} The Italian border control operation of "push-back" on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constituted a serious breach of the principle of *non-refoulement*. More successful, therefore, has been the Spanish programme of equipping beaches on the Gibraltar Strait and then on the Canary Islands with sophisticated surveillance equipment for the rapid detection of migrants' boats.^{465,466} Combined with local readmission agreements which ensured the rapid return of attempted migrants, this effectively neutralised the direct sea routes.⁴⁶⁷

Such actions, however, have little effect on asylum seeker numbers, serving merely to displace traffic to different and potentially more hazardous routes. Furthermore, a report produced for the Home Office has argued that there is "strong circumstantial evidence" that tough asylum controls lead to more smuggling and more illegal immigration. Restrictive policies designed to deter people coming to countries such as Britain could have the effect of pushing people to use clandestine methods. Furthermore, those measures which were the most successful at reducing unfounded claims were also those which had the greatest effect on genuine refugees.

The research, which concentrated on asylum policy in the UK, Germany, the Netherlands, Sweden and Italy between 1990 and 2000, concluded that it was difficult to establish direct links between policies and the number of asylum applications. But it added: "Direct pre-entry measures designed to regulate entry appear, in the short term at least, to have been the most effective in stemming or redirecting asylum flows. Indirect measures such as reception facilities, detention and the withdrawal of benefits appear to have had a much more limited impact".

During the ten-year period, asylum seekers may have been displaced to neighbouring countries with more liberal asylum policies rather than there being "an overall EU-wide reduction in numbers", added the research, led by Roger Zetter of Oxford Brookes University. For example, a fall in applications in 1993 was "widely assumed" to have triggered a rise elsewhere in countries such as the Netherlands. "There is strong circumstantial evidence, though little

⁴⁶³ <http://ecre.org/topics/areas-of-work/access-to-europe/88-pushbacks-to-libya.html>, accessed 5 January 2015.

⁴⁶⁴ ECHR, Case of Hirsi Jamaa and Others v. Italy, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\"dmdocnumber\":\[\"901565\"\],\"itemid\":\[\"01-109231\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\) and <http://www.ecre.org/component/downloads/downloads/432.html>, both accessed 5 January 2015.

⁴⁶⁵ BBC website, 14 August 2002, Spain unveils coastal spy system, <http://news.bbc.co.uk/1/hi/world/europe/2194043.stm>, accessed 25 January 2015.

⁴⁶⁶ *Deutsche Welle*, 16 July 2004, Europe's Invisible Walls, <http://www.dw.de/europes-invisible-walls/a-1268156>, Accessed 25 January 2015.

⁴⁶⁷ *Op cit*, http://digital.csic.es/bitstream/10261/64154/1/Poland%20Report%20_Immigration%20control%20_2009.pdf.

authoritative research, that restrictionism ... led to growing trafficking and illegal entry of both *bona fide* asylum seekers and economic migrants", said the report.⁴⁶⁸

Most controls are, in any event, of limited value to the UK, as it is not directly accessible to migrants, and usually receives them via other EU Member states. If the Dublin Regulation was fully implemented, then the numbers entering Britain would be minimal, suggesting that the UK's best option might be to seek the full cooperation of the EU in securing better compliance with and further development of the CEAS. However, that degree of integration and cooperation has so far eluded EU partners for over 20 years, and there is no good reason to expect that further and better cooperation will be forthcoming in the foreseeable future.

Outside the EU, this could leave Britain, rather like Norway, at the end of the migration chain, having to accept such asylum seekers who present themselves to the authorities, then processing them in accordance with the UN Convention, having regard to provisions of the ECHR and the Strasbourg Court rulings, unless the UK had also withdrawn from the ECHR. Acting in conformity with the UN Convention, the UK would be bound to offer protection to applicants which it deemed to be genuine refugees. The greater numerical problem, though, is in seeking to repatriate the failed asylum seekers.

An illustration of the problems came over the winter of 2014-15 when the Norwegian Government sought forcibly to expel failed Afghan asylum seekers (including women and unaccompanied children), only to find that the Afghan Government was no longer prepared to accept them.⁴⁶⁹ The Afghani Ministry of Foreign Affairs warned "that Afghanistan is a dangerous place to be, the country has huge economic problems, and there is a lack of shelter, jobs and education", insisting that returns should be voluntary.^{470,471,472}

There was a certain irony to this situation as it was the Norwegian government in August 2001 which took an active part in trying to get the Australian government to accept 438 Afghan refugees picked up by the Norwegian cargo ship *MV Tampa* off Christmas Island to the north-west of the Australian coast. Her Master, Captain Arne Rinnan, had responded to an emergency message from the Rescue Co-ordination Centre Australia, and had been guided by an

⁴⁶⁸ *The Guardian*, 23 June 2003, Asylum controls 'increase human trafficking', <http://www.theguardian.com/politics/2003/jun/23/immigrationpolicy.immigration>, and <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs2/hors259.pdf>, both accessed 21 January 2015.

⁴⁶⁹ <http://www.khaama.com/afghanistan-oppose-with-expulsion-of-asylum-seekers-from-norway-9908>, accessed 30 January 2015.

⁴⁷⁰ *Bergens Tildende*, <http://www.bt.no/meninger/kommentar/gudbrandsen/Bumerangen-3290421.html>, accessed 30 January 2015.

⁴⁷¹ *Bergens Tildende*, <http://www.bt.no/nyheter/lokalt/Holdt-protest-mot-tvangsreturer-hemmelig-3290419.html?xtor=RSS-2>, accessed 30 January 2015.

⁴⁷² *Bergens Tildende*, <http://www.bt.no/nyheter/innenriks/Ny-instruks-om-internflyktninger-i-Afghanistan-3292129.html>, accessed 30 January 2015.

Australian Customs aircraft to the 20 metre wooden fishing boat *Palapa 1*, carrying the refugees. But when he sought to offload his human cargo on the Australian-owned Christmas Island, the authorities refused the ship entry to Australian waters.

When Rinnan declared a state of emergency and defied his instructions, the Australians sent an armed SAS team to force him to leave.⁴⁷³ The government insisted that no asylum seeker on board the *Tampa* would set foot on Australian soil.⁴⁷⁴ The ensuing crisis was finally resolved through the intervention of the Australian High Court, and the assistance of Papua New Guinea, and then the island nation of Nauru and New Zealand, with the intervention of the Norwegian government, which had lobbied the Australians to allow the Afghans to disembark and be processed as refugees.

The whole affair raised serious questions about the interpretation and adequacy of international law, many of which remain unresolved.⁴⁷⁵ But the so-called "Tampa affair" also triggered the adoption of a new strategy for dealing with what were known as Irregular Maritime Arrivals (IMAs). This became the "Pacific Solution", "asserting the right of this country to decide who comes here".⁴⁷⁶ Its overt aim was to deter future asylum seekers from making the dangerous journey to Australia by boat, on the premise that once they knew that their trip would probably not end with a legitimate claim for asylum in Australia, they would be dissuaded from attempting to gain entry by this means. Its essence was to intercept asylum seekers at sea and convey them to detention centres in the territories of third countries, specifically in the island nation of Nauru and Manus Island, Papua New Guinea.⁴⁷⁷

Those who then qualified as refugees were offered protection in the territories in which they had been deposited or, in a limited number of cases, resettlement in countries throughout the world, including those in Europe and in the United States. Failed asylum seekers were returned to their countries of origin, or detained indefinitely on the islands.

The elements of this policy were then proposed by Prime Minister Tony Blair in March 2003, based on a Home Office paper.⁴⁷⁸ Asylum seekers would be sent to "regional protection zones" outside the EU and held in "transit processing centres" while their applications were considered. Russia, the Ukraine and Albania were mooted as possible centres. In the longer term, the Government foresaw the establishment of UN safe havens that would offer

⁴⁷³ BBC website, 29 August 2001, Australian troops board refugee ship, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1514390.stm>, accessed 30 January 2015.

⁴⁷⁴ <http://news.bbc.co.uk/1/hi/world/asia-pacific/1511903.stm>, accessed 30 January 2015.

⁴⁷⁵ <http://ijrl.oxfordjournals.org/content/15/2/159.full.pdf>, accessed 30 January 2015.

⁴⁷⁶ <http://www.abc.net.au/lateline/content/2001/s422692.htm>, accessed 30 January 2015.

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href="http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution, accessed 30 January 2015.

⁴⁷⁸ "New International Approaches to Asylum Processing and Protection", <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>, accessed 30 January 2015.

protection in regions close to the main areas of global conflict.⁴⁷⁹ Speaking later, Blair observed that the nature and volume of asylum claims to the UK had changed radically, and the 1951 UN Convention on Refugees had started to show its age.⁴⁸⁰

The idea got a lukewarm response from the EU, although it was later picked up by Germany, with the support of Italy, for discussion at EU level.⁴⁸¹ However, it was blocked first by Spanish Interior Minister Jose Antonio Alonso, on "humanitarian" grounds, and then by France's Dominique de Villepin.^{482,483} Unable to progress by this route, it was nevertheless resuscitated by the then Conservative leader, Michael Howard, who put immigration and asylum at the heart of the 2005 general election campaign.⁴⁸⁴ Unlike the Australians and Tony Blair, though, Michael Howard recognised that this could not be done within the framework of the 1951 Convention, and promised that a new Conservative government would withdraw from it.

In rhetoric remarkably similar to that used by the Australian prime minister four years before (also during an election campaign), Howard declared: "What we ultimately want to do is to say that no one should apply for asylum in Britain. After all, if you think about it, you can only apply for asylum in Britain today if you've entered the country illegally or by deception. It's an invitation to people to break the law". A future Tory government, he said, would only take genuine refugees via the UNHCR, at a rate of 15,000 people a year. "Then", he said, "we really would be giving sanctuary to those who are fleeing persecution and torture and not those who simply have enough money to pay the people smugglers".⁴⁸⁵

Interestingly, of the Blair version of the plan, Amnesty International had observed that it clearly represented an attempt to circumvent important domestic and international legal instruments, including the Refugee Convention, and contravened the intent and purpose of the right to seek and enjoy asylum set out in the Universal Declaration of Human Rights.⁴⁸⁶ When it came to the Howard version, though, Blair himself dismissed it as "incoherent babble". Within a month of winning the general election, the new Blair government formally abandoned the idea.⁴⁸⁷

⁴⁷⁹ <http://www.telegraph.co.uk/news/uknews/1425848/Blunketts-safe-havens-refugee-plan-is-censured.html>, accessed 30 January 2015.

⁴⁸⁰ <http://www.ukpolitics.org.uk/node/4954>, accessed 30 January 2015.

⁴⁸¹ <http://www.dw.de/eu-looks-to-africa-for-refugee-solution/a-1341980>, accessed 30 January 2015.

⁴⁸² <http://news.bbc.co.uk/1/hi/world/europe/3702634.stm>, accessed 30 January 2015.

⁴⁸³ <http://www.euractiv.com/security/eus-biggest-countries-split-migr-news-212306>, accessed 30 January 2015.

⁴⁸⁴ <http://www.telegraph.co.uk/news/uknews/1481818/Howard-puts-immigration-at-heart-of-election-battle.html>, accessed 30 January 2015.

⁴⁸⁵ BBC website, 24 January 2005, Howard unveils Tory asylum plans, http://news.bbc.co.uk/1/hi/uk_politics/4200761.stm, accessed 30 January 2015.

⁴⁸⁶ <http://www.amnesty.org/en/library/asset/IOR61/004/2003/en/1f7ab5e7-d6d0-11dd-ab95-a13b602c0642/ior610042003en.pdf>, accessed 30 January 2015.

⁴⁸⁷ <http://www.thetimes.co.uk/tto/news/uk/article1934230.ece>, accessed 30 January 2015.

This left the UK government trying to process a growing number of refugees, while desperately trying and failing to find homes for an increasingly larger number of failed asylum seekers, eventually having to allow them to stay – exactly the problem the Norwegians were also confronting. As for the Australians, after abandoning their "Pacific Solution" in 2008, the Abbott government launched something very similar in 2013, under the title Operation Sovereign Borders.⁴⁸⁸ Of dubious legality, if it does not contravene the 1951 UN Convention, it barely conforms to its spirit.⁴⁸⁹ To be consistent, if the Australians are to continue their policy, they need to consider withdrawal from the Convention.

7.7 A post-EU policy

At face value, there is much to commend the Australian policy of offshore processing, *in situ* resettlement of genuine refugees, with detention and return of failed asylum seekers. It is a highly attractive option for the UK. However, to implement that policy, or any version of it, the UK must release itself from EU treaty obligations and the *acquis*, and – preferably – withdraw from the ECHR. It must also, if it adopts the Michael Howard scenario, withdraw from the 1951 UN Convention.

Should offshore processing be adopted as the core stratagem, the main issue becomes the need to identify suitable sites. However, the reason why offshore processing is required in the first place is to remove from asylum seekers any opportunity to claim refuge, which then confers residence rights and opportunities to acquire citizenship. Withdrawal from the 1951 UN Convention removes any special status refugees might otherwise have acquired, and relieves the UK from any obligations to grant such rights. Under such circumstances, there would be no particular need to seek offshore sites for processing refugees when, in theory, refugees could be detained pending removal and then moved to other sites at any time, internally or offshore.

Detention, however, is expensive, and removal is also costly and – other than to camps under national control – problematic. Of recorded returns of failed asylum seekers in 2003-04, only seven percent left unaided, and 16 percent were assisted voluntary returns, costing around £1,100 per departure. Enforced returns cost an average of £11,000 each.⁴⁹⁰ The majority, however, fall into the "unremovable" category. The problem, as Tony Blair himself explained, is:

⁴⁸⁸ *ABC News* (undated), Operation Sovereign Borders, The First Six Months, <http://www.abc.net.au/news/interactives/operation-sovereign-borders-the-first-6-months/>, accessed 30 January 2015.

⁴⁸⁹ *The Guardian*, 29 January 2015, Australia's treatment of asylum seekers 'diminishes human rights record', <http://www.theguardian.com/law/2015/jan/29/australias-treatment-of-asylum-seekers-diminishes-human-rights-record>, accessed 30 January 2015.

⁴⁹⁰ National Audit Office, 19 July 2005, Returning Failed Asylum Applicants, <http://www.nao.org.uk/press-releases/returning-failed-asylum-applicants-2/>, accessed 31 January 2015.

... is that in order to remove somebody you need to have a country that is prepared to accept them as one of their nationals and document them as such, and the problem in asylum has always been ... is that countries will often refuse to accept that someone is one of their nationals, and one of the abuses ... is that people will come in for example claiming they are an Iranian, and they're not Iranian, or claiming they're from Zimbabwe and not being a Zimbabwean ...⁴⁹¹

Add to that the depredations of the ECHR, which further restrict the hand of governments, and therein lies an almost intractable problem. If governments are not prepared to release refugees and "unremovables" into the community, indefinite detention is the only option. To implement that, governments must be prepared to cover the considerable costs. They must also have public support and be able to withstand the opprobrium of other nations, international organisations and interest groups, as well as the relentless negative media coverage that such a stance would bring.

In practice, no liberal democracy can sustain a policy of mass indefinite detention - at least, with "prisoners" being kept onshore. This is the one advantage of offshoring detention - it renders the problem, to an extent, out of sight and out of mind. But, governments which cannot invoke this option can rarely get support for an overt "open door" policy either. They are caught in an irresolvable *impasse*, forcing them to "fudge" the issues. Fairly relaxed rules are applied to the definition of refugees, so as to maximise the number of people who can be allowed residence, and the "unremovables" are "lost" in the system. When numbers build up, they are given amnesty - usually thinly disguised as administrative "regularisation" - while only the tiny minority, for whom there is a realistic chance of removal, are detained pending removal.

Perhaps, though, the problem stems from the original Convention definition of the refugee, which has that status applying to those who are *outside* the countries of their nationality. Crucially, once acquired, that status remains until the refugees either return to their countries of origin or acquire new nationalities and enjoy the protection of their adoptive countries. Effectively, therefore, refugees can resolve their status in only one of two ways - either by returning to their countries of origin, or by moving to a new country and acquiring citizenship there. By this means, the Convention - perhaps unwittingly - becomes a driver for immigration.

There, perhaps, is the essence of the problem that the Convention and the entire apparatus of international law obscures: the fact that asylum seekers are not immigrants, *per se*, seeking a new life in different lands, but people seeking protection under international law. But, in order to gain continued protection, they have to become immigrants. This is reinforced by the domestic policy

⁴⁹¹ Number 10, PM s Press Conference, 5 August 2005, <http://webarchive.nationalarchives.gov.uk/20060715135117/number10.gov.uk/page8041>, accessed 31 January 2015.

response, which produces legislation binding together immigration and asylum, with asylum issues handled by the Home Office and an immigration minister.

Such a situation may have been logical in the aftermath of the Second World War in Europe. It was this for which the Convention was originally framed, when millions of people in Europe were on the march and many needed resettlement. But, as Matthew Parris observed in 2002, under the terms of the Convention and the 1967 Protocol, hundreds of millions of people from all over the world could qualify as refugees and arrive on the collective doorsteps of the developed countries and legitimately claim asylum.⁴⁹² The root problem, he observed, was in the very concept of asylum.

One solution might be to limit the definition of a refugee to those who have left their own countries for fear of losing their lives or freedoms and have reached a place of safety for the first time. If they then move to another country in search of better conditions, they should no longer be considered refugees. They should be defined as immigrants and treated accordingly, entitled to no more favourable rights or privileges than any other would-be immigrants. Anything else amounts to back-door immigration, which is almost guaranteed to create an endless supply of asylum seekers, not by any means all of them qualifying as refugees.

This still begs the question as to how to deal with those who present themselves at UK borders, or within the country, without authority to enter or remain, and prove "unremovable", if not by virtue of Convention rights, the ECHR or even EU law, then simply because no other country will accept them. If these people are allowed entry and afforded residential rights, and eventually full citizenship, this undermines the entire immigration system, and negates any deterrent effect arising from the application of rigorous entry criteria. But, short of the unacceptable prospect of detaining large numbers of people, including women and children, for an indefinite period, it is unlikely that there is available a unilateral solution.

Not least, the UK is heavily reliant on agreements with the French government which permit, *inter alia*, British immigration officials to work in Paris, on Eurostar trains, and in Calais and Dunkirk to check travellers' documentation, refusing those without the correct papers to journey to England.⁴⁹³ These are

⁴⁹² *The Spectator*, 7 December 2002, "Bogus" asylum-seekers are not the problem; it's the millions of genuine refugees we should worry about, <http://www.spectator.co.uk/columnists/matthew-parris/10660/bogus-asylumseekers-are-not-the-problem-its-the-millions-of-genuine-refugees-we-should-worry-ab/>, accessed 1 February 2015.

⁴⁹³ These include the Sangatte Protocol of 1993, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273137/2366.pdf, and Le Touquet Treaty of February 2003, <http://collections.europarchive.org/tna/20080205132101/http://fco.gov.uk/files/kfile/cm6172.pdf>, and the Evian arrangements of 2009 and 2010: http://www.gisti.org/IMG/pdf/arrangement_2009-07-06_franco-brit.pdf and <https://www.gov.uk/government/news/uk-france-summit-2010-declaration-on-immigration>, all accessed 5 May 2003.

claimed to have greatly reduced the number of asylum seekers arriving in the UK.^{494,495} And, although the French have been criticised for permitting a build-up of would-be asylum seekers in the port of Calais, upwards of 600 security officials have been deployed there, including riot police. Expenditure has reached €10 million a year.^{496,497,498} Withdrawal of cooperation and relaxation of security measures could lead to a substantial additional influx of migrants, overloading the British system and causing considerable embarrassment.

Cooperation might be secured by formalising a "burden sharing" arrangement with France and other EU Member States, in return for an agreement that they will accept the return of irregular migrants intercepted at UK ports. This might include an extension of the UK's "Gateway Protection Programme", implemented since 2004 as a more structured and consistent basis of managing refugee resettlement.⁴⁹⁹ It has offered a legal route for a quota of UNHCR identified refugees to settle in the UK, albeit with a minuscule number, currently 750 per year.^{500, 501}

A realistic "burden sharing" quota, possibly tied to a percentage of the total number of asylum seekers presenting at the borders of EU Member States, might in the short-term have to dwell in the realms of 40-50,000 per year, as a price to pay for the cooperation of EU member states. However, this should be negotiated annually and, as other measures bite – or there is a downturn in numbers - the quota should be reduced.

In the medium to longer-term, the entire approach to asylum seekers might benefit from reorientation. As early as 2001, then Home Secretary Jack Straw noted that about \$10 billion was spent annually by developed countries in assessing claims for refugee status, most of which were rejected. Yet those same countries gave only \$1 billion a year to UNHCR to look after millions of displaced persons. In his view, the balance of effort was wrong.⁵⁰²

⁴⁹⁴ BBC website, 4 February 2002, Eurostar refugees' loophole closed, <http://news.bbc.co.uk/1/hi/world/europe/1799790.stm>, accessed 20 January 2015.

⁴⁹⁵ BBC website, 1 February 2004, Immigration checks move to France, http://news.bbc.co.uk/1/hi/uk_politics/3446095.stm, accessed 23 January 2015.

⁴⁹⁶ *The Guardian*, 3 September 2014, Calais mayor threatens to block port if UK fails to help deal with migrants, <http://www.theguardian.com/uk-news/2014/sep/03/calais-mayor-threatens-block-port-uk-fails-help-migrants>, accessed 15 January 2015.

⁴⁹⁷ *The Independent*, 12 December 2013, France calls on Britain to 'share' Calais immigrant 'burden', <http://www.independent.co.uk/news/world/europe/france-calls-on-britain-to-share-calais-immigrant-burden-9001623.html>, accessed 15 January 2015.

⁴⁹⁸ *The Daily Mail*, 5 August 2014, Migrants clash in France as camp tensions soar, <http://www.dailymail.co.uk/wires/ap/article-2716533/Migrants-clash-France-camp-tensions-soar.html>, accessed 15 January 2015.

⁴⁹⁹ <http://www.icar.org.uk/navgdresettlement.pdf>, accessed 20 January 2015.

⁵⁰⁰ http://www.refugeecouncil.org.uk/what_we_do/refugee_services/resettlement_programme, accessed 20 January 2015.

⁵⁰¹ <https://www.gov.uk/government/publications/gateway-protection-programme-information-for-organisations/gateway-protection-programme>, accessed 20 January 2015.

⁵⁰² *The Guardian*, 6 February 2001, Full text of Jack Straw's speech, <http://www.theguardian.com/uk/2001/feb/06/immigration.immigrationandpublicservices3>, accessed 19 January 2015.

The essential policy change, therefore, might be to reallocate funding spent on asylum seekers to help refugees to stay close to their homelands, in reasonable safety and comfort, and then to work toward their expeditious returns to their countries of origin.

Pursuit of these objectives might benefit from decoupling the handling of asylum from departments responsible for immigration, and attaching it to development and foreign aid. Asylum policy in the UK might thus be handled by DfID, with the budget focused on preventing situations that might give rise to mass displacement of people, on caring for displaced persons in the regions close to their own countries, and on resettling refugees in their original homelands when crises have abated. Translating that into practice is not easy, but such a structure would help emphasise that refugees should not be considered as immigrants, and that asylum seeking should not be treated as a way of circumventing the rules that apply to regular migrants.

From this, it also follows that the bulk of overseas aid, and our foreign policy priorities, should be directed at measures to promote peace, stability and security in areas contributing most to migrations flows. In countries such as Syria, there is little more can be done in the short-term, but for others, such as Eritrea, which now contributes the second-largest number of asylum seekers in Europe, significantly more could be done.^{503,504}

That country is regarded as one of the worst human rights offenders, although the main migration driver is the compulsory national service.^{505,506} Service extends for much of a citizen's working life. Pay is barely sufficient for survival. Recruits are used as cheap labour for civilian work, development projects, and the ruling party's commercial and agricultural enterprises. Female recruits claim sexual abuse by higher-ranking officers.^{507,508} Unsurprisingly, by early 2011, 220,000 Eritreans - about five percent of the six million population - had fled. However, cross-border camps are far from secure. Refugees are prey to kidnappers and hostage-takers, while in Sudanese camps there have been raids by soldiers who have stolen money and possessions.⁵⁰⁹

⁵⁰³ http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/country-factsheets/malta-emn-country-factsheet_en.pdf, accessed 28 December 2014.

⁵⁰⁴ <http://www.theguardian.com/global-development/2014/nov/21/eritreans-seeking-asylum-europe-increases-threefold-in-a-year-unhcr>, accessed 28 December 2014.

⁵⁰⁵ <https://www.gov.uk/government/news/foreign-office-minister-comments-on-tenth-anniversary-of-the-arrest-of-eritrea-s-g11>, accessed 27 December 2014.

⁵⁰⁶ <http://en.wikipedia.org/wiki/Eritrea>, accessed 27 December 2014.

⁵⁰⁷ <http://www.hrw.org/world-report-2012/world-report-2012-eritrea>, accessed 27 December 2014.

⁵⁰⁸ *The Guardian*, 6 September 2014, One man's hellish journey from Eritrea terror to UK sanctuary, <http://www.theguardian.com/global-development/2014/sep/06/eritrea-dangerous-trek-to-britain-slavery-trafficking>, accessed 28 December 2014.

⁵⁰⁹ <http://www.asmarino.com/news/155-breaking-news/4177-eritrea-funerals-kidnapings-and-injuries-at-shagarab-refugee-camp>, accessed 15 January 2015.

Despite this, FCO criticism has been weak, and actions taken against Eritrea have been limited. They amount to a travel ban and an asset freeze imposed on listed individuals deemed a threat to peace, and the national reconciliation process. Additionally, there is an arms embargo in force but, since this is UN and EU mandated, it precludes further, unilateral action by the UK.⁵¹⁰

Economically, although Eritrea is a country with a population larger than Scotland, it boasts a GDP of less than \$5bn against Scotland's \$250bn. Over 80 percent of its employed population is engaged in subsistence agriculture. It should, therefore, be amenable to economic aid, and willing to accept "strings" attached. Outside the EU, the UK would be in a position to take an international lead in bringing the country back into the fold.⁵¹¹ This is all the more reason why the UK should be playing a global role, working with international partners to reduce migratory pressures, dealing with problems such as asylum seeking at source, seeking to control events instead of reacting to them.

This is then the advantage to be gained from leaving the EU. The independence of action would enable the UK to target its action without reference to a consensus defined by multiple interests, and instead address real world problems with a view to solving them.

⁵¹⁰ <https://www.gov.uk/government/priority/promoting-a-positive-eritrean-role-in-the-horn-of-africa>, accessed 28 December 2014.

⁵¹¹ See, for instance:

http://en.radiovaticana.va/news/2014/07/03/italy_reaching_out_to_the_eritrean_government/1102504, accessed 28 December 2014.

PHASE THREE

A genuine European Single Market

8.0 Regulatory issues

The few attempts to examine the modalities of possible withdrawal have shown that this is an intrinsically difficult if not outright impossible task. The reason for this difficulty is that no one can know the terms of withdrawal, the negotiated arrangement and the nature of the post-exit relationship between the withdrawing Member State and the EU.

Phedon Nicolaides
Maastricht Journal, February 2013⁵¹²

In this third phase, we address the defects of the original exit settlement and look to a more permanent solution to international trade and co-operation in Europe. And in this first of three chapters covering this phase, we deal with the regulatory consequences of remaining as an EEA member.

In this event, the UK will be obliged to keep all Single Market regulation in place. This is an extensive body of law. From May 1992, when the EEA Agreement encompassed 1,849 legal acts, by December 2013 it had grown to 5,758 legislative acts, out of the 20,868 EU acts currently in force (Table 3).^{513,514} By the end of October 2015, there were 4,957 acts remaining in force, with EU laws in force recorded at 23,076. As a percentage of that number, the EEA *acquis* stood at 22 percent ⁵¹⁵

⁵¹² http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf, accessed 15 May 2014.

⁵¹³ EC, Directory of European Union legislation in force, as at 1 December 2013, <http://eur-lex.europa.eu/en/legis/latest/index.htm>, accessed 19 December 2013.

⁵¹⁴ As of January 2011 a further 6,426 acts had been incorporated, bringing the total to 8,311. Many of these replaced earlier acts which consequently became void, so the number of legal acts valid at that time was 4,502. In 2011, 373 legal acts were incorporated, 486 in 2012 and 397 in 2013. See: Official Norwegian Reports NOU 2012: 2, Outside and Inside, Norway's agreements with the EU, Unofficial translation December 2012, http://www.regjeringen.no/upload/UD/Vedlegg/eu/nou2012_2_chapter27.pdf; Annual Report of the EEA Joint Committee 2011, The Functioning of the EEA Agreement (Article 94(4)), <http://www.efta.int/media/documents/eea/eea-institutions/joint-committee-annual-report-2011-incl-annex-1.pdf>; Annual Report of the EEA Joint Committee 2012, The Functioning of the EEA Agreement (Article 94(4)), <http://www.efta.int/media/documents/eea/eea-institutions/joint-committee-annual-report-2012-incl-annex-1.pdf>. See also: EFTA online news reports, 2013, <http://www.efta.int/eea/eea-news> - provisional figures: the number of acts repealed was not stated. All sites accessed on 19 December 2013.

⁵¹⁵ [http://www.efta.int/eea-lex?f\[0\]=field_case_status_short_desc%3A11](http://www.efta.int/eea-lex?f[0]=field_case_status_short_desc%3A11), accessed 4 January 2016.

Since there would be no obligation to retain the remainder of the *acquis*, theoretically, leaving the EU could give relief from around 15,000 acts (although by no means all are applicable to the UK).⁵¹⁶ Amongst others, high profile policies such as the CFP and the CAP, would be amendable to abolition if there was the political will to do so, and the nation was prepared to accept the consequences.

Group	Category	Acts
01	General, financial and institutional	1,401
02	Customs Union & free movement of goods	984
03	Agriculture	3,269
04	Fisheries	1,170
05	Freedom of movement for workers and social policy	579
06	Right of establishment and freedom to provide services	291
07	Transport policy	753
08	Competition policy	1,812
09	Taxation	190
10	Economic and monetary policy and free movement of capital	553
11	External relations	3,370
12	Energy	416
13	Industrial policy and internal market	1,643
14	Regional policy and coordination of structural instruments	396
15	Environment, consumers & health protection	1,180
16	Science, information, education and culture	452
17	Law relating to undertakings	121
18	Common Foreign & Security Policy	553
19	Area of freedom, justice and security	663
20	People's Europe	24

Table 3: European Union legislation in force (source: European Commission)

Rewriting the statute book, however, would be a major undertaking. The Government would be confronting the task of unravelling more than forty years

⁵¹⁶ This *acquis* includes Directives, Regulations, Decisions and Resolutions, some of which are not addressed to the UK and from some of which the UK is excluded on geographical grounds. In the summary archive, the figure is reported as 17,770. See: <http://eur-lex.europa.eu/en/legis/available.htm>, accessed 12 December 2013.

of political and economic integration, the fruits of a process that started in 1950. A task of such complexity has never before been attempted and is probably not capable of *ex ante* definition. Indeed, a recent House of Commons paper stated that, "the full impact of a UK withdrawal is impossible to predict".⁵¹⁷

Nevertheless, to formalise the UK withdrawal, the European Communities Act (ECA) - through which EU law is given effect - must be repealed. The effects of this would not be uniform. Firstly, EU legislation which has been transposed into UK law would be unaffected. Law incorporated into Acts of Parliament (Statutes) would stand and Statutory Instruments (SIs) would remain in force even after enabling acts have been repealed. That would be the case with the ECA which functions as an enabling act. Action would have to be taken by Parliament to remove adopted law which was considered no longer necessary.

On the other hand, EU Regulations – those "done at Brussels" rather than formulated by the UK government in response to EU legislation - rely on the continued force of the ECA to have effect. Many have not been transposed into UK law and those will automatically cease to apply with the fall of the ECA. Those which implement Single Market requirements would have to be re-enacted.

Those regulations which have replaced domestic legislation, where their loss would leave important areas of activity unregulated, will also have to be re-enacted. For instance, food safety requirements for all types of food premises - ranging from abattoirs to processing plants, shops and restaurants - are currently set out in European Regulations. Since these have direct effect and have not been transposed into British law, they would be lost on repeal of the ECA, removing almost all regulatory controls over commercial food production in the UK. Without re-enactment, food consumers would be deprived of important safeguards.⁵¹⁸

That much applies to the bulk of environmental law and to sectors such as consumer protection and health and safety. For instance, the original EU law on the carriage of dangerous substances replaced the Petroleum Act of 1879 and the Petroleum (Consolidation Act) of 1928.⁵¹⁹ Britain could not return to these outdated statutes and hazardous chemicals could not be left unregulated. Moreover, many products, such as medicines for human use, veterinary drugs and pesticides, rely on authorisations implemented by means of EU regulations for their market access.

⁵¹⁷ House of Commons Library, Research Paper 13/42, 1 July 2013.

⁵¹⁸ The Food Hygiene (England) Regulations 2006, for instance, are made under the powers conferred by the European Communities Act, and simply designate "the Community Regulations", which include, Regulation 852/2004, Regulation 853/2004, Regulation 854/2004, Regulation 2073/2005 and Regulation 2075/2005. No attempt has been made to transpose their provisions into UK law.

⁵¹⁹ <http://www.hse.gov.uk/cdg/manual/regenvirment.htm>, accessed 12 December 2013.

For sectors outside the Single Market/EEA framework which are subject to EU law, where statutory controls are still deemed necessary after withdrawal, it would take time to devise and implement alternative legislation. Some EU law would have to be kept in place until replacements had been formulated. This might apply especially to agriculture and fisheries, but also regional policy and much else. These are extremely complex area and replacement regimes would take some years to put in place. Because of their complexity, we look at the agricultural and fisheries sectors separately (Chapters 13&14)

8.1 Replacement and removal of existing law

Despite the obvious problems inherent in defining what law will need to be retained after leaving the EU, departure from the EU is often hailed as presenting an opportunity to remove masses of unwanted regulation. Such a process is honoured by the generic title of "deregulation". This process is not confined to EU law and over the decades since the Second World War, starting with Churchill's "bonfire of regulations", it has assumed something of the character of the search for the Holy Grail. Successive governments, and even European Commissions, have all felt obliged to launch deregulation initiatives.

Yet, no sooner has each one been launched, invariably in a blaze of publicity, it peters out and fades into obscurity, the only measurable effect being a net increase in the amount of regulation promulgated. To mark the start of the most recent succession of failures, one only has to go back to the UK Conservative party conference in 1992 when John Major appointed Michael Heseltine to take charge of his abortive deregulation campaign, one that was supposed to be the prelude to the greatest bonfire of regulation since Churchill. Said Major:

I have asked Michael Heseltine to take responsibility for cutting through this burgeoning maze of regulations. Who better for hacking back the jungle? Come on, Michael. Out with your club. On with your loin cloth. Swing into them!

"This is a battle we've been fighting since 1979", he had said. "But it's a battle that is never won. And now is the time to mount a new offensive. We're already on the march against the Eurocrat and his sheaf of directives".⁵²⁰

The great problem, of course, is that this "march against the Eurocrat", the removal of unwanted law and its replacement where necessary, is complicated by the sheer volume. Various claims have been made that up to 80 percent of economic legislation, and perhaps also fiscal and social law, is of EU origin and one recent, if ill-founded, study from *Business for Britain* claimed that 65 percent of all British law was of EU origin.⁵²¹ Other data, from a House of Commons report, suggested that from 1997 to 2009, 6.8 percent of statutes and

⁵²⁰ <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=138>, accessed 20 April 2014.

⁵²¹ <http://businessforbritain.org/2015/03/02/definitive-study-reveals-eu-rules-account-for-65-of-uk-law/>, accessed 23 April 2015.

14.1 percent of statutory instruments had a role in implementing EU obligations.⁵²²

Therein lies another problem before even the deregulation exercise starts. No one can actually agree how much law is involved, which makes target setting rather difficult. The House of Commons figures, for instance, did not include European regulations which have direct effect without being transposed into law. Nor did they take account of cases where there was no need for law to be drafted to meet EU obligations. In some instances, EU requirements were already covered, because domestic law had anticipated EU requirements, or because laws have been introduced to implement policies agreed in the Common Foreign and Security Policy or the former Justice and Home Affairs area.

Furthermore, in attempting to assess the degree of penetration of EU law, there is an element of comparing chalk and cheese. Of the nearly four thousand UK Statutory Instruments produced in 2013, a huge majority were road traffic orders or administrative instruments of a purely technical nature with no equivalents in EU law.

By way of illustration, the UK legislative database for 2013 reveals the:

- Financial Services (Banking Reform) Act 2013 (Commencement No. 4) Order 2014;
- Non-Domestic Rating (Levy and Safety Net) (Amendment) Regulations 2014; Marriage of Same Sex Couples (Use of Armed Forces' Chapels) Regulations 2014;
- Air Navigation (Restriction of Flying) (Jet Formation Display Teams) (No. 3) Regulations 2014.

Illustrative of the type of traffic orders issued, there are the:

- A46 Trunk Road (Stoneleigh, Warwickshire) (Temporary Prohibition of Traffic) Order 2014; the A5 Trunk Road (Upton Magna, Shropshire) (Temporary Prohibition of Traffic) Order 2014;
- M5 Motorway and A46 Trunk Road (Ashchurch, Gloucestershire) (Temporary Prohibition of Traffic) Order 2014;
- M32 Motorway (Junctions 1-3) (Temporary Prohibition of Traffic) Order 2014; the A46 Trunk Road (M4 Junction 18 to Cold Ashton Roundabout) (Temporary Prohibition of Traffic) Order 2014;
- M4 Motorway (Junctions 17-18) (Temporary Restriction and Prohibition of Traffic) Order 2014.

On the EU front, there is little equivalence. Examples of EU include:

⁵²² www.parliament.uk/briefing-papers/RP10-62.pdf, accessed 23 April 2015.

- Commission Implementing Directive 2014/21/EU of 6 February 2014 determining minimum conditions and Union grades for pre-basic seed potatoes;
- Directive 2014/27/EU of 26 February 2014 amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures;
- Commission Implementing Directive 2014/37/EU of 27 February 2014 amending Council Directive 91/671/EEC relating to the compulsory use of safety belts and child restraint systems in vehicles.

All that can basically stand are the raw figures. Roughly, there are 3,969 General Acts and 71,851 UK Statutory Instruments on the UK legal database, making 75,820 legislative instruments in all (2013 figures). This compares with 20,868 EU acts (directives, regulations and decisions) currently in force (22,390 as of February 2015).⁵²³ It is not possible to come up with an accurate percentage, one with another. For the reasons shown here, it cannot be said that 20,868 EU acts represent "x percent" of the 75,820 UK laws and, even if it could, the point is meaningless.

For the record, in 2013, the EU produced 2,405 new laws, comprising 68 directives, 1,429 regulations and 908 decisions. The UK, by contrast, produced 3,003 new laws, comprising 2,970 Statutory Instruments and 33 Acts. Therefore, in strict numerical terms, in 2013 the EU actually produced 80 percent as many laws as did the UK. Thus, even if it is not possible accurately to determine the extent of EU law in the British legislative code in strict percentage terms, there can be no dispute that a very substantial and growing body of law is involved.

8.2 Better regulatory systems

Where law has to be replaced, or specific legislative controls re-introduced, we would not like to see a replacement programme focused entirely, or even mainly on rebuilding the *acquis*, leaving us with laws where the only difference is a "Made in Britain" label instead of a ring of stars. Simply changing the origin of laws attaching them to new institutional structures does not in any way assist in tackling over-regulation and increasing complexity.

Where possible and appropriate, it would be preferable to rethink the regulatory philosophy and come up with controls that will function at less cost and with less impact. In some instances, the answer will be to rely on risk-related measures. This could yield significant economies, especially when combined with better, timelier intelligence.

⁵²³ <http://eur-lex.europa.eu/browse/directories/legislation.html?displayProfile=allRelAllConsDocProfile&classification=in-force>, accessed 2 March 2015.

An initiative is in fact already under way via the Organisation for Economic Co-operation and Development (OECD), in conjunction with the European Commission.⁵²⁴ Such work might well continue after the UK has left the EU, particularly in relation to the risk-based approach, and especially as "Better Regulation" is not a "one shot" policy and should be part of a continuous evolution.⁵²⁵



Figure 15: The global regulatory body for aviation safety, including pilots' flying hours, is the International Civil Aviation Organisation (ICAO), based in Montreal, Canada. It sets the parameters which regional bodies such as the EU must follow. (photo: Wikipedia Commons)

One example is brought to light by the European Commission's approach to controlling airline pilots' hours, centred on adoption of a prescriptive code which met Chicago Convention obligations on aviation safety.⁵²⁶ The code, which sought to harmonise flying hour rules throughout the EU, was strongly resisted by the British airline pilots' union, BALPA, on the grounds that it represented a drop in standards for Britain.⁵²⁷

⁵²⁴ <http://www.oecd.org/governance/regulatory-policy/44912232.pdf>, accessed 23 April 2015.

⁵²⁵ *Ibid.*

⁵²⁶ European Commission, COM(2013) 409 final, Proposal for a Regulation ... amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0409:FIN:EN:PDF>, accessed 2 December 2013

⁵²⁷ *The Independent*, Passenger safety at risk after EU rejects changes to pilots' hours, transport official warns, 30 September 2013, <http://www.independent.co.uk/news/uk/home-news/passenger-safety-at-risk-after-eu-rejects-changes-to-pilots-hours-transport-official-warns-8849467.html>, accessed 2 December 2013.

The regulatory code was mandated by the Montreal-based International Civil Aviation Organisation (ICAO), but also available from the same source was the more up-to-date "Fatigue Risk Management Systems" (FRMS). They allow operators to manage risks specific to their operations in ways most suited to their needs.⁵²⁸

These systems, though, were regarded as too complex for relatively unsophisticated regulatory authorities in the recently enlarged EU member states. A "one-size-fits all" regime has thus been adopted by the EU which prevents the experienced British regulator adopting flexible regulation.⁵²⁹ By dealing directly with international standards-setters, Britain could conform to best standards yet capitalise on efficiencies available from using enhanced regulatory models.

Here, what is not generally appreciated is that regulation, especially at global level, is not settled art. Different regulatory models are constantly under development and considerable investment on research is ongoing in many different sectors.⁵³⁰ Local and international regulators, therefore, are not always confronting proven systems. To an extent, they are sailing in uncharted waters. Nevertheless, it is anticipated that more risk-based and results-orientated regulation will emerge, in many cases providing alternatives to traditional prescriptive codes.^{531,532}

By their very nature, risk-based regimes carry a possibility of failure. This may be manageable in terms of normal operations but many sectors are also exposed to systematic fraud. Examples are the horsemeat, breast implant and CE marking incidents of 2012. In the financial sector, there have been the Lehman Brothers, Enron, Bernie Madoff and Libor scandals, amongst many others, including VAT "carousel" fraud.⁵³³ The range of losses is wide but some represent only the tip of an iceberg. The horsemeat fraud was part of the larger, global problem of food fraud estimated to cost traders and customers \$49

⁵²⁸ Doc 9966, Fatigue Risk Management Systems — Manual for Regulators, ICAO 2012, <http://www.icao.int/safety/fatiguemanagement/frms%20tools/doc%209966%20-%20frms%20manual%20for%20regulators.pdf>, accessed 2 December 2013.

⁵²⁹ House of Commons Transport Committee, Flight time limitations, First Report of Session 2012–13, <http://www.parliament.uk/documents/TSO-PDF/committee-reports/164.pdf>, accessed 2 December 2013.

⁵³⁰ See, for instance, Glasgow University website: <http://www.bank-reg.co.uk/>, and http://www.sniffer.org.uk/files/4413/4183/7990/ER13_Phase_1_report_Apr11.pdf, both accessed 11 December 2013.

⁵³¹ Anon (2012), Risk Management in Regulatory Frameworks: Towards a Better Management of Risks. UNECE, Geneva. http://www.unece.org/fileadmin/DAM/trade/Publications/WP6_ECE_TRADE_390.pdf, accessed 3 January 2014.

⁵³² Hutter, Bridget M (2005). The attractions of risk-based regulation: accounting for the emergence of risk ideas in regulation. ESCR Centre for Analysis of Risk and Regulation. London School of Economics.

⁵³³ For a comprehensive list, see the Exeter University website: <http://projects.exeter.ac.uk/RDavies/arian/scandals/classic.html>, accessed 3 January 2014.

billion annually.⁵³⁴ At the other end of the scale, the breast implant scandal cost the British taxpayer some £3 million, but caused huge personal distress to those affected.⁵³⁵

Consumer protection legislation aimed at *bona fide* manufacturers and producers does not necessarily protect from deliberately criminal action. The systems devised are simply not designed to deal with activities which may include corruption and bribery with associated money laundering, bleeding into illegal drugs trading and even terrorism.⁵³⁶ Yet the consequences are severe. Bribery at custom posts is a significant barrier to trade, and in some less developed countries accounts for nearly 20 percent of the value of goods transported.⁵³⁷ Collusion and corruption in public procurement can also have a significant effect in distorting trade, to the extent that it can undermine the functioning of free trade agreements.⁵³⁸

Globalisation is exacerbating this problem, not least in dealing with fraud. In the food trade, it is considered epidemic.^{539,540} The industry is believed to be a "soft touch for criminals".⁵⁴¹ Part of the problem, which became very evident during the horsemeat scandal, was the EU's paper-based system of control, relying on HACCP to replace physical checks.⁵⁴² As long as the paperwork was in order, not only were physical checks considered unnecessary, they were treated as barriers to internal trade and actively discouraged. As a result, reputable companies ended up using hundreds if not thousands of tons of horsemeat in processed meat products, relying on documentation rather than physical checks.⁵⁴³

⁵³⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-006265&language=EN>, accessed 3 January 2014.

⁵³⁵ *Daily Telegraph*, "Breast implant scandal 'has cost taxpayer £3m'", 15 June 2012. <http://www.telegraph.co.uk/health/healthnews/9334459/Breast-implant-scandal-has-cost-taxpayer-3m.html>, accessed 3 January 2014.

⁵³⁶ *Japan Times*, 11 November 2014, Turkey seeks to bust vast smuggling racket bringing in meat from Syria: minister, <http://www.japantimes.co.jp/news/2014/11/11/world/crime-legal-world/turkey-seeks-bust-vast-smuggling-racket-brining-meat-syria-minister/#.VLhGHdKsWNM>, accessed 10 February 2015.

⁵³⁷ Anon (2012), Bribery as a non-tariff barrier to trade. Transparency International. <http://www.trademarka.com/wp-content/uploads/2012/11/Bribery-as-a-Non-Tariff-Barrier-to-Trade.pdf>, accessed 4 January 2014.

⁵³⁸ Anon (2010), Global Forum on Competition - Collusion and Corruption in Public Procurement, OECD. <http://www.oecd.org/competition/cartels/46235884.pdf>, accessed 4 January 2014.

⁵³⁹ *New York Times*, Counterfeit Food More Widespread Than Suspected, 26 June 2013. http://www.nytimes.com/2013/06/27/business/food-fraud-more-widespread-than-suspected.html?_r=0, accessed 27 December 2013.

⁵⁴⁰ See: <http://www.newfoodmagazine.com/wp-content/uploads/NSF-Whitepaper.pdf>, accessed 27 December 2013.

⁵⁴¹ Reuters, UK supermarkets should be criminally liable for food fraud – report, 12 December 2013, <http://uk.reuters.com/article/2013/12/12/uk-britain-horsemeat-supermarkets-idUKBRE9BB0RV20131212>, accessed 12 December 2013.

⁵⁴² Hazard Analysis and Critical Control Points.

⁵⁴³ Owen Paterson, Official Report (HOC), 13 February 2013, Col. 740.

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130212/debtext/130212-0002.htm>. The complaint was by no means confined to the UK. After a major fraud in Germany

The same dynamic applies to CE marking, which relies on paper-based certification as a substitute for cross-border checks and further checks at the point of use. This was manifest when, in the wake of the PIP breast implant scandal, the entire system used for medical devices was branded "seriously flawed". The French manufacturer had evaded checks because prior notice had been given. Yet the British regulator had no power to check devices until a failure had been reported.^{544,545}

Despite this, there is no case for reverting to checks on all goods entering Britain, or for routine supervision of commercial enterprises, even service-providers. Apart from anything else, the facilities and resources do not exist. But enforcement agencies must be allowed to make checks if considered necessary which, to be effective, must be timely and targeted – essentially, what is known as "intelligence-led" enforcement. Perforce, this requires good intelligence-gathering. The system must be able to process and evaluate large amounts of data, with facilities to distribute the product to end users in a timely fashion. This in turn requires close liaison between national agencies such as the FBI and with international agencies such as Europol and Interpol.⁵⁴⁶

The enforcement of criminal law, however, is rooted in national governments. Only these have the power to exact the ultimate penalties such as imprisonment and confiscation of assets. Therefore, systems have to rely on effective national co-operation. There is no alternative without incurring massive losses of national sovereignty. Then, decisions must be taken at operational level. A system which requires permissions from a central authority, and a lengthy chain of command, is unlikely to be able to respond quickly to changes in circumstances. Controls vested in a supranational authority are irredeemably flawed.

8.3 Two-tier regulation

Taking the cue from the situation confronting the global financial industry, "convergence" can be expected to become the dominant theme in international trade. By this means, domestic law regulating businesses and other economic activity will increasingly be shaped by international agreements.

involving intensively produced eggs mislabeled as "organic", complaints were made that inspectors were too paperwork-orientated. Controls had made it easy to farmers who wanted to cheat. *Die Zeit, Auch Öko-Kontrollen haben Schwachstellen*, 25 February 2013, <http://www.zeit.de/wissen/umwelt/2013-02/Bio-Eier-Kontrollen-Betrug/komplettansicht>. Both accessed 27 December 2013.

⁵⁴⁴ The Medicines and Healthcare Products Regulatory Agency (MHRA).

⁵⁴⁵ *The Independent*, Implant danger extends to all medical devices, 18 January 2012, <http://www.independent.co.uk/life-style/health-and-families/health-news/implant-danger-extends-to-all-medical-devices-6291116.html>, accessed 27 January 2013.

⁵⁴⁶ See, for instance Operation Opsom: "Tonnes of illicit foods seized across Europe in INTERPOL-Europol led operation", 6 December 2011, <http://www.interpol.int/en/News-and-media/News-media-releases/2011/PR101>. Accessed 26 December 2013.

Despite this, there is a belief that, if we leave the EU, only exporters will need to observe "EU regulations" and, by inference (although this is rarely acknowledged), international law. For domestic actors, EU regulation would cease to be relevant. By this means, the UK could be relieved from a massive regulatory burden and benefit from huge savings in regulatory costs.⁵⁴⁷

Although this is now a commonly recurring refrain, it seems to have been first offered by the Bruges Group in 2011, when Ian Milne argued that over 90 percent of the British economy was not involved in exports to the EU. Put another way, Milne argued, exports to the EU accounted for less than ten percent of British economic output. Within the approximately 90 percent not involved in exports to the EU, 80 percent was generated by British residents trading with each other, ten percent in exporting to the world beyond the EU. Yet for the benefit of that ten percent, the remaining 90 was burdened with Single Market regulation.⁵⁴⁸

This is a specious argument, as the situation must be looked at in the round. The ten percent applies only to the export of goods, whereas as much again, in value terms, might be attributed to services. Then there are the imports from EU countries – collectively goods and services are greater in value than the exports – all of which are subject in some way to EU regulation.

Then, for much of the imports from elsewhere in the world, EU regulation either applies or the EU is the regulatory portal through which the UK gains access. And, as we noted in the introduction, the World Bank tells us that, 32 percent of the UK economy is devoted to external trade in manufacturing goods – importing or exporting them, buying or selling them – and 34 percent involves providing services or receiving services from overseas entities.⁵⁴⁹ The bulk of that part of the economy will in some way be affected or influenced by EU regulation.

Only in less-developed economies might there be some sense in maintaining two-tier regulation, such as those which export high volumes of agricultural commodities. Countries such as South Africa and Israel, for instance, apply rigid quality standards to the export of citrus fruits, but allow more relaxed standards at home. This permits domestic sales of misshapen, blemished and damaged fruit, and other non-conformities which render products unsuitable for export. Income is generated for farmers from produce which might otherwise be treated as waste, used for local manufacturing or animal feed.

⁵⁴⁷ Minford, Patrick (2013), Balance of Competences Review – Setting Business Free: Into the Global Economy. Hampden Trust and The Freedom Association, p.12.

⁵⁴⁸ Bruges Group, The Single Market and British Withdrawal, February 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278491/Bruges_Group_SingleMarketAndWithdrawal.pdf, accessed 29 May 2014.

⁵⁴⁹ World Bank data, see: <http://data.worldbank.org/indicator/NE.IMP.GNFS.ZS>, <http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS>, accessed 20 May 2014.

In more complex economies, two-tier standards can present problems. This is especially the case where high volumes of the similar products are exported and imported between countries in a trading partnership (such as the EU). An example is where the UK exports agricultural produce to the EU, unprocessed or as part of manufactured goods, while also importing high volumes of similar products from the EU.

Less rigorous standards applying to the domestic market would be seen as unfair competition, giving the domestic producers an unfair price advantage and distorting the functioning of the market. Equally, it might be claimed of our exporters that they were enjoying an unfair advantage, being able to offload "substandard" goods on the domestic market in what amounted to a hidden subsidy.

Nevertheless, there is already some flexibility, in that most fruit and vegetables are graded as "extra", Grade 1 or Grade 2 under the EU or UNECE systems.⁵⁵⁰ The real problem is that retailers have been reluctant to market different grades of produce. Multiples have tended to opt for the highest grades available, leaving few outlets for lower grades. The produce is used for manufacture or discarded. In June 2014, however, the Waitrose Supermarket chain launched an experiment, selling lower grade vegetables and fruits alongside premium-grade produce.⁵⁵¹

Earlier restrictions on sale have been self-imposed, for commercial reasons, although often blamed on regulatory authorities. There has, for instance, never been any restriction on selling curved cucumbers, despite the existence of the infamous "straight cucumber directive". Simply, curved cucumbers could only be sold as Grade 2, something which retailers were reluctant to do.

Here, though, there are other complexities. In times of surplus, lower-grade produce is often removed voluntarily from the market – sometimes with fruits or vegetables ploughed back into the soil without being harvested, to avoid dragging down prices. Similarly, lower grades may be discarded as a price maintenance measure, to avoid price collapse. Thus, regulatory issues are sometimes confused with market stabilisation.

8.4 Two-tier regulation and the WTO

Notwithstanding the national implications of a two-tier regulatory system, any move in this direction is very much going against the international trend, where a great deal of energy and political capital is being devoted to standardising

⁵⁵⁰ See, for instance, the UNECE marketing standard for cucumbers: http://www.unece.org/fileadmin/DAM/trade/agr/standard/fresh/FFV-Std/English/15Cucumbers_2010.pdf, accessed 1 July 2014.

⁵⁵¹ *Daily Mail*, 3 June 2014, Damaged and ugly fruit to be sold by Waitrose in a bid to cut endemic food waste, <http://www.dailymail.co.uk/news/article-2645508/Damaged-ugly-fruit-sold-Waitrose-bid-cut-endemic-food-waste.html>, accessed 1 July 2014.

trading regulation at a global level – a process known as "regulatory coherence". This is being sponsored primarily at WTO level.⁵⁵²

As a major trading nation, with ambitions of taking a more prominent role in the global trading system, it would hardly be appropriate for the UK to go against the grain and start dismantling the laboriously constructed body of international agreements or to exempt domestic businesses from them. In these circumstances, the adoption of a two-tier system of regulation would send the wrong message, and especially to Less Developed Countries.

National treatment

Specifically in terms of the WTO regime, a two-tier regulatory framework would also confront the spirit if not letter of the WTO agreements on "national treatment".⁵⁵³ This is the principle of treating foreigners and locals equally. Imported and locally-produced goods should be treated equally, at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents.

Essentially, regulation that applies to domestic products must also apply to imports, which means that relaxations must apply to both classes of goods and services. However, for manufacturers servicing a global market, the greater need is for uniform regulatory standards, and taking advantage of reduced standards in any one country is not always possible – any savings being absorbed by the cost of variations in manufacture, and in inventory costs. Therefore, a regulatory regime that undermines the international regulatory system can be seen as a form of discrimination against imported products, even if it is not necessarily actionable.⁵⁵⁴

However, the requirement in this context is that WTO members "must not apply internal taxes or other internal charges, laws, regulations and requirements affecting imported or domestic products so as to afford protection to domestic production".⁵⁵⁵ If the relaxations in regulations are framed in such a way that only domestic enterprises could take advantage of them, then they could be considered "hidden barriers to trade" and thus become actionable under the WTO disputes procedures.

⁵⁵² The WTO and preferential trade agreements: From co-existence to coherence, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf, accessed 24 July 2015.

⁵⁵³ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed 26 October 2015.

⁵⁵⁴ See, for instance, here: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf, accessed 26 October 2015.

⁵⁵⁵ <http://www.meti.go.jp/english/report/downloadfiles/gCT0002e.pdf>, accessed 26 October 2015.

8.5 Trade mandated regulation

Even where two-tier standards are feasible, the result will not be an absence of local regulation. Otherwise there would be a free-for-all in the domestic market.⁵⁵⁶ This could well be unacceptable to UK citizens, especially where domestic regulation long pre-dates export standards, in some cases by centuries. For a wide range of commodities, credible regulation and enforcement are seen as important mechanisms for maintaining consumer confidence. They also "level the playing field", equalising the cost of regulatory compliance between competing businesses.



Figure 18: Regulation is not always imposed, or considered undesirable. In 1922, the British meat industry lobbied for regulation to improve customer confidence.

In the meat industry, for example, meat inspection is now heavily regulated by EU law. However, a uniform system in Britain was first mooted in 1922 at the behest of the industry. The call came after problems with the "considerable diversity" as to "the amount of meat inspection actually carried out in different districts" and "the standards of judgement and practice of individual inspectors". The lack of uniformity imposed "unequal liabilities" on traders. Where no inspection was carried out, "serious embarrassment" to honest traders was caused, "owing to the absence of any check on unscrupulous traders".⁵⁵⁷

⁵⁵⁶ This has been proposed by the lobby group Business for Britain, as the "British Option", <http://forbritain.org/140113-the-british-option.pdf>, accessed 14 January 2014.

⁵⁵⁷ Ministry of Health, Circular 282: "Circular letter and memorandum on a system of meat inspection... for adoption by local authorities and their officers". Author's collection.

For similar reasons, modern businesses often seek out regulation. One example cited by the DIY chain B&Q was the EU timber regulation. This was regarded as an example of an environmental policy which is essentially desirable in and of itself – it supported many member states' own endeavours to address the challenge of driving out unsustainable timber from the market.⁵⁵⁸

In the UK, B&Q had a long-standing policy of selling only sustainable timber to its customers. Whilst going early on an ethical timber policy made sense to the UK business, before the adoption of the EU timber regulations, the business was put at a disadvantage with its European competitors. EU timber regulation therefore created a more level playing field, and ensured that the company was not put at a commercial disadvantage for "doing the right thing".⁵⁵⁹

At a different level, those supplying supermarkets and large retail chains find the absence of specific product regulation can render them prey to different contract standards applied by their powerful customers. Individual supermarket buyers have been known to demand unique standards simply to lock their suppliers into their system and to prevent them from supplying competitors unless they are prepared to set up different production runs for the different standards. Comprehensive statutory codes protect them from this predatory, anti-competitive activity.

Rather than deal with a multiplicity of standards, businesses will often accept over-rigorous regulation as the price of trading certainty and production standardisation. This has been recognised as the "Brussels effect", in which international trade has frequently triggered a "race to the top", whereby domestic regulations have become more stringent as the global economy has become more integrated.⁵⁶⁰

Furthermore, those preparing goods for export do not always know from the outset the destination of any particular batch and production to different standards is expensive.⁵⁶¹ Harmonisation of regulation across the EU is thus thought necessary for the internal market to function. In its evidence to the government's balance of competence review, Next plc did not necessarily agree with the detail and manner of implementation of some EU regulation (which could be both burdensome and expensive to comply with), but it was conscious of the need to balance this against the benefit of having a single set of rules

⁵⁵⁸ European Commission, Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010, http://ec.europa.eu/environment/forests/timber_regulation.htm, accessed 3 May 2014.

⁵⁵⁹ Balance of Competences, *op cit*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf, accessed 3 May 2014.

⁵⁶⁰ <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1081&context=nulr>, accessed 5 December 2015.

⁵⁶¹ Bjorn Knudtsen, Chairman of the Fish and Fisheries Product Committee, *Codex Alimentarius*. Interviewed by the author on 24 June 2013.

across the EU.⁵⁶²

Furthermore, those businesses which do not operate overseas or export directly may produce components or ingredients for customers who do. They will normally prefer to adopt a single standard, and if the export standard is the most demanding, that will often be adopted for all customers.

Even businesses without overseas links may still have to adopt "export standards" if they are higher than their domestic equivalents, as the higher standards can convey the impression that the imported goods are of better quality or improved performance, making them more desirable. Supermarkets and other multiples, on the other hand, will often want to avoid stocking produce conforming to different standards, and may opt for the higher set. Where "due diligence" certification is necessary for insurance and product liability purposes, again the higher "export standards" will often be applied.

That is not to exclude, however, the possibility of *de minimis* provisions or derogations applying to existing and new legislation to take account of the special needs of SMEs. Reduced structural standards for small slaughterhouses, traditional poultry processors and traditional cheese makers are already a feature of EU law and, when only local markets are served, the principle could be extended to a wide range of enterprises.^{563,564} Where such relaxations apply, though, producers may be restricted to direct retailing within a certain distance from their production sites, or to certain classes of retailing, such as farmers markets.

8.6 Repatriating EU law

To allow time to revise our law books, a holding process will be needed. The best option is to repatriate the entire body of EU law, converting it *en bloc* into British law (by a device similar to the ECA).

This has been done by colonies which have become independent nations, allowing them to adopt the legal instruments enacted by their colonial masters. In India, on independence in 1948, its new Constitution stipulated the continuation of pre-Constitution Laws (Article 372) until they were amended or repealed. It then took until 1955 to set up a Central Law Commission to

⁵⁶² Balance of Competence, *op cit*,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf.

⁵⁶³ European Commission, Staff Working Document, on the understanding of certain provisions on flexibility provided in the Hygiene Package, SEC(2010) 985 final, Brussels, 12.8.2010, http://ec.europa.eu/food/food/biosafety/hygienelegislation/docs/faq_all_business_en.pdf, accessed 12 January 2014

⁵⁶⁴ There are already two-tier reporting systems for limited companies, and reduced financial reporting requirements for SMEs. Further relaxations in accounting standards have been proposed. See: <http://www.accountancyage.com/aa/news/2046115/baker-tilly-favours-tier-accounting-standards>, accessed 14 January 2014.

recommend revision and updating of the inherited laws to serve the changing needs of the country.⁵⁶⁵

Our government might learn from the Indian experience. It could, in conjunction with Parliament, set out an ordered programme of repeal and amendment, appointing a special body similar to the Indian Central Law Commission. In the short-to-medium term, though, there might be fewer changes to the regulatory code than expected, and very few opportunities for cost savings.

8.7 Regulatory convergence

The UK should be looking to continue as far as possible the process of regulatory convergence. Supporters of the EU claim that its processes, often styled as harmonisation, are highly advantageous to industry and commerce, replacing 28 sets of regulations with one, thus making cross-border trade that much easier. With certain caveats, there is merit in that argument but, in a global market, sub-regional harmonisation is insufficient. The "little Europe" of the European Union is too small a canvas. Outside the EU, it will be possible to pursue convergence on a global scale. Global regulatory harmonisation and the elimination of duplication could have a substantial effect in reducing costs.

On the other hand, convergence should be handled with some sensitivity. Attempts to achieve this between markedly different jurisdictions, with different levels of capability and sophistication, can give rise to the phenomenon known as regulatory hysteresis. From the ancient Greek word meaning "deficiency" or "lagging behind", hysteresis can negate beneficial effects of convergence. It needs to be taken into account whenever devising a multi-national regulatory programme where there are differences in developmental levels.⁵⁶⁶

Like lack of absorptive capacity, regulatory hysteresis can bring about reduced levels of enforcement in some areas, but this can occur even when additional resources are made available. Where there is then increased activity (or efficiency) in others, the effect of a convergence programme can be perverse, leading to a greater divergence in standards. Such has been apparent in food safety regulation, and the transition from traditional controls to the system of food safety monitoring called HACCP (Hazard Analysis and Critical Control Points), aspects of which were discussed elsewhere in this book.

This sophisticated mechanism, developed initially for NASA to ensure the safety of astronauts' food, leads to better threat prediction and enforcement in

⁵⁶⁵ See: <http://www.lawcommissionofindia.nic.in/main.htm>, accessed 2 January 2014. See also: <http://lawcommissionofindia.nic.in/1-50/report5.pdf>, accessed 27 January 2016.

⁵⁶⁶ Christensen, Hans B; Hail Luzi and Leuz, Christian (2011). Capital-Market Effects of Securities Regulation: Hysteresis, Implementation, and Enforcement. Online version: <https://bspa.berkeley.edu/access/content/group/e675b947-6067-425e-adbf-10e8922547b9/CHL%20Enforcement.pdf>, accessed 28 December 2013.

sophisticated environments. But it is resource-hungry and demands a higher skill level from enforcement officers than the traditional inspection based on assessing physical conditions of premises. Thus the system is often poorly applied in less sophisticated regimes, while the resources absorbed lead to a drop in the frequency of conventional inspections. The result is a greater gap in relative performances between different administrations.⁵⁶⁷

Convergence, in those instances, might best take second place to expending resources on improving enforcement in areas that cannot meet the standards of more sophisticated jurisdictions. Policymakers need to work on the basis that good implementation of sub-optimal systems can sometimes deliver better results than poor implementation of theoretically better systems.

8.8 Absorptive capacity

In the transition from a full member of the EU to an independent state, progress can only be as fast as the capability of the administrative systems to cope with change. This is often known as "absorptive capacity", defined in the commercial context as "a firm's ability to recognise the value of new information, assimilate it, and apply it to commercial ends".⁵⁶⁸ In slow-moving public sector administration, and especially in relation to the development and assimilation of new legislation, this can be a tortuous process.

Adjustments will have to be made in two broad spheres – in external relations and in domestic administration. In terms of external relations, as an active member of the standard-setting community in its own right, Britain will be abandoning long-standing and familiar arrangements, causing considerable disruption to normal diplomatic and administrative procedures.

Currently, the administration is not well equipped for the change. It lacks skilled negotiators, diplomats and trade experts. While the EU's diplomatic service (the European External Action Service) has expanded, the FCO establishment has declined. Since 2006-7, staffing has been cut from 7,005 to 4,450 currently, and is planned to fall to 4,285 by 2014-15. Administrative costs are projected to fall to £904 million, cutting over £100 million from the budget.^{569, 570}

Civil servants and diplomats will, therefore, need to rebuild the capability to deal directly with the global regulatory system and to take charge of trade policy and third country negotiations. To deal with this workload, cuts made to the FCO establishment will have to be reversed – a process not without

⁵⁶⁷ Personal observations. The author, prior to his current posts, practiced as an independent food safety consultant, with international elements.

⁵⁶⁸ http://en.wikipedia.org/wiki/Absorptive_capacity, accessed 20 April 2014.

⁵⁶⁹ Foreign and Commonwealth Office, Annual Report and Accounts 2011-12 (For the year ended 31 March 2012), <http://www.official-documents.gov.uk/document/hc1213/hc00/0059/0059.pdf>, accessed 8 December 2013.

⁵⁷⁰ European Commission, Draft budget 2013, Section X, European External Action Service, <http://eur-lex.europa.eu/budget/data/DB2014/EN/SEC10.pdf>, accessed 8 December 2013.

expense, which will include recruitment and training costs. Presumably, some staff will be returned by the European Commission, once they become redundant from their EU posts.

On the domestic front, there will be similar problems. Notwithstanding the very real and commendable desire to reduce "red tape" and to exploit the opportunities afforded by selective removal or amendment of EU law, the speed at which change can be accommodated will depend on the resources of administrative systems in both the public and private sectors.

From the past, this author recalls the Health and Safety at Work, etc Act 1974, which heralded a revolution in the way the workplace was regulated. The Act itself stemmed from the Committee on Health and Safety at Work which was appointed in May 1970 by Barbara Castle, then Secretary of State for Employment and Productivity. It was chaired by Lord Robens, Chairman of the National Coal Board, and comprised six other members. Its report, delivered in June 1972 and printed in the following month was, in the tradition of such things, named after the chairman, becoming known as the Robens Report.

The recommendations were substantially enacted in the remarkably short period of five years.⁵⁷¹ However, the end of this process was the start of another. At central government level, an entirely new Health & Safety Commission and other bodies were needed. Local councils had to train 10,000 inspectors and technical assistants. Forms and statutory notices had to be designed, printed, distributed and stocked. New administrative procedures had to be set up. Magistrate and Crown Courts had to train officials to deal with prosecutions.

All the changes had to be made without interfering with normal work flows, within existing budgets, and with no prospect of additional personnel. Training and other time-hungry activities had to be fitted in around other departmental requirements.

Where one sees estimates of potential savings from the reduction in "red tape", therefore, one would also expect ambition to be tempered by a dose of realism. There are delays inherent in working within the restraints imposed by the absorptive capacities of the various systems involved. Not only do the regulators have to deal with change, but the regulated also have to come to terms with new laws and the changes they bring. Quite simply, only so much change can be accommodated at any particular time and, if systems are overloaded, they degrade and eventually cease to function.

8.9 Systemic adjustments

Replacement of EU law presents very specific problems at several levels. Framing sound, effective legislation is a complex and highly skilled activity,

⁵⁷¹ National Archive (online): Committee on Safety and Health at Work (Robens Committee): [http://discovery.nationalarchives.gov.uk/SearchUI/details/C10211-committee-on-safety-and-health-at-work-\(robens-details\)](http://discovery.nationalarchives.gov.uk/SearchUI/details/C10211-committee-on-safety-and-health-at-work-(robens-details)), accessed 20 April 2014.

often requiring clear policy direction and input from experienced professionals. Unfortunately, the EU has taken over much of British law-making machinery, particularly at the less visible policy-making stage. A huge amount of policy and then law comes out of the EU research framework programme, with much of the funding directed to developing a strategic policy making forum.⁵⁷² This includes co-ordination between Commission, Member and Associated States in order to pool resources.

Examination of the Framework Programme 7 (FP7) suggested that 10-15 percent of research projects had direct policy relevance. Of 7,588 British-led projects, 967 had policy implications.⁵⁷³ Many more projects indirectly support policy-making. Thus, from its €50bn budget, possibly €20bn supported the EU legislative programme.⁵⁷⁴

Inevitably, this research is directed at securing "European" solutions, leaving the UK effort depleted. UK policy-makers, therefore, would not only have to rebuild a national capability but also refocus the effort on national problems and UK-specific solutions. This has significant resource implications. Taking account also of the inertia inherent in changing direction, considerable time might elapse before the academic bureaucracy could be refocused and a significant repeal and replacement programme could be got underway.

Add to that specialists in each policy field are limited in number and some of them are of dubious competences. It is then very easy to appreciate that deregulation (or re-regulation) could take decades to complete. On the basis that the Robens Committee absorbed, essentially, 14 man-years (a panel of seven for two years) for just one law, redrafting the entire EU *acquis* could run into tens of thousands of man years. That capacity does not exist. Yet the effect of a rushed and badly designed programme, outstripping existing resources, could be to create more problems than it solves.

At this level, therefore, there is going to be little option but to take a steady, measured approach, in phase with the system's capability to recruit and train staff, and the speed with which it can obtain the physical resources necessary to do the work.

In terms of enforcement, there may be a need for even more fundamental changes. With the legislative rush which came with the completion of the Single Market in 1992, government functions were devolved to non-departmental agencies, with the creation of what were known as Next Step

⁵⁷² For instance, see: "A review of projects funded under the TSER programme and the implications for European science, technology and innovation policy and the five-year assessment of the framework programme", http://ec.europa.eu/research/social-sciences/pdf/insights_policy_research_en.pdf, accessed 4 December 2013.

⁵⁷³ The estimate was reached by means of a keyword search of all declared projects. See: http://cordis.europa.eu/fp7/home_en.html.

⁵⁷⁴ For budget breakdown, see: http://cordis.europa.eu/fp7/budget_en.html, accessed 4 December 2013.

Agencies. Because of the burgeoning cost of enforcement, the strategic policy evolved of requiring economic enterprises to finance their own enforcement. From that developed a new and largely unrecognised form of government body, dubbed the SEFRA (Self-financing Regulatory Agency).⁵⁷⁵

Withdrawal from the EU and any reduction in the level of regulation – as well as commensurate slackening in enforcement activity or its intensity - affords the opportunity to rethink enforcement structures, and consider whether some of the dedicated enforcement agencies should be retained. There is little benefit overall in cutting the regulatory burden if enforcement agencies compensate by increasing the intensity of their activities on the laws that remain.

⁵⁷⁵ Christopher Booker & Richard North, *Daily Mail*, 27 September 1996, Secret Rise of Sinister Regulators. See also: <http://hansard.millbanksystems.com/commons/1993/jun/22/deregulation-no-2>, accessed 29 September 2014.

9.0 The role of global governance

Global institutions give a voice to countries of all sizes and are accountable to these countries. Critics may complain about the distribution of votes and seats and about the lack of effective accountability, but global institutions ensure a degree of fairness and ownership which most other solutions lack.

Bruegel Policy Brief
Global Governance: an Agenda for Europe.⁵⁷⁶

In addressing regulation issues, only so much can be done at national and regional level as more and more issues are resolved at a global level by member states negotiating under the aegis of international bodies. Especially within the trading environment, there is a significant and increasing degree of market organisation at this level, involving bodies ranging from private sector rule-making organisations such as the ISO, to quasi-governmental institutions under the wing of the United Nations and the World Trading Organisation.

The activities of the bodies undertaking functions at this level are known collectively as global governance. Distinct from "global government", it has to be stressed that there is no single body, nor even a coherent group of institutions. Rather, functions are exerted by a range of organisations of remarkable diversity. They have little in common other than their rule-making activities in their designated sectors. There is considerable overlap in functions, some duplication and even a competitive element.

The proliferation of global organisations reflects the advantages they offer to the global trading system. Three specific advantages have been listed by the Bruegel think-tank.⁵⁷⁷ First, they ensure more security and predictability than *ad hoc* arrangements. In time of stress or tension, rules provide core principles to which parties can refer, representing legally enforceable commitments. Moreover, institutions offer formal venues for settling disputes, affording the convenience of fixed procedures and familiar arrangements.

⁵⁷⁶ Bruegel, December 2006, <http://www.bruegel.org/publications/publication-detail/publication/37-global-governance-an-agenda-for-europe/>, accessed 14 May 2014.

⁵⁷⁷ Bruegel, *op cit.*,

Secondly, global institutions give a voice to all countries big and small and are accountable to these countries. Critics may complain about the distribution of votes and seats or about the lack of effective accountability, but global institutions ensure a degree of fairness and ownership which other solutions necessarily lack. This, also, is a contribution to the stability of economic integration. This stability, however fragile, would be lacking in a multipolar world in which integration is driven by private initiatives only, without the legitimacy that is provided by global rules and institutions.

Third, institutions are considered to be a form of capital and can themselves be viewed as global public goods. This is because established institutions can rely on founding principles and internal governance rules without having to start from scratch each time something needs to be done. They can start tackling new issues as soon as they emerge, cutting negotiation costs and avoiding the long and painful process of defining a collective response. Well-designed and well-governed institutions, therefore, are an asset for all participants in the world economy.⁵⁷⁸

Despite their utility, global actors are virtually unknown outside a narrow band of specialists, working within formal and informal structures which are rarely mentioned in, or even acknowledged by the popular media. Politicians and the media often have difficulty getting to grips with EU institutions and activities, and charting the activities of global institutions presents even more of a challenge. Few have any idea of the layers of governance over and above the sub-regional supranationalism of the EU.

9.1 The EU role in global governance

Despite being a sub-regional entity, with its formal remit extending to only 28 countries of continental Europe, the European Union, its agencies and institutions play a considerable role in the globalisation process. The Union takes its mandate from Article 220 of the Treaty of the Functioning of the EU. This requires the Union to "establish all appropriate forms of cooperation" with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the OECD.

The Article also requires that the Union should also maintain such relations as are appropriate with other international organisations. Thus, in addition to UN agencies, it has relations with organisations such as the International Maritime Organisation (IMO), the International Civil Aviation Organisation (ICAO) and the International Labour Organisation (ILO), as well as many others.

The responsibility for implementing Article 220 rests not with the Commission alone: it is shared with the High Representative of the Union for Foreign

⁵⁷⁸ *Ibid.*

Affairs and Security Policy. To ease the process, there is a huge flow of funds from EU coffers to support UN projects. In the six years from 2007 to 2012, around €1.09bn of its budgeted funds were paid to the UN institutions or partners, undoubtedly affording the EU considerable influence and opportunities to shape UN programmes, making for a very close relationship between the EU and the UN.

A good example of the influence is the EU's role in formulating the UN System of National Accounts (SNA), the internationally agreed system on which nations calculate their Gross Domestic Products (GDPs). Such statistical data are the meat and drink of politics. They are tools by which the real economy is described, the performance of which can make or break political parties and decide whether they win elections.



Figure 19: the "top table" for the purpose of revising United Nations' System of National Accounts (SNA). Although only a sub-regional organisation, the EU is given equivalence in the working group to global bodies such as the World Bank.

The system, which has been in place since 1947, is prepared under the auspices of the "Inter-Secretariat Working Group on National Accounts" which comprises five separate organisations, only one of which is the UN. Of the other four, three are the World Bank, the OECD, and the International Monetary Fund (IMF). The fourth is the European Commission, represented by Eurostat.⁵⁷⁹ Collectively, they represent the "top table", deciding on how global statistics should be presented yet, of the five bodies, the EU stands out. It is not a global body, and unlike the others, it is a supranational governmental body rather than a financial or economic body. It is extremely disturbing that the EU

⁵⁷⁹ Eurostat, Essential SNA: Building the basics, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-13-003/EN/KS-RA-13-003-EN.PDF, accessed 9 June 2014.

should be on the working group at all. However, it has clearly recognised where the power lies.

Despite its low profile, this global "reach" of the EU is growing in extent across a wide spectrum of activity. In its 2014-2020 Strategic Framework on Health and Safety at Work, the Commission wrote of the "globalised economy" and the EU's interest in raising labour standards globally. It seeks to do so by taking multilateral action in cooperation with "competent international bodies", and through bilateral action with third countries. It also supports candidate countries and potential candidate countries in bringing their structural capacity and legislation into line with the requirements of EU law.⁵⁸⁰

What it calls its "benchmarking role" in occupational health and safety policy is "largely recognised by international partners and observers". This reflects the rapid expansion of bilateral cooperation in recent years, not just with traditional partners from developed economies such as the United States, but also and especially with new partners such as China and India. The Commission aims to contribute to reducing work accidents and occupational diseases worldwide, working with the ILO in particular, and other specialised organisations such as the WHO and the OECD.⁵⁸¹

The ILO is taking an increasing part in framing EU law on employment and general labour issues, not least working time provisions.⁵⁸² The latest instrument concerns "fair and decent work for domestic workers" (Convention No. 189), which was adopted in March 2013. This requires Member States to ensure that domestic workers receive the same compensation and benefits as other workers. They must be informed of the terms and details of their employment, protected against discrimination, offered decent living conditions and have easy access to complaint mechanisms. The Convention also sets out rules regarding foreign recruitment, which are supported by judgements from the Court of Human Rights.⁵⁸³

EU legislation, such as Directives on health and safety, workers' rights, gender equality, trafficking and asylum, already addresses some aspects covered by the ILO Convention. The provisions of the Convention share the same approach as this legislation and are broadly consistent. On many issues, EU law is more protective than the Convention. However, the Convention is more precise than EU law on the coverage of domestic workers.⁵⁸⁴

⁵⁸⁰ European Commission, Brussels, 6 June 2014, COM(2014) 332 final, EU Strategic Framework on Health and Safety at Work 2014-2020
<http://ec.europa.eu/social/BlobServlet?docId=11828&langId=en>, accessed 9 June 2014.

⁵⁸¹ *Ibid.*

⁵⁸² International Labour Standards on Working Time,
<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/working-time/lang--en/index.htm>, accessed 12 February 2014.

⁵⁸³ http://fra.europa.eu/sites/default/files/fra_uploads/1668-FRA-report-domestic-workers-2011_EN.pdf, accessed 8 February 2014.

⁵⁸⁴ Working conditions: time for Member States to implement the ILO domestic workers convention,

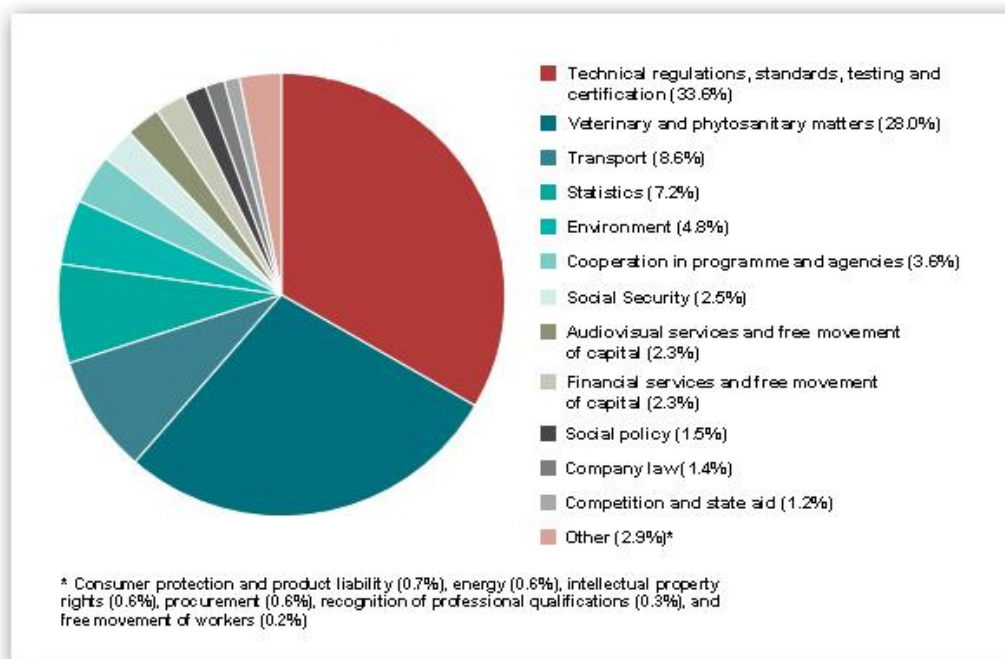


Figure 20: Breakdown by policy areas of EU legal acts in the EEA Agreement: as of December 2010 (shares of the 4,179 incorporated acts in force). Source EFTA.

Nevertheless, despite the activity of the EU at global level, there is a perverse effect arising from globalisation. As more and more issues are addressed at global level, the EU is losing control over its own regulatory agenda.^{585,586} More than 80 percent of the EEA *acquis* (and therefore the EU's Single Market legislation) falls within the ambit of existing international organisations and is thus potentially amenable to global regulation (Figure 20 above).⁵⁸⁷

In terms of detail, over 33 percent of the *acquis* comprises "technical regulations, standards, testing and certification". Much of this is implemented through standards bodies which will eventually emerge as ISO standards (about which we have more to say at the end of this section). Another 28 percent of the *acquis* comes into a category defined as "veterinary and phytosanitary matters". This includes compositional standards for food and food safety. It is there that the hidden hand of globalisation is at its most powerful.

<http://ec.europa.eu/social/main.jsp?langId=en&catId=706&newsId=2024&furtherNews=yes>, accessed 8 February 2014.

⁵⁸⁵ For a detailed treatment of this argument, see: North, Richard A E, *The Norway Option, Re-joining the EEA as an alternative membership of the European Union*. The Bruges Group, November 2013.

⁵⁸⁶ Norwegian Ministry of Foreign Affairs, Meld. St. 5 (2012–2013) Report to the Storting (White Paper), The EEA Agreement and Norway's other agreements with the EU, http://www.regjeringen.no/upload/UD/Vedlegg/Europa/nou/MeldSt5_UD_ENG.PDF, accessed 21 December 2013.

⁵⁸⁷ EFTA, The European Economic Area and the Single Market 20 years on, <http://www.efta.int/sites/default/files/publications/bulletins/EFTA-Bulletin-2012.pdf>. Accessed 21 December 2013.

9.2 The "hidden hand" of global governance

One of the reasons why this "hidden hand" is so rarely recognised stems from a lack of transparency by Brussels in declaring the international origin of they standards. Thus, when in September 2013 a Commission's programme to rationalise food labelling was interpreted by the media as an "EU plan" to prohibit the use of the Union flag on retail packs of meat.⁵⁸⁸

The programme was implementing *Codex Stan 1-1985* on country of origin labelling for packaged foods. Portions of the exact text were copied into the Regulation, thus assuming the identity of EU law.⁵⁸⁹ Even then, the Codex standard relied for its authority (often known as the "legal base") on the WTO Agreement on Rules of Origin.⁵⁹⁰ Yet neither was identified in the Regulation text - there was no distinction made between international and EU law.

A similar dynamic was a play during the furore over new "EU rules" banning from sale, "thousands of favourite British garden plants and flowers" (Figure 21 below).^{591,592} Unknown to the media, the EU was implementing standards initiated by the OECD, alongside UNECE and several other bodies.^{593, 594}

Another example came with Michelle "Clippy" McKenna, a small-scale manufacturer in Sale, Manchester, marketing jams made from home-grown Bramley apples. Because her products did not conform to British regulations, she was prevented from labelling them as jam.⁵⁹⁵ The regulations, however, implemented EU law so there was a classic EU "red tape" story in the making, heavily exploited by the media.^{596,597} Yet the originator of the standard was not the EU but the *Codex*.⁵⁹⁸

⁵⁸⁸ See: *Daily Express*, 17 September 2013, <http://www.express.co.uk/news/uk/430016/Fury-at-EU-plan-to-ban-Union-Flag-from-British-meat-packs>, accessed 4 December 2013. The story also appeared in *The Daily Telegraph*, the *Daily Mail* and many other newspapers.

⁵⁸⁹ Regulation (EU) No 1169/2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:EN:PDF> and <http://www.fao.org/docrep/005/y2770e/y2770e02.htm>, both accessed 25 November 2013.

⁵⁹⁰ http://www.wto.org/english/docs_e/legal_e/22-roo_e.htm, accessed 25 November 2013.

⁵⁹¹ See: *Mail on Sunday*, 16 September 2013, <http://www.mailonsunday.co.uk/news/article-2420839/European-Commission-bid-ban-gardeners-buying-British-plants.html>, accessed 4 December 2013.

⁵⁹² European Commission, COM(2013) 262 final, 6 May 2013, Proposal for a regulation on the production and making available on the market of plant reproductive material (plant reproductive material law), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0262:FIN:EN:PDF>, accessed 15 September 2013.

⁵⁹³ <http://www.oecd.org/tad/code/seeds.htm>, accessed 15 September 2013.

⁵⁹⁴ <http://www.unece.org/trade/agr/welcome.html>, accessed 15 September 2013.

⁵⁹⁵ Jam and Similar Products Regulations 2003.

⁵⁹⁶ Council Directive 2001/113/EC, <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2001/L/02001L0113-20040712-en.pdf>, accessed 3 December 2013.

⁵⁹⁷ See: *The Daily Telegraph*, 22 February 2012,

<http://www.telegraph.co.uk/foodanddrink/foodanddrinknews/9099121/Couple-left-in-a-jam-by-EU-regulations.html>, accessed 4 December 2013, and *Daily Mail*, 23 February 2012,

The Mail

ON SUNDAY

EU'S latest bloomer! Brussels bid to ban gardeners from buying favourite iris, lavender and clematis plants

- Popular British plants are at risk of being banned from sale at garden centres under new proposals
- New plans require each plant to be given a scientific description and be listed on an official register
- UK experts say proposal would be 'too expensive and take years to set up'



Figure 21: Online news report, *Mail on Sunday* 15 September 2013. The provision identified as an EU proposal actually stems from the OECD.

Furthermore, despite these standards being painted as restrictive or burdensome "red tape", they are mechanisms for facilitating trade. A national (or EU) standard that provides a greater level of protection than *Codex* is deemed to be a "trade barrier" unless the WTO decides that the stricter national standard is

<http://www.dailymail.co.uk/news/article-2104836/Clippys-Apple-Preserves-Clippy-McKennis-spread-doesnt-qualify-jam.html>, accessed 3 December 2013.

⁵⁹⁸ Codex Standard for Jams (Fruit Preserves) and Jellies – S tan 79-1981, See: http://std.gdciq.gov.cn/gssw/JiShuFaGui/CAC/CXS_079e.pdf, accessed 4 December 2013.

based on proper "risk assessment". This must demonstrate that the *Codex* instrument does not provide sufficient protection or that the country maintaining the stricter standard has other (valid) scientific justification.⁵⁹⁹

Thus, most technical food standards in the have been initiated by *Codex* and handed down for processing into EU law for adoption by Member States.⁶⁰⁰ Britain, though a member of *Codex*, implements its standards via the EU. Outside the EU, Britain would implement them directly, without using the EU as a middle-man. Apart from that, nothing much would change. By and large, we would still be applying the same standards and end up with the same laws.

Codex, in this respect, is by no means unique. The parent organisation, the Codex Commission (CAC), comes under the aegis of the UN Food and Agriculture Organisation (FAO), and is one of "three sisters" recognised by the WTO Sanitary and Phytosanitary (SPS) Agreement. The other two are the International Plant Protection Convention (IPPC) and the *Office International des Epizooties*, the international organisation for animal health.^{601,602} Respectively, they generate the "international regulatory framework for the protection of plants from pests" and standards which "ensure a safe and fair trade in animals and animal products world-wide".^{603,604} These "three sisters" account for 28 percent of the Single Market *acquis*.

As independent organisations, these are responding to the challenge of the SPS Agreement, particularly the OIE and the CAC. The OIE has established the Animal Production Food Safety (APFS) Working Group in 2002 in order to improve the coordination and harmonisation of their standard setting activities. Through this mechanism and through participation in each other's standard setting procedures, the OIE and Codex collaborate closely in the development of standards relevant to the whole food production continuum. Collaboration between occurs at the international and national level.⁶⁰⁵

International standards, though, do not all originate from formal institutions such as Codex. Some are generated by single issue, or sector-specific, organisations (or groups of organisations). One example is the convention on transboundary movements of hazardous waste. This started life as the Basel

⁵⁹⁹ CSPI International, The Impact of the TBT and SPS Agreements on Food Labelling and Safety Regulations, <http://cspinet.org/reports/codex/wtospst.htm>, accessed 9 February 2014.

⁶⁰⁰ http://ec.europa.eu/food/international/organisations/codex_en.htm, accessed 7 February 2014.

⁶⁰¹ http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm, accessed 4 December 2013.

⁶⁰² <http://ec.europa.eu/trade/wider-agenda/health/food-safety-and-health/>, accessed 4 December 2013.

⁶⁰³ http://ec.europa.eu/food/plant/strategy/docs/conf_280910_ana_peralta_summary.pdf, accessed 4 December 2013.

⁶⁰⁴ <http://www.oie.int/about-us/>, accessed 4 December 2013

⁶⁰⁵ OIE Contribution to the 22nd session of the Codex Committee on Food Import and Export Inspection and Certification Systems: http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-733-22%252FWD%252Ffc22_inf02e.pdf

Convention, hosted by an *ad hoc* body set up in response to a public outcry over exports of toxic waste to Africa and other developing countries. The convention entered into force in 1992 and was adopted by the EU, then to be incorporated into the EEA *acquis*.^{606,607}



Figure 22: Global centre of food standards and much else: the FAO headquarters office in Rome – sponsoring organisation of *Codex Alimentarius*. 1,847 professional staff are employed with 1,729 support staff; 55 percent are based at the headquarters. (photo: Wikipedia Commons)

Another example is the law on the classification, packaging and labelling of dangerous substances, which was originally defined by the EU for its own member states.⁶⁰⁸ In 1992, the legislative lead was transferred to the UN Conference on Environment and Development (UNCED), through which eventually emerged the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). The first version of the code was formally

⁶⁰⁶ <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>, accessed 12 December 2013.

⁶⁰⁷ . See Council Decision 93/98/EEC, and on 22 September 1997 through Council Decision 97/640/EC and Regulation (EC) No 1013/2006 ... on shipments of waste , http://europa.eu/legislation_summaries/environment/waste_management/128043_en.htm. Accessed 12 December 2013.

⁶⁰⁸ Council Directive 67/548/EEC, modified by several instruments up to and including Commission Directive 86/431/EEC. See:http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/121276_en.htm, accessed 12 December 2013.

approved in December 2002 and published in 2003.⁶⁰⁹ This, plus revised editions, has been adopted as EU law.⁶¹⁰ We will return to this in the context of "unbundling", as a means of reducing technical barriers to trade.

9.3 An example of the system in action

Rarely is it possible to see this global system in action but, from an interview with Norwegian veterinary official Bjorn Knudtsen, while he was attending a conference in Bristol, we were able to gain some insight into this largely invisible process of global standards formulation, in the context of Codex and one very specific area of activity.

Setting the scene had been the speech by Mr Cameron, asserting that the UK's place was at the "top table" in order to pursue our national interest, and that included the EU.⁶¹¹ "The fact is", he had said, "that it is international institutions, and in them, that many of the rules of the game are set on trade, tax and regulation". "When a country like ours is affected profoundly by those rules, I want us to have a say on them".

However, Knudtsen, a regional head of his country's Food Safety Agency, was also Chairman of the Fish and Fisheries Product Committee of *Codex Alimentarius*. To him, when it came to international rules on food designed to ensure public safety and fair trading, *Codex* was the "top table". Contradicting Mr Cameron's claim that – like Norway - we would be governed "by fax" from Brussels if the UK left the EU, Knudtsen pointed out that Norway – at least in his area of speciality – was not governed in this way, even though, paradoxically, most of the law covering fish and fisheries products did come from Brussels.

The paradox was explained by the way *Codex* works. Mr Knudtsen's 170-strong committee, with 50-60 countries most interested in seafood, had been established in 1963 and, with the active participation of the members, formulated the rules which the WTO accepted as the basis for trade. Increasingly, member states and trading blocs – such as the EU - were adopting *Codex* standards as the basis for their own regulations, and were gradually undergoing a process where existing regulations were being changed so that they matched Codex standards.

⁶⁰⁹ Globally Harmonised System of Classification and Labelling of Chemicals (GHS), United Nations, New York and Geneva, 2011, http://www.unece.org/fileadmin/DAM/trans/danger/publi/ghs/ghs_rev04/English/ST-SG-AC10-30-Rev4e.pdf, accessed 14 December 2013.

⁶¹⁰ Regulation (EC) No 1272/2008, http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/chemical_products/ev0013_en.htm, accessed 14 December 2013.

⁶¹¹ The "top table" reference came in a web report of the speech by the BBC, on 10 June 2013. See <http://www.bbc.co.uk/news/uk-politics-22839241>. However, the words do not appear in the official transcript of the speech, although the text does reflect that sentiment. See: <https://www.gov.uk/government/speeches/plan-for-britains-success-speech-by-the-prime-minister>, Both accessed 21 April 2014

Thus defined was a process where standards were generated by member states working with this international body, for adoption by *Codex*. Often the EU (as indeed did other trading blocs) promoted their regulations, trying to get them accepted as the *Codex* standard, but the dominant driver, Knudtsen maintained, was the science. This determined the nature of the standards adopted to protect public health and ensure fair trading practices.

A recognised disadvantage of the system, though, is its slowness. A draft regulation could take 6-8 years to go through the system until it was finally approved, usually by consensus. Although there was a complex voting system, votes are usually avoided as being divisive. If there was not complete agreement, the preference was to rework the draft until all parties did agree. And, at any point, a member state could veto a provision through an informal process or, formally, by calling for a vote.

When it comes to framing those rules, Norway is fully involved from the outset. It even paid approximately £250,000 a year to host the *Codex* fisheries committee in Oslo. That gave Norway no specific advantage, Knudtsen said, but he agreed that it gave them what might be called "situational awareness" – an early and better insight into what was going through the system.

Once the *Codex* standard had been agreed, a hierarchy was created. Knudtsen openly admitted – without the least hesitation – that *Codex*, and international bodies like it, form part of world governance. Global trade required global rules, and they produced them, handing them back to member nations and trading blocs such as the EU and NAFTA, as well as the Asian blocs. We thus have a situation where the EU takes the *Codex* standards and in turn uses them as the basis of its own rules for its members and the additional EEA members.

At no point in the development of rules affecting fish and fisheries products, therefore, was Norway a passive receiver of rules from Brussels. To assert that it was without "influence" is wrong. His country, said Knudtsen, was involved at every step of the process from inception to the final formulation of the rules. Brussels simply added the EEA "packaging" before passing it on. The route was Oslo, Brussels and then back to Oslo, the substantive issues having been agreed long before the standard formally reached the EU. Norway never felt that the rules had been imposed on her.

9.4 The role of the World Trade Organisation

Those unfamiliar with the processes of globalisation sometimes believe that the adoption by the EU of *Codex* standards, and standards from similar organisations, is voluntary. That is not the case or, more accurately, no longer the case.

What gives international organisations their power is the WTO Technical Barriers to Trade (TBT) Agreement, ratified by the EU in 1994.⁶¹² Article 2.4 requires of parties to the agreement to use relevant international standards in preference to their own.⁶¹³ This is not optional – the Agreement uses the word "shall" (Figure 23 above). The SPS Agreement, adopted at the same time, has similar effect, with Article 3 stating that – apart from defined exemptions - "Members shall base their sanitary or phytosanitary measures on international standards".^{614,615}



Figure 23: Article 2.4 of the WTO Agreement on Technical Barriers to Trade. In time, this could be the redundancy notice for the EU's version of the Single Market. As more and more international standards are drawn up, the EU is obliged, as party to the Agreement, to use them, replacing its own laws. Eventually, the bulk of the Single Market *acquis* will comprise these international standards.

⁶¹² European Commission, Adoption of the WTO agreements, Council Decision 94/800/EC of 22 December 1994: http://europa.eu/legislation_summaries/external_trade/r11010_en.htm, accessed 30 December 2013.

⁶¹³ See: WTO, Agreement on Technical Barriers to Trade, Art 2.4, http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm; and WTO, Technical Information on Technical barriers to trade, http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm, all accessed 30 December 2013.

⁶¹⁴ https://www.wto.org/english/docs_e/legal_e/15-sps.pdf, accessed 9 November 2015.

⁶¹⁵ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=1385>, accessed 9 November 2015.

As is evident from the SPS Agreement, many of the standards-setting organisations, such as *Codex*, come under the aegis of the United Nations and work in association with the WTO. There are also many informal bodies which contribute to the standards-setting process. They are supplemented by national and international trade associations and standards organisations, with the ISO, already briefly mentioned, managing standards-setting at a global level – of which we will see more later.⁶¹⁶

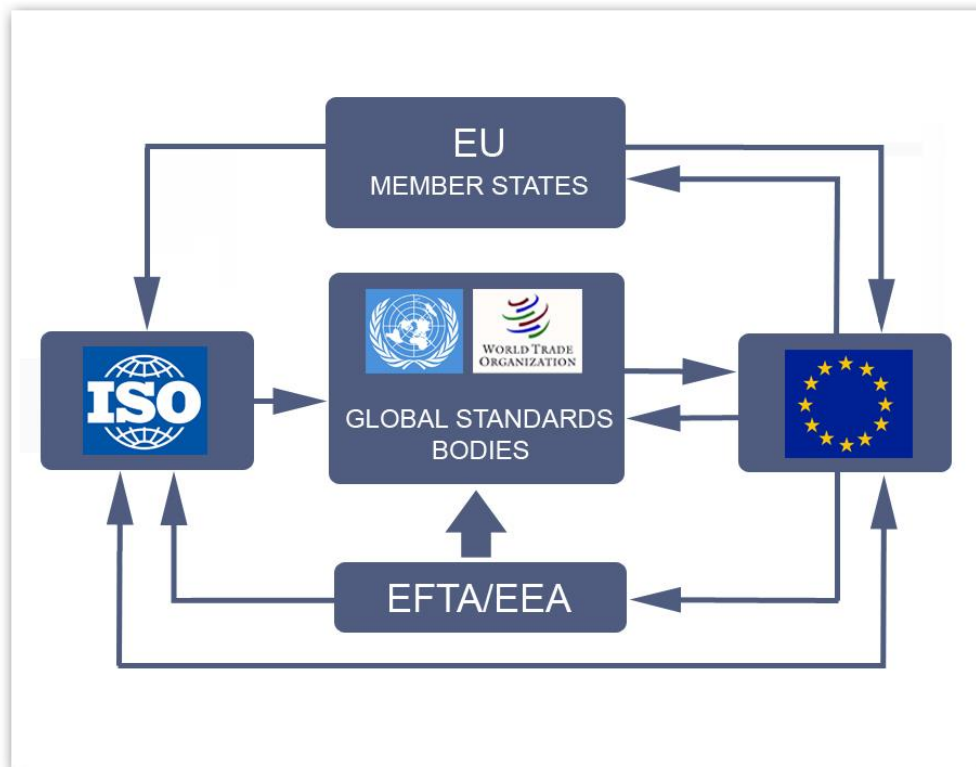


Figure 24: Single Market standard-setting: a simplified flow. Global bodies receive multiple inputs, but EU Member States work through the EU, while EFTA/EEA members are able to negotiate directly with the global bodies.

The collective output of these bodies is not statute law, but the root of an expanding body of "soft" law, often termed "quasi-legislation". Requiring two bodies (at least) for its implementation, such law has been termed "dual-international quasi-legislation", abbreviated to "diqule". To take effect, it must be turned into legislation and embedded in an enforcement and penalty framework.

Rather than initiating its own legislation, processing standards originated elsewhere is increasingly becoming the main activity of the EU. As the TBT Agreement bites, international bodies become the originators, the "manufacturers", so to speak. The EU has become the processor, wholesaler and distributor.

⁶¹⁶ <http://www.iso.org/iso/home.html>, accessed 30 December 2013.

This has very significant implications for a post-exit Britain. As part of EFTA/EEA, it will still be implementing law "done at Brussels" but, in terms of origination, it is in a position to by-pass the "middle man" and go directly to source (Figure 24 below).

This illustrates the EFTA/EEA states feeding directly into the global standards bodies (illustrated by the thick arrow), and such organisations as the ISO, with the standards generated then being passed to the EU for processing into actionable laws. On the other hand, in terms of legislative authority, there is no direct communication between EU member states and the global standards bodies. Formal communications and voting power is routed via the EU.

9.5 ISO – an arm of global governance

As regards the standards for products and (increasingly) services, it is these that not only define the Single Market but also underpin the entire global trading system, not least the WTO multilateral trading regime.

Major generators of these Single Market rules are the national standards organisations which act singly and in concert to devise and approve standards for equipment, machines, chemicals and a huge range of products and devices. The negotiations between these bodies give rise to harmonised national standards and then international standards, which are then absorbed into legislative codes, incorporated in national and EU law.

In Norway, the national standards organisation is Standards Norway (*Standard Norge*). It takes responsibility for all standardisation areas except for electrotechnical and telecommunication issues, and represents its country in the European Committee for Standardisation (CEN) and the International Organisation for Standardisation (ISO). The ISO itself claims responsibility for international standards which “ensure that products and services are safe, reliable and of good quality”, helping companies “to access new markets, level the playing field for developing countries and facilitate free and fair global trade”.

In Norway, over 2,000 voluntary experts from the business community, the public authorities, and employee and consumer organisations participate in this international standardisation work. The voluntary input of resources is estimated at approximately CHF 27 million.⁶¹⁷

The ISO itself is based in Geneva, Switzerland. It is not a formal treaty body but a voluntary organisation made up from members in 162 countries and 3,368

⁶¹⁷ http://www.iso.org/iso/home/about/iso_members/iso_member_body.htm?member_id=1994, accessed 12 May 2014,

technical bodies. It is described as a Transnational Private Regulator (TPR).⁶¹⁸ Members meet annually at a General Assembly to discuss ISO's strategic objectives and the organisation is coordinated by a 150-strong central secretariat based in Geneva. Since its establishment in 1946, it has promulgated 19,500 standards covering almost all aspects of technology and business, from food safety to computers, and agriculture to healthcare.⁶¹⁹

It produces what are known formally as International Standards, which cover most aspects of technology and business.⁶²⁰ These in turn drive European Standards devised by the three recognised European Standardisation Organisations (ESOs): the European Committee for Standardisation (CEN), the equivalent in the electrical and electronic sphere, CENELEC, and the European Telecommunications Standards Institute (ETSI).

Collectively, these ESOs are "a key component of the Single European Market". They are involved in a "successful partnership" with the European Commission and the EFTA. They support European legislation in helping the implementation of the European Commission directives, particularly those developed under the New Approach.⁶²¹

As an integral part of what is termed the standards community, Norway thus has a significant role developing Single Market rules, equal with any other EU Member State. The UK, with its own British Standards Institute, also takes part in the development and approval of Single Market rules, work which would continue unchanged if the UK decoupled itself from the political elements of the EU and focused on trade issues through the EEA.

An example of the role of standard setting bodies emerged in April 2014 when (then) Conservative MP Douglas Carswell wrote in a newspaper blog of the EU's Single Market and its rules and regulations. Far from "opening up Britain for business", he declared, "rules that take effect on 1 July this year threaten to shut down dozens of steel fabricators across the country".⁶²² EU regulation, brought in under the auspices of the single market, he complained, meant that perfectly good, reliable and safe steel fabrication firms "will soon only be able to fabricate steel if they comply with regulations". Fail to tick the boxes, regardless of any other consideration, and you cannot fabricate steel.

The legislation in question was the EU's Construction Products Regulation, which brought in a requirement for CE marking of steel construction

⁶¹⁸ For a discussion of this concept, see: http://aei.pitt.edu/36811/1/ceps_1.pdf and http://sna.gov.it/fileadmin/files/ricerca_progetti/Ricerca_1_Cafaggi_Pistor.pdfm, both accessed 24 April 2015.

⁶¹⁹ <http://www.iso.org/iso/home/about.htm>, accessed 25 April 2014.

⁶²⁰ <http://www.iso.org/iso/home/about.htm>, accessed 12 May 2014.

⁶²¹ <http://www.cen.eu/cen/products/en/pages/default.aspx>, accessed 12 May 2014.

⁶²² Europe's single market is strangling British businesses, 24 April 2014, *The Daily Telegraph*, <http://blogs.telegraph.co.uk/news/douglascarswellmp/100268084/europes-single-market-is-strangling-british-businesses/>, accessed 25 April 2014.

products.⁶²³ However, Recital 18 of the Regulation identified the basis of the standards as the (CEN) codes, ostensibly developed for application in EU member states.

Of crucial concern, though, these so-called Eurocodes were not formulated in isolation, at an EU-level, but in association with the ISO, giving them global application. This was not accidental. The cooperation arose as a result of the Vienna Agreement of 1991, where the EU (through CEN) recognised the primacy of International Standards (stipulated notably in the WTO Code of Conduct), as set out by the ISO, and agreed to co-ordinate its standards with those of the ISO.⁶²⁴ Effectively, this situation renders the ISO, in hierarchical terms, superior to the European bodies.

Cooperation with IEC

A similar arrangement prevails with CENELEC, which enjoys close cooperation with its international counterpart, the International Electrotechnical Commission (IEC). Created in 1906, the IEC is the world's leading organization that prepares and publishes International Standards for all electrical, electronic and related technologies collectively known as "electrotechnology". In principle, most IEC standards are implemented as European and national standards in Europe.

In order to facilitate a consensus-finding process between European and international standards development activities in the electrical sector, CENELEC and IEC formalised the framework of their cooperation through the signature of an 'agreement on common planning of new work and parallel voting', known as the Dresden Agreement.

The Dresden Agreement

The Dresden Agreement, which was signed in 1996, was drawn up against the background of avoiding duplication of effort and reducing time when preparing standards. As a result, new electrical standards projects are now jointly planned between CENELEC and IEC, and if possible most are carried out at international level. This means that CENELEC will first offer a New Work Item (NWI) to its international counterpart. If accepted, CENELEC will cease working on the NWI. If IEC refuses, CENELEC will work on the standards development and its content, keeping IEC closely informed and giving IEC the opportunity to comment at the public enquiry stage.

⁶²³ Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0005:0043:EN:PDF>, accessed 25 April 2014.

⁶²⁴ Agreement on technical co-operation between ISO And CEN (Vienna Agreement), http://boss.cen.eu/ref/Vienna_Agreement.pdf, accessed 25 April 2014.

The Dresden Agreement also determines that CENELEC and IEC vote in parallel during the standardization process. If the outcome of the parallel voting is positive, CENELEC will ratify the European standard and the IEC will publish the international standard.

This close cooperation has resulted in some 75 percent of all European standards adopted by CENELEC being identical or based on IEC standards. This high proportion of aligned standards provides an indicator to the excellent consensus-based way of working CENELEC and IEC have developed and are continually building on. It provides a further indicator of how the implementation of the WTO TBT Agreement is facilitated and provides global access.⁶²⁵

The implementation of the WTO's TBT Agreement, together with the Vienna and Dresden Agreements, creates a situation where European standards bodies become subordinate to the ISO. Where standards are adopted as an integral part of any legislation, and equivalent ISO standards exist, the EU is obliged to adopt the ISO version. This is challenging the EU's legislative monopoly. It no longer has complete control over the standards-making process.

Currently, the EU is updating its own standards to meet all relevant ISO standards. There is some considerable advantage in this. Conformity with ISO standards gives EEA products and services (where relevant) access not only to the European but to the global market.

9.6 International Regulatory Cooperation (IRC)

Although the various elements of international cooperation tend to be diffuse and difficult to classify, the OECD has sought to bring a degree of coherence to the subject, by defining eleven separate mechanisms in what it classifies as International Regulatory Co-operation (IRC). These mechanisms range from the formal and comprehensive to the informal and partial.⁶²⁶ At one level, there is harmonisation through rule-making by supranational or joint institutions such as the EU.

There are treaties between states, regulatory "umbrella" partnerships such as the Canada-US Regulatory Cooperation Council; and intergovernmental organisations such as the ILO, OECD and WTO. Other mechanisms include: regional agreements on regulation such as APEC and UNECE; mutual recognition agreements; transgovernmental networks such as the Basel Committee on Banking Supervision; national requirements to consider international standards; incorporation of international standards in national law;

⁶²⁵ <https://www.cenelec.eu/aboutcenelec/whoweare/globalpartners/iec.html>, accessed 19 April 2016

⁶²⁶ http://www.keepeek.com/Digital-Asset-Management/oecd/governance/international-regulatory-co-operation_9789264200463-en#page1, accessed 26 April 2015.

soft law instruments; and dialogue/information exchange among regulators and stakeholders (see Figure 25 below).⁶²⁷

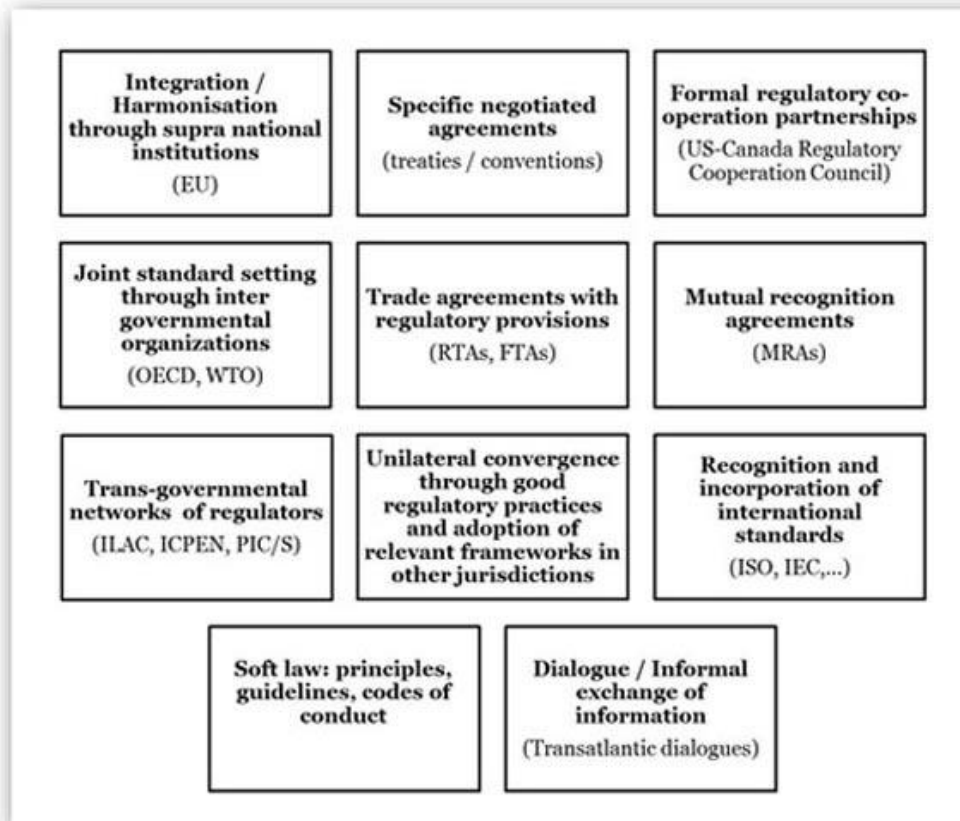


Figure 25: OECD typology of International Regulatory Cooperation mechanisms.

The UK government is fully aware of the extent of IRC and has its development agency, DfID, describe it as "the range of institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule making and implementation, subject to the constraints of democratic values such as accountability, openness, and sovereignty".⁶²⁸

In particular, it notes that, for large or more advanced economies (or regional blocs), harmonisation might prove difficult as both parties have usually already developed a complex set of advanced standards and regulations. When large trading partners seek a reduction in their bilateral regulatory barriers to trade, it thus concludes, mutual recognition of existing standards may be an easier and better way forward. However, whenever possible, rather than developing competing and often incompatible regional standards, using global standards is the best option.⁶²⁹

⁶²⁷ *Ibid.*

⁶²⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32467/12-533-regulatory-cooperation.pdf, accessed 26 April 2015.

⁶²⁹ *Ibid.*

The OECD mechanisms are also recognised by the US government, with President Obama on 1 May 2012 having signed an Executive Order, promoting international regulatory cooperation.⁶³⁰ This had followed a Memorandum to promote US exports and trade through increased transparency and openness in the rulemaking process, issued the previous year by the Office of the United States Trade Representative (USTR) and the Office of Information and Regulatory Affairs (OIRA).⁶³¹

These mechanisms have already been given effect with a Joint Statement on 4 February 2011 from Canada's Prime Minister Stephen Harper and US President Barack Obama, creating the Canada-United States Regulatory Cooperation Council (RCC). This subsequently issued an Initial Joint Action Plan on 7 December 2011.⁶³² That was strengthened in August 2014, with the publication of a definitive plan, setting out major new areas of cooperation.⁶³³

This and other examples demonstrate that there are a variety of ways of seeking the same end, beyond the rigid EU model of regulatory harmonisation, effectively allowing that there is a multi-faceted "toolkit" available to the global community. For the UK, the Single Market may be the ultimate example of regulatory cooperation, but it is by no means the only one. By adopting all and any of the OECD IRC mechanisms, it has much greater flexibility to achieve its desired ends, than by working through the EU.

9.7 The UK's global role

Unless agreement is reached to the contrary, a direct consequence of the UK's newly-found freedom would be separation from the EU's global activities. The official position, as it stands, however, is that the UK gains from working at the international level, within the context of the EU.

The belief is that to have a position expressed by a single body on behalf of all the 28 Member States carries greater weight than if those states acted individually. This is said to apply particularly to those challenges which have an impact globally, for example climate change, and which are addressed through universal membership bodies such as the UN Framework Convention on Climate Change (UNFCCC).

On the basis that a continued close co-operation on an international stage could be advantageous to the UK (and the EU), there is an argument to be made that

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https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf, accessed 26 April 2015.

⁶³¹ <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-23.pdf>, accessed 26 April 2015.

⁶³² <http://www.trade.gov/rcc/documents/rcc-progress-report-release.pdf>, accessed 26 April 2015.

⁶³³ <https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf>, accessed 26 April 2015.

the UK should seek formal cooperative arrangements with the EU, to allow the two bodies to work as a single entity in certain fields. Climate change might be one such.

However, there is general agreement that the EU does not perform a useful role at global level. British representatives of the maritime industry, for instance, thought that the Commission's representation at the IMO actually interfered with the UK's ability to act effectively, especially as the EU often sought to "Europeanise" global standards by adding its own requirements. As a global industry, they felt, shipping should be regulated at the global level, without sub-regional add-ons.⁶³⁴

The UK Chamber of Shipping felt that there was no advantage in the EU having a greater say in IMO under the present circumstances or in the foreseeable future. Lloyd's Register said that the EU was not a "flag"; the Commission did not have international treaty obligations to treaty parties in the maritime world. The UK is a "flag" and does have international treaty obligations. Thus, while the European Commission may take decisions "for the good of the Union", the practical consequences fall on the flag states. Those states, it was considered, rather than the Union, should make the decisions.⁶³⁵

Furthermore, it was found that the Commission's attempts to forge common positions in IMO negotiations were often counterproductive, making it harder to achieve desirable outcomes. The EU was looking after its own interests while individual Member States were trying to work with a broader range of IMO member nations towards agreed and workable international rules. They took the view that the EU should not seek to augment rules agreed internationally. Creating slightly different regional EU rules could lead to a loss of competitiveness in the global market.⁶³⁶

Even then, EU officials were not felt to have sufficient expertise in technical areas and should therefore be prepared to be guided by Member States and industry stakeholders. One participant at a workshop in Brussels commented that putting forward bloc views to a technical body like the IMO risked politicisation of the debate and could detract from the quality of technical decision-making because an open exchange of views based on technical and expert opinion is curtailed.

Some industry members thus found it difficult to identify any benefit for the UK in the event of either the EU having a greater say in negotiating international agreements at the IMO, or greater coordination of Member States'

⁶³⁴ Review of competences,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278966/boc-transport.pdf, accessed 3 May 2014, pp. 34-35.

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

positions.⁶³⁷ In effect, the action of the EU in interposing itself between member states, or representing them in negotiations, was not helpful.

As a result, maritime industry stakeholders were unhappy about the European Commission representing all EU Member States in either the IMO or ILO. As with the Norwegians on their *Codex* committee, they took the view that member states were more effective when acting individually. As long as the EU was not a sovereign state, the UK should take the position that negotiations on global bodies between sovereign states should exclude the EU.

Some of the problems stemmed from the fact that the European Commission only had observer status at the IMO. Membership of such bodies generally comprised sovereign states, and the EU could not qualify for membership without these organisations changing their constitutions. This aspiration was currently unrealistic and was not supported by industry – and therefore was unlikely to happen. No short-term improvement could thus be anticipated.

This industry sector, therefore, suggests that there are occasions when the UK is better off in the international arena as an independent player. Post-exit, it might be better advised not to seek a long-term relationship with the EU on international bodies. Arguably, it should be robust, not only in maintaining an independent position, but also in seeking to restrain EU influence on such bodies, unless it is tactically appropriate to allow it to play a part. However, this should not preclude the UK forming *ad hoc* alliances with the EU.

For its model as to how it can relate to the global system as an independent player, the UK can look to Norway, which – as the *Codex* example illustrates – is a skilled exponent of the global system. Notwithstanding its EFTA/EEA membership, it is able to exert considerable influence on its own account. In some respects, the Norwegians have far more power over the regulatory agenda than the UK. On global councils, they have equivalence with the EU. But, if the UK is to prosper – with its more complex economy and greater resources – it needs greater levels of participation than EFTA states. It will need to sit on a much wider range of committees and working parties, and take part in far more conferences than are attended by EFTA/EEA members.

The extent and nature of this commitment is rarely recognised. Even in 1980, the Brandt Commission had noted "the very large number of international meetings", estimating about 6,000 every year in New York and Geneva – the two main centres of UN activity. The connected documentation, then about a million pages a year, put an enormous burden on member governments, particularly on smaller ones when they tried to contribute effectively to international co-operation.⁶³⁸

⁶³⁷ *Ibid.*

⁶³⁸ Brandt Commission (1980), *North-South: a programme for survival*. Pan Books, London., p.260.

Now, international meetings have become big business. Outside the official UN and national government buildings, what are known as "international association meetings" reached 10,070 in 2011 (up from 9,120 the previous year), with venues ranging from Vienna, holding the position at number one, to Paris, Barcelona, Berlin, Singapore and Abu Dhabi.⁶³⁹

Servicing these meetings is resource-intensive, requiring skilled personnel, good secretarial and logistic support, and is costly in terms of travel, accommodation and general expenses. It is sensible, therefore, to share the burden with like-minded countries, in which context a UK as part of EFTA might rely on its partners to represent it on some issues. Reciprocal agreements could be mutually beneficial where there are common interests and objectives.

As it stands, much of the UK's liaison with global bodies and the negotiations are managed by the Commission and the EU's external services. A co-ordinated hand-over will, therefore, be required, with an agreed transitional phase to allow smooth continuation of work in progress.

⁶³⁹ <http://www.dcb.ae/images/edutools/5thIndustryTrendsReport.pdf>, accessed 11 June 2014.

10.0 UNECE

In many instances, EU action needs to be seen in the context of international arrangements at the UN Economic Commission for Europe (UNECE). For example, a 1958 UNECE agreement has been effective as the main international framework for the harmonisation of vehicle technical standards at the international level and recent regulatory developments at the EU level have seen Directives replaced with a number of UNECE Regulations.

HM Government

Review of the balances of competences between the EU and the UK, Transport, February 2014.⁶⁴⁰

Returning to the bigger picture, in the third and final chapter of this phase, we take another look at the initial exit settlement. In so doing, we need to recall that it provides only a short-term framework for structuring trade relations with the EU. From the very outset we have recognised that this is not a stable, long-term solution. As long as the European Union takes pole position in defining the trading rules and much else for the whole region, the centre of power is in Brussels. Any country not within the Union is at a disadvantage.

Even within the EU, there are different levels of commitment, with the inner core defined as the eighteen eurozone members in what is often described as a Europe of concentric circles.⁶⁴¹ The non-eurozone Schengen and then non-Schengen members are described as the outer core zone, while accession countries and EEA members are part of the "periphery". Neighbours are known as the "outer periphery".

This image of concentric circles conveys the reality of an EU-centric Europe, where those furthest from the centre have least power. This was an image endorsed by Romano Prodi, former European Commission president, in an

⁶⁴⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278966/boc-transport.pdf, accessed 3 May 2014.

⁶⁴¹ See, for instance: Frank Schimmelfennig, Center for Comparative and International Studies, ETH Zurich, Circles and Hemispheres Differentiated integration in and beyond the European Union, EUSA Conference, Baltimore, May 2013, http://euce.org/eusa/2013/papers/9a_schimmelfennig.pdf, accessed 11 July 2014.

interview for the BBC Radio 4 Today programme in July 2014.⁶⁴² The thrust of Prodi's remarks was that Britain was "losing weight" in Brussels, its former "high level of power" diminished. "To have less power in Brussels is to defend less and less your national interests", he said. Asked about alternative arrangements, such as Britain leaving the EU and making a free trade agreement, Prodi's view was: "As you did with the euro, you can be out on the periphery ... if you are interested in a looser relationship with Brussels, you will get less and less power". The problem, he averred, was that, "you will not be in the core but the periphery".

10.1 Breaking away from Brussels

This problem is inherent in most of the alternatives to European Union membership, which has blighted the European question from the very earliest days of the EEC. A peripheral "association" agreement was mooted in Britain in 1963, after de Gaulle's first veto of Britain's membership application. This was rejected by Edward Heath. His grounds were that an economic association "would not enable Britain to take any part in shaping the Community's policies and the Government should be wary of being enticed into so weak a position".⁶⁴³

In 1968, following de Gaulle's second rejection of Britain's application, several more alternatives to full membership were suggested, including the so-called Benelux proposals delivered in the Benelux Memorandum of January 1968. It called for consultations between Britain and the Community and for joint action in fields outside the scope of the Community.

There was also the Harmel Plan, named after the then Belgian Foreign Minister, M. Harmel, who on 21 October 1968 used the forum of the Western European Union (WEU) meeting in Rome to suggest closer co-ordination, particularly of foreign and defence policies. Meanwhile, the Council of the EEC was examining the possibility of a "trading arrangement" between the Community and other countries, with a possible alignment between the EEC and EFTA, reflecting an idea first put forward in a Franco-German declaration in February of that year.⁶⁴⁴

Each of these ideas shared the same inherent weakness: the UK was outside the core and excluded from the decision-making processes. More than forty years

⁶⁴² An account of the interview was furnished by the Press Association and published on the Mail online website, 3 July 2014, <http://www.dailymail.co.uk/wires/pa/article-2679038/BITAIN-S-EU-INFLUENCE-DIMINISHED.html>, accessed on the day of broadcast. The narrative is based on this report and from notes taken by the author on listening to the interview recording.

⁶⁴³ Stephen Wall, *Official History of Britain and the European Community*, Volume II, p.28.

⁶⁴⁴ Multiple sources attest to the existence and development of these options, but a good overview of the state of the art can be gained from Lord Carrington's speech to the House of Lords on 5 November 1968. See:

http://hansard.millbanksystems.com/lords/1968/nov/05/address-in-reply-to-her-majestys-most#S5LV0297P0_19681105_HOL_125, accessed 25 August 2014.

later, the same weakness manifests itself. For instance, when a group of European think-tanks in 2013 published a proposed draft treaty to take the European Union on from the Lisbon Treaty, which they called "A Fundamental Law of the European Union", they defined the new status of "Associate Member", whereby states could take part in specific policies of the EU – such as the single Market – without committing to the full *acquis*.⁶⁴⁵ This would accord a position of less power and influence to those states which adopted this status.

This associate membership harps back to the 1963 idea, again inviting a fear of being "enticed into so weak a position", the very same that has so far precluded the UK from seeking alternative arrangements. The UK regards a position on the periphery as unattractive, generating - as is evident from David Cameron's position – an insistence that the UK keeps its seat at the "top table".

One possible option would be to create an alternative and rival power base, as did the UK in 1960 with the establishment of EFTA, comprising the seven countries, Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. This was when it was not actually considering membership of the EEC, but because the members were relatively weak economically, compared with France and Germany, they were often referred to as the "Outer Seven", as opposed to the "Inner Six" of the EEC.⁶⁴⁶

Nevertheless, there is little appetite for setting up a rival to the EU amongst most countries, although deteriorating relations between Russia and the EU over Ukraine does mean that Russia is no longer seeking closer trading relations with EU member states and nor is it likely to support EU-led initiatives.

On the other hand, some EFTA members are keen to renegotiate the EEA agreement, and it is possible that negotiations might bring Switzerland back fully into the fold, creating something of a return to the 1960s structure. The overall object, though, would not be to develop a wholly independent structure, but simply to achieve better terms in any deal with the EU. A new EFTA-EU relationship, therefore, would still put its members in a subordinate position, in the outer circle with Brussels still in the central, dominant position, perpetuating the idea of a Europe of concentric circles.

Despite this very obvious handicap, the "No to EU" coalition in Norway would welcome this development. There is considerable antipathy towards the Agreement and an aspiration to replace it with a free trade agreement.⁶⁴⁷ Here, British membership of EFTA is seen as increasing the negotiating power of the

⁶⁴⁵ <http://www.pdf-archive.com/2013/10/29/fundamental-law-final-en/fundamental-law-final-en.pdf>, accessed 3 July 2014 (Art 137, p.93 and Protocol No 9, p.284).

⁶⁴⁶ http://en.wikipedia.org/wiki/European_Free_Trade_Association, accessed 4 July 2014.

⁶⁴⁷ The Alternative Report: Alternatives To The Current EEA Agreement, Oslo, 9 March 2012, www.neitleu.no/content/.../2/file/Alternativrapporten+Engelsk+02.pdf, accessed 21 December 2013.

bloc. That position may be strengthened by other member states which may wish to leave the EU. In the context of Greece leaving the euro, it was argued that a departure from the single currency might trigger a re-alignment of eurozone countries, with perhaps the formation of a Northern core.⁶⁴⁸ Leaving the EU might have a similar effect on the EU as a whole.

One obvious candidate might be the Republic of Ireland, although its departure could be complicated by its membership of the single currency. Another possibility might be Denmark, which is slated as being amongst the most Eurosceptic of EU members. Sweden, Finland and the Baltic states might follow, joining with Switzerland to become part of the "EFTA-plus" grouping. It would consolidate its fourth place in the world trade league, with an overall trading volume of \$2,636bn (2011).⁶⁴⁹ Nevertheless, this still does not afford an optimal position, and there is a danger, as the separate organisation grew in stature, it could replicate old antagonisms and create new rivalries rather than fostering close co-operation.

As an alternative, the idea of an entirely new, pan-European organisation was recently offered by the Alliance of European Conservatives and Reformists. It proposed a European Common Market, based on the concept of a pan-European free trade area open to all states on the continent, including those within the EU. This left open the possibility of countries such as Britain being an associate member of the EU, while having fully sovereign parliaments (with control of their own borders).⁶⁵⁰

Previously, Dutch MEP Michiel Van Hulten had offered a European Area of Freedom, Security and Prosperity. It would comprise all EU and EFTA member states, as well as all existing EU candidate countries (including Turkey) and even Russia. The idea was a free trade area with a common foreign and security policy, adopting the EU's existing internal market rules after reviewing and, if necessary, amending them. It would co-operate on cross-border issues such as transport and the environment, but would have no role in education, social and taxation policy and justice and home affairs.⁶⁵¹

A drawback of such ideas is that they are still based on a Europe of concentric circles. The EU remains at the centre and the new grouping is on the periphery, those on the outer fringes assuming a subordinate or inferior status. This would be no more acceptable to the UK than any existing arrangements which cast it in a subordinate role. This makes it necessary to look at the bigger picture, looking for structures which avoid casting the UK in a subordinate role.

⁶⁴⁸ Leaving the euro: A practical guide, *op cit*.

⁶⁴⁹ WTO, online database, *op cit*.

⁶⁵⁰ Iain Martin, *The Sunday Telegraph*, 1 December 2013, "This is the Common Market Europe needs", <http://blogs.telegraph.co.uk/news/ianmartin1/100248497/this-is-the-common-market-europe-needs/>, accessed 1 December 2013.

⁶⁵¹ European Council on Foreign Relations, 22 November 2011, http://ecfr.eu/content/entry/commentary_to_get_out_of_this_crisis_we_need_to_rebuild_europe_from_scratch, accessed 21 December 2013.

Specifically, it requires a re-evaluation of the structures as a whole, and then to resolve the EU's legislative monopoly for the whole of Europe. The EU-centric nature of European trade policy, and much else, needs to be revisited.

10.2 Potential regional structures

Looking for a completely different architecture, that avoids being Brussels-centric, we find that one has existed in embryonic form as a hierarchical arrangement, since 1948.

It was then that Winston Churchill, with others, argued for the United Nations to be the "paramount authority" in world affairs, but with regional bodies as part of the structure. They would be "august but subordinate", becoming "the massive pillars upon which the world organisation would be founded in majesty and calm".⁶⁵² Effectively, a New World Order would comprise a hierarchy of three tiers – national, regional and global. In the European context, this would include all the nations in continental Europe.

While this might have been Mr Churchill's ambition for that moment, what has actually emerged is not a dominant regional but a sub-regional entity. This is the European Union, which has assumed the role and many of the powers of a regional entity, without actually being one.

However, on a Europe-wide basis, there are organisations which might potentially qualify as regional bodies. In fact, there are two. One is the Council of Europe and the other the UNECE. However, the Council of Europe is nominally a stand-alone grouping – an organisational cul-de-sac which was rejected by Monnet in favour of the European Union. UNECE, on the other hand, forms part of an existing hierarchical structure as one of five UN regional commissions.⁶⁵³ Established in 1947, it is based in Geneva and reports to the UN Economic and Social Council (ECOSOC). It has 56 members, including most continental European countries, Canada, the Central Asian republics, Israel and the USA. Its key objective is to foster economic integration at sub-regional and regional level.⁶⁵⁴

After a slow start, when it achieved little, UNECE is now responsible, *inter alia*, for most of the technical standardisation of transport, including docks, railways and road networks.⁶⁵⁵ With the United Nations Environment Programme (UNEP), it administers pollution and climate change issues, and hosts five environmental conventions covering issues ranging from

⁶⁵² Speech to the Congress of Europe, The Hague, 7 May 1948. The Churchill Society, <http://www.churchill-society-london.org.uk/WSCHague.html>, accessed 8 November 2013

⁶⁵³ The other four are: United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), Economic Commission for Latin America (ECLAC), United Nations Economic Commission for Africa (ECA) and United Nations Economic and Social Commission for Western Asia (UNESCWA).

⁶⁵⁴ http://www.regionalcommissions.org/?page_id=20, accessed 21 November 2013.

⁶⁵⁵ <http://www.unece.org/leginstr/trans.html>, accessed 2 December 2013.

transboundary air pollution to the Aarhus Convention.^{656,657} Its remit includes "sustainable housing" and agricultural quality standards.^{658,659} It is also a key body in the development of the global harmonised system (GHS) for the classification and labelling of chemicals.⁶⁶⁰



Figure 26: Although often attributed to the EU, vehicle construction standards are increasingly determined by UNECE in Geneva, with the EU adopting "UN Regulations" as its own. (photo: Wikipedia Commons)

Of great relevance here, the UNECE Transport Division provides a secretariat for the World Forum for the Harmonisation of Vehicle Regulations (WP.29), establishing a regulatory framework for vehicle safety and environmental impact.⁶⁶¹ Its work is based on two agreements, made in 1958 and 1998, the totality creating a legal framework whereby participating countries agree type approvals for vehicles and components. This is the basic legislation which permits vehicles to be used on the roads, without which they cannot be traded –

⁶⁵⁶ <http://www.unece.org/unece/welcome.html>, accessed 9 December 2013.

⁶⁵⁷ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. See: UNECE Environmental Policy, <http://www.unece.org/env/welcome.html>, accessed 2 December 2013.

⁶⁵⁸ <http://www.unece.org/housing-and-land-management/about-us/working-group-on-a-possible-framework-convention-on-sustainable-housing.html>, accessed 2 December 2013.

⁶⁵⁹ <http://www.unece.org/leginstr/agri.html>, accessed 2 December 2013.

⁶⁶⁰ http://www.unece.org/trans/danger/publi/ghs/ghs_welcome_e.html, accessed 24 December 2013.

⁶⁶¹ <http://www.unece.org/trans/main/welcwp29.html>, accessed 9 December 2013.

internally or across borders – and which permits the sale of safety-critical spare parts.

As far as the agreements go, there are currently 57 signatories, including the EU. Non-EU countries include the major vehicle manufacturing countries of Japan and South Korea.⁶⁶²

UNECE instruments, called "UN Regulations", permit mutual recognition of each member country's type approvals.⁶⁶³ As of 2012, there were 128 UN Regulations appended to the Agreements. Most cover a single vehicle component or technology.⁶⁶⁴ Importantly, the EU has transferred lead regulatory authority on vehicle standards to UNECE, allowing that, "only UNECE documents determine the applicable law".⁶⁶⁵ There is, therefore, "a very strong correlation between EU legislation and UNECE regulations", with the EU having stepped back from the role of originating standards for vehicle manufacturers in the territories of EEA member states. In fact, the role of UNECE is now built into the framework directive on type approval for vehicles and trailers, and automotive components.⁶⁶⁶

The role of UNECE is even recognised by the UK government. In a rare acknowledgement of the role of international bodies, it advises readers in its review of competences between the United Kingdom and the European Union, in the transport sector, that:

In many instances, EU action needs to be seen in the context of international arrangements at the UN Economic Commission for Europe (UNECE). For example, a 1958 UNECE agreement has been effective as the main international framework for the harmonisation of vehicle technical standards at the international level and recent regulatory developments at the EU level have seen Directives replaced with a number of UNECE Regulations.⁶⁶⁷

Yet standards harmonisation via UNECE is by no means confined to vehicle manufacturing. In the agricultural sector, the EU has made great play of abolishing 26 of the 36 specific marketing standards for fruit and vegetables, including the so-called "straight cucumber directive".⁶⁶⁸ However, replacement

⁶⁶² Council Decisions 1997/836/EC of 27 November 1997 and 2000/125/EC of 31 January 2000, http://ec.europa.eu/enterprise/sectors/automotive/files/unece/sec-2011-0689_en.pdf, accessed 27 November 2013

⁶⁶³ http://en.wikipedia.org/wiki/World_Forum_for_Harmonization_of_Vehicle_Regulations

⁶⁶⁴ Wikipedia, *op cit*.

⁶⁶⁵ European Commission website: Reference documents - Application of UNECE Regulations: <http://ec.europa.eu/enterprise/sectors/automotive/documents/unece/application/>, accessed 21 November 2013.

⁶⁶⁶ See recital 11, Directive 2007/46/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0046&from=EN>, accessed 13 November 2014.

⁶⁶⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278966/boc-transport.pdf, accessed 3 May 2014.

⁶⁶⁸ *The Daily Telegraph*, Bent banana and curved cucumber rules dropped, 24 July 2008, <http://www.telegraph.co.uk/news/worldnews/europe/2453204/Bent-banana-and-curved-cucumber-rules-dropped-by-EU.html>, accessed 2 June 2014.

regulations require produce to meet what are known as "general marketing standards" (GMS).⁶⁶⁹ These are not specified in detail by the EU, but products are deemed to comply if they conform to relevant UNECE standards.⁶⁷⁰ In other words, the EU has not abandoned detailed marketing standards at all. It has simply bumped them up to UNECE which has become the official standards-setting body, having even published its own cucumber specification.⁶⁷¹ For cucumbers to be traded freely throughout the EU – or imported into the customs union - they must conform to this standard.

The activities in the transport and agricultural sectors, plus activities in other sectors such as air and water pollution, indicate that UNECE is a body with considerable regulatory breadth. That it could be expanded to manage a Europe-wide single market, taking over from the sub-regional European Union, is not an unreasonable proposition. Creating an entirely new organisation might be considered reinventing the wheel. Logic suggests that a better option is to build on what already exists.

Working within the aegis of the WTO's TBT Agreement, UNECE could thus be equipped to coordinate the production of single market instruments for the whole of continental Europe, then administering the functioning of the market. It would replace the EU as the dominant body, thereby involving all European countries in the decision-making process, not just EU Member States.

This is perhaps an improvement on that offered by Lord Leach of Fairford, who has advocated attempting "to redefine the EU as the Single Market" rather than as "a vague aspiration to political union".⁶⁷² Such a scenario would conform with the Foreign Affairs Committee's idea of "radical institutional change" to give decision-making rights in the Single Market to all its participating states, on an equal footing.⁶⁷³ By this means, the EU-centric "Europe of concentric circles" would be avoided, and with it any idea of first class and second class members. Each body, such as EFTA and the EU, has equal standing, creating a community of equals.

10.3 UNECE – the hierarchical solution

Co-opting UNECE as the body responsible for the administration of the Single Market takes advantage of a hierarchical structure which is already a

⁶⁶⁹ Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011, laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:157:0001:0163:EN:PDF>, accessed 2 June 2014.

⁶⁷⁰ <http://www.unece.org/trade/agr/standard/fresh/ffv-standardse.html>, accessed 2 June 2014.

⁶⁷¹ http://www.unece.org/fileadmin/DAM/trade/agr/standard/fresh/FFV-Std/English/15Cucumbers_2010.pdf, accessed 2 June 2014.

⁶⁷² Open Europe Blog, *Lord Leach: EU reform is the best option, even for us sceptics*, 14 May 2013, <http://openeuropeblog.blogspot.co.uk/2013/05/lord-leach-eu-reform-is-best-option.html>, accessed 28 November 2013.

⁶⁷³ HoC, *The future of the European Union*, *op cit*.

component of the existing global framework (illustrated below in Figure 27). It thus removes entirely the idea of a Europe of concentric circles, where the EU is positioned at the core, with the peripheral bodies or nations seen in a subordinate or inferior position. Instead, it becomes a partnership of equals.

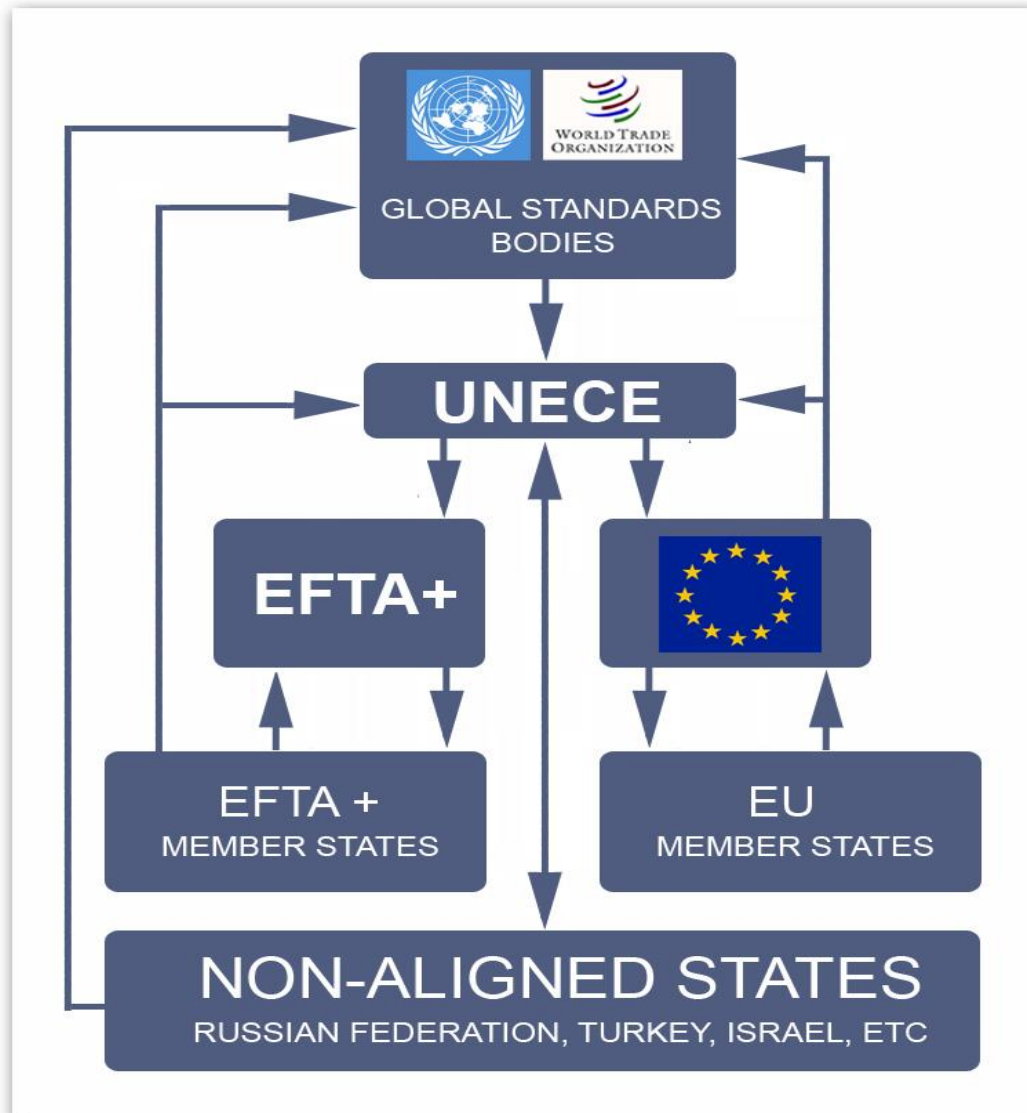


Figure 27: A pan-European single market based on UNECE as the co-ordinating body (simplified lines of communication shown).

Potentially, there are four levels, or tiers, although it should be stressed that the hierarchy represents an administrative structure, rather than a senior-subordinate relationship where the lines represent the flow of power. The authority and power remains with the member states, except where the sub-regional EU is concerned. By choice, its member states are represented at the higher administrative levels by the bloc to which they belong.

In terms of building the market, new standards may be initiated at any level but typically they might be generated by bodies such as Codex, through to non-

treaty entities such as the Basel Committee on Banking Supervision. They might have global effect or, if generated at a regional level, apply only to the European market. Either way, for standards to apply throughout the region, they would be recognised and processed by UNECE. As "UNECE regulations", they would be promulgated by the Economic Commission and then adopted at EU level for EU member states, and by national legislatures for other members. An EFTA+ secretariat may act as a co-ordinating body and a conduit for communication, perhaps using the modified two-pillar consultation structure developed under the EEA Agreement.

What is currently absent from the UNECE structure is a formal court, with nothing in any way comparable with the European Court of Justice or the EFTA Court. UNECE was host to the European Convention on International Commercial Arbitration of 1961, which informed the UNCITRAL Arbitration Rule, which was revised in 2010.⁶⁷⁴ International arbitration is a developing field and forms the basis of the controversial Investor-State Dispute Settlement mechanisms adopted for TTIP. One might expect, therefore, the parties to agree a form of dispute settlement specifically to deal with any enhanced UNECE agreement.

Not entirely through its own fault, but rather reflecting the almost complete ignorance of and indifference to its activities, UNECE remains virtually unknown to the wider public, to most of the media and the majority of British politicians. If it is to take on an expanded role, efforts need to be made to acquaint both the general public and legislators with its activities. This may require structural changes, with open meetings and a strong publicity effort.

The great strength of the option, though, is that it harnesses a process which is already taking shape, using existing structures without having to reinvent the wheel. Instead, we are accelerating and shaping a process which is happening and will continue to develop, with or without our input.

10.4 Preparing for a post-exit strategy

With the possibly of adopting UNECE as an overarching structure in mind, an entirely different shape to the Article 50 negotiations emerges. Instead of the exit agreement being regarded as the end point, with the settlement treated as the final word, parties should be asked to agree that the structures adopted are interim, with the Article 50 agreement being regarded as the first of a number of agreements.

Effectively, the exit settlement is kept in place for only as long as it takes for something better to be devised. Negotiators thus would be expected to put down a marker, to the effect that once the agreement has been concluded, new

⁶⁷⁴ See respectively: https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf and <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, both accessed 22 April 2014.

discussions should begin on the next of what might be several stages. That might in the first instance be the negotiation of a new EFTA/EU trade agreement to replace the EEA arrangements. However, that would merely be a precursor to negotiating a restructuring with UNECE and its members.

In this, UNECE becomes the standard-maker for a single market which covers the entire geographic continent of Europe, or wider if it is to embrace the entire 56-strong membership of the organisation. Standards are then couched in a similar manner to existing UNECE regulations, leaving each subsidiary organisation or member to implement them in accordance with their own arrangements.

Procedures may or may not require change. As it stands, decisions are made by consensus where possible. Where consensus cannot be reached, a vote is taken and a decision is approved by a three-fourths majority of the parties present and voting. That requires 37 votes, which thereby prevents either the EU or EFTA+ forcing a decision on their own, although it does allow the EU to block the approval of decisions. Such a position may be unacceptable, except that members may agree to a provision but may also opt out – whether they voted for or against - by not ratifying it. In such cases, provisions will only apply to members which have ratified them in accordance with their own constitutional procedures.⁶⁷⁵

This structure preserves the essential difference between the supranational EU and the intergovernmental UNECE.

10.5 A community of equals

In breaking the EU-centricity, and separating political integration from trade, the adoption of UNECE as the administrative body also restores political neutrality to trading agreements. Where the Association Agreement with Ukraine was seen as a "Trojan Horse" for political integration, UNECE-led initiatives have no political overtones. Notwithstanding political relations between, say, Russia and the European Union, trading agreements can proceed independently.

Because the relationship is based on geography rather than seeking political integration, there is no conditionality. Vexed matters such as freedom of movement are separated and access to the market no longer relies their adoption.

The regional aspects replace much of the EU's neighbourhood policy, eliminating some of the flaws that have been identified.⁶⁷⁶ Picking up on the phrase used earlier, the trading association under the aegis of UNECE becomes a community of equals. There is no sense of some nations being closer to the

⁶⁷⁵ UNECE Decision 2010/19 Rules of procedure,
http://www.unece.org/fileadmin/DAM/env/Irtap/conv/Rules_of_Procedure.pdf

⁶⁷⁶ Lehne, Stefan, Carnegie Endowment for International Peace, *op cit*.

centre than others, of there being an "inner circle" or periphery, and no privileged position where the EU is entitled to make decisions, from which other nations are excluded.

Trade, under these circumstances, should mean trade, rather than an opportunity for leverage, by which putative trading partners can be induced to accept other policies against the promise of being given access to European markets. Where conditionality is applied, often to achieve human rights or other objectives, it is regarded as an application of "soft power". In this, the EU sees human rights as universal and indivisible. By its own account, "it actively promotes and defends them both within its borders and when engaging in relations with non-EU countries".⁶⁷⁷ This is a deliberate policy which amounts to interference in the internal affairs of other nations.

Thus, while the application of "soft power" is an excellent diplomatic tool, it might be preferable to leave trade in goods and services out of the bartering. To avoid the extended and often unsuccessful negotiations that we are seeing, conditionality might be limited to direct externalities – such as the adoption of hygiene codes as a condition for trading in foodstuffs. In that event, the guiding ethos would be to avoid making such trade conditional on adoption of human rights or other matters not directly related to the trade in question.

Needless to say, there is no reason why there should not be permissible exceptions. For instance, the EU's "Anything But Arms" initiative – easing trade restrictions to less developed countries on all products except arms, or equipment used by police forces for public order purposes, is perfectly legitimate. Arms sales generally are made conditional on the acceptance of end use restrictions, while public order equipment might be made conditional on the adoption of human rights codes.

Problematically, though, such conditionality is often a matter of bilateral agreement, with one country (or bloc such as the EU) being seen to be imposing its mores or standards on its partners. A better approach might be to seek regional or global agreements governing, for instance, the sale of arms. That way, negotiating parties might agree to adopt the provisions of those codes, rather than have one party seeking to impose its particular standards on another.

For the UK, outside the EU, it is in a position to raise such issues and place them on the agenda at the United Nations (i.e., global) level. In all instances, the UK might best expend its efforts in brokering agreements between equals, to avoid the perception of more wealthy nations seeking to impose their demands on weaker partners. But that same provision also applies in relations between the UK and the EU. Any arrangement which casts the UK in a subordinate role, in relation to the EU or any of its member states, is simply not sustainable in the longer term.

⁶⁷⁷ http://eeas.europa.eu/human_rights/index_en.htm, accessed 27 August 2014.

PHASE FOUR

Restoring independent policies

11.0 Foreign and defence policy

Only strength can cooperate. Weakness can only beg.

Dwight D Eisenhower

The essence of Britain's departure from the EU is a celebration of nationalism, and a decisive rejection of supranationalism. Its status as a newly independent nation will permit a great deal of autonomy in terms of policymaking. In this and the following chapters that comprise phase four, we look at examples of key policies, and how they might develop in an independent UK. This is by no means an exhaustive list, but simply provides a snapshot, to illustrate the nature and extent of the task involved.

We start by looking at the way an independent foreign policy and the linked defence policy might emerge.

11.1 The European Union dimension

In EU terminology, "foreign policy" is designated as "external policies". Its strategies, instruments and missions are overseen by the European External Action Service, previously headed by Catherine Ashton, the High Representative for Foreign Affairs and Security Policy, and the European External Action Service. The establishment of her post and developments in the Common Security and Defence Policy were the two major innovations of the Lisbon Treaty.

The EU declares that it has four key aims: the support of stability; the promotion of human rights and democracy; seeking the spread of prosperity; and supporting the enforcement of the rule of law and good governance. By its own admission, the policy mix is vast, "ranging from bilateral agreements to guidelines and legislation".⁶⁷⁸

On its website, it lists no less than 31 policy areas, ranging from the Arctic Region, to "uprooted people", taking in Conflict Diamonds (Blood Diamonds - The EU & the Kimberley Process), "Green Diplomacy" and the environment, and the flagship Common Foreign & Security Policy (CFSP), the Middle East Peace Process, Nuclear Safety and Terrorism.

⁶⁷⁸ http://eeas.europa.eu/policies/index_en.htm.

As to the CFSP, it previously formed the second pillar of the old EU structure, implemented on an intergovernmental basis with most decisions taken unanimously by the Council of the European Union (formerly the Council of Ministers) or the European Council. The Treaty of Lisbon abolished the pillars, although the decision-making procedures were unaffected. The European Council is still the institution responsible for defining the general guidelines and strategies of the EU. On this basis, the Council of the EU is then responsible for developing and putting in place the implementing measures.

On matters relating to the CFSP, Member States and the High Representative for Foreign Affairs and Security Policy have a right of initiative. The High Representative exercises this right with the support of the Commission. In addition, the High Representative must regularly inform and consult the European Parliament on the implementation of the CFSP. In particular, the High Representative must ensure that the views of the European Parliament are duly taken into consideration.

While unanimity remains the general rule for decisions adopted by the Council and the European Council concerning the CFSP, the Treaty of Lisbon introduced a specific bridging clause applicable to the whole of the CFSP. Using this clause, the European Council may authorise the Council to act by a qualified majority to adopt certain measures. Exceptions are made for decisions with military implications or those in the area of defence. Apart from a few specific, technical areas, the ECJ has no jurisdiction over CFSP decisions.

The new Treaty does not make any changes to the financing of the CFSP: expenditure with military implications or in the area of defence is funded by Member States; all other expenditure is covered by the EU budget. The Treaty, however, introduces two new mechanisms to ensure rapid finance for the most urgent actions, one from the Union budget and the other from a start-up fund, financed by contributions from Member States.⁶⁷⁹

11.2 The need for realignment

British foreign policy is set out annually, currently in the 2013-14 FCO Annual Report, which has Britain pursuing "an active and activist foreign policy, working with other countries and strengthening the rules-based international system in support of values".⁶⁸⁰

In this, there is evident a strong element of self-delusion as the FCO continues to assert an independent role. It intends – or so it says - "to use its global

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http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0025_en.htm.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325896/FCO_Annual_Report_2013-14.pdf.

diplomatic network to protect and promote UK interests worldwide" and it also aims "to retain and build up Britain's international influence in specific areas in order to shape a distinctive British foreign policy geared to the national interest". It also intends to respond effectively to crises by maintaining a high state of crisis readiness. And despite increasing European integration, it is determined to continue "a strong, close and frank relationship with the United States that delivers concrete benefits for both sides". The essence of the policy, though, is to advance the British national interest "through an effective European Union policy in priority areas, engaging constructively while protecting our national sovereignty".

Other aspects included the delivery of more effective and modernised international institutions, particularly the North Atlantic Treaty Organisation, the European Union, the United Nations, the Organisation for Security and Co-operation in Europe and the Council of Europe. The FCO also wanted to strengthen the Commonwealth as a focus for promoting democratic values and human rights, climate resilient development, conflict prevention and trade.

Then it was to use "soft power" as a tool of UK foreign policy, promoting British values and human rights and contributing to the welfare of developing countries and their citizens. It would use the National Security Council as a centre of decision making on international and national security issues; strengthen the UK's relationships with emerging powers in a systematic way across Government to support UK prosperity and security; and use the G8 Presidency in 2013 to develop open economies, open governments and open societies and meet objectives on tax, trade and transparency.

From this comprehensive list, expressed as nine "bullet points" in the annual report, reference to the European Union is minimal, but significant, in terms of seeking to advance British interests through "effective European Union policy". Taken literally, that suggests that the EU is seen as a means by or through which British interests are advanced, which thereby sets the parameters for a post-withdrawal policy. Rather than working through the EU, the UK will need to revert to promoting its interests directly.

However, there is more to this than simply a change of form. To an extent, UK policies, without the means directly to implement them, cease to be ambitions and become merely aspirational. That is evident in terms of policy towards Syria. As expressed in the annual report – the policy is to "accelerate political transition" and "prepare for the aftermath", providing humanitarian support and minimising "the impact on the region". The policy also encompasses the avoidance of "major regional spill-over of the conflict" and "a reduced terrorist threat to the UK".⁶⁸¹

Pressure to achieve "political transition" (regime change by another name) has been exerted through the United Nations Security Council but this has been

⁶⁸¹ *Ibid.*

somewhat overshadowed by the emergence of ISIS (Islamic State of Iraq and Syria). Now that it has spread from its Syrian area of operations to Iraq, with claims of creating a "caliphate", it is evident, as the FCO report acknowledges, that: "We did not achieve our overarching policy goals in Syria".

In this, the United States is still considering direct military intervention in Syria against ISIS, and is already carrying out air strikes in the region, alongside the RAF and other air forces. These combined actions could have the unintended effect of preventing or slowing down political transition, thereby frustrating current UK policy objectives. The UK has the option, therefore, of maintaining an unachievable policy or changing it to conform to the new reality. And that effectively sets the paradigm for a post-exit foreign policy. Each aspect of current policy will need to be re-evaluated to ascertain which, under the new circumstances, are merely aspirational and which can be considered realistic ambitions. Aspirations can either be "parked" or changed, while ambitions can be pursued.

Policies as statements of ambition, of course, suggest the UK has the resources to implement them. In some cases, this has implications for defence spending, where military intervention is part of the resolution. However, current plans include the use of "soft power" as a tool of UK foreign policy, which we will explore later in this chapter. Suffice to say at this point that "soft power" – as with military power - requires co-ordinating efforts with allies and non-state actors including NGOs and major charities. Leaving the EU will doubtless require certain realignments, the need for which will emerge over time.

11.3 Levels of co-operation

Despite its independence, as its closest neighbours are EU member states and the EU represents a powerful trading and political bloc, there will be a need for Britain to continue working closely with the EU. That co-operation will tend to be structured at two levels. The higher level will be the *haute politique*, which traditionally encompasses foreign policy and defence but also now extends to "soft power" issues such as foreign aid and human rights. Then, at a secondary level, there will be the myriad of administrative relations concerning the nuts and bolts of neighbourly coexistence.

In the first instance, though, what takes on special importance is not the nature of the co-operation but the mechanisms which facilitate it. As an EU member, the UK enjoys countless opportunities for contact, but many of the links forged will be severed following exit. New links will have to be established, and some of the older links will have to be re-established and strengthened.

Doubtless, an independent Britain will seek to manage some of its administrative relations through existing EU institutions, agencies and programmes. However, in terms of *haute politique*, there is a possibility that some of the relations between the UK and the EU will be managed little differently from the way they are now. This is because the EU, despite being

primarily a treaty organisation, still handles many aspects of foreign policy and defence outside the treaty framework, on an intergovernmental basis. Given the political will, high level meetings with Community officials and with Member State politicians will continue, and there will be scope for ongoing co-operation.

What will change, of course, are the ways in which relations between the UK and the rest of the EU Member States are conducted. Many of the institutional mechanisms – such as the European Council and the Council of Ministers - will no longer be available. We will also lose access to bodies such as the Political and Security Committee (PSC), established under the aegis of the Council and the High Representative, a body which is made up of ambassadors from the Member States and thus has inbuilt UK representation. Currently, it is responsible for the political control and strategic direction of crisis management operations, and is authorised to take decisions on the practical management of a crisis. In this work it is assisted by a Politico-Military Group, a Committee for Civilian Aspects of Crisis Management, and the Military Committee and Military Staff.⁶⁸²

Many of the communications at lower level, such as through COREPER and the External Action Service, will also cease to exist. Therefore, as part of the exit settlement, new mechanisms for communication and coordination will have to be devised. To safeguard British interests, some may need to be formalised and built into the exit agreement.

11.4 Foreign policy mechanisms

In dealing with foreign policy co-operation, it is possible to refer to structures used in the early days of the Community. For instance, since the 1970 Davignon Report, there have been regular meetings of (then) EEC foreign ministers, with the formation of the European Political Committee (EPC).⁶⁸³ From April 1974 their gatherings became known as Gymnich meetings, after the Federal German government guest house near Bonn (Schloss Gymnich) in which they were held.

The Gymnich meetings are usually convened at a weekend, to permit the discussion of long-term strategies in the loose, informal setting. Normally, there are no fixed agendas and ministers are not accompanied by large numbers of staff. Nor is there usually a final communiqué and the outcomes are treated as strictly confidential. Organised at the time by Hans-Dietrich Genscher, they have become bi-annual events. Crucially for the UK, foreign ministers from

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http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/r00005_en.htm.

⁶⁸³ Report by the Foreign Minister of the Member States on the problems of political unification, Luxembourg, 27 October 1970. Bulletin of the European Communities No. 11, 1970, pp. 9-14. [EU Council of the EU Document], http://aei.pitt.edu/4543/1/epc_first_report_oct_1970.pdf.

associated countries, which are not EU members, are also invited as guests.⁶⁸⁴ Thus, there would be no settled reason why UK foreign ministers might not continue to attend, on more or less the same basis as before, provided an agreement could be reached to that effect.

The Gymnich principle has also been extended to meetings of justice and home affairs ministers, where national co-ordination is discussed informally, sometimes under the aegis of the EU rotating presidencies. Again, UK ministers might be invited routinely as guests, enabling high-level departmental contacts to be maintained, outside the formal venues of the Council of the European Union meeting, which UK ministers would no longer be able to attend.

Meetings at the level of heads of state and governments, however, have now been institutionalised as routine European Council meetings, to which the UK might no longer be invited. On the other hand, G8/20 forums (or G7 with the absence of Russia) might provide adequate means of continuing high-level dialogue between UK prime ministers and their counterparts.

Where additional high-level contacts are thought necessary, it might be advantageous to establish formal bilateral structures, along the lines of the EPC, with provision for formal "summits" of heads of state and governments at regular intervals, to make up for the loss of contact through the European Council. This might be especially appropriate for communications on matters of defence not covered by NATO, foreign policy and macro-economics.

For especially urgent or important matters, there also remains the possibility of talks on the margins of the regular meetings of the European Council in Brussels, where the (then) 27 heads of state and governments assemble. There are plenty of precedents for invited guests to address the Council, during formal and informal meetings.

At ministerial and official level, in other policy areas, meetings can employ what is known as the "open method of coordination" (OMC). This is directed at producing what is very often described as "soft law", a process of policymaking which does not lead to binding legislative measures or require Member States to change their law.⁶⁸⁵ It has been used particularly to develop employment policy, but is not restricted to that sphere. It includes research and development, enterprise and immigration, and all areas of social policy.⁶⁸⁶

Generally, the OMC works in stages. The Council of Ministers agrees on policy goals, Member States translate them into national and regional policies and then specific benchmarks and indicators to measure best practice are agreed upon.

⁶⁸⁴ <http://de.wikipedia.org/wiki/Gymnich-Treffen>.

⁶⁸⁵ Eurofound, Open Method of Coordination, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/openmethodofcoordination.htm>.

⁶⁸⁶ *Ibid.*

Although the system was devised as an intergovernmental tool for policy areas reserved for national governments, it was sometimes seen as a way for the Commission to "put its foot in the door". Outside the EU, pressure to conform to EU policy initiatives would be reduced and OMC could no longer be used as a "back door" for Community encroachment. Then, because it is an established way for ministers and officials to communicate across a wide range of issues, it could have some value to a post-exit Britain, allowing for EU-UK co-ordination when necessary.

Here, existing EFTA arrangements can be exploited (about which we write further in the next chapter). The extensive consultation system is well-established and much of the communication is structured through OMC.⁶⁸⁷ It enables ongoing and largely cordial relations to be maintained with EU member states and institutions.

Co-operation can then be assisted by modern communications technology, including video conferencing. It is no longer necessary for contacts to be routed via diplomatic services and, within agreed areas, there can be routine, direct communication between ministers and officials. Even at a higher level, many European leaders are on first-name terms; they can pick up telephones, send e-mails and even exchange messages on social media.

There are then the informal meetings at innumerable venues such as Davos, where ministers and even prime ministers can work up policies and joint positions without relying on the traditional diplomatic routes. Within the EU, institutions occasionally use e-mail consultation as part of the legislative procedures, and that level of co-ordination could be used by the UK.⁶⁸⁸ Therefore, when informal mechanisms proliferate, it is not always necessary, in a post-exit world, to define formal structures to replace those which have been lost. These will emerge in their own way, to serve the needs of the moment.

11.5 Neighbourhood policy

Of necessity, in withdrawing from the EU, the UK will be redefining its relationship with the EU. From being a full member, the UK will become a "neighbour", a relationship which for the EU has very specific policy implications. This presents the EU with as much of a problem as the UK, as it deals with its immediate, non-EEA neighbours through a formal "European Neighbourhood Policy" (ENP). This was developed in 2004, with the objective of "avoiding the emergence of new dividing lines between the enlarged EU and our neighbours and instead strengthening the prosperity, stability and security of all".⁶⁸⁹

⁶⁸⁷ EFTA bulletin: decision shaping in the European Economic Area, 2009,

<http://www.efta.int/sites/default/files/publications/bulletins/eeadecisionshaping-bulletin.pdf>.

⁶⁸⁸ For instance, see here:

http://www.unece.org/fileadmin/DAM/trade/wp6/documents/2010/wp6_10_06e.pdf, p.3.

⁶⁸⁹ http://eeas.europa.eu/enp/about-us/index_en.htm.

The policy framework embraces the EU's 16 closest neighbours – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. It chiefly constitutes a bilateral policy between the EU and each partner country. And in EU-speak, it is further enriched and complemented by regional and multilateral co-operation initiatives: the Eastern Partnership (launched in Prague in May 2009); the Euro-Mediterranean Partnership (EUROMED) (formerly known as the Barcelona Process, re-launched in Paris in July 2008); and the Black Sea Synergy (launched in Kiev in February 2008).⁶⁹⁰

It is hardly the case that the UK would fit this current structure, and membership of the EEA would automatically exclude it from the ENP. However, if the longer term ambition is to renegotiate the EEA Agreement, any future relationship between the UK and the EU will need to take account of ENP developments.

Specifically, ENP has come under strain after Russian responses to the Ukraine partnership agreement, with accusations that this reflects expansionist foreign policy ambitions of the EU. A 2014 report, however, drew attention to conceptual flaws in the policy, and argued that the implementation was incoherent.⁶⁹¹ A further report complained that "there had been a strong element of 'sleep-walking' into the current crisis", with Member States and the UK's Foreign and Commonwealth Office being taken by surprise by events in Ukraine".⁶⁹²

Between the sixteen countries, there was little in common other than a geographic proximity to the EU. The methodology of the policy was derived from the EU's enlargement experience, but it was not the case that accession of the current neighbours was anticipated. Thus, the broad brush policy approach mixed countries that wanted a closer association with the EU with those that did not. The absence of the carrot of future membership frustrated those countries which had ambitions for EU membership.

Furthermore, it was asserted that, with the policy having been designed for long-term engagement in a stable environment, it was ill-suited for the rapid change that characterised much of the EU's neighbourhood. It insisted on conditionality in its relationships with its neighbours but frequently applied those conditions inconsistently and selectively; it was Eurocentric in conception and often ignored the roles outside actors (such as Russia) played in the EU's neighbourhood. The policy also overemphasised bilateral relationships, overlooking the fact that many of the neighbourhood's problems required a regional approach.

⁶⁹⁰ *Ibid.*

⁶⁹¹ Lehne, Stefan, Carnegie Endowment for International Peace, *Time to Reset the European Neighbourhood Policy*, Carnegie Endowment for International Peace, Carnegie, Europe, February 2014. http://carnegieendowment.org/files/time_reset_enp.pdf.

⁶⁹² <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/115/115.pdf>.

Outside the EU – unless it rejoins the EEA - the UK would assume the novel position of a "neighbour", on a par with the other sixteen neighbouring countries which are currently afforded that status. This could have advantages in that it could assist in redefining the EU's neighbourhood policy. It might even assist EEA countries, some of which (notably Norway) might welcome the chance to negotiate different relationships with the EU. From the outset, though, the UK might form an alternative focus point, through which the sixteen countries can relate, and decide their positions, breaking away from the Euro-centricity of the current arrangements.

With the five EFTA countries, potentially, that creates a neighbourhood group of 21 countries which have a common concern in having the EU as a neighbour. Even as an informal grouping, liaison over common interests allows for concerted action, should the need arise, offsetting and to an extent neutralising the power of the EU.

11.6 Soft power dynamics

A 2014 House of Lords report on "Persuasion and Power in the Modern World" wrote of "immense changes" taking place in the international landscape. The conditions under which international relations are conducted, it said, have undergone, and are continuing to undergo, major shifts which will accelerate and be compounded in the years immediately ahead.⁶⁹³ It went on:

Unprecedented international access to state information, the digital empowerment of individuals and groups, the growing role of global protest networks and NGOs, the complexity of modern trade supply chains and multinational corporate operations, accelerated urbanisation, the increasing asymmetry of modern warfare, and transnational challenges are diffusing and fragmenting traditional state power, and enabling the world's peoples and countries to be increasingly interconnected and interdependent. At the same time, the rising power, economic and political, of non-Western countries (the so-called "rise of the rest") is altering the international balance of power and influence.

The UK, like other nations, the Committee averred, is directly affected by these new conditions, which created a demand for new approaches in the exercise and deployment of our influence. These involved generating international power through influencing other countries to want the same things as the UK, a situation achieved by "building positive international relationships and coalitions which defend our interests and security, uphold our national reputation and promote our trade and prosperity". This, the Committee said, has been described as the exercise of "soft

⁶⁹³ House of Lords Select Committee on Soft Power and the UK's Influence, Report of Session 2013–14, Persuasion and Power in the Modern World, <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsoftpower/150/150.pdf>.

power", as distinct from the use of force and coercion for a nation to assert itself, labelled as "hard power".

Relying on witness Jonathan McClory, the Committee referred to the future of international influence residing in transnational networks. McClory argued that the ability to build and mobilise networks of state and non-state actors towards the advancement of an objective is what would separate successful and unsuccessful states in the future of foreign policy. Being a central actor across multiple networks would allow a country to shape the preferences, debates, procedures, rules, and ultimately outcomes of decisions that can only be taken multilaterally.

States were able to derive power from being at the hub of a hub-and-spokes network, or by bridging or exploiting holes in networks to influence communication between other actors. Therefore, "a state can wield global power by engaging and acting together with other states, not merely acting against them".⁶⁹⁴

Specific applications of "soft power" include such matters as the promotion of human rights at an international level, in which context it is asserted that the EU is a "clear multiplier" for the UK. By working with the EU, the UK "benefited from a louder voice, had more moral authority, and was less likely to face bilateral retaliation".⁶⁹⁵ The EU was also well placed to promote human rights as the world's largest aid donor.

This was the view projected in the balance of competences review on Foreign Policy yet the authors of the review also asserted that:

The EU is part of a network of international institutions, including the UN, the Commonwealth, the Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE), which provides a framework of laws, standards and tools through which the UK can pursue its human rights work.

In terms of the loudness of "voice", therefore, the volume depends not only on the EU but also upon the other partners in the "network", each of which have their own presence and audiences, each of which contribute to the "framework" which the UK utilises. Since the EU is only one component of this framework, its removal diminishes the volume of the UK's "voice" only by a fraction corresponding with its overall contribution.

Where the attenuation of volume is deemed significant, the essence of the post-EU settlement might, therefore, be to seek compensatory volume by increasing

⁶⁹⁴ *Ibid.*

⁶⁹⁵ HM Government, Review of the Balance of Competences between the United Kingdom and the European Union Foreign Policy, July 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf.

the involvement with other partners. However, the UK – along with its other EU Member States partners - has invested considerable political capital in pursuing human rights issues, promoting them as a major part of its own foreign policy. The mechanism in which it has chosen to invest, though, is the EU Council's strategic framework on human rights and democracy, promulgated in June 2012.⁶⁹⁶ This is slated as "the first comprehensive statement of related EU values and commitments since 2001".

In pursuing the framework agenda, the EU is working with the United Nations General Assembly, the UN Human Rights Council and the International Labour Organisation. It supports the UN Human Rights Council and the UN Office of the High Commissioner for Human Rights, as well as the treaty monitoring bodies and UN Special procedures. One initiative which the EU is following is the Universal Periodic Review (UPR), a process which involves a review of the human rights records of all UN Member States.

Described by the United Nations as a state-driven process, it comes under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve human rights in their countries and to fulfil their human rights obligations. It is designed to ensure equal treatment for every country when their human rights are assessed. By October 2011 it had reviewed the records of all 193 UN Member States.⁶⁹⁷

As an indication of how such mechanisms infiltrate political systems, UPR's processes have been accepted as a "core part" of the EU's internal and external policies. The EU and its Member States - including the UK - are "committed to raising UPR recommendations which have been accepted, as well as recommendations of treaty monitoring bodies and UN Special Procedures". This applies in terms of bilateral relations with all third countries, while Member States themselves agree to implement recommendations applicable to their own territories. Strategic direction is provided by the Council Working Group on Human Rights (COHOM), of which the UK is a member.⁶⁹⁸

In forthcoming UPR rounds, the EU intends to pay close attention to the degree of implementation by third countries of UPR commitments which they have accepted. Providing the support measures for their implementation will then form a major component of ongoing policy. In this, the EU will be working with the Council of Europe and the OSCE. It also plans to work in partnership with regional and other organisations such as the African Union, ASEAN, SAARC, the Organisation of American States, the Arab League, the Organisation of Islamic Cooperation and the Pacific Islands Forum with a view to encouraging the consolidation of regional human rights mechanisms.

⁶⁹⁶ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

⁶⁹⁷ <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

⁶⁹⁸ [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433870/EXPO-DROI_ET\(2011\)433870_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433870/EXPO-DROI_ET(2011)433870_EN.pdf).

So integrated into the fabric of UK foreign policy is the UPR programme and the linked policy measures that it has assumed a strategic role, determining other policy issues such as the allocation of foreign aid. Removal occasioned by EU withdrawal would leave a major gap. That leaves two major options – either to replicate the programme outwith the EU, or to abandon the idea of using UPR recommendations as a basis for bilateral programmes, and to devise an entirely new policy foundation. Whether this will be predicated on an extension of soft power or on a more conventional basis is probably a matter which will need an extensive debate before a decision can be made.

11.7 Overseas Aid

As a form of "soft power", overseas aid can be an important tool in the pursuit of UK policy objectives, such as the relief of migratory pressures in a way that will directly or indirectly reduce unwanted immigration to this country.

Currently, the UK is committed to spending 0.7 percent of GNI on overseas aid. In 2014, it disbursed £11.775 billion, equivalent to 0.71 percent of GNI. Of this, £6.775 billion was disbursed via the Department for International Development (DfID) as bilateral aid. The remaining £5 billion was managed by other agencies as multilateral aid, including £1.824 billion to the World Bank, £518 million to UN agencies and £1.471 billion to Regional Development Banks and other multilateral agencies.

The sum dispersed also includes a contribution to the EU aid budget of £1.188 billion, some 16 percent of the total EU aid spending.⁶⁹⁹ The majority of that, nearly 70 percent, is part of the UK's share of the EU's budget and is not discretionary. However, in a review of DfID's overview of EU aid spending, it was found that there was no effective performance management system in place for EU aid. And while the EU's scale and influence provided an opportunity for development impact, this was not being effectively harnessed.⁷⁰⁰

As to the UK's *modus operandi*, it takes what is called a "selective approach", working on a limited number of policy areas, focusing on anti-corruption, transparency, trade and climate change. Work on anti-corruption has intensified, and work on the environment and climate change has been maintained. In addition, a new cross-government approach is integrating development and security for countries in crisis.⁷⁰¹

The OECD regards this approach as "useful", although there is no systematic way to ensure conflicts between policy objectives are addressed. Focusing on

⁶⁹⁹ Department for International Development's (DfID) Annual Report and Accounts, 2014-15, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445698/Annual-Report-2014-2015.pdf, accessed 26 December 2015.

⁷⁰⁰ Independent Commission for aid Impact, Report 17, December 2012, DFID's Oversight of the EU's Aid to Low-Income Countries, <http://icai.independent.gov.uk/wp-content/uploads/ICAI-EU-report-061212-FINAL.pdf>.

⁷⁰¹ OECD Development Co-operation Peer Reviews: United Kingdom 2014, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmintdev/663/663.pdf>.

win-win opportunities, where the UK's national interests align with development priorities, has meant less attention on mitigating the risk that other policies – notably migration – impact negatively on development. As is the case for other donors, the OECD says, awareness of potential trade-offs is low.⁷⁰²

Neither, in terms of what is known as "policy coherence for development" (PCD), is UK spending particularly well managed. Supposedly at the heart of a new approach to overseas aid spending is the idea of "working across Government in the UK, and with global partners in the multilateral system, to maximise the impact on development of all the UK's actions".⁷⁰³ The fact that this is regarded as new tells its own story. As the OECD remarked:

... the lack of a comprehensive approach to ensuring its development efforts are not undermined by other government policies means potential incoherence in other policy areas can be overlooked. It also means opportunities might be missed for stakeholders to provide evidence on and solutions to problems of incoherence. For instance, little has been done to address potential links between migration policy and development.⁷⁰⁴

Criticism in similar terms is expressed elsewhere. The Africa All Party Parliamentary Group in its 2012 report was concerned about "the lack of objective criteria" used to select countries to which aid should be allocated ("focus countries"), the lack of transparency of the process of selection and the poor quality of some of the information on which these decisions were based. Then, the published criteria on which the aid had ostensibly been allocated (the Needs-Effectiveness Index (NEI)) appeared to have been used to justify the subjective decisions of officials, rather than to make objective decisions.⁷⁰⁵

Given the potential for "incoherence" and the lack of objectivity in the allocation of aid, withdrawal from the EU will not necessarily have a significant effect on UK policy. Issues which were incoherent before withdrawal will doubtless remain so afterwards, unless specific measures are taken to ensure otherwise. The main effect of withdrawal, therefore, may simply be to afford the opportunity to terminate its contributions to the EU and either effect savings, or redirect spending to other areas where a significant development impact can be achieved.

Redirection of that spending could, in itself, improve policy coherence. For instance, the UNHCR in 2013 presented a global needs-based budget of US\$3,924 million, revised to the unprecedented level of US\$5,335 million.

⁷⁰² *Ibid.*

⁷⁰³ House of Commons International Development Committee, 2 February 2015, The Future of UK Development Cooperation: Phase 2: Beyond Aid Tenth Report of Session 2014–15, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmintdev/663/663.pdf>.

⁷⁰⁴ OECD, *op cit.*

⁷⁰⁵ DFID's Aid Priorities and Africa A Report on the Bilateral Aid Review by the Africa All Party Parliamentary Group January 2012, http://www.royalafricansociety.org/sites/default/files/reports/bar_report_draft8_edited%20_2_s mall.pdf

Diversion of the amounts formerly paid to the EU to the UN agency could significantly enhance its capabilities.⁷⁰⁶ Directed at improving the conditions of refugees close to their countries of origin, such spending might have a useful effect in reducing migratory pressure.

More generally, redirection of foreign policy resulting from withdrawal from the EU might then require a reorientation of aid policy to bring it into line with any new or different policy objectives, and in particular a focus on links between development and migratory policies. For maximum effect, there would also have to be some re-evaluation of aid disbursed via the World Bank and other agencies – which collectively receive substantially larger amount than the EU.

However, since the evidence suggests a level of incoherence in policy formulation, the development of linkages with other policy areas would in fact be a continuation of what is currently regarded as the new approach. In other words, aid policy is so under-developed, both at EU and national level, that aid policy adjustments will depend not so much on the event of EU withdrawal but on already established efforts to improve policy coherence.

11.8 Defence cooperation

Post-war European defence co-operation has been a central part of UK policy since the termination of hostilities with Germany in 1945. Traditionally it has been organised via the Atlantic Alliance (NATO), which remains the UK's preferred instrument.

It is, therefore, anticipated that a post-exit UK will continue to pursue its defence co-operation via NATO. The EU, on the other hand, has ambitions of developing a capability for autonomous action independently of the Atlantic Alliance. Britain's independence need not preclude it from supporting those ambitions, which can be done outside the framework of EU treaties.

An example of such support came with the St Malo Declaration on 4 December 1998, a joint declaration made by French President Chirac and Prime Minister Tony Blair.⁷⁰⁷ Although this was an Anglo-French declaration, from the first two paragraphs it is very clear that it was addressing the EU defence position, notably stating:

1. The European Union needs to be in a position to play its full role on the international stage. This means making a reality of the Treaty of Amsterdam, which will provide the essential basis for action by the Union. It will be important to achieve full and rapid implementation of the Amsterdam provisions on CFSP. This includes the responsibility of the European Council to decide on the progressive framing of a common

⁷⁰⁶ UNHCR Global Report 2013, Funding UNHCR's programmes, <http://www.unhcr.org/539809dc0.html>.

⁷⁰⁷ <http://www.atlanticcommunity.org/Saint-Malo%20Declaration%20Text.html>.

defence policy in the framework of CFSP. The Council must be able to take decisions on an intergovernmental basis, covering the whole range of activity set out in Title V of the Treaty of European Union.

2. To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises.

In particular, the declaration called for the EU to be "... given appropriate structures and a capacity for analysis of situations, sources of intelligence and a capability for relevant strategic planning, without unnecessary duplication". It also called for the EU to have recourse to "suitable military means", which included "European capabilities pre-designated within NATO's European pillar or national or multinational European means outside the NATO framework".

More usually, the EU works within the framework of the European Council, which it was able to do in response to the St Malo declaration. In June 1999, the Cologne European Council decided to give substance to the EU's "Petersberg tasks", framed in 1992 by eleven of the then EU member states through the mechanism of the Western European Union (WEU). The tasks covered humanitarian and rescue, peace-keeping and combat forces in crisis management, including peace-making.⁷⁰⁸ At the Council, these were placed at the core of what was labelled the "European Common Security and Defence Policy". The fifteen heads of government, along with the President of the European Commission, declared that:

...the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises without prejudice to actions by NATO.⁷⁰⁹

Similarly, in December 1999, the Helsinki European Council took the initiative further and agreed on the creation of a European Rapid Reaction Force (ERRF). This was to be an EU-led military force able to deploy within 60 days and sustain for at least one year up to 60,000 personnel capable of the full range of Petersberg tasks. Also agreed was a "Headline Goal" which set out the specific force components which member states agreed to contribute. Force commitments were outside the framework of the EU treaties.

The ERRF subsequently developed into the battlegroup concept, which then included Norway which in November 2004 declared together with Sweden and Finland that it would contribute to building a Nordic Battlegroup. The Norwegian contribution would consist of about 200 soldiers, serving in support

⁷⁰⁸ Named after the hotel near Bonn, where in June 1992, Western European Union ministers who formulated the "tasks". See:

http://europa.eu/legislation_summaries/glossary/petersberg_tasks_en.htm.

⁷⁰⁹ Presidency conclusions. Annex III.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm.

functions such as medical service, logistics and strategic lift.⁷¹⁰ Due to its reservations on the European Security and Defence Policy (ESDP), Denmark did not participate in the battlegroup.⁷¹¹ Thus illustrated is the anomalous position where non-EU member states can contribute to the EU defence identity, while some EU member states are able to exclude themselves from it. Also illustrated is the potential for the UK to participate in EU military ventures, should it so desire, without continued membership of the EU.

Another avenue for defence cooperation is suggested by the treaty signed between the British government and five other nations – France, Germany, Spain, Italy and Sweden – on 27 July 2000.⁷¹² Described as a "Framework Agreement" between the six countries, it concerned "measures to facilitate the restructuring and operation of the European defence industry". But, in Part 7 (Articles 45-49), the Parties recognised "the need to harmonise the military requirements of their armed forces" and set out a permanent process for "harmonised force development and equipment acquisition planning". The Framework Agreement is an inter-governmental treaty and is not an EU institution. It does not have an office, secretariat or budget and relies on the parties to agree and deliver the work programmes. It was one of the first examples of closer European co-operation in the armaments field.

Crucially, the Parties agreed "to co-operate in establishing a long term master-plan that would present a common view of their future operational needs". This would constitute a framework for harmonised equipment acquisition planning and "orientation for a harmonised defence related R&T policy". To that effect, they agreed to subscribe to a "detailed analysis of military capabilities and the national planning status and priority of equipment and system programmes", as well as co-operating "as early as possible" in the genesis of the requirement up to and including the specification of the systems they wanted to develop and/or purchase.⁷¹³

Despite being concluded entirely outside the framework of the European Union, it took in the six member states which accounted for 90 percent of indigenous armament production within the EU and opens the way for a significant degree of defence integration. The recitals refer to making a contribution to "the construction of a common European security and defence policy".

⁷¹⁰ Jan Joel Andersson, *Armed and Ready? The EU Battlegroup Concept and the Nordic Battlegroup* (Stockholm: Swedish Institute for European Policy Studies, 2006), 37-38. <http://www.sieps.se/sites/default/files/32-20062.pdf>.

⁷¹¹ For details on the Danish reservations, see the report ordered by the Danish Parliament. Dansk Institut for Internationale Studier, *De danske forbehold over for den Europæiske Union: Udviklingen siden 2000* (Copenhagen: Dansk Institut for Internationale Studier, 2008).

⁷¹² http://news.mod.uk/news/press/news_press_notice.asp?newsItem_id=391

⁷¹³ For full text, see: <http://treaties.fco.gov.uk/docs/pdf/2001/TS0033.pdf>. The treaty has been amended. See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238614/7604.pdf It was adopted by the Executive Committee Brussels on 13 March 2008 but not ratified by the UK

The Treaty also called for the Parties to "define and implement the methods, means and organisation" to achieve their objectives. This was done in July 2004 when, by a Joint Council Decision, the EU set up the European Defence Agency (EDA). It started work in January 2005 as an intergovernmental organisation, its task to co-ordinate and promote development of European military capabilities and to foster the establishment of a European defence market.⁷¹⁴

Subsequently the EDA was absorbed into the EU as a formal agency, where it is responsible for coordinating large scale programmes such as the A-400M military transport aircraft. The UK is part of that programme and would have to continue working within the EDA from outside the EU, as does Norway on a case-by-case basis.

The Framework Agreement (FA) is still in force. To implement it, an Executive Committee (ExCo) composed of senior officials has been formed. *Inter alia*, it is responsible for exercising executive level oversight of the FA. Six sub-committees were then created by the ExCo to implement the six areas of the Agreement. Each nation takes it in turn to chair the ExCo on an annual basis and the UK provided the chairmanship to 30 June 2011, when France took over. The ExCo meets two or three times a year to review progress on current activities and agree new priorities and activities. It is also responsible for providing regular reports to Ministers and State Secretaries.⁷¹⁵

One would presume that the UK would want to consider whether to continue with this relationship. It does not preclude relationships with defence contractors from other nations, as with the development and production of the F-35B for the UK carrier programme, or the Army's Watchkeeper UAV programme, the platform for which is of Israeli design. And, while there is a general desire to standardise military equipment at a European level, this has not prevented the UK from developing specific equipment to meet operational needs of forces engaged in active duty, very often through Urgent Operational Requirements (UORs).

In fact, operational demands have imposed their own limits on the degree of standardisation than can be achieved or is desirable. In French "anti-jihadist" operations in Mali during 2013, for instance, in free-ranging operations, in scrub and semi-arid conditions, there was little threat from IEDs (Improvised Explosive Devices) and mines. Troops, therefore, were able to rely for their mobility on the conventional VAB 4x4 armoured personnel carrier (APC). In different conditions in Afghanistan, where the IED threat was high, British troops required carriers of a completely different design, optimised for mine and IED protection. Therefore, as long as forces are committed to different theatres (or different roles in the same general theatres of operation), each with

⁷¹⁴ <https://www.eda.europa.eu/aboutus/whatwedo>.

⁷¹⁵ See: <https://www.gov.uk/letter-of-intent-restructuring-the-european-defence-industry>, and <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/694/694we15.htm>.

their own operational demands, the prospect of standardised equipment, while ostensibly attractive, is not at all realistic.

This is evident in the latest French army re-equipment plans, centred on its "Scorpion" modernisation programme. Announced on 5 December 2014 and valued initially at €752 million, it covers the purchase of a new generation of armoured wheeled combat vehicles. Two main vehicles are involved: a 6x6 *Véhicule Blindé MultiRôle* (VBMR), known as Griffon and a 6x6 *Engin Blindé de Reconnaissance et de Combat* (EBRC), to be called the Jaguar.⁷¹⁶ The nearest British equivalent to the programme is the now-stalled Future Rapid Effects System (FRES). This was to be based on the eight-wheeler Pirana V armoured vehicle, similar to the US Stryker, and a tracked reconnaissance vehicle under the designation "Scout SV". The latter is currently on order.⁷¹⁷

Effectively, different doctrinal approaches are driving huge differences in capabilities – with the French equipment more attuned to supporting operations in central Africa. Furthermore, these differences do not take into account the electronic systems – in which the French have also gone ahead on their own *Bulle Opérationnelle Aéroterrestre* (BOA) network-centric systems. These are unlikely to interface with British equipment when it finally emerges.

The British Army, on the other hand, is trialling the Mastiff protected patrol vehicle in the mechanised infantry role. A legacy vehicle from the Iraqi and Afghani conflicts, based on the US-built Cougar, it is optimised for counterinsurgency in high-threat environments where IEDs are the weapons of choice for insurgents. The type is one of the few capable of countering the Explosively Formed Projectile (EFP) which, in skilled hands, is a "game changer", denying traditional security forces tactical mobility. Thus, if the vehicle is retained, the UK inventory will include a capability not shared with any other modern force, and one which is very different from other European forces.⁷¹⁸

Divergences are even apparent in what might appear to be common platforms, such as the Tornado multi-role combat aircraft and the Eurofighter Typhoon – which are operated by numerous European air forces. UK models have been modified to such a great extent to serve national requirements – with distinctive and unique weapons capabilities - that there is less interoperability than might be imagined between the same types in service elsewhere. Even with the Airbus A-400M transport, there are significant differences in capabilities and systems, in what would appear to be identical aircraft. With the passage of time, these differences are likely to increase.

Largely, therefore, while interoperability remains a significant ambition and a strong political imperative, achieving it is proving elusive. There is still much

⁷¹⁶ <http://www.janes.com/article/46852/update-france-kicks-off-scorpion-vehicle-programmes>

⁷¹⁷ BBC website, 3 September 2014, Nato summit: £3.5bn armoured vehicle deal to be signed, <http://www.bbc.co.uk/news/uk-wales-south-east-wales-29040182>

⁷¹⁸ <http://www.eureferendum.com/blogview.aspx?blogno=85361>

to play for before forces become integrated to any significant degree, even where that is possible – which looks increasingly unlikely. Much the same goes for operational procedures, where co-ordination is poor and national contingents are rarely capable of working closely together in integrated campaigns.⁷¹⁹ Rather, the contingents tend to be allocated their own areas of operation, making multi-national operations a matter of different nations working separately in the same general area, rather than integrated into a single operation.

If within the EU, the UK has been unable (or unwilling) to achieve any great degree of defence integration, it seems less likely that progress will continue outside the EU, unless specific provision is made for it. This begs the question as to whether this should be a UK defence objective, a question which must be resolved either as part of the Article 50 negotiation process, or shortly thereafter. Then, either as part of the exit agreement, or alongside it, it may be desirable to set out specific areas of development and co-operation – where they are not already covered by existing arrangements – as treaty commitments.

One point at issue here is that the UK defence capability has been so far degraded as a result of successive defence cuts, that expeditionary forces are no longer capable of autonomous operation, except for the most minor of operations. Without very significant increases in spending, the UK is committed to coalition operations, with partners filling capability gaps. Reliance on partners, however, is less than advantageous if prospective partners all suffer the same capability shortfalls, or lack theatre-specific weapons systems. There is sense, therefore, in ensuring that capabilities are assessed on a multi-national level, to avoid over-provision in some areas and shortfalls in others.

This was the thinking behind the 2010 Headline Goals, where EU member states agreed to work to an overarching equipment plan in order to ensure a balanced capability. That way, in joint operations, each national contingent would bring to the table their own capabilities, without undue duplication.

Such close integration necessarily requires a high degree of interoperability, both in terms of equipment and operational procedures. There is, however, only limited convergence between European and US forces, so the UK will have to make a high-level decision as to whether it will seek to optimise for a partnership with European or US forces. To an extent, decisions are mutually exclusive. It cannot easily afford interoperability with both.

This suggests that, prior to adopting a position on which basis negotiations with EU member states will be conducted, the UK will have to host its own internal debates to decide upon high level policy parameters, based on three broad possibilities – that the UK should be capable of autonomous operations, or will

⁷¹⁹ See for instance, this report on NATO air operations in Libya 2011: <http://theaviationist.com/2011/10/26/libya-final-report>.

act in partnership either with US forces or with the Europeans. The latter option will require a position to be put by the UK government to the European Council with a view to negotiating mutually acceptable outcomes, having regard to the financial implications and the willingness of the nation to undertake expeditionary operations.

12.0 Agriculture

The Common Agricultural Policy (CAP) fails to adequately fulfil important societal objectives: to enhance biodiversity and climate protection, improve water quality, preserve scenic landscapes, increase animal welfare, promote innovative, efficient farming and fair competition in the internal market, and avoid harming farmers abroad.

2010 Declaration by Agricultural Economists⁷²⁰

The second policy we look at, in this fourth phase, is agriculture. The food and farming sector is important to the UK economy, with the whole food chain contributing £85 billion per year to the economy and 3.5 million jobs.⁷²¹ In policy terms, it is dominated by the European Union and its Common Agricultural Policy (CAP). Financially, this is the most important policy in the EU. It is also the most complex, made more so by the need to ensure conformity with WTO agreements.

Currently, €57 billion, or 40 percent of the EU budget is devoted to agricultural support in one form or another. About €4.0 billion is expended on UK agriculture and related activities, which would cease on withdrawal, unless alternative provision was made. Cessation could create a significant problem. Farming leaders are thus nervous about the possibility of leaving, especially as the strongest advocates of EU withdrawal tend to be those most opposed to farming subsidies.

However, while the EU average total subsidy is about 18 percent of farming income, Norwegian farmers gain just short of 60 percent, only just ahead of Switzerland, while Iceland farmers are paid just short of 50 percent.⁷²² In other words, those European farmers who are outside the EU benefit from much higher subsidies than those within the European Union.

⁷²⁰ <http://www.reformthecap.eu/declaration>, accessed 24 May 2014.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69488/pb13702-food-export-actionplan.pdf, accessed 13 April 2015.

⁷²² <http://www.oecd.org/tad/agricultural-policies/monitoring-evaluation-2015-highlights-july-2015.pdf>, accessed 4 January 2016.

The "poster child" for advocates of subsidy-free farming is New Zealand, the government of which in 1984 abruptly terminated farm payments, ostensibly driven by a commitment to the free-flow of global market forces. Expected outcomes were improved economic efficiency and more effective use of land. But the changes occurred outside the framework of a coherent national policy for rural development, resulting in diverse and unexpected outcomes.⁷²³

In particular, observers noted a transformation in the rural landscape. Much marginal land was taken out of use, there was some expansion of forestry – although less than expected – and a massive expansion of dairying into areas previously devoted to extensive beef cattle and sheep rearing. There were major increases in life-style farms (hobby farms) and a massive subdivision of coastal and high-country land, often to foreign owners. All these changes took place against a background of declining local rural services such as banks, hospitals and post-offices, accelerating these changes and causing a considerable decline in rural community infrastructures.⁷²⁴

Those changes in New Zealand caused considerable political stresses, and it cannot be assumed that reduction or removal of subsidies would not have similar or greater effects in the UK, with significant political ramifications.

For British farmers, an "absolute nightmare scenario" is the UK outside the EU losing access to the single market. Lower tariffs with the rest of the world would drive down food prices, reflecting in lower farm gate prices. UK farmers would not be subsidised, whereas their competitors would be, both in Europe and elsewhere, giving rise to the "perfect storm scenario".⁷²⁵ Therefore, to allay those fears, and to ensure a smooth transition to our fully independent status, some form of continued government intervention would be sensible, even if on a temporary basis.

Whatever the final form of an independent UK policy, though, it is not unreasonable to suggest that the breadth and complexity of the CAP is such that complete policy replacement might take a decade or more - given that the UK Parliament agrees to provide the necessary resources. Against that, the terms on which trade with the EU will continue will depend on the initial settlement and its degree of alignment with EU policy. Divergence from the initial settlement may well prejudice or complicate trading arrangements.

In devising a substitute agricultural policy, therefore, there are these two main areas which must be addressed. The first is the status of trade in agricultural goods (including processed food and food products) with EU member states. Exports (including non-alcoholic drinks) to the EU are worth approximately

⁷²³ <http://www.oecd.org/tad/agricultural-policies/39283883.pdf>, accessed 10 September 2014

⁷²⁴ *Ibid.*

⁷²⁵ From a commentary by Martin Haworth, Director of Policy and Communications, NFU, <http://www.civitas.org.uk/pdf/SofteningTheBlow.pdf>, accessed 9 September 2014.

£12 billion annually, so continued trading will be essential.⁷²⁶ Any exit agreement will have to ensure uninterrupted trade flows. The second is the regulation and support of agriculture – the management of agriculture itself, including the continuation of support, environmental schemes and rural development – which hitherto have been an EU competence.

12.1 Immediate post-exit trading arrangements

As to the immediate measures required to secure trade in agricultural products with the EU, there are no existing models on which UK negotiators could rely. Neither the EEA agreement, nor the same terms as currently negotiated by the Swiss, or even Turkey, would enable the UK to enjoy duty free access to the Single Market. Agriculture is not included in EFTA agreements, and nor is it part of Swiss bilateral agreements or in the Turkish Customs Union agreement. There are limited agreements in some product categories, but these fall considerably short of quota-free access.

Nevertheless, the lack of any comparable model should not unduly trouble the UK. There are special factors relating to Turkey and EFTA countries, which militate against trade agreements, but these would not apply to the UK. Essentially, the issue is one of alignment between the different policies – otherwise expressed as the degree of regulatory convergence. To allow tariff-free access to the Single Market, the EU requires a close degree of alignment between systems, otherwise known as regulatory convergence. The aim is to maintain a "level playing field" that does not put its producers in any of the trading countries at a disadvantage.

This issue is often neglected in the planning of post-exit scenarios, with suggestions – explored elsewhere in this book – that the EU would tolerate a situation whereby Community rules are applied to products exported to the EU, but a more relaxed regulatory regime is applied to produce marketed internally or to non-EU countries.

However, a truly open market that operates freely in both directions can only exist when there is a high degree of regulatory convergence between trading parties. A lack of alignment, with lower standards in the importing country, means that exporting states are bearing higher regulatory costs and are thus disadvantaged.

This explains why EU trade in agricultural products with Turkey has not progressed. Despite being a candidate country with long-standing ambitions of becoming an EU member, it has only reached "a low level of alignment" in the preparedness for accession. Furthermore, its government has not told the European Commission when it will be able to complete transposition and harmonisation of EU legislation. The Commission also complains that the "quality, quantity and completeness of available reliable and comparable

⁷²⁶ <http://www.fdf.org.uk/publicgeneral/UK-fd-export-full-year-2012.pdf>, accessed 13 April 2015.

official statistics are very limited in many sectors of the chapter "Agriculture and Rural Development", thus preventing it from ascertaining the true state of play.⁷²⁷

On this basis, Turkey has not been permitted equal access to the Single Market, and there are no plans to allow access in the foreseeable future. In like manner – where there is a lack of alignment in EFTA countries, albeit for different reasons - the Commission would not accept the case for equal access in these markets. Therefore, the Turkish "model", such as it is, would not be one on which the UK could rely.

In the UK, regulatory convergence is already high, by virtue of its current membership of the EU. Provided that agricultural policy post-exit continues to be roughly aligned, there could be no rooted objection to the UK participating fully in the Single Market in agricultural products.

Furthermore, the UK is an extremely valuable market for the EU. The sector (including drink and animal feed) exported about £18.2bn in 2012 of which about £9.5bn went to EU countries.⁷²⁸ Its imports in the same year reached £37.6bn, of which more than £25bn came from the EU, with a surplus on account in favour of the EU in excess of £15bn. With a near 3:1 disparity between import and export, the UK is in a powerful position. One might expect it to be able to cut a deal based on current terms, provided the current degree of regulatory convergence is maintained.

Here, membership of the EEA would help considerably for, although there is no comprehensive deal on agricultural (and food) products within the agreement, the mechanisms for a formal agreement exist. This is by virtue of Protocol 3 of the EEA agreement, which covers agricultural products, allowing opt-outs for named members.⁷²⁹

This framework could be used for a settlement within the EFTA/EEA matrix, applicable to the UK only. Additional rules on trade in agricultural products could be agreed and then referenced in one or more tables appended to the Protocol, becoming part of the Article 50 exit agreement. This would permit continued trade on the current basis, without requiring a new treaty structure or taking negotiations into uncharted waters.

⁷²⁷ European Commission, Screening report , Turkey, Chapter 11 – Agriculture and Rural Development, 7 September 2006.
http://ec.europa.eu/enlargement/pdf/turkey/screening_reports/screening_report_11_tr_internet_en.pdf, accessed 25 May 2012.

⁷²⁸ Defra statistics:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208436/auk-2012-25jun13.pdf, accessed 10 April 2014.

⁷²⁹ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol3.pdf>, accessed 10 April 2014.

12.2 WTO: transitional arrangements

It is assumed by most commentators that, on leaving the EU, the UK will continue as a full member of the WTO on the same terms and conditions currently enjoyed, albeit that it will behave as an independent member, negotiating freely on its own behalf.⁷³⁰

However, in a student text published by the Graduate Institute of International and Development Studies (IHEID) in Geneva, for the British-based "People's Pledge" campaigning organisation, it is asserted that continued membership of the WTO is dependent on conformity with certain technical requirements relating to ongoing secondary agreements.⁷³¹ Non-conformity, it is asserted, would place the UK outside the WTO framework, which would have significant implications for agriculture.

Yet it can hardly be the case that WTO membership is threatened. Within the Marrakesh Agreement establishing the WTO, there is provision for member states to withdraw (Article XV), but none for expelling or suspending members.⁷³² Furthermore, any non-conformity arising from UK withdrawal from the EU is not necessarily significant in the context of the way the WTO functions, primarily as a contractual agreement within the framework of an international agreement. As such, action is triggered only when there is perceived (or alleged) harm. The legal mode of the WTO's Dispute Settlement Understanding (DSU) is seen as *corrective*, seeking to repair harm done rather than imposing conformity for the sake of it.⁷³³

A peculiarity of the system is that infringement of obligations is considered *prima facie* to constitute "a case of nullification or impairment". From this follows a presumption that a breach of the rules necessarily has an adverse impact on other members' parties, and the member against whom the complaint has been brought is required to rebut the charge. This would have the perverse effect of requiring the UK, rather than any aggrieved party, to prove that no harm had occasioned from its action.⁷³⁴ Since the WTO (unlike the EU) has no

⁷³⁰ Although the WTO Treaty is technically a "mixed agreement", it does not provide any opportunity to select only parts of the agreement. Thus, despite sharing competences with the EU, each member state is a full member. See: Steinberger, E (2006), *The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO*, The European Journal of International Law Vol. 17 no.4, <http://www.ejil.org/pdfs/17/4/101.pdf>, accessed 14 June 2014.

⁷³¹ The Future of the United Kingdom in Europe: Exit Scenarios and their Implications on Trade Relations, Graduate Institute of International and Development Studies (IHEID), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202013/Group%20A_The%20Future%20of%20the%20United%20Kingdom%20in%20Europe.pdf, p.54, accessed 14 June 2014.

⁷³² WTO Agreement, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

⁷³³ Weiler, J H H (2012), Jean Monnet Working Paper 05/06, *A Theory of WTO Law*, <http://www.jeanmonnetprogram.org/papers/06/060501.pdf>, p.16, accessed 14 June 2014.

⁷³⁴ This is highlighted in the Turkey-India textile dispute: WTO, WT/DS34/R, 31 May 1999 (99-2081), Turkey – Restrictions on Imports of Textile and Clothing Products, Report of the Panel, which cites Article 3.8 of the DSU (p.149). India claimed that the restrictions appeared

powers to impose sanctions directly on non-conforming members, its decisions can only be enforced by complainant governments using WTO decisions. They allow retaliatory trade sanctions against offenders whose practices have been judged illegal by the WTO.⁷³⁵ In the absence of such action, non conformity will be largely of academic interest.

That said, there is an issue arising from the 1995 Agreement on Agriculture, where payments of different types of agricultural subsidies are subject to agreed restrictions. For developed countries (which include the UK) certain types of subsidy, such as domestic production subsidies and export payments, are prohibited unless commitments have been made to reduce those subsidies, set out in formal "schedules of concessions and commitments".⁷³⁶ Similar schedules apply to quotas imposed on the import of certain products from third countries.

A potential problem arises in that schedules for EU member states have been agreed *en bloc*, in respect of all 28 members, leading to arguments that the UK, on withdrawal, could not automatically take with it any rights to EU agricultural subsidies and quotas. According to Petros Mavroidis, described as a WTO expert at Columbia University: "If the UK wishes to pay subsidies, then the EU and the UK will have to present a new proposal to all WTO members, the sum of which will not exceed what they have already committed".⁷³⁷

However, restrictions apply only to trade-distorting subsidies, in what is called the "amber box". So-called "green box" and "blue box" subsidies are exempt. The "blue box" subsidies cover payments directly linked to acreage or animal numbers, but under schemes which also limit production by imposing production quotas or requiring farmers to set aside part of their land.

"Green box" subsidies must not distort trade, or at most cause minimal distortion. They include environmental protection and regional development programmes. Specifically, they have to be government-funded (not by charging consumers higher prices) and must not involve price support. Rather than

to nullify or impair benefits accruing to it, while the panel found that Turkey had not provided sufficient information to set aside the presumption that its import restrictions on 19 categories of textile and clothing products had nullified and impaired the benefits accruing to India.
[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+wt%2fds34%2f*+not+rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fds34%2f*+not+rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true), accessed 15 June 2014.

⁷³⁵ Garrett, G & McCall Smith, J (1999), *The Politics of WTO Dispute Settlement*, Paper to the American Political Science Association, Atlanta, GA,
<http://www.yale.edu/leitner/resources/docs/1999-05.pdf>, accessed 14 June 2014.

⁷³⁶ WTO Agreement on Agriculture, see particularly Articles 3 & 13.
http://www.wto.org/english/docs_e/legal_e/14-ag.pdf. See also WTO website: Goods Schedules, Members' commitments,
http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm, both accessed 14 June 2014.

⁷³⁷ Reuters, 15 May 2013, Analysis - UK trade may struggle to stand still after EU exit,
<http://uk.reuters.com/article/2013/05/16/uk-britain-europe-trade-idUKBRE94F0I220130516>, accessed 14 June 2014.

directed at particular products, they tend to include direct income supports for farmers "decoupled" from current production levels or prices. These subsidies are allowed without limits.⁷³⁸

Of the subsidies paid under the current Multiannual Financial Framework (MFF) under the 2010 CAP reforms, 94 percent would accord with "green box" and other exempt categories. They could, therefore, continue to be paid by an independent UK without breaching WTO provisions. Furthermore, there are established provisions for "rectifications and modifications" of schedules, and members are allowed to modify concessions or withdraw them from their schedule, through negotiation and agreement with other members.⁷³⁹

As the EU has only used €8.76bn of the €72.2bn ceiling agreed with the WTO in 2009/2010, a fraction of the allowable limit, re-apportioning subsidy concessions should be relatively uncomplicated.⁷⁴⁰ Even if there was no agreement, as long as there was overall parity in subsidies paid in the "amber box", any technical breaches in WTO would be unlikely to trigger a complaint procedure.

Import quotas, according to Mavroidis, may be more problematic because they apply EU-wide and are the result of negotiations with suppliers. For beef alone that would reopen negotiations with countries like Argentina, the United States, Canada and Australia, which enjoy quotas of low-tariff exports to the EU.⁷⁴¹

However, quotas are trade restrictions and the general prohibition under WTO rules relates to the imposition of *new* restrictions. Upon the exit of the UK, individual EU members are unlikely to increase their individual quotas to make up the portion normally taken by the UK. Thus, the UK would be more or less obliged to carry over the same quota levels that applied when it was an EU member. Even if adopted unilaterally, no harm would accrue to any party and it would be unlikely that any complaint could succeed.

All of this notwithstanding, there are clearly issues of some complexity which arise as a result of UK withdrawal from the EU. To avoid inadvertent non-conformity, the UK thus might need to maintain ongoing liaison with high-level WTO officials, to the extent even of seeking assent from EU negotiators of sharing information on the proceedings of some negotiations. At some point, we may actually be seeing tripartite discussions, if not actual negotiations, to ensure that any exit settlement is WTO compliant.

⁷³⁸ See WTO background briefing note,

http://www.wto.org/english/tratop_e/agric_e/agnegs_bkgrnd_e.pdf, accessed 14 June 2014.

⁷³⁹ WTO website, Current Situation of Schedules of WTO Members,

http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm, accessed 14 June 2014.

⁷⁴⁰ Reuters, *op cit*.

⁷⁴¹ *Ibid*.

12.3 Post-exit agricultural policy

Because the continued export of UK agricultural products to the EU will require a high degree of alignment in policies, one would expect initially for there to be little pressure for an immediate reform of the UK system, or the implementation of any changes.

Logic would dictate that the UK should shadow EU policy until such time as the industry was prepared for and could cope with a degree of divergence. Even then, any such divergences would need to be studied and measured to keep the necessary equivalence with EU policy, to avoid giving unfair trading advantages to any producers within the overall system, and thereby prejudice market access.

On this, there is probably less urgency required than might be imagined. The Common Agricultural Policy (CAP) has developed considerably since the days when unrestrained subsidies were driving annual growth in production of two percent, while the market was only able to absorb a quarter of that growth – a policy from which wine lakes and butter mountains emerged. For more than twenty years, starting in 1992 with the so-called MacSharry reforms, the CAP has undergone successive transformations which have largely addressed these problems.⁷⁴²

The result has been a change from 1992 when market management represented over 90 percent of total CAP expenditure, driven by export refunds and intervention purchases. By the end of 2013 it had dropped to just five percent. Market intervention has been relegated to a safety net tool for times of crisis. Direct payments are now the major source of support, 94 percent of which are decoupled from production.

There remains an element of income support and safety net mechanisms for producers, with some integration of environmental requirements and reinforced support for rural development across the EU. The production subsidy element has been cut and, with increased market responsiveness, the point has been reached where the level of decoupling matches that which an independent Britain would require.

In 2010, a further round of reform was initiated, amounting to the first ever fundamental overhaul of the entire CAP, taking in changes in the decision-making process. The European Parliament, for the first time, acts as co-legislator with the Council.⁷⁴³ This reform also took place in the framework of the discussions on the overall EU budgetary framework for 2014-2020, the seven-year Multiannual Financial Framework (MFF), which provides the funding necessary to implement the CAP.

⁷⁴² European Commission, COM(91) 100 final, The Development and Future of the CAP, http://ec.europa.eu/agriculture/cap-history/1992-reform/com91-100_en.pdf, accessed 26 May 2014.

⁷⁴³ http://ec.europa.eu/agriculture/policy-perspectives/policy-briefs/05_en.pdf, accessed 25 May 2015.

This means that new policy was agreed for the period until 2020, and there will be no substantial changes in systems until after that date. Then, most likely, policy renewal will follow the seven-year MFF interval, taking the next settlement to the end of 2026 before there is any further structural change.

Three groups of changes have been identified. Firstly economic, including food security and globalisation, a declining rate of productivity growth, price volatility, pressures on production costs due to high input prices and the deteriorating position of farmers in the food supply chain; secondly environmental, relating to resource efficiency, soil and water quality and threats to habitats and biodiversity; and thirdly territorial, where rural areas are faced with demographic, economic and social developments including depopulation and relocation of businesses.

The Commission argues that the role of the CAP is to provide a policy framework that supports and encourages producers to address these challenges while remaining coherent with other EU policies. To that effect, it has adopted three new long-term CAP objectives: viable food production; sustainable management of natural resources and climate action; and balanced territorial development.

Such overall objectives are, in principle, those which the UK government would readily support. They focus on the need "to attain higher levels of production of safe and quality food, while preserving the natural resources that agricultural productivity depends upon". This, the Commission says, "can only be achieved by a competitive and viable agricultural sector operating within a properly functioning supply chain and which contributes to the maintenance of a thriving rural economy". In addition, it says, "to achieve these long-term goals, better targeting of the available CAP budget will be needed".⁷⁴⁴

What is helpful in this context is that the Commission has proposed that CAP expenditure for 2014-2020 is frozen at the level of 2013. This means that, in real terms, CAP funding will decrease compared to the current period. What are known as "Pillar 1" payments – area payments made to farmers – will be cut by 1.8 percent and for "Pillar 2", encompassing rural development, environmental, etc. payments, by 7.6 percent (in 2011 prices).

On a Community level, this means a total amount of €363bn for 2014-2020, of which €278bn is earmarked for direct payments and market-related expenditure (pillar 1) and €85bn for rural development (pillar 2) in 2011 prices. This will represent 37.8 percent of the EU budget for the period, with the UK contribution already earmarked, imposing no extra financial burdens.

What is also attractive is that, from 2014 onwards, decisions on direct payments will be made increasingly by member states, with the possible transfer of up to

⁷⁴⁴ *Ibid.*

15 percent of national allocations between pillars. Member States will be able to target such spending on their own national priorities. Even without developing a specific UK policy framework, therefore, a shadow policy would develop aspects unique to the UK.

This would be very necessary in the context of the detailed aspects of the current reforms. As always, the implementation is overly bureaucratic, and many aspects of the so-called "greening" policy are intrusive and unnecessary, particularly the "three crop" policy, which requires a minimum of three different crops to be grown on arable farms.

12.4 Continuing policy development

Following a transitional phase, one problem that will emerge is that it will not only be UK policy which is changing. It is also the case that EU policy is no longer static. The Commission is committed to a regime of continuous development, and is working on a "more balanced, transparent and more equitable distribution of direct payments among countries and among farmers".

The Commission's aim is to reduce disparities in the levels of direct payments between member states, known as "external convergence". Levels of direct payments per hectare are currently based on historic parameters in many countries. These will be progressively adjusted with the introduction of a minimum national average direct payment per hectare across all member states by 2020.

This is mirrored by "internal convergence" within the member states. Payments will no longer be based on uneven historical references which are more than a decade old but "on a fairer and more converging per hectare payment at national or regional level". In addition Member States will be permitted to rebalance payments with the introduction of the redistributive payment, voluntary capping and degressivity (reduction) of payments, beyond the mandatory cuts which will apply to basic payments above a certain threshold.

These complex adjustments will have the effect of further harmonising conditions within EU member states but will then expose the UK to the risk of excessive divergence. Should this occur, the Commission might no longer accept the equivalence of the British system for the purpose of free trade in agricultural products. To avoid this, there will have to be a degree of liaison and ongoing negotiation, to which effect it may be necessary to create a standing liaison committee, to keep respective governments apprised of actual and intended changes.

The need to maintain a level of regulatory convergence, as an ongoing process, may impose future constraints on UK freedoms. Rather than enjoying an increasing degree of independence in policy-making, the UK will find itself locked into long-term EU planning, with limited autonomy if trade is to

continue uninterrupted.

These constraints on independent policy-making may prove unacceptable in the long-term, or they may be regarded as a necessary price to pay for ensuring access to the Single Market. This is a political decision that will have to be made some time in the future, after the UK has completed the leaving formalities and the system has been allowed to settle down. Should constraints prove unacceptable, the UK could decide to disengage entirely from a shadow policy, or it could negotiate partial disengagement. Given that alternative markets could be found for some products, or where export trade is unimportant, the first option might be to remove specific sectors from any EU-UK agreement.

Alternatively, the UK might accept or introduce degressivity as a means of buying a "licence" to formulate policy independently. By thus compensating EU member state producers for perceived disadvantages, the UK can pursue measures favourable to UK producers without further penalty.

12.5 Withdrawal from specific sectors

The idea of partial disengagement from the CAP, or from specific programmes allied to but not directly part of the CAP, can be illustrated by the treatment of the financial support programme aimed at improving the economic value of forests. This is a particularly good example, where disengagement might be recommended, given the September 2013 report from the European Court of Auditors (ECA), which found that an expenditure of €535 million on the programme had had no measurable effect.⁷⁴⁵

At the Commission level, the situation had not been specifically analysed so as to justify the proposal of specific financial support, while key features of the measure had not been defined. At Member State level, the aims of the scheme had not been adequately described, as a result of which the funding had been poorly focused. The ECA thus found that only a few of the audited projects improved significantly the economic value of the forests, either by improving the value of the land (building of forest tracks and roads) or the value of the stands (silvicultural operations like pruning or thinning).

This did not stop the agriculture council discussing the EU's (then) new forest strategy, which aimed "to cut through the mass of rules governing the protection of forests". That strategy was announced on 20 September the day after the ECA's report, with a 17-page report calling for a new forestry "framework".⁷⁴⁶ The document conceded that, in the Treaty on the Functioning of the EU, there was no reference to specific provisions for an EU forest policy.

⁷⁴⁵ European Court of Auditors, Press Release, 19 September 2013, http://www.eca.europa.eu/Lists/ECADocuments/INSR13_08/INSR13_08_EN.pdf, accessed 6 June 2014.

⁷⁴⁶ European Commission, 20 September 2013, COM(2013) 659 final, http://ec.europa.eu/agriculture/forest/strategy/communication_en.pdf, accessed 6 June 2014.

Thus, on technical, financial and legal grounds, the UK could disengage, without prejudice to other programmes, and without any significant political implications.

The general premise of withdrawal from specific policy sectors could then be extended progressively to different regimes, but on the same basic premise, that the programmes could be dealt with in isolation, and there would be no knock-on effects carrying over into other programmes. Discrete programmes, such as the milk, beef and sugar regimes, might benefit from this treatment. In this, it is important to bear in mind that two very significant regimes – pig rearing and poultry (meat and eggs) – have never been fully absorbed into the CAP and have never attracted subsidies. Assistance has been limited to export refunds, and limited support for private storage, as a price stabilisation mechanism.⁷⁴⁷ Therefore, there are already extant models on which new market-driven regimes could be based, applicable to other sectors.

A programme of gradual removal of specific sectors from the CAP matrix need not be devised entirely without reference to remaining EU member states. Nor does removing a sector mean that it has to break away from all EU influence. For instance, any one of the livestock regimes may be taken out of the support programme, but EU fresh meat production standards could be maintained. Likewise, it would be possible to withdraw from the dairy regime while still maintaining EU (Codex) derived hygiene, compositional and welfare standards.

Currently, though, enforcement of some standards is secured by means of cross-compliance – making subsidy payments conditional on conformity with specified rules. Changes to payment regimes, therefore, can have significant implications on the way policies are then enforced, all of which will have to be factored into any proposed changes. One might expect, for instance, the EU to resist the removal of specific sectors from payment regimes, simply because it weakens the ability to ensure compliance with non-statutory production requirements.

On the other hand, it is in the increasingly restrictive demands under the cross-compliance label that many of the complaints about "red tape" reside. Farmers complain that the conditionality inherent in the system is now so expensive to administer, and so restrictive, that it negates the value of the subsidies. Under certain circumstances, farmers would be prepared to forego farm payments in return for a more relaxed regulatory regime, bringing them closer to the market. This might have more relevance as payment schemes are increasingly used to support "multifunctionality" (see below – 13.7).

Given that there is within the EU a general desire to reduce overall spending on the CAP, the UK could provide a service to the EU as a whole, developing spearhead models, by which new subsidy-free regimes could be "test driven" before being adopted more widely within the EU. Perversely, once no longer

⁷⁴⁷ http://ec.europa.eu/agriculture/publi/fact/meat/2004_en.pdf, accessed 11 September 2014.

hampered by membership of the EU, the UK could actually exert greater leadership from outside the bloc than from within.

12.6 Rural development

Where there is further scope for independent action is in rural development, which is now an integral part of the CAP. Despite this, it is currently untouched by the EU's reform programme. Policy is implemented through national and/or regional rural development programmes (RDPs) which, for a seven-year period, set out the actions to be undertaken and the corresponding allocation of funding for them.

Proposed reform, however, aims to remove this flexibility, by strengthening the "strategic approach" requiring member states to base their RDPs upon at least four of six common EU priorities. Such priorities are expressed with the bureaucratic opacity typical of European policy-makers. Recipients are rewarded for: "fostering knowledge transfer and innovation in agriculture, forestry, and rural areas"; "enhancing farm viability and competitiveness of all types of agriculture in all regions and promoting innovative farm technologies and sustainable management of forests"; and "promoting food chain organisation, including processing and marketing of agricultural products, animal welfare and risk management in agriculture".

However, such is the range of issues that comes under the broad head of "rural development" that it should not be difficult to devise policies which have equivalence with EU programmes, without being exactly the same. This would ensure a degree of alignment sufficient to avoid accusations that the UK was enjoying an unfair trading advantage. The essence would be that the UK should have a defined rural development policy, which is given the same degree of priority (and afforded the same level of expenditure, but no more) as it would have enjoyed had the UK remained in the EU. The difference would be that the exact details and the priorities would be determined by the UK.

Even pursuing local policies need not be problematical. EU parameters are so widely cast that an independent UK policy would most likely have a degree of overlap with EU Member State policies. Any differences might be largely cosmetic and be resolved by presentational adjustments, rather than by having to make substantive changes. In short, as long as the UK maintains a specific rural development policy, this would afford a degree of alignment sufficient to avoid creating problems with mutual trade.

In the early stages, though, the UK might be expected to run its rural policy in parallel with the EU, with no distinctive identity. As such, rural development policy would not diverge significantly from its EU base, until a clear political intent to forge an entirely new policy structure had emerged, and then only after a prolonged national debate. As the nation got used to its independent status, emergent local needs would be dealt with on their merits without the constraints of EU policy. Rural policy would then increasingly interface with non-

agricultural demands, eventually emerging as part of an overall "multifunctionality" agenda.

12.7 Multifunctional policy

The term "multifunctionality" in relation to agriculture or rural development describes policy instruments with objectives additional to the strict needs of agriculture. Such a policy recognises that rural areas have roles in addition to producing food and agricultural goods. National food security, food safety, environmental benefits, cultural landscape, land conservation, flood control, biodiversity, recreation, cultural heritage and viable rural areas are cited as additional functions, which can legitimately form part of an integrated (i.e., multifunctional) rural policy.⁷⁴⁸

Currently, it is asserted that "multifunctionality" and the "European rural model" are one and the same, with EU commentators arguing that the CAP, as modified with its "Pillar II" rural development programme, is an example of multifunctionality.⁷⁴⁹ Here, there seem to be definitional variations, different things being understood from the same term. Mainly, there are differences in degree.

The EU's idea of multifunctionality is restrictive, while Norway is one of the most prominent exponents of expansive multifunctionality. Norway links agricultural policy with its regional policy, its objective being to keep the countryside populated, to which there are then added strategic defence components. The Norwegian policy thus goes beyond the "Pillar II" elements of the CAP, which define the limits of permissible multifunctionality in the EU domain.

The Norwegian policy driver is avoiding rural depopulation, with about 75 percent of its five million population living in what might be described as urban areas, and only three percent of the total land area available for agriculture (apart from forestry). As in other countries, farm numbers have been decreasing (70,111 in 1999 from 198,315 in 1959) and as the process of centralisation continues, it risks leaving substantial parts of the countryside under-populated, or completely devoid of people.⁷⁵⁰ To counter this trend, there is a long history of supporting the agricultural sector in order to keep rural areas settled. This was not only for social reasons. The strategic defence element relates to keeping the Russian border areas populated, thus providing staff and infrastructure for military bases in the border regions.

These drivers go against the grain of developments in agriculture. With the progress of technology and continually improving farming techniques, labour requirements are much reduced. In many developed countries, the agricultural

⁷⁴⁸ http://www.csa-be.org/IMG/pdf_multi_fonct_-OMC_Hele.pdf, accessed 20 June 2014

⁷⁴⁹ <http://ec.europa.eu/agriculture/rur/leader2/rural-en/biblio/model/art02.htm>, accessed 9 September 2014.

⁷⁵⁰ <http://ageconsearch.umn.edu/bitstream/24386/1/cp03he01.pdf>, accessed 20 June 2014.

workforce is now considerably less than five percent, compared with 29 percent in the UK in 1840, towards the end of the industrial revolution. Smaller rural populations beget reduced demand for goods and services in rural areas, leading to closure of local services such as shops, schools and hospitals.

However, the viability of rural areas is not necessarily dependent on agricultural production. Rural dwellers can be subsidised without attaching this to agricultural production. In some countries, present agricultural subsidies are considerable, and would need to be raised little to be a viable living allowance. Subsidies for Denmark have been calculated at over \$33,000 per farm in 1995, which is more than the net financial returns per farm in that year. It would have been cheaper for the taxpayer to pay farmers their net profit, against an undertaking that they did no farming.

Furthermore, since agricultural subsidies mainly go to the large farmers, well-targeted subsidies for rural dwellers can be more cost-effective than agricultural support. One approach is the payment of direct subsidies to create rural employment opportunities. Though often not an efficient way of allocating resources, this is a way that non-agricultural industries can be encouraged to locate in particular rural areas. Provision of high-speed broadband will also encourage firms and the self-employed to locate in rural areas. In other words, in order to keep people in rural areas it is not necessary to subsidise agricultural production.⁷⁵¹

Keeping the countryside populated, however, is more than just keeping people in rural areas. Much of the character of the countryside depends on it being farmed. Furthermore, sustaining "living rural communities" and maintaining a "beautiful countryside" are important contributors to the tourism industry. They also contribute to the health of the urban population, who benefit from rural tranquillity. But agriculture is also believed to have a role in contributing to knowledge of food production. In Norway, this is considered an important part of helping to "shape the Norwegian identity". For these and other reasons, policy can be regarded as multifunctional, extending beyond the narrow remit of supporting agricultural production alone.⁷⁵²

While the UK might prefer to allow market forces to determine production priorities, it might also wish to step in with support where there are defined needs. In particular, where farmers are required (or encouraged) to carry out environmental measures, or landscape improvements, at considerable cost to themselves for which there is no market mechanism by which they can be recompensed, payments might be made from public funds.

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http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0102/02cib13, accessed 7 July 2014.

⁷⁵² Bjørkhaug, H & Richards, C A (2008), Multifunctional agriculture in policy and practice? A comparative analysis of Norway and Australia, *Journal of Rural Studies*, 24, 98-111; see also: OECD (2009), *Methods to Monitor and Evaluate the Impacts of Agricultural Policies on Rural Development*, <http://www.oecd.org/agriculture/44559121.pdf>, accessed 20 June 2014.

12.8 Landscape and tourism

One particular example of a multifunctional element of British agriculture, currently unrewarded by the CAP, is rural tourism. The value of countryside trips in England is £3.2 billion - 18 percent of total domestic tourism spend. The industry, growing at five percent per annum - above the national economic growth rate - creates employment and opportunities for business growth where other opportunities may be limited. It maintains and protects existing jobs, micro-businesses and those self-employed in rural areas. In Yorkshire, rural areas account for 39 percent of all jobs in the visitor economy in the region and 37 percent of the total visitor economy.

Furthermore, tourism provides the ability to supplement the income streams of businesses operating or fixed in rural locations. A good example of this is farm diversification, which can help maintain the environmental and landscape qualities which are valued by visitors, communities and businesses alike.⁷⁵³

Such tourism is intrinsically reliant on the beauty of the countryside which, in an artificial, managed environment, depends on the activities of farmers. However, apart from those farming businesses which have a tourist component - such as those which have diversified into bed and breakfast, or host rural activities - there is no free market mechanism for reimbursing farmers for their contribution to a major public good.

From the same economic wellspring that suggests that negative externalities, such as water pollution, should be borne by the originator, on the "polluter pays" principle, it is arguable that those who deliver "positive externalities" - such as landscape - should also be recognised.⁷⁵⁴ Accordingly, it has been proposed that agricultural support payments should be directed at those enterprises which most contribute to landscape quality, delivering financial value to the tourist industry. The basis would be the difference between the income that could be gained by full commercial exploitation of the land without regard to "externals" such as landscape quality, and that which is available from restrained land use, with activities geared to maximising the value of the "externals".⁷⁵⁵

Studies on this issue suggest that support levels can be defended by the "public good argument", with the emphasis on landscape preservation, indicating that support on stimulating high production levels is often badly targeted. It is more efficient to support extensive production techniques, than production *per se*.⁷⁵⁶

⁷⁵³ England, a strategic action plan for rural tourism, 2010-2020.

http://www.visitengland.org/Images/FINALRural%20Tourism%20Action%20Plan_tcm30-32567.pdf, accessed 4 July 2014.

⁷⁵⁴ http://www.csa-be.org/IMG/pdf_multi_fonct_-OMC_Hele.pdf, accessed 9 September 2014.

⁷⁵⁵ North, RAE (2001), *The Death of British Agriculture*, London: Duckworth.

⁷⁵⁶ <http://www.uib.no/filearchive/No.%2011-05.pdf>, accessed 9 September 2014.

One might note in this context, though, that where farmers engage in the "uglification" of their land, this might be regarded as a "negative externality", for which a penalty might be extracted. Such might apply to another aspect of multifunctionality, where land is devoted to energy production in one form or another. Involvement might range to the production of wood chippings for electricity production and oilseed rape for biofuels, where intensive production and the monoculture entailed in large-scale production might have a deleterious effect on the landscape.

Of far more profound impact is the installation of windfarms or solar panel arrays, which can have a significant impact on landscape, and on the use and enjoyment of adjoining land. The effect of wind turbines on birdlife is also of concern. While such activities are directed at meeting EU renewable energy quotas, applying penalties to their proliferation would be counter-productive, but a release from EU obligations would permit a change in the treatment of such activities.

12.9 A policy of incrementalism

Putting all this together, one would expect the UK to transition towards its own unique policy over a period of years, only gradually implementing its own specific objectives. This might be done by shifting support from direct payments to promoting "multifunctionality", rewarding those who deliver positive externalities, while gradually withdrawing from the CAP market regimes on a sector-by-sector basis. That would in effect convert the negative and restrictive cross-compliance system – where farmers are penalised for failure to conform to increasingly restrictive "red tape" - to a reward-based system, where best practice is incentivised by payments which reflect the cost of delivery.

This policy amounts to one of incrementalism, implying a cautious approach which does not risk too great a divergence from the EU, in order to secure a continuation of trading arrangements. UK policy-makers, though, will also have to recognise that the CAP is not fixed, and is also undergoing continuing transformation. As we have argued, Britain - even if only by example - might expect to influence that process, which could ease the process of transition to a more market-orientated policy, as EU member states move towards the same goal.

Policy-makers will also need to recognise that longer term multifunctionality will depend as much on agreement with WTO members, where there are substantial variations in approach and working models. The need to gain acceptance by the EU will be augmented by the need to ensure WTO compliance.

Many exporting developing countries argue that proposals to deal with non-trade concerns outside the "green box" of non-distorting domestic supports amount to a form of special and differential treatment for rich countries. Several

even argue that any economic activity - industry, services and so on - have equal non-trade concerns, and therefore if the WTO is to address this issue, it has to do so in all areas of the negotiations, not only agriculture. Some others say agriculture should be given special consideration.⁷⁵⁷

In particular, no element of the policy must be seen as creating any new barrier to trade. Upon this will depend the level of price support that will be permitted, should the UK wish to continue with agricultural subsidies.⁷⁵⁸ Overall, the key to any successful transition from the EU-based to independent policy is long-term predictability. Agriculture is a business that lives with constant change – in weather, climate and in market conditions. But its capability to deal with politically induced change is limited and poor decision-making can do long-term damage.

The industry, however, is characterised by a high investment-to-production ratio, making most modern farming highly capital-intensive. Investment decisions have to be made well in advance, so farmers, managers and entrepreneurs need as much certainty as can be afforded. Proposed changes should be signalled well in advance and extended transition periods should be afforded.

With that, the industry has shown itself capable of absorbing extraordinary degrees of change, reinventing itself in successive generations in a way that not all other industries have been able to manage. Thus, major changes in post-exit policy do not have to be avoided, but they should be slow in coming, with plenty of warning and maximum opportunity for consultation and discussion.

Farmers, in particular, will need to be reassured that they will not have to confront rapid, unnecessary change, to which effect a slow transition from the CAP to national control is advisable.

12.10 Longer-term options

Looking to the longer-term, the best and most persuasive argument against the CAP is the very concept of a *common* policy stretching from the tundra of northern Finland to the arid hills of Athens, and all points in between. The very idea is absurd and drives away Norwegians, Icelanders and the Swiss, who have their own very specific needs for agriculture, which simply could not be accommodated within the framework of a common policy.

What applies to Europe though, also applies to the United Kingdom. There may not be the same extremes, but there are huge differences between the dairy country of Cornwall and Devon, the green hills of Wales, the arable plains of

⁷⁵⁷ http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd10_nontrade_e.htm, accessed 9 September 2014.

⁷⁵⁸ http://www.csa-be.org/IMG/pdf_multi_fonct_-OMC_Hele.pdf, accessed 9 September 2014.

East Anglia, the lush Vale of York, the barren but beautiful hills of the Pennines and Cumbria, and the extraordinarily diverse Scotland.⁷⁵⁹

No more is a common agricultural policy applicable to the UK, therefore, than it is to the rest of Europe, and freedom from the constraints of the European Union could eventually allow for a fundamental rethink of how we manage (and regulate) agriculture in this country. One would like to think that it could eventually be devolved, not just to the separate national administrations, but to regional and even county level, where the development of strategic policy might lie, tailored to the specific conditions on the ground. There would then be not one policy, but several hundred, with the national administrations simply providing oversight and dealing with external trade and international relations.

Greater autonomy might require broader reform, outside the direct remit of agriculture, such as the devolution of tax-raising powers to a lower level. Farming subsidies (and rural development generally) might then be financed from local rather than rural taxation, but with a wider range of tax options granted to rural authorities, such as the possibility of a tourist tax. Other tax options might include community taxes on energy schemes, to reflect the rural contribution to urban economies, and levies on water abstraction.

If county areas prove to be too small to become viable administrative authorities, then the current Euro-regions – with or without some boundary changes – might suffice. There should be no great problem with this – the regions were in fact first defined in the 1920s, as an emergency measure to deal with the national strike, and then as civil defence regions to cope with the German bombing of World War II.

Whatever then transpires, the essential fact is that in the post-exit UK, there are options. No longer will agricultural policy be determined primarily by Brussels, leaving policy-makers at all levels to decide what is most appropriate for their communities and taxpayers, and how those needs should be interfaced with the demands of regional and global trading communities.

⁷⁵⁹ For an overview of Scottish agriculture, see here: <http://www.nfus.org.uk/farming-facts/what-we-produce>, accessed 28 May 2014.

13.0 Fisheries

We are determined that the next Conservative government will establish national and local control over fishing. We intend to raise this in the Council of Ministers at the first opportunity and I believe we can achieve this through negotiation. However, should negotiation not succeed, it remains the case ... that the British Parliament is supreme and we would introduce the necessary legislation to bring about full national and local control.

Michael Howard, Conservative Party Leader, 9 June 2004⁷⁶⁰

While there are aspects of the CAP which may be tolerable, at least in the short to medium-term, there are no redeeming aspects of the EU's Common Fisheries Policy (CFP). Limited reforms have been largely cosmetic and do not address the fundamental deficiencies of the policy.

However, restoring national policies in a post-EU environment is extraordinarily complex. When Conservative Farming and Fisheries spokesman Owen Paterson undertook a review of the CFP, it took two years to produce a draft outline, embodying the basic principles of a repatriated policy.⁷⁶¹ On that basis alone, given the need for extensive consultation, and setting up the administrative and other systems needed to manage the implementation of policy, it would not be untoward to argue that it could take longer than five years – and perhaps more than a decade – to get to the stage of introducing a UK policy.

The starting point of the Paterson review was the recognition that, prior to UK entry to the EEC, the British fishing industry had been a model of sustainability. Yet, after decades of the CFP, areas of the most fertile and productive fishing grounds in the world were being threatened with closure. Others were producing yields well short of their potential capacity, whilst ever-increasing restrictions were being imposed on British fishermen.

⁷⁶⁰ a letter addressed to John Whittingdale, OBE MP, then Shadow Secretary of State for Agriculture, Fisheries and Food

⁷⁶¹ Consultation on a National Policy on Fisheries Management in UK Waters. A Conservative Party Green Paper. January 2005.

<http://www.eureferendum.com/documents/fishinggreenpaper.pdf>, accessed 19 May 2014.

The figures themselves told the story. In 1972, a total of 939,800 tons was landed by British vessels, compared with 145,850 tons landed by foreign vessels. Vessel numbers were then not accurately recorded (and nor indeed was the entire UK catch). But in 1995, we know that 9,200 fishing vessels landed 912,000 tonnes of fish – not a great difference, but then the CFP was only just beginning to bite.

In 2002, however, after Commission actions to reduce the fishing effort, there were only 7,578 vessels, which landed 686,000 tonnes – a 25 percent reduction in catches over eight years.⁷⁶² By 2012, the UK fleet had dropped to 6,406 vessels, comprising 5,032 ten-metre and under vessels and 1,374 over ten-metre vessels. Landings dropped to 627,000 tonnes, with a value of £770 million. But the real contrast came with the imports. In the same year, these reached 638,410 tonnes, valued at £2.6bn. Of that, £797 million came from the EU-27, a significant proportion of which were caught in UK waters.⁷⁶³

This provided a graphic illustration of the way the CFP worked. Access to fishing grounds had been dominated by political considerations, on the basis of "equal access" to what was defined as a "common resource". Fishing fleets from EU member states were given proportionately greater shares of the fish allocations in UK waters than the British fleet, the "total allowable catch" determined annually during a grotesque bargaining session in Brussels, between fisheries ministers.

Fish allocations, therefore, had had little to do with good fisheries management, which laid the decline and impending collapse of British fisheries squarely at the door of the CFP. It was on that basis that it was concluded that the only hope of restoring British fishing grounds to commercial viability in the interests of all fishermen – including those in foreign fleets – lay in returning control to the UK Government and introducing entirely new management regimes.

The complexity then came in the recognition that simply exchanging a bureaucratic system run from Brussels for one run by the bureaucracies of London, Edinburgh, Cardiff and Belfast was a poor bargain. In itself, national control is no panacea. If it is to work, it has to be accompanied by genuine devolution, backed by a new, effective and imaginative management system which has the trust of the nation and the fishermen who work within it.

Therein lies the essence of the post-exit settlement. Leaving the EU, *per se*, is no solution in itself. EU policies require individual replacement, each with something better. And fisheries provided a useful example. Largely self-contained in policy terms, it is a test bed for policy development, and as an example of the complexity of the repatriation process.

⁷⁶² MAFF/DEFRA statistics.

⁷⁶³ <http://www.marinemanagement.org.uk/fisheries/statistics/documents/ukseafish/2012/final-1.pdf>, accessed 19 May 2014. All figures include shellfish landings.

In the view of the European Commission, the fisheries problem was diagnosed as overfishing, with much reliance on the slogan "too many fishermen chasing too few fish".⁷⁶⁴ The Paterson review did not take this to be a *prima facie* cause. Rather, it was the failure of management in allowing overfishing for political reasons. The distinction was crucially important. The one was the cause, the other was the symptom. With that remit, a "top down" approach to solving complex fisheries management problems was deemed inappropriate. The view was taken that effective policy could only be developed with the full co-operation and assent of fishermen, on the basis of best practice, guided by good science, together with an appreciation of the wider issues.

One of those wider issues was the protection of the environment. It was argued this was not incompatible with safeguarding the fishing industry. Over-fishing and other abuses damage the marine environment and also damage the long-term economic value of a fishery. Therefore environmental protection was regarded not as an adjunct to a fisheries policy but as an inherent part of it.

It was also recognised that commercial value was not necessarily confined to the value of fish landed by the catching fleet. There was value in recreational fishing, tourism and leisure pursuits. Furthermore, a healthy ecosystem had an inherent value which could not necessarily be expressed in cash terms.

Whatever the specific short-term or strategic objectives of specific fishery areas, Paterson maintained that, properly managed, with carefully devised and targeted controls, the resource could be constantly renewable. Efforts to rebuild stock could proceed alongside sensible commercial exploitation. On this basis, the review concluded that fisheries could provide a good living for fishermen and the communities which supported them and relied on them, without drastic panic measures, while satisfying the entirely valid demands of all those who care for the environment.

13.1 Background

The assumption underlying Paterson's post-exit policy was that UK fisheries should revert to exclusive national control. Nevertheless, he recognised that foreign states, including the EU member states then exploiting UK waters, had acquired rights. Some of these rights pre-date the CFP and some stretch back as far as the Middle Ages. Consolidated under the current CFP regime, they would have to be honoured, unless some could be waived as part of the Article 50 negotiation process. Without that, there could be no question of excluding foreign vessels, unless in strict accordance with international (and domestic) law.

⁷⁶⁴ For instance, see European Parliament press release: 4 February 2013. <http://www.europarl.europa.eu/news/en/news-room/content/20130201STO05560/html/Plenty-more-fish-in-the-sea-MEPs-to-decide-on-best-way-to-tackle-overfishing>, accessed 19 May 2014.

Much of the Commission case for a common fisheries policy was that "fish know no boundaries", a slogan that was taken to legitimise supranational management. However, Paterson observed that it would be more accurate to observe that fish do not observe *man-made* boundaries. For instance, the Norwegian Sea, as a "large marine ecosystem", is to a great extent self-contained, with limited fish movement between this and adjoining systems. Nevertheless, that area is split by numerous political boundaries. Furthermore, the EU, in defining specific policies, had created artificial boundaries which dissected natural ecosystems; the Cod Box and the Irish Box exemplified this. These boundaries inhibited rather than encouraged proper fisheries management.

Where there are migratory and straddling stocks, between natural ecosystems rather than across politically-defined boundaries, these would still require management on a trans-national basis. The EU, however, was responsible only for the waters defined by the territories of its Member States, and its law was subject to the overarching provisions of the 1982 Law of the Sea Convention, usually referred to as UNCLOS III. This sets out the international obligations of maritime nations and would also define the UK legal framework.



Figure 28: An Icelandic factory ship (now sold to Greenland) in Reykjavik harbour. Maintaining a modern fishing fleet with healthy fish stocks requires an effective fisheries policy. It would, however, take many years for the UK to develop the sophisticated system operated by Iceland and other independent countries (photo: author's collection).

Three of the UK's important North Atlantic neighbours with strong fishing interests were Norway, the Faeroes and Iceland. The UK would need to work closely with them.

Norway manages vast areas of the ocean but 80 percent of its fish is taken from stocks which straddle waters managed by the EU, Faeroes, Greenland, Iceland and Russia. The legal framework under which all these players operate is the United Nations Fish Agreement (UNFA), adopted in 1995. It is known as "the conservation and management of straddling fish stocks and highly migratory fish stocks" agreement. It has an enforcement and dispute settlement mechanism and some important conservation obligations. The UK is already a signatory and would expect to build on it as a basis for managing relations with international partners, including EU member states.

International relations with specific partners would be managed through the North East Atlantic Fisheries Commission (NEAFC), set up by the 1980 Convention on future multilateral co-operation in North-East Atlantic fisheries.⁷⁶⁵ The Russian Federation, Norway, Iceland, Denmark (representing the Faroe Islands and Greenland) and the European Union are parties.⁷⁶⁶ During the recent mackerel quota dispute, Iceland officials constantly found it beneficial to be negotiating as one of five, rather than one of 28 member states.⁷⁶⁷

13.2 The legal framework

The 1982 Law of the Sea Convention permits a nation to define areas which come under its sovereign control and in which it can claim certain rights. These include the territorial waters extending 12 miles from the maritime baseline; an Exclusive Economic Zone (EEZ) extending 200 miles from the coastal state's maritime baseline (or to a median line equidistant from it and any neighbouring coastal state less than 400 miles away). The UK has some rights over the High Seas zone beyond the limits of national EEZs.⁷⁶⁸

As far as the UK is concerned, the fundamental principle on which a policy should rest is that the fish and other sea creatures within the UK EEZ are the property of the nation as a whole. Custody of that resource lies with the central and devolved governments. Fishermen have no inherent rights to the fish and other aquatic creatures in these waters and no inherent rights to the property so gained.

There is, however, a distinction between inherent rights and acquired rights. Some fishermen had gained acquired rights, which in most respects were as

⁷⁶⁵ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=1337>

⁷⁶⁶ <http://www.neafc.org/about>, accessed 7 February 2014.

⁷⁶⁷ Interview, Sigurgeir Thorgeirsson, Icelandic Ministry of Agriculture and Fisheries, Reykjavic, 29 January 2014.

⁷⁶⁸ http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed 19 May 2014.

firm as if they were inherent, to the extent that any difference was largely academic. Nevertheless, as a matter of principle, the basis of policy is that inherent rights are vested in the Crown and under certain, well-defined circumstances (which relate to conservation issues) acquired rights can be withdrawn or modified, in accordance with relevant legal provisions.

Thus, there is a fundamental difference between an independent policy and that which prevails with the UK as a member of the EU. In respect of both domestic and foreign fishermen, the UK Government(s), on behalf of the Crown, has complete authority to decide who would exploit the resource. It would also decide the quantities taken and the conditions under which the resource was exploited. In effect, fishermen permitted to exploit the maritime resource would do so under some form of licence, implied or explicit.

13.3 UK and international coordination

Because of the need to work with neighbouring nations and the EU, in addition to the complexities of dealing with devolved governments in the UK, there is an evident requirement for a statutory body to take responsibility for policy harmonisation and coordination. It would provide a forum for the exchange of views, both at UK and international levels. It was anticipated that it would take the form of an advisory committee or council, made up of representatives from England, Wales, Scotland and Northern Ireland. It would advise the Secretary of State on proposed international agreements and on the functioning of existing agreements.

This body would be expected to assist in coordinating cross-zone access, as in the case of the pelagic fleet which does not operate in any one fisheries zone, and to advise on establishing cross-border zones between nations. It would also be expected to be involved in projects that involved sharing certain functions with neighbouring governments, such as research and monitoring. Cooperative arrangements would be sought in all areas but particularly in the North Sea, where working closely with Norway was considered both desirable and necessary, together with the EU, the Faeroes, Iceland, Greenland, Canada and the United States.

In the Irish Sea, the UK will need to work constructively with Ireland. In the Channel and South-Western waters, France, Belgium, Holland and the EU authorities would be natural partners.

13.4 The fundamentals of the management system

Paterson's over-riding strategic objectives were to restore the marine environment, rebuild stocks and then manage their conservation once restored to healthy levels. This necessarily required limiting fishing effort, in order to rebuild the biomass of pressure stocks. For stocks in general, the priority was to ensure that biomass was kept buoyant.

Fish, though, were not the only concern. There were also the wildlife populations, including the seabird colonies, which depended on fish for their diets. Technical measures to minimise damage and disruption to these populations, including special measures to reduce bird losses from long-lining and fish mortality from ghost fishing, were also considered. There was to be a balance between commercial interests and wildlife. Seal and other predatory populations had also to be managed, not least because they could do more damage to a fishery than commercial exploitation, with knock-on effects which harmed the whole ecosystem.

This was indicative of the level of detail that had to be considered. The moment a policy area is returned, all manner of extraneous issues must be addressed. And in terms of controlling fishing effort, there are many different management systems adopted throughout the world. An element of choice was required, but the review was able to determine that the system employed by the EU with its Total Allowable Catches (TACs), its national and vessel quotas and the requirement to discard huge volumes of above-quota catches, was totally unacceptable and beyond reform.

Assessing the different management systems, the view was taken that the only way fisheries could be managed successfully in a UK context was by using good quality, accurate catch data, available to fisheries managers with minimum delay. Thus, Paterson decided that the UK management system must prioritise data collection. The system which most successfully achieves this is known as "days at sea" effort control. This had to be combined with an absolute prohibition on discarding any commercial species – fish caught in excess of quota. That which was caught had to be landed.

With these two fundamental principles, a twelve-point comprehensive management framework was constructed. This included: designated permanently closed areas for conservation purposes; provision for the temporary closures of fisheries; promotion of selective gear and technical controls; rigorous definition of minimum commercial sizes; a ban on industrial fishing; a prohibition of production subsidies; zoning of fisheries; registration of fishing vessels, skippers and senior crew members; measures to promote profitability rather than volume; and effective and fair enforcement.

The details of this framework are beyond the scope of this book, but two specific aspects are of some interest, because they could be implemented only outside EU control. These are: temporary closures and the use of selective gear. Temporary closure of fisheries needs to be a key aspect of policy. To work, it requires accurate, real-time information coming out of a fishery, permitting rapid reaction even to small-scale changes in a fishery: closures are initiated within a matter of hours. There are systems capable of this speed of response in the Falklands, in Iceland and the Faeroes. Best practice needs to be applied to UK fisheries.

The trigger for temporary closures is usually evidence of excessive catches of juveniles, where continued fishing might cause serious damage to fish stocks. Closures may be on an *ad hoc* basis, as a result of information gained from ongoing monitoring, or routinely on a seasonal basis, where past experience has shown a high likelihood of excessive by-catch. The capability to close fisheries in a matter of hours is a clear break with the EU system of management where closure decisions are taken only once a year, often on the basis of inaccurate information that is years out of date.

The mismatch between this timescale and the responsiveness required demonstrates the limitations of transnational control. A system based in Brussels could not exert control with the finesse needed. For a centrally managed system, hour-by-hour micro-management of individual fisheries is simply not possible. Yet, for Brussels to delegate control to local agencies destroys its own legitimacy. Therefore, for ideological reasons, the EU could not afford to permit more effective fisheries management.

As to "selective gear", this is fishing equipment which can "surgically extract" one particular species from a mixed fishery without affecting others. There are also techniques for allowing under-sized fish to escape and survive. It is one of the many untold scandals of the CFP that the bureaucracy actively discourages the development of selective gear and either makes its use difficult or in some circumstances actively penalises its use. Thus, in the North Sea when cod were under pressure while haddock were plentiful, the EU opted for fisheries closures. The use of selective gear would have enabled the harvesting of haddock without affecting the cod, with the beneficial side-effect of relieving the pressure on cod stocks and aiding their recovery.

Therefore, the Paterson review recommended that a UK fisheries management system should actively promote the development and use of selective gear and other technical measures to ensure that, as far as is practicable, only target species at commercial sizes would be harvested. Fisheries management authorities needed to be mandated to favour those operators who exploit fully the potential of technical controls. Mandatory use of the appropriate gear and correct rigging had to be a part of any control system.

The problem for the EU is one of variety. Selective fishing relies on taking advantage of sometimes very small differences in behaviour between species, behaviour which is often determined or modified by environmental conditions. Therefore, selective gear and technical controls often have to be fishery-specific. What will work in one fishery will not necessarily work in another. What works for a period may no longer work if conditions change.

Thus the Commission, should it choose to adopt such controls, is faced with an infinite number of variations, presenting the need to devise a regulatory regime of infinite complexity. This is simply beyond the capacity of the EU which could not devote the resources needed to the task, even if they were available.

13.5 Management structures and operations

In terms of the management function, having regard to practicalities, some of which we have elucidated above, the Paterson review decided that, in England, Wales - and where appropriate in Northern Ireland - fisheries management should be devolved to local fisheries management authorities, working within a strategic and legal framework devised by central government. The fisheries ministry would supervise and offer general direction, rather than undertake management tasks, and handle international relations. It would, however, manage and supervise British-registered fishing vessels outside the EEZ.

For inshore waters, Scotland and Northern Ireland already have their own arrangements and in England and Wales, the existing local-authority-based fisheries committees provide a good basis on which to build regulatory structures. Nevertheless, Paterson was aware of criticisms of the lack of enforcement powers, the inadequate resources for enforcement and a lack of transparency in decision-making. Also, he had been made aware that mechanisms were needed to ensure that all interested parties, such as recreational fishermen and tourism bodies, had rights of access to fisheries and rights to have their views taken into account.

The answer was to set up devolved Fisheries Management Authorities (known as FMAs). There would be two types: inshore - typically out to 12 miles; and offshore - 12 to 200 miles or to the median line. Each would have a small executive board, responsible for policy-making, a consultative council and an executive arm responsible for administration. There would also be an agency, responsible for monitoring and carrying out enforcement action. Members would be appointed independently of the Secretary of State, and inshore boards would be appointed by the local authorities in the relevant maritime areas.

136 Scientific services

The provision of accurate, reliable and timely scientific data was seen as a crucial element of successful fisheries management. Data may be collected as part of normal fishing activities or be fisheries independent, acquired from specific surveys conducted by specialised research/survey vessels. Fisheries dependent data are especially valuable and relevant, comprising in the main catch data, augmented by data from samples of catches, examined either on-board catching vessels or at landing ports, or by survey vessels operating with working fleets.

To that effect, any independent policy needs to take account of data collection needs, as well as the quality and utility of data. More effective systems would tend to optimise the use of fisheries-dependent data, reducing the requirement for independent (and often flawed) surveys of the type used to generate data for calculating TACs.

Outside the consensus of the European Union, there are aspects of fisheries science that are highly contentious. The recommendations of some scientists are disputed, sometimes with good cause, by fishermen and others. Further, there are major areas of disagreement as to the interpretation of some data in terms of practical fisheries management. Leaving the EU, therefore, would re-open the debate on the science used to determine fisheries effort, the nature of which could delay the adoption of settled policy.

Probably, it is not sufficient or wise to rely on a single source, or establishment, for scientific advice - especially in matters of contention. Excessively narrow sources of scientific advice and particularly the advice tendered through the International Commission for the Exploitation of the Sea (ICES) - to the exclusion of contrary advice - has been in part responsible for a breakdown in trust between the scientific and fishing communities.

It is thus essential that scientific advice is not only of good quality but that all parties who are bound or affected by its findings trust its integrity and have confidence in it. In this, the Paterson review saw the need to ensure diversity in the provision of scientific information. To that effect, it made proposals on the sourcing of scientific data, and how to manage and improve fisheries research.

Such issues, when Member States are part of the common policy, are decided at Community level. But the opportunity of redefining (or refining) the science is one afforded by independence. A decision would thus have to be made on whether to adopt EU-approved scientific norms, even if *pro temp*, or whether to strike out and build a new national consensus on the science of fisheries management. Such a decision would have significant cost and timing implications. A comprehensive study would perhaps take a decade or more to come to fruition, before new principles could be adopted and integrated into policy, shaping legislation and management procedures.

13.7 Enforcement, monitoring and sanctions

The central feature of the EU policy is that it is defined by regulations which form part of the criminal code, underwritten by criminal sanctions enforced by member states. The effect is to criminalise the industry, creating a situation where even minor technical and administrative infractions are deemed to be criminal offences. It puts fishermen on the same basis as drug pushers, thugs and thieves. Yet this is an industry where people put their lives at risk and lose them, in order to earn a living and to provide the nation with a valuable food. The Paterson review found this unacceptable.

The alternative proposed was the use of the civil code, using contract law, allowing companies or individuals to enter into contractual agreements with the state, or the FMAs acting as agents for the state. The contracts would permit them to exploit certain areas of sea, subject to terms and conditions enforceable in the civil courts or specialist fisheries tribunals. This would not rule out the use of the criminal code to deal with offences of fraud, deception and theft.

The effect of this approach would be to decriminalise the relationship between the fisherman and the state. It could also afford a degree of flexibility which cannot be achieved by the regulatory route. While it can take years to formulate new regulations, contracts and their conditions could be tailored specifically to meet the individual circumstances of fishermen, and then amended to meet changing situations. Further, an annual review facility could be afforded, upon renewal of contracts, which would allow new conditions to be negotiated and agreed in the light of experience. Once again this is a facility which is not available within the EU.

As to compliance monitoring, this is facilitated by the use of the "days at sea" system, rather than quota allocations. Easily and cheaply measurable, this system detaches catch data from effort limits so enforcement difficulties are minimal. The structural disincentive to reporting accurate catch data is also removed, as there is no risk of penalty attached to recording catch levels. Figures become more reliable.

Then, to minimise errors and ease compliance, Paterson proposed automatic satellite-based monitoring systems not only in respect of recording time at sea but also for positioning information. This would allow real-time monitoring of vessel locations, facilitating the enforcement of closed areas and ensuring that vessels fished only in the areas for which they were authorised.

As with current systems, it was accepted that fisheries operators would be required to keep paper records, using the existing logbook system for recording catch details. Skippers would be required to maintain accurate details and the data recorded would form the basis of mandatory landings declarations. It was recognised, though, that there were opportunities to develop electronic record-keeping, with the possibility of enabling real-time satellite transmission of catch data, to assist in stock monitoring and to enable rapid decision-making.

Moving from the EU mandated system, however, the Paterson review noted that there would be a considerable administrative burden in setting up more accurate recording systems. It was proposed that gaps in the current system be remedied, with first purchasers of all catches, including processors who bought direct from vessels, required to keep detailed records of fish bought, with details as to their sources, location and timings. Reconciliation of purchase data with landing declarations would form an important part of the monitoring programme. Not least of the difficulties, though, would be managing foreign boats, which operated out of overseas ports and landed catches outside the UK.

Something which has eluded the EU, which has been looking for uniform Europe-wide solutions, would be the implementation of electronic record-keeping and transmission to enable rapid tracking of fish landings and sales, assisting in the swift detection of possible malpractice.

Paper and electronic records, however, can only go so far, and it was fully appreciated that physical monitoring was also necessary. It was anticipated that there would be continued surveillance by fisheries patrol vessels, with random boarding and inspection. This would be augmented by use of on-board scientific observers and compliance officers, plus aerial surveillance with the possible adoption of unmanned aerial vehicles (UAVs).



Figure 29: A Reims/Cessna Vigilant F-406, based at Inverness Airport. Two aircraft are operated by Directflight under contract to the Scottish Fisheries Protection Agency, carrying out surveillance duties and patrols. Such assets are an important part of the fisheries enforcement system (Source: Wikipedia Commons).

An example of the detail into which policymakers must delve, though, comes with the difficult task of enforcing the prohibition of discarding and "high grading" – the practice of dumping fish already caught to make room for catches of better fish. This happens, for instance, when there is a market premium for one size of fish over another, and a vessel catches more valuable fish later in a trip, when holds are already full.

The Paterson review looked at regimes adopted in the United States and elsewhere, and came back with indications of how sophisticated fisheries monitoring needed to be, well in advance of EU systems. US authorities were working on constructing statistical models of catch composition for different types of vessel and fisheries. In Norway and the Falklands, the data were obtained from a "reference fleet", selected vessels from which catches were intensively monitored. If there were significant departures from the reference catches, then suspect vessels were required to carry on-board inspectors to monitor catches, at the expense of the operator.

Illegal entry to UK waters

Despite the implementation of a more liberal regime, there was an expectation that some vessel operators would not accept the disciplines imposed. Some would enter UK waters with the intention of exploiting the fish resource illegally. There was also the problem of illegal activities, such as using nets with incorrect mesh sizes.

Airborne surveillance was considered the obvious and most cost-effective means of detection of illegal fishing. With modern technology, aircraft can sweep vast expanses of sea over a short period. Detection rates were therefore likely to be high and inasmuch as the fitting of tamper-proof satellite location beacons would be mandatory for the whole of the offshore fleet, any vessel not sending a transponder signal could be deemed to be fishing illegally until evidence was provided to the contrary.

For surveillance purposes, a civilian aircraft fleet is currently used. That would have to be absorbed into any new structures and maintained. Authorities are also able to call on military assets, although with the scrapping of the Nimrod fleets, there is a major capability gap. The Royal Navy surface fleet, however, can be called upon when available. Assets are, in fact, used routinely to assist in fisheries monitoring.⁷⁶⁹ It was also expected that existing arrangements in Scotland would continue, where enforcement and surveillance duties are carried out by the Scottish Fisheries Protection Agency.

There then remains the issue of sanctions, against all types of transgressors. It is self evident that these need to be fair, and proportionate; but they also need to bite when the occasion demands. Using the civil code system, a set of penalties from specified breaches could be written into standard contracts and modified to suit the particular circumstances in which they are to be applied. To be an effective deterrent, penalties had to exceed in monetary or equivalent value any gain accrued from breaches.

The most effective sanction for legal operators was considered to be the withdrawal of "days at sea" allocations. This sanction not only had the greatest economic impact but, as a penalty, was inherently proportional. The loss imposed increases with the size of vessel to which it was applied. On a graduated scale, the authorities could also require observers to be placed aboard vessels, at the operators' cost; for multiple offenders there remained the sanction of licence withdrawal for varying periods, up to a life ban on holding a licence.

13.8 The policy in context

The detail so far adduced provides a snapshot of the problems associated with returning one small policy area from EU to national control. This is but one

⁷⁶⁹ Not least, the military monitor fishing activity in order to notify submarine crews, to avoid risk of collision and gear fouling.

policy area amongst hundreds which will have to be restructured from the very start. And at the heart of the process will be finance.

The Paterson review estimated that overall Community and member state financing of the CFP amounted to some €1 billion annually, for production worth €7 billion. The exact mix of funds paid was not known, although the UK annual financial contribution to the CFP was estimated at about £40 million, a sum notionally saved by Britain's withdrawal from the EU.

It was anticipated that administration and enforcement would progressively become self-funding, affording further savings. DEFRA reports that the costs of administering fisheries were reckoned at £55 million per year, but figures for Scotland were lacking. Conversely, there were no specific figures for enforcement in England, Wales and Northern Ireland, as Royal Navy costs were not shown separately. Enforcement costs for Scotland amounted to £16.5 million, through the Scottish Fisheries Protection Agency. Assuming that policing costs for the rest of UK waters would be similar and taking incidental cost savings into account, it was estimated that repatriation of the CFP could provide annual savings to the Treasury in the order of £130 million a year.

Such savings, however, do not come easily. They are the fruits of root and branch reform and the basis of a fundamental policy review, and progressive introduction of new systems. Potentially, the process will take decades before yielding any dividend. It will require substantial investment of governmental, legislative and administrative time, research effort, industrial involvement and public consultation. The end result will indubitably be better, but there will be no short-cuts. To that extent, CFP repatriation becomes a paradigm for the entire exit experience.

14.0 Environment policy

The EU has some of the world's highest environmental standards, developed over decades. Environment policy helps protect Europe's natural capital, encourages business to green the EU economy, and safeguards the health and wellbeing of people living in the EU.

European Commission website⁷⁷⁰

More so than perhaps any other policy area, environment is an amalgam of international, EU and domestic measures, to which the EU is a late arrival: a significant omission in the original 1957 Treaty of Rome was any mention of "environment". Legislation on environmental matters remained largely a matter for member states.

That notwithstanding, the UK had already built up an effective and flexible body of law, capable of addressing many environmental issues, based on the common law principle of tort, employing the principle of "nuisance" – termed as an action which interfered with the rights over or enjoyment of property.

The 1848 Public Health Act introduced the then novel concept of the "statutory nuisance" which enabled inspectors (usually local authority officers) to take action to abate nuisances defined as such, as they occurred. Crucially, there was removed any need for public complaint, and it was by this means that many environmental issues, including water pollution and noise, were controlled. The concept was reinforced further in the 1936 act and then in the Control of Pollution Act 1974 which, for instance, added "vibration" to the definition of "noise" as a statutory nuisance.

Although there was strong Community interest in the environment, with the first Environmental Action Policy (EAP) having been defined by the European Council in 1973, it lacked a legal base by which direct action could be taken.⁷⁷¹ Therefore, early intervention was couched in terms of enabling the proper

⁷⁷⁰ http://europa.eu/pol/env/index_en.htm, accessed 19 June 2014.

⁷⁷¹ For a short history of EU environmental policies, see <http://home.cerge-ei.cz/richmanova/UPCES/Hey%20-%20EU%20Environmental%20Policies%20A%20Short%20History%20of%20the%20Policy%20Strategies.pdf>, accessed 15 June 2014.

functioning of the single market. Adopting the philosophy of "equal misery", the Communities sought to impose a level playing field, equalising the costs of environmental controls between member states, to avoid any one member gaining a trading advantage through adopting lower environmental standards than its competitors.

This led to early tensions between the UK and the rest of the Community, with the implementation of highly proscriptive standards for the discharge of certain industrial pollutants into watercourses.⁷⁷² Given the high dilution effect of the UK's fast flowing and relatively short watercourses, compared with continental counterparts, UK interests often argued that higher discharge standards could be permitted without damage to the environment or public health. The insistence on common standards, therefore, characterised the "one size fits all" philosophy of Community legislation.

Less well understood at the time, and even less so now with the passage of time, is the change brought about in regulatory philosophy. The UK, from those early years of EEC membership, started moving from a reactive "nuisance-based" stance, requiring evidence of harm before action, to a proactive, interventionist stance. This was based on proscriptive standards promulgated by the EEC, themselves often based on theoretical limits and statistical calculations indicating probabilities of potential harm, with the addition of substantial safety margins.

14.1 The complications of policy

Such is the range of environmental policy that it also covers such issues as the mandatory provision of nature reserves. If this strand is followed, it provides an excellent illustration of the way different influences have come together, of which the EU is but one.

The starting point, in UK policy terms, came with the National Parks and Access to the Countryside Act 1949, creating a power to designate nature reserves, including a power for the statutory body with responsibility for nature – the Nature Conservancy - to acquire land compulsorily, albeit with limited power and a minuscule budget.

At the time, in post war Britain, the emphasis in agricultural policy was the drive for intensification, with greater acreage put down to arable cropping, rooting up hedgerows and ploughing up permanent pastures, forcing a move away from traditional cattle and sheep husbandry. These developments reactivated an age-old conflict between farming and conservation interests,

⁷⁷² See, for instance, Council Directive of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry (82/176/EEC), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31982L0176>, and Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (83/513/EEC), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31983L0513>, both accessed 15 June 2014.

renewing what has been described as the "battle of the birds", which the conservationists felt they were losing.

The important point here is that the next policy impetus still did not come from the EU (or its EEC predecessor), but from the burgeoning NGOs movement. Already, there had been long-established organisations such as the Royal Society for the Protection of Birds (RSPB), which had been formed in 1891, which was already setting up reserves, its first in 1932. Then came the Wildfowl & Wetlands Trust, dating from 1946, the International Union for Conservation of Nature (IUCN), established in 1948, and the relative latecomers: WWF in 1961, Friends of the Earth in 1969 and Greenpeace in 1971.

During that period, there had been an increasing awareness of environmental problems, with publication of books such as Rachel Carson's *Silent Spring* in 1962 and *Limits to Growth* in 1972. "Environment", as an identifiable issue and its new-found label, became a fashionable and popular cause. For the EEC, imbued with the idea "pollution knows no boundaries", it presented a useful opportunity to extol the virtues of international action.

By then landmark developments were already in hand, which were to lay the foundation of EU action. One came in 1962 during a conference which formed part of Project MAR (from "MARshes), a programme established two years earlier because of concerns at the rapid destruction of European marshes and other wetlands, with a resulting decline in the numbers of waterbirds. The MAR Conference was organised by Luc Hoffmann, one of the founders of the WWF, and held in November 1962 in Les Saintes Maries-de-la-Mer in the French Camargue, not far from the Tour du Valat wetland research station (which was also founded by Luc Hoffmann).

Over the next eight years, a wetland convention text was painstakingly negotiated through a series of international technical meetings (St. Andrews, 1963; Noordwijk, 1966; Leningrad, 1968; Morges, 1968; Vienna, 1969; Moscow, 1969; Espoo, 1970), driven largely by NGOs and the Netherlands. In the same year that the Ramsar Convention was signed, 1971, the then secretary general of the United Nations Conference on the Human Environment, Maurice Strong, commissioned a report on the state of the planet, *Only One Earth: The Care and Maintenance of a Small Planet*, co-authored by Barbara Ward and Rene Dubos.

These organisations, old and new, were able to exploit the widespread recognition that many wild species were in danger of extinction and that many habitat types were disappearing. The wetland thus became the "poster child" for the entire conservation movement. Some 80 experts from non-governmental environmental organisations, governments mostly from European countries, and hunting associations published their recommendations, in which they called for a list of internationally important wetlands to be protected and for the development of an international treaty to give that list legal force.

The report summarised the findings of 152 leading experts from 58 countries in preparation for the first UN meeting on the environment, held in Stockholm in 1972. This was the world's first "state of the environment" report.

The Stockholm Conference established the environment as part of an international development agenda. It led to the establishment by the UN General Assembly in December 1972 of the United Nations Environment Programme (UNEP), with headquarters in Nairobi, Kenya, and the election of Strong to head it. As head of UNEP, Strong was later to convene the first international expert group meeting on climate change.

That conference was highly significant because it marked the beginnings of international co-operation in the field of environment, from which date environmental law has been regarded as a legitimate and important area of international law. And at EEC level, the baton was picked up by the Paris Summit of October 1972. This had the Member States declaring:

Economic expansion is not an end in itself. Its firm aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in the improvement in the quality of life as well as in standard of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind.⁷⁷³

From this came the first EEC action plan on the environment, published on 22 November 1973. Although the main focus was on pollution, it called for joint action by Member States in the Council of Europe and other international organisations. Amongst other things, it then called for a study "with a view to possible harmonisation of national regulations on the protection of animal species and migratory birds in particular".⁷⁷⁴

Of the international organisations, which included the OECD, UNESCO and UNEP, the Council of Europe was quickest off the mark, adopting in 1973 the concept of a European Network of Biogenetic Reserves to conserve natural or near-natural habitats. This programme started in 1976.

Following the 2nd European Ministerial Conference on the Environment in 1976, Switzerland published a study recommending a European convention on nature conservation which led to the Berne Convention on the Conservation of European Wildlife and Natural Habitats, also hosted by the Council of Europe and opened for signatures in September 1979. It included annexes of plant and

⁷⁷³ http://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf, accessed 2 June 2014.

⁷⁷⁴ <http://home.cerge-ei.cz/richmanova/UPCES/Hey%20-%20EU%20Environmental%20Policies%20A%20Short%20History%20of%20the%20Policy%20Strategies.pdf>, accessed 2 June 2014.

animal species requiring protection but did not refer to networks of protected areas.

It was into this situation that "Europe" - still then the EEC - arrived, with what conservationists at the time considered "the big breakthrough". After pressure from members of the European Parliament following lobbying from the public and NGOs for measures to protect birds and especially migratory species, a proposal for the Birds Directive was published by the European Commission.

At the time, "environment" had not been a competence of the EEC and was not to become so until the Single European Act in 1986 (Art 130). Thus, the Community was moving into areas for which it had no power or treaty mandate, evidenced by the tenuous justification offered for the Directive:

... the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain, within the operation of the common market, the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion.

The recital to the Directive notes that the necessary specific powers to create the Birds Directive "have not been provided for in the Treaty", hence the reliance on the "catch-all" provision in Article 235 of the Treaty of Rome.

Despite the absence of a specific competence, it was agreed unanimously by the Member States, who agreed that conservation of birds was a cross-border responsibility requiring coordinated action. This was Council Directive 79/409/EEC on the conservation of wild birds. Otherwise known as the Birds Directive of 2 April 1979, it was transposed into UK law to become the Wildlife and Countryside Act 1981.

At the time, this groundbreaking new legislation galvanised the situation in the UK, paving the way for a raft of measures, which included the use of a new designation known as Sites of Special Scientific Interest (SSSIs). Specifically, it converted a permissive power vested in the Nature Conservancy to create nature reserves into a mandatory duty.

Having nominated species of birds at risk, it required Member States to "take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats" for all the species of birds listed. The directive then required Member States to designate sites, known as Special Protection Areas (SPAs), for those species.

From this modest beginning is built a complicated and extensive network of natural protection mechanisms, ostensibly implemented in the name of EU law, but owing its origin and continuation to those multiple influences. Together with the Birds Directive, we have the Habitats Directive, 92/43/EEC, passed in

1992.⁷⁷⁵ This was to be transposed into British law by the Conservation (Natural Habitats Etc.) Regulations 1994, commonly known as the Habitats Regulations.⁷⁷⁶

The Birds and Habitats Directives now form the cornerstone of Europe's nature conservation policy. The policy itself is built around two pillars: the Natura 2000 network of protected sites and the strict system of species protection. All in all, claims the European Commission, the directives protect over 1,000 animals and plant species and over 200 so called "habitat types" (e.g. special types of forests, meadows, wetlands, etc.), which are of European importance.⁷⁷⁷

14.2 Further developments in EU policy

With the agreement of the Single European Act, which came into force in 1987, the EEC at last acquired specific powers to legislate on environmental matters (Articles 130r, 130s and 130t). There was no longer any requirement that it should confine its action to issues with cross-border implications, nor any attempt to restrict policy to such matters. Environment policy within the European Communities had come of age.

Nevertheless, there were strong restraints on the exercise of powers, as unanimous Council agreement was required (with a QMV waiver under Article 130s). The European Parliament had a right to be consulted on proposals. Member States retained the right to maintain or introduce more stringent protective measures, provided that such measures were compatible with the Treaty.

The next significant changes came with the Maastricht Treaty in 1993, which required the promotion of "sustainable and non-inflationary growth respecting the environment", and that the European Union, as it had now become, should include 'a policy in the sphere of the environment'. A new objective of "promoting measures at international level to deal with regional or worldwide environmental problems" was added, and the principles on which environmental action should be based were expanded so as to "aim at a high level of protection taking into account the diversity of situations in the various regions of the Community". There was a wider application of QMV.

Another change, of enormous significance, was the requirement that policy was to be based on the "precautionary principle" (Article 130r(2) EC). Following a Council resolution of 13 April 1999, this was elaborated on in 2000 by the Commission, with the publication of a Communication on the "precautionary

⁷⁷⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:206:0007:0050:EN:PDF>

⁷⁷⁶ <http://www.legislation.gov.uk/ukxi/1994/2716/contents/made>

⁷⁷⁷ http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm, accessed 20 September 2014.

principle", which set out the operating principles for this new addition.⁷⁷⁸ This marked a fundamental break between the original UK "reactive" policy to the fully-functional "pro-active" stance.

By 1999, the Amsterdam Treaty had introduced a direct reference to promoting "sustainable development" and established a new principle that environmental protection requirements should be integrated into the definition and implementation of the EU's policies. Any shred of a requirement for unanimity was removed, increasing the role of the European Parliament by making the co-decision procedure the standard decision-making procedure for environmental legislation.

The only reference to the environment in the Treaty of Nice, which came into force in 2003, was a Declaration attached to the treaty. It encouraged the use of "incentives and instruments which are market-oriented and intended to promote sustainable development".

The 2009 Treaty of Lisbon did not make any further significant changes to the EU's environmental competences, except that the objectives of EU policy on the environment in Article 191(1) now refer to "combating climate change" in the context of promoting measures at international level to deal with regional or worldwide environmental problems.⁷⁷⁹ The specifics of climate change we deal with in the next Chapter.

14.3 The growth of internationalism

It is not only such laws as the Birds and Habitats Directive that have international implications. Some of the very fundamentals of the environmental policy have international roots. For instance, the first endorsement of the precautionary principle came in 1982 when the World Charter for Nature was adopted by the UN General Assembly. Its first international implementation was in 1987 through the Montreal Protocol. Soon after, the principle was incorporated in many other legally binding international treaties such as the Rio Declaration and Kyoto Protocol.⁷⁸⁰

As to the concept of "sustainable development", this was also raised in 1982 by the UN World Charter for Nature. In 1987, the UN World Commission on Environment and Development released the report *Our Common Future*, now commonly named the "Brundtland Report" after the commission's chairman,

⁷⁷⁸ European Commission, COM(2000) 1 final, 2 February 2000, Communication from the Commission, on the precautionary principle, <http://old.eu-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:EN:PDF>, accessed 15 June 2014.

⁷⁷⁹ The historical narrative is adapted, in part, from the HM Government Review of the Balance of Competences between the United Kingdom and the European Union Environment and Climate Change, February 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf, accessed 15 June 2014.

⁷⁸⁰ http://en.wikipedia.org/wiki/Precautionary_principle, accessed 15 June 2014.

the then Prime Minister of Norway Gro Harlem Brundtland. In 1992, the UN Conference on Environment and Development then published in the Earth Charter, an action plan known as Agenda 21 which outlined the building of a "just, sustainable, and peaceful global society in the 21st century".⁷⁸¹

Then, in 1992, the UK with other countries joined an international treaty, the United Nations Framework Convention on Climate Change, aimed at limiting average global temperature increases attributed to climate change. This was further extended in 1997 by the Kyoto Protocol, which was also adopted and ratified by the UK.⁷⁸² Principles and agreed measures from this treaty and subsequent agreements were further extended by the Climate Change Act, which went beyond any requirements agreed with the EU.⁷⁸³

Partly, these activities derive from the initiative of former Prime Minister Margaret Thatcher, and the UK – at her insistence – has played a leading role, both in the UNFCCC and in the EU, including nomination of the then head of the UK Meteorological Service as the first chair of the Intergovernmental Panel on Climate Change (IPCC), as part of the UN process.

On this basis, in terms of *les grandes lignes* of environmental policy, it cannot necessarily be asserted that release from the EU would lead to any substantial changes. Even if the EU component is detached from national and international elements, it is difficult to assert that the gaps would not have been filled by national initiatives. In short, even without EU intervention, UK policy might not be much different from what it is now. Thus, leaving the EU cannot be taken as conferring a mandate for reductions in measures currently attributed to the EU.

14.4 Identifying the national interest

Far from being welcomed, withdrawal from the EU will be regarded by some environmental campaigners as a retrograde step. Reviewers from the Centre for European Policy Studies (CEPS) assert that the consequences of a hypothetical UK secession from the EU would compromise the UK's ability effectively to lead and steer policy. They also consider it would leave the UK vulnerable to being required to contribute to EU internal and international commitments as a condition of continued membership of the single market, but without having a say in what is agreed.⁷⁸⁴ They add:

⁷⁸¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21,

<http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, accessed 16 June 2014.

⁷⁸² Background on the UNFCCC: The international response to climate change, http://unfccc.int/essential_background/items/6031.php, accessed 16 June 2014.

⁷⁸³ http://www.legislation.gov.uk/ukpga/2008/27/pdfs/ukpga_20080027_en.pdf, accessed 16 June 2015.

⁷⁸⁴ EPIN Paper No. 40 / June 2014 , British Balance of Competence Reviews, Part II, <http://www.ceps.eu/ceps/dld/9349/pdf>, accessed 16 June 2014.

Many in the UK welcome the drive to improve environmental standards coming from the EU. This has been in many fields, including coastal bathing and drinking water, urban air quality associated with single market standards for vehicles and fuels, waste disposal and ground water protection. Improved environmental quality in these fields is on the record, as it is for dangerous substances and installations (Seveso directives), and for chemicals.

Unsurprisingly, therefore, the Government's Review of the Balance of Competences draws attention to the difficulty in defining the national interest that should shape policies on environment and climate change. Environmental (and climate change), it suggests, is:

... a contested area of policy both in the UK, and across the EU, where the interests of industry and of individuals are inevitably sometimes different and where attitudes to environmental conservation and action to address climate change also differ widely among organisations, the British public and the business community.⁷⁸⁵

Arguably, therefore, an enthusiastic programme of repeal, directed at a wide sweep of environmental measures, could build a considerable cadre of opposition to EU withdrawal, even to the extent of prejudicing the success of an "leave" campaign. Thus, the key, short-term element of an exit plan might be an assurance that the bulk of environmentally related legislation would be re-enacted, pending what might be termed a "national conversation" on the direction a post-exit policy should take.

This notwithstanding, there are legislative areas which could be "chipped away", without necessarily prejudicing what might be regarded as the integrity of the EU's programme. Listed by the European Commission, this covers eleven headings, including: tackling climate change; sustainable development; waste management; air pollution; water protection and management; and noise pollution.

However, in keeping with its origin as part of the Single Market *acquis*, most of the legislation is marked of "EEA relevance", such as the Waste Framework Directive, or is specifically identified as part of the internal market *acquis*, such as the Directive on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors.⁷⁸⁶ Even household waste management, and municipal recycling quotas (involving

785

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf, accessed 23 June 2014.

⁷⁸⁶ See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0098&from=EN> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2000L0014:20051227:EN:PDF>, accessed 19 June 2014.

domestic waste), are deemed to be part of the single market and the EEA *acquis*.⁷⁸⁷

Nevertheless, there is scope for manoeuvre, illustrated by comments on the so-called REACH Directive (Registration, Evaluation, Authorisation and Restriction of Chemicals). Although this is cited as being particularly damaging to SMEs, many of the complaints relate not to the regulations themselves but the way they are implemented. Here – as with other legislation - there is a possibility that implementation can be simplified and costs reduced.⁷⁸⁸ Nevertheless if the UK remains within the EEA, there is little flexibility in the shorter term. Most legislation would have to be carried over or, where necessary, re-enacted without change.

14.5 Equalising the national debate

Given that a necessary precursor to any re-alignment of environmental policy is a "national conversation", it is essential that the debate is balanced. In this context, one sees an effective imbalance, where "stakeholders" are not neutral players. This is apparent in the government's review of the balance of competences concerning the environment.⁷⁸⁹ There, we see the Royal Society for the Protection of Birds (RSPB) expressing the view that the EU's water directives "have been instrumental in delivering improvements in river water quality". The Royal Society also attributed improvements in air quality to EU action and thought that the EU's ambitious climate change targets could provide a competitive advantage over countries which are slower to act.

Yet, nowhere in the entire review is there any indication that the RSPB has been the beneficiary of grants to the value of €14 million from the EU, to support various projects. Nor is there any indication that the international arm of the RSPB, Birdlife International, with offices in Brussels, was lead recipient of funds to the extent of €25,680,683, paid by the European Commission between 2007 and 2012. Furthermore, while the RSPB presents information about itself in the evidence submitted to the review, it makes no reference to its EU funding sources.⁷⁹⁰

⁷⁸⁷ See for instance, European Environment Agency, *Municipal waste management in Norway*. This states: Norway is an EFTA member and has signed the agreement on the European Economic Area. Norway has through this agreement to implement the directives in the environment area, <http://www.eea.europa.eu/publications/managing-municipal-solid-waste/norway-municipal-waste-management>, accessed 19 June 2014.

⁷⁸⁸ Prime Minister's Business Taskforce, October 2013, *Cut EU red tape Report from the Business Taskforce*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249969/TaskForce-report-15-October.pdf, accessed 15 February 2015.

⁷⁸⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf, accessed 27 June 2014.

⁷⁹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279198/environment-climate-change-evidence-all.pdf, accessed 27 June 2014.

Similarly, evidence is presented by Valpak Ltd, the UK's "largest compliance scheme operator with member schemes for the Packaging, WEEE and Waste Battery regulations". However, since it is an organisation set up specifically to implement waste management schemes, it is effectively a child of EU legislation. When asked whether it considered EU environmental standards were "necessary for the proper functioning of the internal market", rather unsurprisingly it considered that they played "an essential role in ensuring that producers are on a relatively level playing field across Europe".⁷⁹¹

What is not generally realised is the extent to which NGOs and other "civil society" organisations are funded directly or indirectly by the EU. Environmental NGOs in particular benefit from a dedicated EU fund known as the LIFE+ programme. Authorised by Regulation (EC) No 614/2007, it declares that "non-governmental organisations contribute to the development and implementation of Community environmental policy and legislation. It is therefore appropriate for part of the LIFE+ budget to support the operations of a number of appropriately qualified environmental NGOs through the competitive and transparent awarding of annual operating grants".⁷⁹²

A typical beneficiary is Friends of the Earth Europe. Its work programme in 2013 cost €1,368,059.00, to which the EU contributed €751,064.00 (54.89 percent). Of the "top 10" environmental NGOs, forming an alliance known as the Green 10, only one – Greenpeace – did not accept money from the Commission. The other nine receive very substantial support, from LIFE+ and other programmes. Over the period 2007-2012, WWF was paid €53,813,343 by the EU. Birdlife was lead recipient for funds worth €25,680,683, *Naturfreund* was paid €2,862,371 and Bankwatch €8,178,095. The EEB was lead recipient for €13,186,263, Climate Action Network was paid €2,240,616, HEAL (as EPHA) €4,622,921, Transport & Environment €2,172,353 and Friends of the Earth was lead recipient for grants worth €13,674,033. Together, over the 2007-2012 period, these nine were primary or lead recipients of funds to the value of €126,610,677 disbursed by the European Commission.⁷⁹³

These organisations, which purport to represent 20 million people, are not simply passive receivers of funds but active players in the legislative and policy-making process. According to their website, they:

... work with the EU law-making institutions - the European Commission, the European Parliament and the Council of Ministers - to ensure that the environment is placed at the heart of policymaking. This includes working with our member organisations around Europe to facilitate their input into the EU decision-making process.⁷⁹⁴

⁷⁹¹ *Ibid.*

⁷⁹² http://eur-lex.europa.eu/resource.html?uri=cellar:5ab0de7b-95c4-483b-8835-c98ed63f729d.0006.01/DOC_1&format=PDF, accessed 27 June 2014.

⁷⁹³ Data obtained from the European Commission Financial Transparency System: http://ec.europa.eu/budget/fts/index_en.htm, accessed 24 June 2014.

⁷⁹⁴ <http://www.green10.org/about-us/>, accessed 28 June 2014.

While campaigning at EU level, the Green 10 "encourage the full implementation of EU environmental laws and policies in the Member States", they "lobby for new environmental proposals, as appropriate" and "work with the EU institutions to ensure that policies under consideration are as environmentally effective as possible". Crucially, though, they also work with the EU to promote its "environmental leadership in the global political arena", effectively acting as advocates not only for environmental issues but for the European Union itself.⁷⁹⁵

The overtly political role of these NGOs has been recognised by a number of countries, not least in New Zealand which in 2011 withdrew charity status from Greenpeace.⁷⁹⁶ More recently, though, the Indian government's Intelligence Bureau produced a report entitled "Impact of NGOs on development" which claimed that the opposition to several development projects in the country by a significant number of NGOs, including Greenpeace, would have "a negative impact on economic growth by two to three per cent", making them a "threat to national economic security".⁷⁹⁷

Subsequently, the Ministry of Home Affairs served a "show cause notice" on Greenpeace, asking why its permission to get foreign funding under the Foreign Contribution (Regulation) Act, 2010 (FCRA) should not be withdrawn. At least ten more NGO's were also targeted.⁷⁹⁸

The use of this provision by the Indian authorities, and the action by New Zealand, indicates that it is possible to curtail the power and influence of NGOs. As far as the UK is concerned, something similar to the FCRA might be desirable, preventing UK advocacy groups from accepting contributions from foreign institutions, or from being allied with organisations with foreign affiliates. Certainly, it would not be sensible to secure withdrawal from the EU without also curtailing the power and influence of NGOs which are acting as its advocates, often with access to the very heart of government.

14.6 Reframing environmental policy

Ostensibly, withdrawal from the European Union would allow the clock to be turned back, and a reversion to traditional legislative and enforcement standards and procedures. Take away the EU and the driving forces that brought laws such as the Birds and Habitats Directive into existence would still exist, and there would still be a strong constituency in favour of their continuation, not least from the well-supported environmental NGOs which helped bring them

⁷⁹⁵ *Ibid.*

⁷⁹⁶ *The New Zealand Herald*, 10 May 2011, Greenpeace loses charity status case, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10724605, accessed 28 June 2014.

⁷⁹⁷ *Times of India*, 11 June 2014, <http://timesofindia.indiatimes.com/india/Greenpeace-and-other-NGOs-threat-to-nations-economy-IB-report-warns/articleshow/36400491.cms>, accessed 28 June 2014.

⁷⁹⁸ *Economic Times*, 14 June 2014, http://articles.economictimes.indiatimes.com/2014-06-14/news/50581806_1_foreign-contribution-foreign-funding-ngos, accessed 28 June 2014.

into being. Straightforward repeal, or replacement with new UK law, would not appear to be an immediate option for such laws.

The intrusive, expensive and unpopular nature of some EU provisions will require fairly immediate action. For instance, despite provisions relating to the use of landfill and domestic recycling being marked as having "EEA relevance", it would be hard to justify to the general public a refusal to change such things as EU recycling quotas, or the massively increased costs of waste collection and disposal they entail.

Already, and for some time, the EU-inspired regime is becoming unpopular, with increasing protests about "wheelie bin clutter", and the amount of space required to store multiple bins, and families might expect some relief.^{799,800} Thus, there may well be considerable popular pressure to repeal or modify such provisions, and little tolerance for continued conformity with EU objectives.

One example is landfill, where the public are constantly being warned that space is about to run out. However, although the UK produces approximately 70 million cubic metres of municipal waste each year, there is a stock of over 819 million cubic metres of landfill space. Quarrying, gravel extraction and other industries create about 114 million cubic metres of new space each year.^{801,802} There is actually no shortage of space and the only pressure comes from the European Commission's continuously expanding ambitions. In July 2014, it produced a new legislative proposal which sets a new target for recycling, requiring 70 percent of all municipal waste and 80 percent of packaging waste to be recycled by 2030. It will also totally ban the landfill of recyclable waste by 2025, aiming "to virtually eliminate landfill" by 2030. At most, it will accept an irreducible minimum of five percent of waste that cannot be recycled.⁸⁰³

Those new targets will be "difficult for the UK to meet".⁸⁰⁴ Recycling rates have recently stagnated after a period of rapid growth in the past decade, with DEFRA figures released in November 2013 recording 43.2 percent of waste in

⁷⁹⁹ See, for instance, *Daily Mail*, 19 June 2009, Not In My Front Yard: Now the recycling industry joins rebellion, <http://www.dailymail.co.uk/news/article-1194050/Wheelie-bins-The-revolt-grows-recycling-industry-backing-Mails-campaign.html>, and *Daily Telegraph*, 17 June 2009, Wheelie bins cause angry families to protest, <http://www.telegraph.co.uk/earth/earthnews/5554319/Wheelie-bins-cause-angry-families-to-protest.html>, both accessed 2 July 2014.

⁸⁰⁰ See also: *Daily Express*, 16 August 2013, War on wheelie bins that litter our streets, <http://www.express.co.uk/news/uk/422386/War-on-wheelie-bins-that-litter-our-streets>, accessed 2 July 2014.

⁸⁰¹ <http://raedwald.blogspot.co.uk/2011/02/no-shortage-of-landfill-in-uk-update.html>, accessed 2 July 2014.

⁸⁰² <http://www.independent.co.uk/news/uk/home-news/uk-warned-it-will-run-out-of-landfill-sites-in-eight-years-2021136.html>, accessed 2 July 2014.

⁸⁰³ See:

<http://ec.europa.eu/environment/waste/pdf/Legal%20proposal%20review%20targets.pdf>
http://europa.eu/rapid/press-release_IP-14-763_en.htm, accessed 2 July 2014.

⁸⁰⁴ <http://www.theguardian.com/environment/2014/jul/02/can-the-uk-meet-a-70-recycling-target>, accessed 16 July 2014.

England recycled in 2012-13.⁸⁰⁵ For the year of 2013, 38.836 million tonnes were disposed of by way of landfill, down from 71.51 million in 2005, with landfill tax levied at £1.2bn.⁸⁰⁶ For householders already groaning under the increased burden of Council Tax, this is possibly the last straw.

The Commission, effectively, has given itself over to green ideology that its new plans, together with "waste prevention, ecodesign, reuse and similar measures" could bring "net savings of €600 billion", or eight percent of annual turnover, for businesses in the EU, while "reducing total annual greenhouse gas emissions by 2-4 percent". It also believes that over two million "extra" jobs could be created.⁸⁰⁷ This is all part of what the Commission was calling a "circular economy", breaking away from the "take-make-dispose" model to a never-ending cycle of making, recycling and re-using.⁸⁰⁸

However, the outgoing European commissioner for the environment, Janez Potočnik, acknowledged that the "circular economy" was unlikely to spring into being "if simply left to the market": "It is profitable, but that does not mean it will happen without the right policies", he said. To drive the agenda, therefore, he proposed that the EU's new Horizon 2020 research programme would be used to support research and development in the waste management and recycling industries, and in improving the design of products to make them easier to reuse, repair and recycle.⁸⁰⁹ Thereby we see once again the research budget being used to support legislative initiatives.

Furthermore, as with earlier waste initiatives, this proposal is marked as having "EEA relevance". That means that, if enacted, it will also apply to EFTA/EEA countries, including Britain if it was outside the EU but within the EEA. However, there is always an opportunity to challenge the Commission's interpretation of EEA relevance, although no EFTA/EEA member has opted to do so with legislation already enacted. Whether the UK, on withdrawal, could challenge the interpretation retrospectively is uncertain.

Nevertheless, there is a possibility of challenging the EEA relevance of some of the EU legislation already in force. This could be included in the Article 50 negotiations and if the parties agree that the EEA designation could be waived, the resultant list could form a country-specific protocol to the EEA re-admission agreement, thereby excluding them from application to the UK.

This allows for the final EEA agreement to be modified by two separate protocols, one adding legislation to which the UK would wish to be bound – as

⁸⁰⁵ <http://www.theguardian.com/environment/2014/jul/02/recycling-target-uk-councils-waste-europe>, accessed 3 July 2014.

⁸⁰⁶ HM Customs & Excise, Landfill Tax Bulletin, April 2014, <https://www.uktradeinfo.com/Statistics/Pages/TaxAndDutybulletins.aspx>, accessed 3 July 2014.

⁸⁰⁷ http://europa.eu/rapid/press-release_MEMO-14-450_en.htm, accessed 3 July 2014

⁸⁰⁸ <http://ec.europa.eu/environment/circular-economy/pdf/circular-economy-communication.pdf>, accessed 3 July 2014.

⁸⁰⁹ *Ibid.*

in agriculture – and the other excluding the UK from the application of other legislation, each protocol applying to the UK alone rather than to the entirety of the EFTA/EEA bloc.

14.7 The implications for EU withdrawal

Illustrated in this Chapter is the way international, EU and British influences have been intertwined over a long period and have combined to produce a multi-origin policy set. In assessing the impact of EU law, though, it cannot be said with any certainty that, had the UK not joined the EU, outcomes would have been substantially different. We see in the history of the development of the EU law, the actions of campaigners and the emergence through international activism of agreements created at that level.

In this context, the then EEC was a downstream entity, responding to a global movement and those involved in promoting law at that level were exploiting its willingness to be part of the greater global movement. They promoted the passing of European law, and then took advantage of it once it had come into force. But, without the EEC, British policymakers could and almost certainly would have been exposed to the same international pressures and influences, and could well have developed their systems to parallel those in Europe, to achieve like effects.

Now, with over 40 years of integration, what we do not see is two policy, legislative and administrative systems working separately to achieve (or cause) effects. We actually see a single, integrated system, working as one - in harmony with global initiatives - delivering outcomes which could not have been designed or achieved by any single entity acting alone.

Therefore, the interdependency is such that removal of the EU component would leave a non-functional system. For the system then to function, it is arguable that the missing parts would have to be replaced by components very similar to those removed. The residual parts themselves have been designed or adapted to give effect to EU policy and legislation, all within the context of continued administrative direction from Brussels. Before any substantial changes could be made, the objectives of the system would have to be redefined and the entire machinery almost completely rebuilt, from the ground up.

Most likely, though, even outside the EU, exactly the same political imperatives which brought the integrated system to its current state would continue to exist. Powerful NGOs such as the RSPB, and WWF, working in conjunction with other local and international NGOs, form a powerful lobby group which could exert considerable influence on public opinion, and on the parliamentary process. Whatever pressure there might be to deregulate and eliminate EU law, one can be fairly well assured that instruments such as the Birds and Habitats Directives would have their champions, and find themselves re-enacted as British law in such a way as to preserve most of the subsidiary British regulation.

The point here is that there are multiple examples of the intricate relationships between national, EU and international initiatives, the nature of which requires considerable study to identify and understand. Such complexity – as we see in the body of this book – is replicated elsewhere in the system. Doubtless, there are many more examples which we have yet to identify, but which are crucial to the sectors in which they have effect.

This must affect any plans devised for the withdrawal of the UK from the EU. So complex and subtle is the relationship between the two entities, and so interwoven is EU law with the British system, that even were removal easily possible, the remainder would often be non-functional. One could even express the EU in terms of an invasive cancer, having so infiltrated the body of its victim that to remove the cancer would kill the patient.

Fortunately, the EU is not a cancer and nor is its intervention necessarily malign or even unwelcomed by significant and influential sections of the British public. The Birds Directive, as we have already argued, has its own constituency of support, and many would fight to keep it, as they did those many years ago to bring it into being.

Thus, while removal of EU law is always possible and Great Britain is not a "patient" which is likely to die, wholesale removal of law, and rapid detachment from the EU, is clearly not a practical option. Nor, across the board, is it a desirable one. Most of all, though, no moves should be taken unless or until we are certain of what is involved, allowing assessments to be made of the possible consequences of removal, the advantages and disadvantages. These things, rather than the origin of any measure, may need to be our guide to the actions we take.

15.0 Climate change and energy

Human influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, in global mean sea level rise, and in changes in some climate extremes. This evidence for human influence has grown since AR4. It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.

IPPC AR5 Report, Summary for Policymakers, 2013⁸¹⁰

Initially an integral component of the environment movement, from the late '80s, climate change has emerged as a separate issue with its own identity and body of law.

Despite the EU's heavy involvement in resultant policy, little change might be expected in UK policy on its departure from the EU. From its inception, the UK has been the leader in promoting a response to climate change and much of that which forms the core of EU policy was driven by the UK and is incorporated separately in the UK's Climate Change Act 2008.⁸¹¹ Many of the provisions go further than EU requirements, which means that the broader UK policy on climate change would be largely unaffected by withdrawal. Certainly, as far as Article 50 negotiators might be concerned, there would be little to be lost in the short-term by accepting conformity with the entire climate change *acquis* as part of the exit settlement.

Campaigners against climate change law might find such a stance unduly restrictive, especially if they expect withdrawal will reduce the impact of climate change obligations. Nevertheless, the real issue is with the Climate Change Act and with our international obligations, such as our participation in the United Nations Framework Convention on Climate Change (UNFCCC) and our agreement to the Kyoto Protocol on reduction of CO₂ and other greenhouse gas emissions. These need to be addressed before any changes to the UK regimes can be expected.

⁸¹⁰ http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf, accessed 21 September 2014.

⁸¹¹ http://www.legislation.gov.uk/ukpga/2008/27/pdfs/ukpga_20080027_en.pdf, accessed 13 September 2008.

The Convention contains the undertakings entered into by the industrialised countries to reduce their emissions of certain greenhouse gases which are responsible for global warming. The total emissions of the developed countries are to be reduced by at least five percent over the period 2008-2012 compared with 1990 levels.

Alongside the UK commitment, the EU has also become a party to the convention. Council Decision 2002/358/EC of 25 April 2002 concerns the approval, on behalf of the European Community, of the Kyoto Protocol to the UNFCCC and the joint fulfilment of commitments thereunder. The European Community ratified the Framework Convention by Decision 94/69/EC of 15 December 1993. The Framework Convention entered into force on 21 March 1994.⁸¹²

One of the key policy responses is climate change adaptation. Following publication of the 2009 White Paper on adapting to climate change, proposing a "European framework for action", the EU in 2013 adopted a multi-component Adaptation Strategy Package, the core of which is the EU Strategy itself (COM (2013) 216 final).⁸¹³ Currently, the Commission is in the process of providing guidelines for formulating adaptation strategies, designed to help EU countries to develop, implement and review their adaptation policies. They cover aspects which are missing from existing adaptation strategies, such as cross-border issues, and the need to ensure coherence with national disaster risk management plans.

This was to include by 2014, an adaptation preparedness scoreboard, identifying key indicators for measuring Member States' level of readiness. In 2017, based on reports mandated by its own Monitoring Mechanism Regulation and on the adaptation preparedness scoreboard, the Commission intends to assess whether action being taken in the Member States is sufficient. If it deems progress to be insufficient, by reference to the coverage and quality of the national strategies, it will consider a legally binding instrument.⁸¹⁴

Within any realistic timescale for British withdrawal, the UK will either be subject to such an instrument, or will have implemented its own strategies to match EU requirements. Withdrawal will, at least, give the UK more flexibility on how it approaches the process of adaptation, or whether indeed it wants to

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http://europa.eu/legislation_summaries/environment/tackling_climate_change/128060_en.htm, accessed 7 February 2014.

⁸¹³ See respectively: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0147&from=EN>, http://ec.europa.eu/clima/policies/adaptation/what/documentation_en.htm and <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0216&from=EN>, all accessed 13 September 2014.

⁸¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0216&from=EN>, *op cit.*

continue with those processes to which it is not committed via its international or domestic obligations.

Even then, since the UK's 2013 National Adaptation Programme – which owes as much to the Climate Change Act as the EU and the UK's own Climate Change Risk Assessment - is based largely on sensible measures which would have been undertaken anyway, such as flood and coastal erosion risk management. Thus, actual changes made may be marginal.⁸¹⁵ Unless or until there is a UK commitment to reduce climate change related activity, this adaptation programme – with or without anticipated amendments - is likely to stand, irrespective of our EU membership status.

15.1 Energy policy

Another crucial element of climate change policy is the way it defines energy policy. Between London - with the Department of Energy and Climate Change (DECC) - and Brussels, "energy policy" and "climate action" have been merged to become one. Tellingly, in Jean Claude Juncker's new Commission, energy and climate change now come under the responsibility of a single Commissioner, Miguel Arias Cañete.⁸¹⁶

And it is when we look to Brussels that we see how much energy policy has become the slave to climate action. It has become the primary tool by which the EU intends to meet its 2050 climate change target of reducing greenhouse gas emissions by 80 percent relative to 1990 levels, which it endorsed in 2009.⁸¹⁷ But what that means in practice does not appear to have been widely understood. While politicians are so often accused of short-termism, this is a policy locked into a 36-year timeline, where the most probable outcome of the EU policy, if it is allowed to continue unchecked, is that the UK runs out of electricity.

Partly obscuring the 2050 policy objectives is the focus on the 2020 climate targets, where the EU and the UK are committed to a 20 percent reduction in emissions, to producing 20 percent of our energy from renewables, and to reducing our energy consumption by 20 percent. This is the so-called 20-20-20 package.⁸¹⁸

But this is just an interim stage. The key target is and will remain the 80 percent reduction in emissions by 2050. Furthermore, this is not just a vague aspiration.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69487/pb13698-climate-risk-assessment.pdf and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209866/pb13942-nap-20130701.pdf, accessed 13 September 2014.

⁸¹⁶ http://europa.eu/rapid/press-release_IP-14-984_en.htm, accessed 13 September 2014.

⁸¹⁷ https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf, accessed 8 October 2014.

⁸¹⁸ http://ec.europa.eu/clima/policies/g-gas/progress/index_en.htm, accessed 22 September 2014.

It is a firm, solemn target, to which our respective governments are committed as an article of faith, and which is driving policy. And what is not fully appreciated is the particularly important role of energy usage and within that the role of electricity, representing what former energy minister Chris Huhne called a "seismic shift in energy policy" and EU Energy Commissioner, Günther H. Oettinger, called a "paradigm shift in the way we produce, transmit, distribute and trade energy".⁸¹⁹

Firstly, electricity production must "decarbonise" almost completely. Currently, around 70 percent (give or take) of our electricity is produced by carbon-based fossil fuel – mainly gas and coal (the rest mainly nuclear and wind, with some hydro).⁸²⁰ And this "carbon" element has to be taken out of the mix, almost completely. By 2050, the aim is to produce all of our electricity (all but a tiny proportion from emergency back-up plants), with "zero carbon" emissions.

This is a hugely ambitious task, a colossal enterprise involving the expenditure, according to one estimate, of £1,100 billion, nearly the entire UK GDP for a full year.⁸²¹ The European Commission estimates that the additional investment to achieve decarbonisation (over and above that which would be spent anyway) could run to €304bn a year, between 2011-2050, for the whole of the EU.⁸²² This equates to £1.3tn for the UK. The International Energy Agency estimates additional global costs at \$44bn. Apportioned on the basis of contribution to global GDP, this also equates to £1.3tn.⁸²³

An inevitable consequence of decarbonising domestic heating and cooking is the end of domestic gas heating and cooking. Electricity and other, more exotic sources will have to be used.⁸²⁴ The entire domestic gas distribution network will need to be closed down, unless sufficient volumes of biogas can be produced – which is unlikely. Also, there will be substantially fewer petrol and diesel-fuelled cars. The intention is that they should be replaced with electric and hybrid, plug-in vehicles. As a result, electricity will have to provide a much greater proportion of our energy requirement. In fact, from its current levels, the system has almost to double its capacity, bringing its share of final energy demand to 36-39 percent of the total, by 2050.

⁸¹⁹ Speech, 17 November 2010, <https://www.gov.uk/government/speeches/the-rt-hon-chris-huhne-mps-speech-to-the-cbi-conference>, and http://ec.europa.eu/energy/publications/doc/2011_energy_infrastructure_en.pdf, both accessed 17 September 2017.

⁸²⁰ <http://www.bbc.co.uk/news/business-24823641>, accessed 22 September 2014.

⁸²¹ http://www.businessgreen.com/digital_assets/4177/Powerful_Targets.pdf, and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48072/2290-pathways-to-2050-key-results.pdf, both accessed 22 September 2014.

⁸²² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011SC0288&from=EN>, 11 October 2014.

⁸²³ <http://www.iea.org/newsroomandevents/pressreleases/2014/may/name,51005,en.html>, accessed 11 October 2014.

⁸²⁴ [www.energynetworks.org/modx/assets/files/gas/futures/Delta-ee_ENA Final Report OCT.pdf](http://www.energynetworks.org/modx/assets/files/gas/futures/Delta-ee_ENA_Final_Report_OCT.pdf), accessed 22 September 2014.

Despite the length of the timeline, planning is already in place, and the policy is progressively being rolled out. The European Commission thus suggests raising "low carbon technologies" in the electricity mix to around 60 percent in 2020, to 75 to 80 percent in 2030, and nearly 100 percent in 2050.⁸²⁵

As to how to achieve its decarbonisation target, the Commission offers several possibilities. Its particular enthusiasm, though, rests with using renewable energy, under what it calls its "high RES" (Renewable Energy Sources) scenario. In this, renewable technologies generate 97 percent of all electricity, with 50 percent being wind generated.⁸²⁶ A feature of this is that it will be a high capital cost model, and will also create a high need for balancing capacity, storage and grid investment.⁸²⁷ Alternatives are not much better. For instance, the Commission's high energy efficiency scenario still requires an increase in electricity consumption (again to power much of the transport fleet and for domestic space heating), of which 67 percent will be generated by renewables, including wind, solar and biomass.

Taking the "high RES" scenario, which doubles the electricity requirement, this would put the peak UK demand at about 120GW. Wind would have to deliver a usable capacity of over 60GW. Given average load factors of 30 percent, this suggests an installed capacity of around 180GW – although the greater problem is how to deliver the peak demand when there is no wind. As to the financial element, one report suggests costs per GW of approximately €900-1,150 million, which could bring the total investment requirement to about €200 billion.⁸²⁸ From another source, costs have been cited at \$2,000 million per GW and, on the basis of calculations from yet another source, the total cost of fleet installation – including an offshore component - might reach £360 billion by 2050.⁸²⁹

In order to meet targets, this investment would be funding an expansion in the fleet over the next 36 years at a rate of 2,500 giant 2MW turbines a year, 90,000 machines, extending over 16 million acres.⁸³⁰ That is only three million acres short of the 19 million acre area of Scotland, and almost exactly half the area of

⁸²⁵ European Commission, A Roadmap for moving to a competitive low carbon economy in 2050, Brussels, 8 March 2011, COM(2011) 112 final, http://eur-lex.europa.eu/resource.html?uri=cellar:5db26ecc-ba4e-4de2-ae08-dba649109d18.0002.03/DOC_1&format=PDF, accessed 16 September 2014.

⁸²⁶ http://ec.europa.eu/energy/energy2020/roadmap/doc/sec_2011_1565_part2.pdf, and http://www.isi.fraunhofer.de/isi-wAssets/docs/e/de/publikationen/Final_Report_EU-Long-term-scenarios-2050_FINAL.pdf, both accessed 8 October 2014.

⁸²⁷ European Commission, Energy Roadmap 2050, Brussels, 15 December 2011, COM(2011) 885 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0885&from=EN>, accessed 16 September 2014.

⁸²⁸ http://www.ewea.org/fileadmin/ewea_documents/documents/publications/WETF/Facts_Volume_2.pdf, accessed 16 September 2014.

⁸²⁹ https://www.irena.org/DocumentDownloads/Publications/RE_Technologies_Cost_Analysis-WIND_POWER.pdf, <http://www.telegraph.co.uk/comment/9468604/The-great-wind-delusion-has-hijacked-our-energy-policy.html>, both accessed 16 September 2014.

⁸³⁰ <http://www.nrel.gov/docs/fy09osti/45834.pdf>, accessed 8 October 2014.

England. By way of a reality check, wind expanded from 427 to 6,488MW between 2001 and 2011, equivalent to adding 300 2MW turbines per year.⁸³¹ There, at the heart of the Commission's "high RES" decarbonisation policy is the fatal flaw. At any practical level, it cannot be achieved. It simply will not happen, even if some green groups seem to believe 100 percent renewable provision is possible.⁸³² Yet, as far as EU policy goes, a renewables-driven policy is one of the most promising options, and one on which considerable development resource has already been expended.

15.2 UK policy preferences

UK policy is predicated on statutory commitments built into the Climate Change Act, through which the UK is also committed to exactly the same 80 percent cut in greenhouse gas emissions by 2050.⁸³³ The UK is thus pursuing exactly the same electricity decarbonisation scenario, where demand for electricity by 2050 doubles as a result of electrification of much of industry, heating and transport. But rather than rely on the "high RES" scenario, the UK only intends to make "significant use" of the UK's wind resources, onshore and offshore, "while keeping wind deployment well within the estimated limits that account for land use, sea use, ecological sensitivity and proximity constraints".

Without stating this clearly, therefore, wind is a limited option, leaving the UK intending to rely on nuclear generated electricity. To meet its own zero-carbon target, the government assumes new nuclear capacity will be built at a rate of 1.2 GW a year. It also assumes that carbon capture and storage (CCS) for gas and coal plants will be successful, allowing new fossil fuel plants to be rolled out, delivering an additional 1.5 GW a year after 2030. This is essential if gas and coal-fired electricity generation is to continue.⁸³⁴ Yet, to date, only one commercial-scale CCS plant has been commissioned, the Boundary Dam coal fired power plant in Saskatchewan, Canada. This 110MW coal-fired plant is operating at a third less efficiency, at a cost of three times more than a comparable plant without CCS fitted.⁸³⁵ Despite earlier estimates which put losses at less, a 30 percent loss of efficiency seems to be a typical

⁸³¹ http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-DK-13-001/EN/KS-DK-13-001-EN.PDF, accessed 16 September 2014.

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http://www.theecologist.org/News/news_round_up/2591866/renewables_can_supply_100_of_worlds_power_by_2050.html, accessed 18 October 2014.

⁸³³ <https://www.gov.uk/government/organisations/department-of-energy-climate-change/about>, accessed 25 September 2014.

⁸³⁴ HM Government, 2050 Pathways Analysis July 2010,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/42562/216-2050-pathways-analysis-report.pdf, accessed 16 September 2014.

⁸³⁵

<http://www.leaderpost.com/technology/JOHNSTONE+Clean+coal+best+stop+climate+change/10262940/story.html>, accessed 9 October 2014.

expectation.⁸³⁶ There is thus no evidence that the technology will ever be able to make a cost-effective contribution to energy policy.⁸³⁷

As to nuclear power, the total capacity requirement has not been specified, and no targets have been set, although the figure of 75GW has been discussed.⁸³⁸ If wind generation is to be limited, it may need to exceed 80GW.⁸³⁹ However, recent European experience with the construction of nuclear plants is not good. Of the two latest examples of the European Pressurised Reactor, both have suffered major delays and cost over-runs. The Finnish 1.6GW Olkiluoto 3, the country's fifth and biggest nuclear reactor, was due to start operating in 2009, but commissioning has been delayed to 2018, with planned costs of €3.2 billion expected to double.⁸⁴⁰

The French Flamanville 3 1,650 MW reactor, on which work was started in 2007 by operator EDF, was scheduled to start operations in 2012. It is still not operational and, by September 2014, costs had escalated from €3.3 to €8.5 billion.⁸⁴¹ As of April 2015, a very serious fault had been found in the pressure vessel, threatening the viability of the entire project.⁸⁴²

Of the 66 reactors currently under construction throughout the world, 49 - mostly in Asia, but including five US reactors - have been delayed, while budgets are escalating. Average costs have risen from \$1,000 per installed kilowatt to around \$8,000/kW over the past decade.⁸⁴³

In Britain's current nuclear power programme, by the end of 2014, only the Hinkley Point C plant - with a planned 2x1.6GW capacity - had received a site license and planning permission (as of October 2013). Meanwhile, in May 2012, EDF had raised the estimated cost of a completed plant to £7 billion, up from £4.5 billion, leading one analyst to suggest that new nuclear power plants

⁸³⁶ See: <http://www.iea.org/techno/essentials1.pdf>, and http://www.academicjournals.org/article/article1380556480_Stanley%20and%20D%C3%A1vil-a-Serrano.pdf, both accessed 9 October 2014.

⁸³⁷ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmenvaud/654/654.pdf>, accessed 22 September 2014.

⁸³⁸ HM Government, Long-term Nuclear Energy Strategy, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/168047/bis-13-630-long-term-nuclear-energy-strategy.pdf, accessed 21 September 2014.

⁸³⁹ *The Observer*, Fifty new nuclear plants could be goal in official energy plans, 21 December 2013, <http://www.theguardian.com/environment/2013/dec/21/nuclear-plants-energy-plans>, accessed 17 September 2013.

⁸⁴⁰ <http://uk.reuters.com/article/2014/09/01/finland-nuclear-olkiluoto-idUKL5N0R20CV20140901>, accessed 14 September 2014.

⁸⁴¹ http://en.wikipedia.org/wiki/Flamanville_Nuclear_Power_Plant, accessed 17 September 2014.

⁸⁴² <http://www.independent.co.uk/news/uk/home-news/uk-nuclear-strategy-faces-meltdown-as-faults-are-found-in-identical-french-project-10186163.html>, accessed 19 April 2015.

⁸⁴³ <http://www.worldnuclearreport.org/IMG/pdf/201408msc-worldnuclearreport2014-hr-v4.pdf>, accessed 26 September 2014.

in the UK were no longer commercially viable.⁸⁴⁴ This triggered a dispute over electricity pricing (the so-called "strike price") between EDF and the government, allowing inflated electricity prices of £92.50 per megawatt hour, double the current wholesale price to allow for the recovery of the investment. The support price will be guaranteed and index-linked for 35 years after the station comes on stream.⁸⁴⁵

The provisional agreement triggered an in-depth investigation by the European Commission into UK measures supporting nuclear energy.⁸⁴⁶ This added nine months' delay.⁸⁴⁷ Of perhaps greater relevance, the design is the European Pressurised Reactor, which does not inspire confidence.⁸⁴⁸ With completion currently scheduled for 2023, costs have risen to £24.5 billion.⁸⁴⁹ It is evident that the British nuclear-led option is no more realistic than the Commission "high RES" scenario or any other of the decarbonisation options. There is simply no plausible scenario by which the British government can conceivably meet its 80 percent emission cut by 2050.

15.3 Demand management

Despite the fragility of plans to decarbonise electricity generation, the supply-side equation is by no means the full extent of either EU or UK policies. A less visible component of both is the adoption of a stratagem known generically as Demand Side Response (DSR). More straightforwardly, it is sometimes just called demand management. This is a major development in the nature and structure of the electricity industry, made necessary by the wide-scale deployment of time-variable renewable generation, particularly wind generation, which presents a number of challenges in relation to the balance of supply and demand.⁸⁵⁰

According to a report produced for DEFRA in September 2011, demand management changes the whole relationship between the supplier and customer. "No longer is it considered viable for electricity to be provided 'on demand' in response to the requirements of end-users", it says. "Rather, a co-

⁸⁴⁴ Reuters, 8 May 2012, UK nuclear build requires taxpayer rescue – Citi, <http://uk.reuters.com/article/2012/05/08/uk-nuclear-britain-edf-idUKBRE8470XC20120508>, accessed 17 September 2014.

⁸⁴⁵ <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldconaf/172/172.pdf>, accessed 4 October 2014.

⁸⁴⁶ European Commission, State aid: Commission opens in-depth investigation into UK measures supporting nuclear energy, http://europa.eu/rapid/press-release_IP-13-1277_en.htm, accessed 14 September 2014.

⁸⁴⁷ <http://www.theguardian.com/environment/2014/sep/22/hinkley-point-nuclear-reactor-gains-eu-approval>, accessed 22 September 2014.

⁸⁴⁸ http://en.wikipedia.org/wiki/Hinkley_Point_C_nuclear_power_station, accessed 17 September 2014.

⁸⁴⁹ *Financial Times*, Brussels backs Hinkley Point C as cost forecasts soar, 8 October 2014, <http://www.ft.com/cms/s/0/372216e6-4ec0-11e4-b205-00144feab7de.html#axzz3Ff1xG7AG>, accessed 9 October 2014.

⁸⁵⁰ <https://www.ofgem.gov.uk/ofgem-publications/57026/dsr-150710.pdf>, accessed 16 September 2014.

ordinated approach is required whereby energy production and demand become integrated to ensure the use of renewables can be optimised whilst also minimising the use of fossil fired generation".⁸⁵¹

An essential part of demand management will be "Vehicle-to-Grid" (V2G), a system employing the millions of electric cars expected to be in use, and their batteries, as an additional tool for managing the grid. At one level, the charging of cars overnight can be interrupted if there is a supply shortfall while, at another, the electricity stored in car batteries can be used to power the grid when demand exceeds supply, compensating for the variability and intermittency of renewables, especially wind power.⁸⁵² There is also a third element, in dealing with what is known as "wrong time" electricity, when windfarms produce more power than is needed. Since excess power can destabilise the grid, in much the same way as a shortfall, it has been mooted that the heaters of electric cars coupled to the grid could be turned on remotely, to soak up the excess power.⁸⁵³

For this system to function, the grid itself must be modified to become a "smart grid". This has a wider application than just managing electric vehicle batteries. With "smart meters" it becomes the Advanced Metering Infrastructure (AMI). This allows further management opportunities, with the provision of "smart appliances" which can be switched on and off according to supply conditions. The European Commission argues that the deployment of AMI throughout Europe will bring about a step change in the scope for gathering and communicating information about energy supply and consumption. The information provided will allow consumers to save energy, to which effect Member States are obliged to roll out smart electricity meters for at least 80 percent of their final consumers by 2020 "provided this is supported by a favourable national cost-benefit analysis".⁸⁵⁴

For an investment of €45 billion, the European Commission claims energy savings varying from nil (in the Czech Republic) and one percent (Poland, Slovakia) to five percent (Greece, Malta), with an average - for all data available - around 2.6 percent ($\pm 1.4\%$) or 3 percent ($\pm 1.3\%$) considering only the data from those countries which have rolled out or are proceeding with

⁸⁵¹ Delivering the Benefits of Smart Appliances EA Technology, A research report completed for the Department for Environment, Food and Rural Affairs, September 2011, <http://efficient-products.ghkint.eu/spm/download/document/id/996.pdf>, accessed 17 September 2014.

⁸⁵² *EurActiv*, 29 April 2013, Electric vehicles sell power to the US grid, <http://www.euractiv.com/transport/electric-vehicles-sell-electricity-news-519414>, and *Autoweek*, 28 April 2013, <http://autoweek.com/article/car-news/make-money-your-electric-vehicle>, both accessed 17 September 2014.

⁸⁵³ A Test of Vehicle-to-Grid (V2G) for Energy Storage and Frequency Regulation in the PJM System, <http://www.udel.edu/V2G/resources/test-v2g-in-pjm-jan09.pdf>, accessed 17 September 2014.

⁸⁵⁴ Electricity Directive, 2009/72/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>. See also: http://europa.eu/rapid/press-release_IP-11-271_en.htm. Both accessed 15 September 2014.

large-scale roll-out.⁸⁵⁵ No data for the UK are offered, but the House of Commons Public Accounts Committee has estimated the total cost of installing 53 million meters at £10.6 billion, or around £215 per home or small business – for a notional saving of just two percent of the average household energy bill.⁸⁵⁶

However, a fundamental flaw of AMI is that it assumes the availability of variable tariffs, for which introduction in the UK there are no plans.⁸⁵⁷ The system itself does not save electricity, *per se*. Its essential function is to convey variable price information to users. They can respond to the price signals and programme non-essential appliances to function only in off-peak periods, thereby reducing their consumption and reducing the peak loading on the generation system. Reducing peak loading is known as "peak shaving", for which individual consumers are rewarded with cheaper tariffs.

The system is under large-scale test on the Danish island of Bornholm, where around 2,000 households have been equipped with smart meters, their washing machines, televisions and computers fully networked, ready to be controlled by the local utility company, Oestkraft. The experiment was (and still is at the time of writing) part of a pump-priming, 4-year €21 million pilot project, part-funded from the EU's research programme. Called EcoGrid EU, it is one of 245 EU energy projects which are soaking up €2.3 billion in tax-funding. Under test in EcoGrid EU is a supply scenario where over 50 percent of electricity is provided by renewables – mainly wind – the volatility causing considerable instability in the grid, requiring creative systems in order to balance supply and demand.⁸⁵⁸

The response is to price electricity according to availability, changing at five-minute intervals, the levels communicated via the "smart grid" (i.e., one which is able to communicate information). The approximately 2,000 residential consumers in the experiment (of a total of 28,000 on the island) are equipped with "smart" controllers which allow real-time prices to be presented to them, with electrical equipment pre-programmed to use electricity only when the prices drop below certain levels. By this means, customers can stack their

⁸⁵⁵ European Commission Staff Working Document, SWD(2014) 189 final, 17 June 2014, Cost-benefit analyses & state of play of smart metering deployment in the EU-27, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0189&from=EN>, accessed 18 September 2014. See also <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0356&from=EN>.

⁸⁵⁶ <http://www.independent.co.uk/money/spend-save/smart-meters-set-to-cost-households-215-in-return-for-minor-savings-9722195.html>, <http://www.nao.org.uk/wp-content/uploads/2014/06/Update-on-preparations-for-smart-metering.pdf>, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/103/103.pdf>, accessed 15 September 2015.

⁸⁵⁷ <http://www.wired.co.uk/news/archive/2012-12/21/smart-meters>, accessed 16 September 2014.

⁸⁵⁸ EcoGrid EU, A Prototype for European Smart Grids, <http://www.ecogrid.net/images/Documents/EcoGrid%20EU%20-%20Guide%20to%20the%20large-scale%20project.pdf>, accessed 17 September 2017.

dishwashers last thing at night, but the machines will only cycle when the price is right – perhaps at two o'clock in the morning.⁸⁵⁹

The remarkable thing about this scenario, though, is that it assumes the completion of AMI and also the attainment of challenging targets for the introduction of unspecified millions of electric vehicles, possibly as many as 18-20 million. Work is in hand integrating electric vehicles with the AMI, with their contribution being trialled in the Bornholm experiment.⁸⁶⁰ At this point, however, AMI is not on schedule and the vehicle target depends on breakthroughs in battery technology, the nature of which are unknown, to a timescale that is unknown.⁸⁶¹ As with the supply side, therefore, this component of the 2050 policy is based on unrealised assumptions, with no indication that they are realisable or when they might be realised.

In terms of demand management, there are simpler and cheaper ways of achieving some of the effects of AMI, with a small fraction of the expenditure. One technique is known as "dynamic demand", involving fitting certain domestic appliances, such as refrigerators, with low-cost sensors coupled to automated controls. These measure the frequency of the current supplied – which should be a constant 50 cycles per second – and switch off their appliances when the system load temporarily exceeds supply, causing the current frequency to drop.⁸⁶² Since appliances such as refrigerators do not run continuously, switching them off for short periods (20-30 minutes) is unlikely to be noticed and will have no harmful effects on the contents. Yet the cumulative effect on the generating system of having Britain's 40 million fridges fitted with dynamic demand units could be to cut peak loading by 728 to 1,174MW.⁸⁶³

Dynamic demand technology could probably yield net savings equivalent to those delivered by AMI, with costs so modest that they could be absorbed in the prices of new appliances, without imposing any noticeable burden on the consumer, or requiring consumer interaction.

⁸⁵⁹ *Die Zeit*, 26 September 2012, Denmark, a test lab for the energy transition, <http://www.zeit.de/wirtschaft/2012-09/daenemark-energiewende/komplettansicht>, accessed 17 September 2014.

⁸⁶⁰ Electric Vehicle Fleet Integration in the Danish EDISON Project - A Virtual Power Plant on the Island of Bornholm, http://orbit.dtu.dk/fedora/objects/orbit:59638/datastreams/file_5186822/content, accessed 17 September 2014.

⁸⁶¹ See, for instance: The King Review of low-carbon cars, parts I & II, <https://research.mbs.ac.uk/INNOVATION/Portals/0/docs/seminar/kingreview.pdf> and http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/bud08_king_1080.pdf, accessed 22 September 2014.

⁸⁶² http://www.cired.net/publications/cired2013/pdfs/CIRED2013_0507_final.pdf, https://pure.strath.ac.uk/portal/files/7103876/dynamicDemand_as_on_IEEE_site_1_.pdf, accessed 15 September 2014.

⁸⁶³ *The Guardian*, How 'smart fridges' could slash UK CO2 emissions and help renewables, 28 April 2009, <http://www.theguardian.com/environment/2009/apr/27/carbon-emissions-smart-fridges-environmentally-friendly-appliances>, accessed 12 October 2014.

Other techniques are used to manage peak loads, which is also an important part of demand management. These include the provision of banks of diesel and gas-power generators, with installations typically capable of producing 20MW at short notice, to supplement power supplies at times of peak demand. Their provision reduces the need to keep large plants fired up – the so-called spooling reserve. Voluntary load shedding is also employed, with some operations disconnecting from the network and using generators to supply their power needs. In other cases, power hungry equipment, such as commercial cold stores, or air conditioning installations, are shut down at peak times, thus "shaving" the peaks and reducing the need to bring additional capacity online.⁸⁶⁴ Some of the capacity is managed under a system known as Short Term Operational Reserve (STOR).

With as much as a 25GW diurnal variation in demand – with a winter peak capacity approaching 60GW, significant capacity has to be built and maintained purely to meet short-duration peaks in demand. The use and extension of STOR and like facilities makes a significant contribution to reducing the need for peak generation plants. As such, the actual total requirement for electricity capacity could be reduced to below that of common projections and, as techniques for smoothing demand improve, overall system capacity requirements could be further reduced.

According to one aggregator, removing between 5-15 percent of peak demand is realistic, as part of the new-found capacity market.⁸⁶⁵ This could be worth up to 9GW. That is effectively the output of seven major nuclear plants (or their equivalent) which would otherwise have to be built. As it stands Ofgem has already estimated that demand response services could save the UK £800 million annually on transmission costs and £226 million on peak generation capacity.⁸⁶⁶

Investment certainly is the key to securing the widespread introduction of this capacity, but it is not currently being seen in significant volumes. This is attributed to the short term nature of the contracts. Initially, longer term STOR contracts of 15 years were available, but they were only offered to fill a projected gap in provision and were suspended once the need had been met. Although the longer term contracts did serve to bring forward investment in new flexible plant specifically for participation in balancing services and remain a tool for the system operator should they project a gap in provision in the future, there are no plans to repeat the exercise, as it is thought that longer term contracts will foreclose the market to new, potentially more efficient, and economic, technologies.⁸⁶⁷

⁸⁶⁴ BBC website, Chill out, save energy, no sweat, <http://www.bbc.co.uk/news/science-environment-23343211>, accessed 14 September 2104.

⁸⁶⁵ <http://www.kiwipowered.com/pr28.html>, accessed 16 September 2014.

⁸⁶⁶ <https://www.ofgem.gov.uk/ofgem-publications/57026/dsr-150710.pdf>, *op cit*.

⁸⁶⁷ Department of Energy and Climate change, Electricity System: Assessment of

15.4 Energy efficiency

The third component of the 2050 strategy is to improve energy efficiency and thereby reduce overall energy usage. The International Energy Agency (IEA) calls energy efficiency the "first fuel," on the basis that, over term, the amount saved is more than the output of any single fuel source.⁸⁶⁸ The UK view is that it reduces greenhouse gas emissions, improves energy security, mitigates fuel poverty, increases productivity and reduces the costs of meeting the UK's renewable energy target.⁸⁶⁹

The EU also accepts that energy reduction is extremely important, promoting it through its Energy Efficiency Directive.⁸⁷⁰ In the preamble to the Directive, it notes that the Union is "facing unprecedented challenges resulting from increased dependence on energy imports and scarce energy resources, and the need to limit climate change and to overcome the economic crisis". Energy efficiency, it states, "is a valuable means to address these challenges. It improves the Union's security of supply by reducing primary energy consumption and decreasing energy imports. It helps to reduce greenhouse gas emissions in a cost- effective way and thereby to mitigate climate change".

Reduced demand also cuts investment requirements, not only on generating plant but also on the grid and local distribution networks. In terms of environmental impact, the effect of energy efficiency is also significant. There is less (or no) visual blight from wind turbines and their attendant pylons, and an overall reduction in the demand for conventional but nonetheless intrusive generation sets.

One major policy stream aimed at increasing efficiency is legislation directed at increasing energy efficiency of consumer appliances - from washing machines to vacuum cleaners – and building efficiency, mainly by the incremental strengthening of insulation standards. These have considerable value.⁸⁷¹ However, this is only the tip of a huge iceberg, achieving results largely through the implementation of EU law, even if some is inspired by the UK.⁸⁷²

Future Challenges – Annex, 9 August 2012,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48550/6099-elec-system-assess-future-chall-full.pdf, accessed 17 September 2012.

⁸⁶⁸ On the basis of a subset of 11 IEA member countries. See:

<http://www.iea.org/Textbase/npsum/EEMR2013SUM.pdf>, and

<http://www.euractiv.com/energy/iea-treat-energy-efficiency-worl-news-531136>, both accessed 21 September 2014.

⁸⁶⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/42984/5533-final-stage-impact-assessment-for-the-green-deal-a.pdf, accessed 20 September 2014.

⁸⁷⁰ [\[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0001:0056:EN:PDF\]\(http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0001:0056:EN:PDF\), accessed 14 September 2014.](http://eur-</p></div><div data-bbox=)

⁸⁷¹ http://ec.europa.eu/clima/policies/roadmap/docs/efficiency_plan_en.pdf, accessed 15 September 2015.

⁸⁷² <http://archive.defra.gov.uk/environment/economy/documents/energy-products-1209.pdf>, accessed 21 September 2014.

Energy use in residential and commercial buildings is a profitable target. These are responsible for about 40 percent of the EU's total final energy consumption and 36 percent of the EU's total CO₂ emissions. The potential by 2020 is significant: 30 percent less energy use within the sector.⁸⁷³ Furthermore, the savings are thoroughly worthwhile. The European Commission estimates that, EU-wide, it would save 400 Megatonnes of oil equivalent (Mtoe) in primary energy. It would also avoid the construction of about a thousand coal-fired power stations or half a million giant wind turbines, averaging 4 MW in 2020, operating 2300 h/year. The CO₂ emissions reduction would be about 860 Mt.⁸⁷⁴

Yet, while this is actually feasible, the Commission has acknowledged that its target is unlikely to be reached. It is settling for a nine percent energy saving by 2020.⁸⁷⁵ In an indication that it is no longer a lead priority, a recent policy review allocated only a "significant role" to energy efficiency in delivering the Union's climate and energy objectives, and even this was to be the subject of a review to be concluded later in 2014.⁸⁷⁶

As to the British government, despite an evident lack of commitment to delivering any significant energy savings in the commercial and industrial sectors, it is still going through the motions, subscribing to a "Carbon Plan 2050". This will require the UK to halve *per capita* energy consumption, even though it lacks the vision or the policy instruments to achieve this outcome.⁸⁷⁷ Instead, the government is adopting a highly bureaucratic EU-based scheme built into the Energy Efficiency Directive, under the title: Energy Savings Opportunity Scheme (ESOS).⁸⁷⁸ This requires large commercial enterprises to pay for expensive audits of their energy usage, which must identify "cost-effective" energy efficiency opportunities.

Even though it has widespread application, the scheme is estimated to deliver only £1.6 billion in energy savings – and that assumes that firms will implement the non-binding recommendations identified from their audits. There are, though, no specific grants or financial incentives which would make marginal or capital-intensive schemes more attractive. Imposing the bureaucracy inherent in schemes such as ESOS, with its complex costings and a penalty regime that includes fines of £50,000, is hardly the way to enlist the co-operation of the business sector.

⁸⁷³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0772:FIN:EN:PDF>, accessed 20 September 2014.

⁸⁷⁴ *Ibid.*

⁸⁷⁵ The Commission's new Energy Efficiency Plan, http://europa.eu/rapid/press-release_MEMO-11-149_en.htm?locale=en, and http://ec.europa.eu/energy/efficiency/eed/doc/2011_directive/sec_2011_0779_impact_assessment.pdf, *op cit*, both accessed 15 September 2014.

⁸⁷⁶ http://ec.europa.eu/energy/doc/2030/com_2014_15_en.pdf, accessed 14 September 2014.

⁸⁷⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf, accessed 14 September 2014,

⁸⁷⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351158/ESOS_Guide_FINAL.pdf, accessed 14 September 2014.

15.5 Policy alternatives

The huge problem with decarbonisation, apart from the fact that it cannot be achieved, is that it is an all-or-nothing strategy which does not leave openings for alternatives. It requires very specific technology, such as "zero carbon" windfarms, and electric vehicles. Solutions, such as high-efficiency low-emission generating coal-fired plants, installed to reach interim targets, become dead-end technology. No matter how energy efficient they are, they can never be "zero carbon". They must be replaced well before 2050. Furthermore, because "zero carbon" technology is capital intensive, the drive to meet the 2050 target blocks investment in low emission options.

Thus, pursuing the decarbonisation route ends up with the worst of all possible worlds. Not only has it no possibility of working, the unsuccessful attempts to make it work exclude alternatives. To deal with the resultant shortfall in electricity production, emergency measures then have to be taken. The only viable option to add capacity rapidly is unabated gas-fired generators, with commensurate increase in emissions. The UK ends up worse off than if it adopted less ambitious but achievable targets.

Nevertheless, in order to abandon the 80 percent target, the UK will have to repeal the Climate Change Act – which Parliament (in theory at least) could do at any time. Without leaving the EU, the UK would then be caught by the "double coffin lid" of EU policy objectives. The EU's approach to policymaking is seriously handicapped by a tendency to think (and then legislate) in separate compartments. The EU thus fails to acknowledge that the desired outcome is what matters. Energy saving and producing electricity by the use of renewables delivers the same emissions outcome, but the EU insists on separating the two routes towards the same goal and applying non-interchangeable targets to each, in both cases amounting to 20 percent.

Leaving the EU restores policy flexibility, allowing its targets to be ignored. Then, energy efficiency becomes a realistic and highly viable option, offering considerable advantages over wind energy. The latter raises the overall electricity costs, whereas the effect of energy saving is neutral or marginally positive. Investment costs are matched by the financial savings delivered (on a current cost basis).⁸⁷⁹

15.6 Combined heat and power (cogeneration)

Of all the possibilities for energy savings in buildings, one of the most promising is the proven technology of combined heat and power (CHP), the use of plant to generate electricity and then capturing the waste heat to use for productive purposes such as space heating in buildings, or in domestic premises using district heating schemes. The technology includes the use of diesel

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http://ec.europa.eu/energy/efficiency/eed/doc/2011_directive/sec_2011_0779_impact_assessment.pdf, accessed 14 September 2014.

generators, delivering as little as 500kW, or the same plant using spark-fired natural gas, to gas turbines delivering up to 50MW and steam boilers of similar size, driving steam turbines.

CHP technologies have been around a considerable time. The concept of what has been referred to as district heating was first implemented in 1884 to provide energy for the Del Coronado Hotel in San Diego, United States.⁸⁸⁰ Slough Trading Estate, home of the Mars Bar, has a 40MWe CHP plant which was upgraded in 2008.⁸⁸¹ But it has been supplying heat and power to the estate since 1920. The cogeneration plant serving the Volkswagen factory in Wolfsburg Germany was built in 1938 and has supplied the local town with power ever since.⁸⁸²

The value of this technology is substantial. In the EU, the current transformation efficiency in conventional thermal power and heat stations is only 49.9 percent, while the best of the CHP plants are capable of delivering 85 percent efficiencies.⁸⁸³ There are also positive externalities, in reducing infrastructure costs, and delaying the need for extensive upgrades and replacements to the distribution network.

The Commission itself is enthusiastic about the technology, but it has failed to promote it effectively, attributing its failure to the "limited" efficiency and effectiveness of its CHP (Combined Heat & Power) Directive.⁸⁸⁴ It cites the lack of "concrete obligations" and the "soft wording" of its Directive, which had failed to create the investment security needed. It had also failed to decrease the burden of the numerous administrative procedures, to the extent that there was no level playing field for this technology and its operators.⁸⁸⁵

The lack of "investment security" is probably one of the most potent contributors to the overall failure, combined – in the view of the Commission – with insufficient access to finance.⁸⁸⁶ Renewables – especially wind energy – have been given lucrative guarantees, in the form of doubled or trebled electricity prices, and have absorbed available

⁸⁸⁰ http://www.ceere.org/iac/iac_combined.html, accessed 17 October 2014.

⁸⁸¹ <http://www.cospp.com/articles/print/volume-9/issue-1/project-profile/biomass-chp-plant-serves-uk-trading-estate-mixed-wood-waste-fuel-sourced-locally.html>, accessed 17 October 2014.

⁸⁸² http://de.wikipedia.org/wiki/Heizkraftwerk_Wolfsburg_Nord/Süd, accessed 17 October 2014.

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<http://setis.ec.europa.eu/system/files/4.Efficiencyofheatandelectricityproductiontechnologies.pdf>, accessed 13 October 2014.

⁸⁸⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0008&from=EN>, accessed 14 September 2014.

⁸⁸⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0008&from=EN>, *op cit.*

⁸⁸⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0772:FIN:EN:PDF>, *op cit.*

investment capital. Yet the vastly more cost-effective and reliable CHP has been treated as a Cinderella option.⁸⁸⁷

Significant problems are the high capital cost and limited returns (very often amounting only to cost neutrality), with payback periods longer than normally considered viable. Given the commercial risks, dividends from energy efficiency alone have not been sufficient to drive a large-scale uptake of CHP, especially as there is no direct provision for offsetting positive externalities, which benefit network operators rather than investors.

To an extent, this is recognised by the UK government, in seeking to promote energy efficiency in the NHS. Its buildings consume over £410 million worth of energy and produce 3.7 million tonnes of CO₂ every year. Energy use contributes 22 percent of the total carbon footprint and, in its own terms, the NHS says that this offers many opportunities for savings and efficiency, allowing these savings to be directly reinvested into further reductions in carbon emissions and improved patient care.⁸⁸⁸ In 2013, therefore, it decided to kick-start its energy saving programme with a £50 million fund, aiming to deliver savings of £13.7 million a year.⁸⁸⁹ CHP comprised a substantial part of this spending.⁸⁹⁰ Already, however, the potential had been well demonstrated in Guy's and St Thomas' Hospitals in London. Each fitted 3MW gas-powered CHP generators, reducing their £10 million annual energy bill by £1.5 million.⁸⁹¹

The savings offered illustrate the extent of the opportunity in decreasing energy costs. To kick-start a broader national programme, providing state aid would be appropriate, especially if the expenditure was more cost-effective than similar amounts spent on renewables and delivered positive externalities.

The lack of wider investment tells its own story. Without direct financial incentives to the commercial sphere, from 2004 to 2008, the share of electricity from high-efficiency CHP increased only from 10.5 to 11.0 percent. In the United States, the value of CHP is recognised as the most efficient way of capitalising on the shale gas bonanza and the Environmental Protection Agency

⁸⁸⁷ Since 2010 DECC has recorded investments in large scale renewable electricity totalling over £34 billion,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308012/ORED_Renewable_Electricity.pdf, accessed 26 September 2014.

⁸⁸⁸ http://www.ruh.nhs.uk/about/annual_report/documents/social_responsibility_report_2009-10.pdf, accessed 20 September 2014.

⁸⁸⁹ <https://www.gov.uk/government/news/new-nhs-efficiency-schemes-set-to-save-137-million-per-year-on-hospital-energy-bills>,

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260921/list_of_successful_schemes_final_for_publication.pdf, accessed 15 September 2015.

⁸⁹¹ <http://www.energyefficiencynews.com/articles/i/4531/>, 19 October 2014.

established the Combined Heat and Power (CHP) Partnership in 2001 to encourage cost-effective CHP projects.⁸⁹²

In Massachusetts, a 2006 study of CHP potential determined that the technical potential for CHP was greater than 4,700 MW at 18,500 sites throughout the state, equal to approximately 40 percent of the electricity industry's generating capacity. The greatest opportunities were in commercial and institutional buildings, particularly office buildings, and in the relatively small size range of 50 to 500KW generation units.⁸⁹³ This, no doubt, influenced President Obama's Executive Order of August 2012 which called for a 50 percent increase in CHP capacity by 2020, increasing capacity by 40GW to around 12 percent of US generating total. This is expected to save manufacturers as much as \$100 billion in energy costs over the next decade, and energy users generally some \$10 billion per year.⁸⁹⁴

In fact, though, the future is already with us. In Freiburg, Germany, about 50 percent of the electricity is now produced with CHP, up from just 3 three percent in 1993. There are 14 large-scale and about 90 small-scale CHP plants (e.g., at the city theatre and indoor swimming pools). The two large-scale plants located near landfills use landfill gas as fuel. Others use natural gas, biogas, geothermal, wood chips, and/or heating oil. An important concomitant development is new district heating systems which can replace individual oil or gas burning furnaces.⁸⁹⁵

In view of its potential, CHP is recognised by the US EPA as an approved energy efficiency measure, making it eligible for financial incentives.⁸⁹⁶ From 2009 to 2011, it has delivered a commercial and industrial energy efficiency programme, making nine percent electricity savings.⁸⁹⁷ And, as an indication of the extent of the opportunity, installed capacity in the United States is currently 83.3GW, about the same as the entire capacity of the entire UK generating system, and nearly ten times its CHP capacity.⁸⁹⁸

In Denmark, CHP, primarily supplying heat for heat networks, contributed 46 percent of national electricity generation in 2011. In Germany, CHP contributed 13.1 percent of electricity generation in the same year. The German

⁸⁹² EPA, Combined Heat and Power Partnership, <http://www.epa.gov/chp/partnership/index.html>, accessed 25 September 2014.

⁸⁹³ http://www.northeastchptap.org/Data/Sites/5/documents/Potential_for_CHP_in_Massachusetts-Mattison.pdf, accessed 25 September 2014.

⁸⁹⁴ <http://www.whitehouse.gov/the-press-office/2012/08/30/president-obama-signs-executive-order-promoting-industrial-energy-effici>, accessed 9 October 2014.

⁸⁹⁵ <http://www.ecotippingpoints.org/our-stories/indepth/germany-freiburg-sustainability-transportation-energy-green-economy.html>, accessed 14 October 2014.

⁸⁹⁶ <http://www.aceee.org/energy-efficiency-sector/state-policy/massachusetts/193/all/195>, accessed 25 September 2014.

⁸⁹⁷ <http://web.mit.edu/cron/project/EESP-Cambridge/Articles/Program%20design/ACEEE%20-%20January%202013%20-%20Frontiers%20of%20Program%20Design%20copy.pdf>, accessed 21 September 2014.

⁸⁹⁸ http://www.epa.gov/chp/documents/catalog_chptech_full.pdf, accessed 21 September 2014.

Government has set a target to increase CHP to 25 percent of generating capacity by 2020.⁸⁹⁹

By contrast, in the UK there seems to be a lack of enthusiasm for CHP. The total capacity (electrical), standing at about 9GW, producing 6.3 percent of total electricity, is the second lowest of the major EU economies. Only France – boasting its huge nuclear fleet – is lower, at 2.8 percent. Unlike many other countries, the UK has no defined CHP targets for the 2050 strategy. The expectation is that the technology will be phased out and replaced by options with longer payback periods. The use of biomass in high temperature processes has been mentioned as an alternative.⁹⁰⁰ With no longer-term commitment, it is unsurprising that the sector has performed relatively poorly.

From 2005 to 2010, electricity production from CHP installations had fallen from 27,235 to 23,644GWh and heat production from 51,454 to 43,201GWh despite an increase of installed capacity of 12 percent.⁹⁰¹ The Government attributed this to "the economic situation ... and the recession which impacted on manufacturing outputs and reduction in CHP operation". By contrast, over the same period – constrained by exactly the same "economic situation" - the installed capacity of wind generation has increased from 1.3 to 6.5GW, a capacity increase of over 500 percent, despite the massively inferior cost-benefit ratio.⁹⁰² Yet it is estimated that CHP saves nearly twice as much CO₂ as wind.⁹⁰³

Furthermore, CHP technology has the particular advantage of affording the localisation of the electricity supply system. For instance, Leeds Teaching Hospital and the University of Leeds together have financed their own dedicated power station, comprising CHP units and an electricity generation capacity of 15MW.⁹⁰⁴ Office buildings, supermarkets and other installations can operate CHP units of 1.5MW or less.

Implemented nationally, a programme of encouraging localised, distributed electricity generation would massively increase the resilience of the system. Generation at smaller, local facilities is less susceptible than centralised power plants to disruption from failure, industrial disputes or even attack. It can improve energy efficiency overall, and ease pressure on

⁸⁹⁹ See: http://ec.europa.eu/energy/publications/doc/2013_pocketbook.pdf, and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190149/16_04-DECC-The_Future_of_Heating_Accessible-10.pdf, accessed 9 October 2014.

⁹⁰⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47613/3702-the-carbon-plan-delivering-our-low-carbon-future.pdf

⁹⁰¹ See second national progress report (UK), http://ec.europa.eu/energy/efficiency/cogeneration/cogeneration_en.htm, accessed 14 September 2014.

⁹⁰² http://en.wikipedia.org/wiki/Energy_in_the_United_Kingdom, accessed 14 September 2014.

⁹⁰³ http://www.epa.gov/chp/documents/meeting_100511_hedman.pdf, accessed 9 October 2014.

⁹⁰⁴ <http://www.cogenco.com/uk-energy/ressources/documents/1/44529,Leeds-Tchng-Hosp-NHS-trt-Uni-of-le.pdf>, accessed 17 September 2014.

the distribution system.⁹⁰⁵ It would also reduce transmission losses, which can account for 5-7 percent of national electricity production. A 20 percent reduction is considered realistic which, in the UK would be the equivalent of saving the output of one large nuclear installation.⁹⁰⁶

15.7 Integrated systems: deep building renovation

The pursuit of energy efficiency does not stop at more efficient energy production and distribution, but also in usage in a myriad of ways – from more efficient lighting to better insulation. The totality of a package applied to any particular building can have very significant effects in reducing overall energy usage.

This point was being made with some emphasis in 2007 when the European Insulation Manufacturers Association (Eurima) noted that energy efficiency from buildings had the potential to save €270 billion a year in energy costs, EU-wide, and reduce energy use by the equivalent of 3.3 million barrels of oil a day

whilst creating up to 530,000 new jobs.⁹⁰⁷ In a report produced a year previously, it had argued for a market transformation, complaining that there was "very little reliable information about the impact of policies".⁹⁰⁸

By 2014, thinking embraced a concept called extended building renovation. This was an integrated approach to upgrading energy efficiency, which included a combination of energy production techniques and insulation and other saving strategies, amounting to a total "makeover" of buildings treated.⁹⁰⁹

By following a "deep renovation" strategy in the buildings sector, it has been argued that final energy use for space heating, hot water and cooling in buildings could be reduced by 66 percent by 2050, delivering a reduction of imported gas consumption by 95 percent (down from 1,653 TWh in 2015 to 82 TWh) and of oil consumption by 97 percent (from 745 TWh to 19 TWh). However, the shallow renovation scenario practically

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http://www.northeastchptap.org/Data/Sites/5/documents/Potential_for_CHP_in_Massachusetts-Mattison.pdf, accessed 25 September 2014.

⁹⁰⁶ European Commission, Action Plan for Energy Efficiency: Realising the Potential, Brussels, 19 October 2006, COM(2006)545 final

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0545&from=EN>, accessed 17 September 2014.

⁹⁰⁷ Eurima, Press Release, Brussels, 12 June 2007, Converting Building from Energy Wasters to Climate Savers,

http://www.eurima.org/uploads/Modules/Mediacentre/12June_EURIMA_PR_EU_Roadmap.pdf, accessed 20 September 2014.

⁹⁰⁸ http://www.eurima.org/uploads/EU_Roadmap_building_report_020307.pdf, accessed 20 September 2014.

⁹⁰⁹ http://www.bpie.eu/documents/BPIE/Developing_Building_Renovation_Strategies.pdf, accessed 20 September 2014.

does not reduce the demand for gas. Hence, energy import independence cannot be reached.⁹¹⁰

Such are the merits of "deep renovation" that Oliver Rapf, Executive Director of the Buildings Performance Institute, believes Europe needs a completely new policy approach; a paradigm shift. Europe's buildings use over 60 percent of all gas imports and a third of all oil imports. The technology and know-how are there, all it takes is the political will to move on from the current framing and decision making based on incremental changes. It is self-evident, he says, that a super-efficient and low carbon Energy Union should be at the core of political responses.⁹¹¹

15.8 Small modular nuclear reactors

The failure of policymakers to embrace localisation (as opposed to decentralisation, such as in dispersing centralised fossil-fuel plants into small packages of wind power) of electricity generation suggests that they are in the thrall of megalophilia, where huge nuclear and other plants are demanded, despite their obvious disadvantages and expense. Given that 60 percent or more of the total energy production from a nuclear plant is waste heat, such plants are ostensibly ideal for CHP, but as long as the size of units demands isolation from potential heat users, there is no economic way of using the waste.

On the other hand, there is the alternative of the small nuclear plant, known as the Small Modular Nuclear Reactor (SMRs). These are factory-built and can be installed once ground works are complete, whence they are able to deliver energy without delay.⁹¹² Some of the designs have a long history in powering submarines and ships, in which service most of the technical problems and safety issues have been resolved.

The range of technologies proposed for SMRs is extensive and this has resulted in their potential to fulfil a much broader range of roles, not just electricity generation. They are a preferred option for non-electric applications that require a proximity to the customer such as seawater desalination, district heating and other process heat applications.⁹¹³

David Clarke, chief executive at the Energy Technologies Institute, recently told a House of Commons select committee:

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http://www.eurima.org/uploads/ModuleXtender/Publications/117/Ecofys_XI_Energy_dependency_report_final_20_05_2014.pdf, accessed 20 September 2014.

⁹¹¹ *Euractiv*, 19 September 2014, Energy efficiency at the heart of Europe's stability, <http://www.euractiv.com/sections/energy/energy-efficiency-heart-europes-stability-308582>, accessed 21 September 2014.

⁹¹² <http://www.energy.gov/ne/nuclear-reactor-technologies/small-modular-nuclear-reactors>, accessed 14 September 2014.

⁹¹³ National Nuclear Laboratory, Small Modular Reactors, Their potential role in the UK, July 2012, http://www.nnl.co.uk/media/1048/nnl__1341842723_small_modular_reactors_-_posit.pdf, accessed 4 October 2014.

Fundamentally, we see the small module opportunity driven by economics in terms of the potential for low-cost energy and reduced need for cooling water compared with big nuclear plants, meaning that you open up more opportunities for sites on which you can build these units, and then there is potential for siting them closer to centres of population so that you can use the waste heat off-site.

Rolls-Royce Chief Scientific Officer, Paul Stein, was just as forthright, effectively arguing in front of the same committee that SMRs effectively provide the only answer if we are to meet the government's target of 40GW from nuclear power. He envisages a plant capable of producing a 150MW reactor a month, producing 1.8 GW a year, which is the equivalent of producing one big power station, in terms of energy output, a year.⁹¹⁴

Even for district heating, there is considerable flexibility in siting. The Nesjavellir geothermal CHP plant in Iceland services almost the whole of Reykjavik and sends hot water over 27km. In initial tests, its overall flow rate was around 560 litres per second. Water took seven hours to run the length of the pipe and cooled by 2°C.⁹¹⁵ The Akranes and Borgarnes district heating service provides the towns of Akranes (6,600 inhabitants) and Borgarnes (1,950 inhabitants) with geothermal water, as well as some farmhouses, along a 63 km long pipeline.⁹¹⁶ Using that as a guide, the SMRs can be 20-40 miles from the districts they serve.

The UK Government believes there is "undoubtedly" a medium to long-term potential, but bringing that potential to market will be "challenging". The question of whether the technology is commercially viable is still open. It is currently funding a feasibility study on the use of these reactors, and the Minister of State for the Department of Energy and Climate Change estimated in September 2014 that it would take five to seven years to bring a demonstration project to life". In the context of UK energy needs, this was regarded as a relatively short time.⁹¹⁷

Although an SMR is defined by the International Atomic Energy Agency (IAEA) as those delivering an output of less than 300MWe, at the smaller end of the spectrum is a US design, the Gen4 Hyperion. It can deliver 70MW of heat and 25MW of electricity, for a period of ten years without refuelling.⁹¹⁸

⁹¹⁴ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/energy-and-climate-change-committee/small-nuclear-power/oral/10962.pdf>, accessed 17 October 2014.

⁹¹⁵ <http://geoheat.oit.edu/bulletin/bull17-4/art2.pdf>, accessed 8 October 2014.

⁹¹⁶ <http://www.geothermal-energy.org/pdf/IGAstandard/WGC/2010/3418.pdf>, accessed 8 October 2014.

⁹¹⁷ House of Commons Energy and Climate Change Committee, Wednesday 10 September 2014, evidence by Matthew Hancock MP, Minister of State for Energy, Department of Energy and Climate Change: Small nuclear power, <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15985&st=09:47:30>, accessed 4 October 2014.

⁹¹⁸ <http://www.gen4energy.com/>, accessed 14 September 2014.

What is holding up full commercial exploitation of this technology is the cost of regulatory approval, which is little different from a large scale reactor. To expedite and partially subsidise the process, the US Department of Energy has commissioned the installation of three different modular reactors at its Savannah River test facility, with a view to undertaking generic or "fleet" licensing.⁹¹⁹ The US Government has so far spent \$450 million on developing the concept.⁹²⁰

Within the EU, however, licensing of nuclear plants remains a national competence, but there is no provision for a fleet licensing approach and there are no extant proposals for simplifying or speeding up licensing at an EU level.⁹²¹ But, in the absence of EU action, European licensing initiatives in the nuclear field are stalled, while national initiatives cannot be pursued unless the EU vacates the field – which is unlikely. Caught between these two stools, the industry is not in a position to pioneer the development of innovative systems.

Nevertheless, it is unlikely that "Brexit" would have a direct impact on the short-term provision of CHP – nuclear or otherwise, and there is nothing to prevent public support of CHP or even SMRs. While payment to commercial businesses in the form of capital grants and operating subsidies is normally prohibited under EU "state aid" rules – as indeed it is for nuclear plants in general - aid for high-efficiency cogeneration plants (including assisting in the capital costs of installing district heating schemes) is permitted – irrespective of fuel type.⁹²² Therefore, even support for nuclear plants would be permissible, as long as they were used for cogeneration.

15.9 The four-pillar policy

Putting the key elements of a post-exit policy together, we have four main pillars, three of which have already been identified. The first is a reliance on local, gas-fired CHP as the primary provider of electricity; the second is the provisions of small modular nuclear reactors, also delivering combined heat and power. The third is deployment of proven demand management techniques, aimed at smoothing peaks and cutting the peak capacity requirement. Unproven technologies such as AMI would be abandoned.

Further, since high cost technologies such as wind-powered generation yield results inferior to those delivered by CHP, in this four-pillar policy, investment is diverted from wind and other renewables to expanding the CHP fleet. Small-

⁹¹⁹ <http://theenergycollective.com/dan-yurman/43216/hyperion-build-small-modular-reactor-savannah-river>, accessed 14 September 2014.

⁹²⁰ Hancock, *op cit*.

⁹²¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0844&from=EN>, accessed 14 September 2014.

⁹²² Guidelines on State aid for environmental protection and energy 2014-2020, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN). See also: http://europa.eu/rapid/press-release_MEMO-14-276_en.htm, both accessed 15 September 2014.

scale cogeneration and the use of small modular nuclear plants, plus effective use of demand management could permit the removal of expensive renewables altogether. They form no part of any rational energy policy.

Clearly, this minimises emissions, but it is not a "zero carbon" option. There is thus no point in pursuing the electrification of transport or heating – this simply transfers emissions. If increased energy efficiency could reduce emissions by half, doubling consumption of electricity without decarbonisation would merely restore the *status quo*.

In terms of the generation side, this becomes primarily a two-fuel industry: gas and nuclear. With the emergence of shale and other types of unconventional gas (including coal bed methane), reliance on gas is probably more secure than it has ever been. But when it comes to nuclear, the reliance on uranium is less so.

Here, the possibility of thorium as the primary fuel offers greater security.⁹²³ There is enough energy in 5,000 tons to meet world energy demand for a year, on which basis proven reserves are sufficient for more than 500 years.⁹²⁴ It clearly has potential as a fuel, and the Chinese are working on introducing a working prototype by 2024.⁹²⁵ This brings the technology into the medium-term policy framework which suggests a further key component of a new energy policy should be an investigation into its practical applications. However, other possibilities include molten salt and pebble bed reactors, each of which offers some potential.⁹²⁶ Pebble bed is more advanced, with the first demonstration reactor due to go active in 2017.⁹²⁷

That still leaves room for a small number of large, centralised plants, to provide some base load for the national system, and to provide technology test beds. These form the fourth pillar of the policy. A few large nuclear reactors could be part of the mix, especially if they were "thorium enabled", so constructed as to allow retrofitting to enable them to use thorium as a fuel. Coal also should be included, as a means of using domestic coal production, currently at about 12.7 million tonnes per annum. But rather than look to the ludicrously expensive and grossly inefficient carbon capture and storage, the new energy mix could include high-efficiency, low-emissions (HELE) coal plants, bringing

⁹²³ http://en.wikipedia.org/wiki/Thorium-based_nuclear_power, and <http://www.bbc.co.uk/news/science-environment-24638816>, both accessed 19 September 2014.

⁹²⁴ <http://www.the-weinberg-foundation.org/wp-content/uploads/2013/06/Thorium-Fuelled-Molten-Salt-Reactors-Weinberg-Foundation.pdf>, accessed 27 September 2014.

⁹²⁵ <http://www.scmp.com/news/china/article/1452011/chinese-scientists-urged-develop-new-thorium-nuclear-reactors-2024>, accessed 26 September 2014.

⁹²⁶ <http://www.the-weinberg-foundation.org/wp-content/uploads/2014/07/Briefing-Nuclear-Energy-Molten-Salt-Reactors-Thorium-Alvin-Weinberg-Foundation.pdf>, accessed 26 September 2014.

⁹²⁷ http://northerngraphite.com/wp-content/uploads/2014/03/nextbigfuture_com_2014_04_construction_progresses_on_chinas.pdf, accessed 27 September 2014.

efficiencies to well above 45 percent (up from less than 30 percent in older plants).⁹²⁸

Not least, utilisation of the technologies involved provides a test-bed for developing countries, and can be used as part of a co-operative endeavour to assist less developed coal-using countries to improve their own efficiencies.⁹²⁹ On a national scale, this may yield higher emissions than alternative technologies but, by assisting less developed countries, global fuel efficiencies are increased and emissions reduced. If all coal plants in operation in 2010 were upgraded to this level, almost 350 million tonnes of coal per year could be saved. This would be equivalent to 11 percent savings over coal used in 2010.⁹³⁰

This then points to a fundamental restructuring of the electricity supply industry. Instead of being dominated by six major suppliers, it reverts to a large number of small-scale, local facilities as the primary providers. On the basis of the Massachusetts studies, CHP could provide as much as 25GW of UK capacity by 2050. This does not seem unrealistic given an official UK government report published in 2007, forecasting a potential of 16GW by 2015.⁹³¹

If demand management has the potential to reduce the overall peak capacity requirement to about 50GW, CHP is capable of supplying 50 percent of the electricity needs, even at periods of highest demand. For the balance, SMRs could possibly generate another 15GW, supplying useful additional energy for district heating and process heat. The rest could be easily met by large reactors – potentially thorium breeder reactors and HELE coal plants.

A reserve is also available in the form of the 1.65 GW of installed hydro-electric capacity (currently 1.8 percent of UK capacity) and approximately 2.8 GW of pumped-storage hydroelectric power, contributing just over 4 GW to the mix.⁹³² With another 4GW available from interconnectors, from France, Holland, Ireland and Norway, there is more than enough capacity surplus to avoid any shortfall even under exceptional conditions. If needed, interconnector capacity could be doubled to 8GW by 2020.⁹³³

⁹²⁸

http://www.iea.org/publications/freepublications/publication/TechnologyRoadmapHighEfficiencyLowEmissionsCoalFiredPowerGeneration_WEB_Updated_March2013.pdf, accessed 19 September 2014.

⁹²⁹

<http://www.majoreconomiesforum.org/images/stories/documents/mef%20helec%20tap%2014dec2009.pdf>, accessed 19 September 2014.

⁹³⁰ IEA, *op cit*.

⁹³¹ <http://www.code-project.eu/wp-content/uploads/2009/05/UK-Report-Art-6-CHP-Potential-and-Barriers-DEFRA-REPORT.pdf>, accessed 20 October 2014.

⁹³² http://en.wikipedia.org/wiki/Hydroelectricity_in_the_United_Kingdom, accessed 26 September 2014.

⁹³³ <http://www2.nationalgrid.com/Media/UK-Press-releases/2014/%C2%A31-billion-could-be-saved-from-electricity-costs-if-UK-doubles-its-interconnector-capacity-by-2020,-says-new-analysis-from-National-Grid/>, accessed 26 September 2014.

The crucial element of the policy though is the level of CHP implementation. This permits a fundamental policy shift, emphasising generation of electricity as close to the point of consumption as possible. With predictions of half a million additional jobs created by energy efficiency measures, total job creation is probably very much higher, these being real, long term jobs which create added value to the economy.

This real world approach ends up contributing more to overall EU climate change and energy security targets outside the EU than in. Decoupling from EU policy, removing the possibility of legal intervention from the Commission, ultimately with a reference to the European Court of Justice and the possibility of massive fines, is facilitated by EU withdrawal, permitting rational policy that has a chance of working, and is the best proposition for security of supply. It allows the pursuit of realistic, achievable and desirable energy efficiency targets, as opposed to pursuing unachievable emission targets, the outcome of which risk increasing emissions rather than reducing them.

16.0 Financial services

... it is likely that the UK would have implemented the vast bulk of the financial sector regulatory framework had it acted unilaterally, not least because it was closely engaged in the development of the international standards from which much EU legislation derives.

House of Lords European Union Committee
5th Report of Session 2014–15

The international origin of much of EU law is nowhere more evident than in the financial sector, where most of the provisions covering financial services start their lives outside Brussels.

External origins are so much part of the system that special terminology has been invented. The EU is variously said to "upload" its international financial rules or, in many cases, it "downloads" them from international bodies. "Downloading" is defined as the incorporation of international "soft" rules (standards, principles, guidelines) into EU legislation. "Uploading" is defined as the incorporation of EU legislation (or parts of it) into international financial regulation.⁹³⁴ The EU's measures on the adequacy of banking capital, known as the CR IV Package, is an example of "downloading", the source being the Basel III agreement crafted by the Basel Committee on Banking Supervision (BCBS).^{935,936}

The new regulation also applies to the EEA but, outside the EU/EEA, the essence of the CR IV package would still apply to Britain as a party to the Basel III agreement. It would "download" it directly, rather than via the EU. This is acknowledged in a House of Lords report on the post-crisis EU financial regulatory framework. With only a few exceptions, it is likely that the UK would have implemented the vast bulk of the EU financial sector regulatory framework had it acted unilaterally, "not least because it was closely engaged in

⁹³⁴ See: Quaglia, Lucia (2012), *The European Union and Global Financial Harmonisation*, European University Institute, Florence, Department of Political and Social Sciences. http://cadmus.eui.eu/bitstream/handle/1814/22234/SPS_2012_04.pdf?sequence=1, accessed 24 December 2013.

⁹³⁵ See: <http://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe>, accessed 27 August 2013.

⁹³⁶ <http://www.bis.org/bcbs/basel3.htm>, accessed 21 December 2013.

the development of the international standards from which much EU legislation derives".⁹³⁷

16.1 An opaque process

The process is rarely visible to the popular media and almost entirely unknown to the general public. Only very occasionally does a hint of the real power emerge, as in January 2014 when the Basel Committee ruled on leverage ratios for banking loans, the issue at the heart of the 2008 banking crisis.⁹³⁸ The picture, however, is extremely mixed. Regulation does not follow a single template. For instance, "over the counter" derivative trading is regulated by the EU's European Markets Infrastructure Regulation. But even this does not work in isolation.

The regulatory package stems from a commitment made by the G20 nations in November 2008 at the Washington summit. They pledged "to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems".⁹³⁹ Then, in London in April 2009 they agreed to "take action to build a stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens".⁹⁴⁰ Thus, in an industry of global reach, the EU regulation combines with elements "downloaded" from the US Dodd-Frank Act and the Basel III guidelines.⁹⁴¹ Outside the EU, Britain would download from similar sources, its regulatory package looking very little different from what it is now.

On the other hand, the Alternative Investment Fund Managers Directive (AIFMD) is largely of EU origin.⁹⁴² It is seen as a building block of "Fortress Europe" – a more protective European market sheltered from competition. A recent survey had 68 percent of respondents believing that AIFMD will lead to fewer non-EU managers operating in the EU. Some 72 percent viewed the

⁹³⁷ House of Lords, European Union Committee 5th Report of Session 2014–15 The post-crisis EU financial regulatory framework: do the pieces fit?, <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/103/103.pdf>, accessed 12 July 2015.

⁹³⁸ *Sunday Telegraph*, 18 January 2014, The 'too big to fail' problem just got worse, <http://www.telegraph.co.uk/finance/comment/liamhalligan/10581764/The-too-big-to-fail-problem-just-got-worse.html>, accessed 18 January 2014.

⁹³⁹ https://g20.org/wp-content/uploads/2014/12/Washington_Declaration_0.pdf, accessed 26 April 2015.

⁹⁴⁰ https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf, accessed 26 April 2015.

⁹⁴¹ Regulatory Reform and Collateral Management: The Impact on Major Participants in the OTC Derivatives Markets, J P Morgan, Winter 2012. https://www.jpmorgan.com/cm/BlobServer/Regulatory_Reform_and_Collateral_Managementpdf.pdf?blobkey=id&blobwhere=1320534213352&blobheader=application/pdf&blobheadertype=1=Cache-Control&blobheadervalue1=private&blobcol=urldata&blobtable=MungoBlobs, accessed 9 December 2013.

⁹⁴² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:01:EN:PDF>, accessed 9 December 2013.

Directive as a business threat.⁹⁴³ As an EEA member, Britain would have to retain its provisions - one of the many reasons why EEA membership can only be regarded as a temporary solution.

Nevertheless, simply to attribute cost to additional regulation, and then to argue for its repeal, is not a realistic approach to the problem of excessive regulation. In September 2013, Deloitte recorded that new regulations had cost the European insurance industry as much as €9 billion since 2010, with each of the top 40 insurers having spent more than €200 million on compliance.⁹⁴⁴ Of regulation deemed to have a major impact, 36 percent was of national origin. The rest came from the EU or international sources.

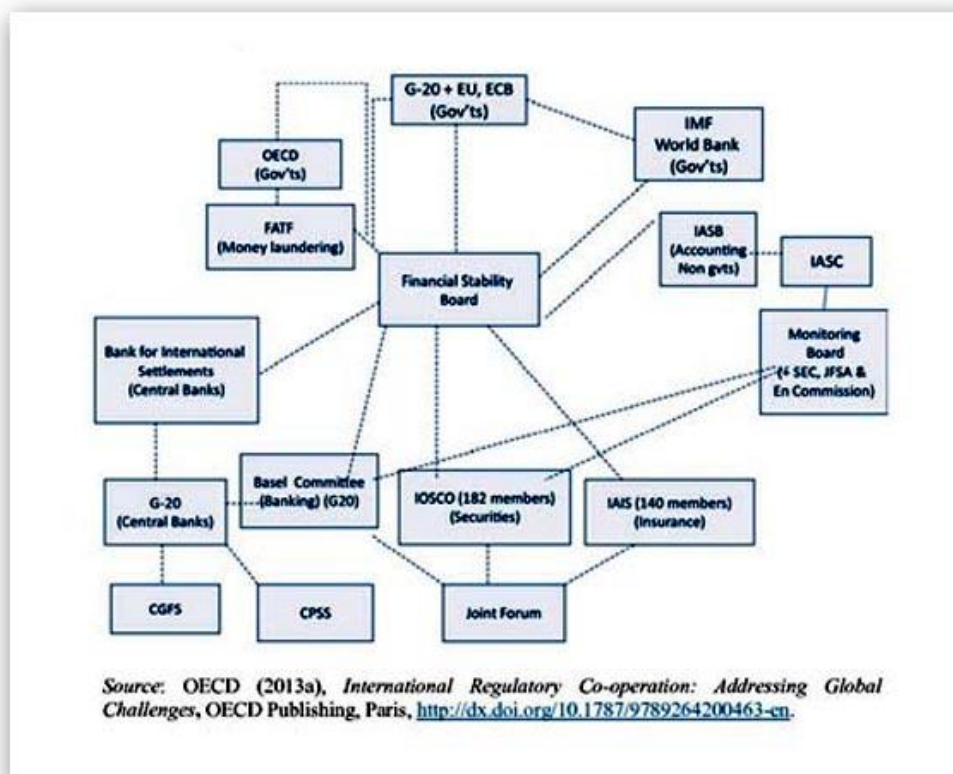


Figure 16: International regulatory bodies in the financial sector.

Instruments such as the "Solvency II" package, on capital requirements, have international dimensions. Specifically, Directive 2009/138/EC implements recommendations from the International Association of Insurance Supervisors,

⁹⁴³ <http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/Financial%20Services/uk-fs-aifmd-survey-responding-new-reality.pdf>, accessed 9 December 2013.

⁹⁴⁴ Deloitte, Cost of regulation weighs on insurers, http://www.deloitte.com/view/en_GB/uk/news/news-in-focus/c8e8a7e92bde0410VgnVCM2000003356f70aRCRD.htm, Reuters, 5 September 2013, European insurers spent 9 billion euros on regulation - report: <http://uk.reuters.com/article/2013/09/04/uk-europe-insurance-regulation-idUKBRE9831A520130904>, accessed 8 December 2013.

the International Accounting Standards Board, the International Actuarial Association and nine other agencies alongside the World Bank and the IMF. At a European level, all of these work with the EU's Frankfurt-based European Insurance and Occupational Pension Authority (EIOPA), and with Member State regulatory bodies.⁹⁴⁵

At a technical level, the G20 works through the Financial Stability Board (FSB). Founded in April 2009, it has a mandate "to coordinate at the international level the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies". It brings together national authorities, international financial institutions, sector-specific international groupings of regulators and supervisors and committees of central bank experts.⁹⁴⁶

It counts as its members the Basel Committee on Banking Supervision (BCBS); the Committee on the Global Financial System (CGFS); the Committee on Payment and Settlement Systems (CPSS); the International Association of Insurance Supervisors (IAIS); the International Accounting Standards Board (IASB) and the International Organisation of Securities Commissions (IOSCO).⁹⁴⁷ This, in effect, is the standards setters' standards setter, positioned at the centre of a web of international bodies concerned with regulation at a global level (see diagram above).

Significantly, the FSB is chaired by Mark Carney, Governor of the Bank of England. Its secretariat is hosted by the Bank for International Settlements in Basel, Switzerland.⁹⁴⁸ This institution shifts the focus of power to Basel, where the global agenda is monitored and steered, with regular cross references to its sponsoring body, the G20.

On banking conduct, the FSB published a regulatory framework on 29 August 2013, which was approved in principle by G20 leaders at St. Petersburg. The FSB has also established a road map to transform shadow banking into resilient market-based financing. Leaders of the G20 endorsed these proposals in Brisbane and agreed to address further measures.⁹⁴⁹

16.2 Global dimensions

Such global dimensions again mean that leaving the EU, *per se*, would not entail any significant change in the way financial services were regulated. Furthermore, much the same costs would be incurred. Thus, an alternative

⁹⁴⁵ Directive 2009/138/EC (recast): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0138&from=EN>, accessed 25 November 2015.

⁹⁴⁶ See: <http://www.financialstabilityboard.org/members/links.htm>, accessed 21 May 2014.

⁹⁴⁷ *Ibid.*

⁹⁴⁸ See: <http://www.financialstabilityboard.org/about/history.htm>, accessed 12 December 2013.

⁹⁴⁹ https://g20.org/wp-content/uploads/2014/12/brisbane_g20_leaders_summit_communique1.pdf, accessed 26 April 2015.

stratagem is suggested by the consultancy KPMG which argues that significant costs arise from duplication and the lack of a consistent measure of insurers' financial solvency. It estimates the global industry could save up to \$25 billion per year from harmonised, consistent regulation. Solvency II is seen as a start, part of a global initiative alongside the Solvency Modernisation Initiative in the US and recent ERM enhancements in China.⁹⁵⁰



Figure 17: Bank of International Settlements, Basel. Host to the BCBS - one of the global regulatory centres of the financial services industry. (Wikipedia Commons)

Indicative of future expectations was a commentary in *Reuters*. It complained that one of the great disappointments in the raft of regulatory changes emerging from the financial crisis of 2008 had been the failure of regulators to agree a common framework. In an attempt to achieve this, a greater role was proposed for the International Organisation of Securities Commissions (IOSCO). Headquartered in Madrid, Spain, IOSCO is the international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector.

⁹⁵⁰ <http://www.icaew.com/en/technical/financial-services/financial-services-faculty/harmonised-rules-could-save-insurers-billions>, accessed 9 December 2013.

Founded in April 1983, it currently has 200 members, and is dedicated to developing, implementing and promoting adherence to internationally recognised standards for securities regulation. It works intensively with the G20 and the Financial Stability Board (FSB) on the global regulatory reform agenda.⁹⁵¹ The way forward was seen as this organisation promoting and facilitating regulatory convergence, something which was regarded as inevitable for global markets.⁹⁵²

Whatever European issues currently apply, the eventual ambition is to have harmonised global legislation for what is, after all, a global industry. Furthermore, UK regulators are not ill-disposed to this idea.

The chief executive of the Financial Conduct Authority, Martin Wheatley, states that his authority intends to "reflect on and embrace" the international nature of markets. He talks of a "new regulatory landscape" and of driving changes in regulation, infrastructure and culture, as a body at the "heart of international regulation". His view is that the regulator exists "to drive forward a changing global agenda". "You will witness first-hand how we share priorities with our EU and US counterparts, and how we are at the forefront of discussions to address cross-border risks", he says.⁹⁵³

Such discussions require access at the highest level, well above the narrow sub-regional entity that is the EU. Despite it being positioned as such by David Cameron, the "top table" is quite simply not the EU. Occupying that position globally is the G20. Thus, when the EU sought to adopt a Financial Transaction Tax (FTT) against British wishes, invoking the enhanced co-operation procedure, it was to the G20 that the financial markets representative bodies turned.^{954,955}

16.3 The Global Legal Entity Identifier (LEI)

A particular example of how the global financial regulatory system is taking place comes with the emergence of the so-called Legal Entity Identifier (LEI). Since the 2008 financial crisis, it has been regarded as a crucial element of the

⁹⁵¹ <http://www.iosco.org/about/>, accessed 19 December 2013.

⁹⁵² <http://blogs.reuters.com/great-debate-uk/2013/11/11/regulatory-convergence-is-inevitable-for-global-markets/>, accessed 9 December 2013.

⁹⁵³ CityAM, FCA proclaims position at heart of global markets regulation, 19 November 2013, <http://www.cityam.com/blog/1384864406/fca-proclaims-position-heart-global-markets-regulation>, accessed 11 December 2013.

⁹⁵⁴ European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final, Brussels, 14.2.2013, http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2013_71_en.pdf, accessed 14 January 2014.

⁹⁵⁵ *Daily Telegraph*, Financial transaction tax contravenes G20 agreements, warn global markets bodies, 18 April 2013, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10004288/Financial-transaction-tax-contravenes-G20-agreements-warn-global-markets-bodies.html>, accessed 14 January 2014.

regulatory and enforcement system, in controlling the global financial services system. It is actually a sub-system based on the ISO 17442 standard. It comprises a twenty-digit alphanumeric code and associated set of six reference data items uniquely to identify a legally distinct entity that engages in financial market activities.⁹⁵⁶

Collectively, these identifiers make up a global database which enables regulators, private sector firms, and industry associations instantly to identify anyone engaged in specified financial activities. Despite the simplicity of the concept, the ramifications make it extremely complex to achieve in practice.⁹⁵⁷ Private industry has made several attempts over the past 20 years to establish a system and has failed. Now it is going ahead under the aegis of G20 and the Financial Stability Board (FSB).

At their direction, there was established in January 2013 a Regulatory Oversight Committee (ROC), called the LEIROC. This is a group of over 70 public authorities from more than 40 countries. It will coordinate and oversee the worldwide LEI framework.⁹⁵⁸

This led in 2014 to the setting up of the Global Legal Entity Identifier Foundation (GLEIF) to act as the operational arm of the Global LEI System. It operates out of offices in Basel, Switzerland, home of the Bank for International Settlements. GLEIF also accredits and monitors the Local Operating Units (LOUs). These are the partner organisations which actually issue the LEIs to legal entities engaging in financial transactions.⁹⁵⁹ In the UK, one of the prominent LOUs is the Stock Exchange. It contributed to the development of the ISO, and is the UK's National Numbering Agency for the provision and maintenance of financial reference data.⁹⁶⁰

When it comes to the UK withdrawing from the EU, the crucial thing is that the EU is a downstream organisation. It was not even on the ground floor. US interests as early as 2009 were pushing for the system but the idea was not endorsed by EU Internal Market Commissioner Michel Barnier until February 2011.⁹⁶¹ "We must also work together in a common identification of market players", he then said: "This is an area where the US is already committed, but that requires global standards".

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https://www.treasury.gov/initiatives/wsr/ofr/Documents/LEI_FAQs_August2012_FINAL.pdf, accessed 22 March 2016

⁹⁵⁷ <https://www.gleif.org/en/newsroom/blog/taking-the-next-step-legal-entity-identifier-regulatory-oversight-committee-proposes-process-for-collecting-data-on-direct-and-ultimate-parents-of-legal-entities>, accessed 22 March 2-16

⁹⁵⁸ <http://www.leiroc.org/>, accessed 22 March 2016.

⁹⁵⁹ <https://www.gleif.org/>, accessed 22 March 2016

⁹⁶⁰ href="http://www.lseg.com/LEI, accessed 22March 2016

⁹⁶¹

http://www.sifma.org/uploadedfiles/issues/technology_and_operations/legal_entity_identifier/le-i-global-calls.pdf?n=65408, accessed 22 March 2016

This makes the point that the process of leaving will have a largely neutral effect on financial services regulation. The EU is not the originator of the system or the regulation. It is the law taker rather than the law maker. For the UK, outside the EU would make little difference. We would continue to shape and then adopt international regulation.

16.4 Accounting standards

Common accounting standards are an important element in the Single Market and indeed, an important part of the internationalisation of financial services. At EU level, such standards are used to underwrite core EU legislation such as Council Directives 78/660/EEC, 83/349/EEC on consolidated accounts, Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings – as amended by Directive 2013/34/EU.⁹⁶²

An independent UK, however, would not be disadvantaged by the proliferation of these standards as they are not generated by EU institutions. Rather, via Regulation (EC) No 1606/2002 (the "IAS Regulation"), the International Financial Reporting Standards (IFRS) is used. This is a mandatory requirement for companies with securities listed on a regulated market in the EU.

Crucially, IFRS are issued by the International Accounting Standards Board (IASB) and related interpretations by the International Financial Reporting Interpretations Committee (IFRIC), two bodies of the International Accounting Standards Committee Foundation (IASCF).⁹⁶³

The sponsoring organisation for the standards board is the IFRS Foundation, "an independent, not-for-profit private sector organisation working in the public interest". The governance and oversight of the activities undertaken by the IFRS Foundation and its standard-setting body rests with its Trustees, who are also responsible for safeguarding the independence of the IASB and ensuring the financing of the organisation.⁹⁶⁴

IFRS are used alongside the standards of the US Public Company Accounting Oversight Board (PCAOB), the two standards effectively providing the global base for company reporting. As of August 2008, more than 113 countries around the world, including all of Europe, currently require or permit IFRS reporting and 85 require IFRS reporting for all domestic, listed companies.

⁹⁶² European Commission: EU Single Market, Directive on statutory audit, http://ec.europa.eu/internal_market/auditing/directives/index_en.htm, accessed 10 February 2014.

⁹⁶³ Regulation (EC) No 1606/2002 of 19 July 2002 on the application of international accounting standards, http://www.esma.europa.eu/system/files/Reg_1606_02.pdf; European Commission: EU Single Market, International Standards on Auditing (ISAs), http://ec.europa.eu/internal_market/auditing/isa/index_en.htm, 10 February 2014.

⁹⁶⁴ About the IFRS Foundation and the IASB, <http://www.ifrs.org/The-organisation/Pages/IFRS-Foundation-and-the-IASB.aspx>, accessed 10 February 2014.

Currently, profiles are completed for 122 jurisdictions, including all of the G20 jurisdictions plus 102 others.⁹⁶⁵

Interestingly, the growth economies such as China, Korea and Brazil are very supportive of the IASB work, seeing IFRS as "an opportunity to secure a seat at the top table of global financial reporting". For example, China provides the secretariat for the IASB's emerging economies group.⁹⁶⁶ Thus, a globally-orientated UK would be better able to work with these actors, without having to work through the filter of EU institutions.

16.5 Passporting

Within the EEA, special administrative provisions have been made to facilitate trading in financial services within the single market, through a process known as "passporting". This allows any firm authorised in an EEA state to carry on permitted activities in any other EEA state, either by exercising the right of establishment (of a branch and/or agents) or providing cross-border services. In the UK, this is referred to in the Financial Services and Markets Act 2000 (as amended) (FSMA) as an EEA right.⁹⁶⁷

Passporting rights only apply within the EEA and not in the Channel Islands or the Isle of Man. Swiss general insurers have the right to set up an establishment in the EEA under the provisions of their bilateral treaties. EEA general insurers also have equivalent rights in respect of Switzerland under these treaties. Special arrangements also apply in relation to Gibraltar.

The Prudential Regulation Authority (PRA) is the lead regulator for outward passports for dual-regulated firms in respect of the nine current single market directives:

Capital Requirements Directive (2013/36/EU);
Third Non-Life Insurance Directive (92/49/EEC);
Consolidated Life Assurance Directive(2002/83/EC);
Reinsurance Directive (2005/68/EC);
Insurance Mediation Directive (2002/92/EC);
Markets in Financial Instruments Directive (2004/39/ EC);
Undertaking Collective Investment Scheme Directive (85/611/EEC);
Payment Services Directive (2007/64/EC);
Second Electronic Money Directive (2009/110/EC).

⁹⁶⁵ IFRS around the world, <http://www.ifrs.org/Use-around-the-world/Pages/Jurisdiction-profiles.aspx>, accessed 10 February 2014.

⁹⁶⁶ Hans Hoogervorst, LSE, November 2012, <http://www.ifrs.org/Alerts/Conference/Documents/HH-LSE-November-2012.pdf>, accessed 11 February 2014.

⁹⁶⁷ <http://www.bankofengland.co.uk/pru/Pages/authorisations/passporting/default.aspx>, accessed 14 July 2015.

If a firm from an EEA state "passports" into another EEA state solely on a "services" basis, it will not have a physical presence in the country it which it is trading. To use the "branch" provisions, the firm opens another office in the country into which it is passporting. As long as it is then properly authorised to trade in its home country, in most circumstances, the firm will still be regulated by its home state regulator, thereby avoiding the time-consuming and expensive procedure of having to register with the local regulators.

Clearly, if the UK leaves the EU, then these arrangements will cease to apply, although continued participation in the EEA agreement will permit the UK to continue taking advantage of them.

16.6 Free movement of capital and payments

Closely allied with, and an integral part, of the regulatory package affecting financial services, but also much else, is the "free movement of capital". Originating in the 1957 Treaty of Rome as one of the four freedoms, it has been re-enacted and revised, the current treaty (TFEU Article 63) declaring that: "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited". Furthermore, the article states that: "all restrictions on payments between Member States and between Member States and third countries shall be prohibited".

Britain, thereby, is deprived of a considerable element of tax sovereignty. It cannot, for instance, demand that corporate earnings are retained in this country until tax has been paid on them. Companies trading in Britain can offshore their money and if, by so doing, they can convert it or manipulate it in some way as to exempt it from taxation, they are free to do so.

Free movement of capital, however, is not an issue confined to the EU. Outside the EU it is facilitated by the OECD, originally introduced in 1961 via its Code of Liberalisation of Capital Movements. Although this is not a mandatory code in a strictly legal sense, all 34 members nevertheless adhere to it as a price of maintaining membership of the club.^{968,969}

Within the territories of EU member states, only EU law can give binding force to the commitments endorsed in the code. Therefore, it is only used by the EU for its external relations, where it is applied it to such countries as Turkey. Furthermore, the EU provisions are "appreciably stricter than those in the OECD", making the EU "one of the world's most open capital movement regimes".⁹⁷⁰

⁹⁶⁸ This has been amended and extended, the current version (2013) running to 173 pages. See: http://www.oecd.org/daf/inv/investment-policy/CapitalMovements_WebEnglish.pdf, accessed 11 December 2013.

⁹⁶⁹ These include the United States, Britain and most EU members, Switzerland and Turkey. The code has been extended to all members of the IMF and on 28 June 2012 the OECD made it open to adherence by all interested countries.

⁹⁷⁰ See: http://ec.europa.eu/internal_market/capital/docs/reports/120203_market-monitoring-working-document_en.pdf, accessed 11 December 2013.

However, for the first time in over half a century, the major economic powers are questioning whether to reapply controls over capital movement – largely because of issues of tax sovereignty and egregious examples of tax avoidance by multinational corporations.

Even within the territories of EU Member States, though, G20 is taking the global lead, working on a multilateral basis with UNCTAD.⁹⁷¹ The aim of this grouping is to resuscitate the IMF's Articles of Agreement of 27 December 1945, which allow that "members may exercise such controls as are necessary to regulate international capital movements". A G20/UNCTAD report notes that experience with the current financial crisis challenges the conventional wisdom that dismantling all obstacles to cross-border private capital flows is the best recipe for economic development.⁹⁷²

Within the EEA, Britain could not unilaterally implement any G20/UNCTAD recommendations and re-impose capital controls – under normal conditions.⁹⁷³ Outside, it would be caught by the OECD Code, to which it is a party. This again brings into high profile the increasing globalisation of regulation. Removing one level simply exposes another.

One can compare Britain with the victim in a horror movie, trapped alive in an as-yet-unburied coffin. Having broken through the lid in a bid to escape, he finds to his consternation that there is another lid over the first. This "double lid" in respect of capital movement is, on the one hand, the EU treaty obligations and, on the other, the OECD code. The main effect of breaking through the EU/EEA legislative layer is to reveal the second "lid". As regards relief from the "over-liberal" capital movement regime, the most optimistic outcome is that G20/UNCTAD recommendations deliver revisions to the OECD code, improving the ability of national treasuries to control capital movements.

⁹⁷¹ United Nations Conference on Trade and Development.

⁹⁷² G20 Working Group on the Reform of the International Monetary System, Contribution by the UNCTAD Secretariat to Subgroup I: Capital Flow Management, March 2011. http://unctad.org/en/Docs/webgds2011_g20d06_en.pdf, accessed 8 December 2013.

⁹⁷³ EFTA/EEA members are entitled to take exceptional measures under Art 43.4 of the EEA Agreement, in order to protect their balance of payments. This option was adopted by Iceland at the end of 2008 in response to its financial crisis, an action which was subsequently approved by the EFTA Court. See: http://www.eftacourt.int/uploads/tx_nvcases/3_11_Judgment_EN.pdf, accessed 20 January 2014.

17.0 The Digital Market

Unless you have been living in a cave with no mobile reception, you and I are aware that the European telecoms sector is facing some major problems, but also some major opportunities.

Neelie Kroes
European Commission Vice-President, formerly responsible for the Digital
Agenda⁹⁷⁴

An indication of how difficult it is to decouple UK and EU policy and develop an independent regulatory framework comes with an evaluation of the telecommunications and related industries, now known collectively as the "digital market". This comprises the physical infrastructure relating to the provision of telephones and electronic communication generally, television and radio, and the content providers, including state broadcasters. But it extends also to the sale of goods and services online (i.e., via the internet).

Of the market as a whole, telecommunications in particular is a significant and growing sector of the UK economy. It increased from about £50.8 billion in 2003 to around £60 billion in 2013, making up just over three percent of the economy. The Communication Workers Union has over 70,000 members working in the UK telecommunications sector. Around three quarters (54,234) were employed in British Telecom, with the remainder located in over 30 telecoms companies.⁹⁷⁵ The importance of the industry, however, transcends the financial value as it forms part of the UK's critical national infrastructure, "necessary for the functioning of the country and the delivery of the essential services upon which daily life in the UK depends".⁹⁷⁶

However, this sector is becoming increasingly difficult to define, as the lines between goods and services are increasingly blurred, as is the distinction between content and platform provision. One example is buying digital content such as music or films online: physical CDs are clearly goods and subscriptions

⁹⁷⁴ We must act now – time for a Connected Continent, Speech 12 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-693_en.htm

⁹⁷⁵ http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMV.pdf, accessed 6 March 2015.

⁹⁷⁶ <http://www.cpn.gov.uk/about/cni/>, accessed 6 March 2015.

to a streaming platform are clearly services, but the status of the downloaded tracks themselves is less clear. Another distinction is with newspapers. Again, the physical printed products are clearly goods, whereas online digital subscriptions are services. As regards content and platforms, an internet service provider (ISP) might provide access to the internet for subscribers (the "platform"), but many also provide them with content – including news services.

As such, there is an increasing tendency to lump together the information and communications technology (ICT), media and telecoms sectors, generically described as the "digital market". This, throughout the EU-27 in 2012 accounted for 4.7 percent of GDP, employing 6.3 million people.⁹⁷⁷ In this chapter, we will refer to this "digital market".

17.1 The Regulatory Framework

In the UK, the primary regulator is Ofcom – a semi-autonomous government agency working under UK statutes. Known as the National Regulatory Authority (NRA) for the purpose of implementing EU law, it is able to relate directly with EU institutions, bypassing UK bodies. Its primary instrument is the Communications Act 2003, a significant proportion of which transposes the EU Electronic Communications Framework into UK law. Ofcom thus considers a key priority in its international work is ensuring a sound and effective framework at EU level.

The original EU framework is of relatively recent origin, although its genesis is pre-Maastricht, when the then EEC had attempted to use the Terminal Equipment Directive (88/301/EEC) - issued under Article 90 of the Treaty of Rome - to force the liberalisation of telecoms including the satellite and mobile markets. Despite Member States objecting on the basis it was outside the EEC's own competences (satellite communications for example have military implications) the ECJ after 30 months of legal wrangling upheld the Directive.

Telecommunications became a full-blown competence via the Maastricht Treaty, permitting the EU to establish and develop trans-European networks (TENs) in the areas of transport, telecommunications and energy. Even by then, however, telecommunications was becoming a globalised industry, increasingly reliant on global bodies to set standards. The EU emphasis, however, has been on the "liberalisation" of the industry, breaking up (often) state-owned monopolies with a view to creating a single (i.e. EEA-wide) market in digital products. Using its then new powers, the European Commission launched a strong push to adopt a common strategy for the creation of a European information society driven by a European information infrastructure. Alongside this, in 1993, the European Council agreed to fully liberalise voice telephony services by 1 January 1998.

⁹⁷⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332668/bis-14-987-free-movement-of-services-balance-of-competencies-report.pdf, accessed 27 March 2015

The immediate outcome of the European Council's intervention was the publication of a 1994 report by a High Level Group on "Europe and the Global Information Society". Known as the Bangemann Report, it urged the European Union "to put its faith in market mechanisms as the motive power to carry [Europe] into the information age". This required actions at the European (i.e., EU) level, with Member States striking down "entrenched positions which put Europe at a competitive disadvantage".⁹⁷⁸

The report proposed "fostering an entrepreneurial mentality to enable the emergence of new dynamic sectors of the economy; [a means of developing] a common regulatory approach to bring forth a competitive, Europe-wide, market for information services." It then noted: "In addition to its specific recommendations, the group proposes an action plan of concrete initiatives based on a partnership between the private and public sectors to carry Europe forward into the information society". In this, it took the view that liberating market forces and heightened competition would not in themselves produce, or would produce too slowly, the critical mass which had the power to drive investment in new networks and services. Bangemann thus argued that, "We can only create a virtuous circle of supply and demand if a significant number of market testing applications based on information networks and services can be launched across Europe to create critical mass".⁹⁷⁹

The report was to have a significant and lasting influence on the framing of subsequent EU policies for Information and Telecommunications Technologies (ICT) research and communication services. For instance, it was explicitly invoked as a framework for the strategy in the audio-visual sector. Yet, for all that, the Bangemann Report was out of date almost as soon as it was written, having largely ignored the emergence of the internet and failed to anticipate its growth for the profound effect it would have on the communications industry.

Despite this, a comprehensive ICT framework directive was agreed in 2002, with the declared aim of encouraging competition, improving the functioning of the market and guaranteeing basic user rights. The European Commission states as its overall goal that consumers should benefit from increased choice arising from low prices, high quality and innovative services. It claims that its intervention has helped the prices of telecoms' services fall by around 30 percent in the past decade.⁹⁸⁰ In November 2007 the European Commission published a series of legislative proposals for updating the Framework. These proposals were contained in the "Citizens' Rights" amending Directive and the "Better Regulation" amending Directive.

In November 2009, the EU adopted a reform package, revising the framework directive. The package was adopted and subsequently transposed into national law by 25 May 2011. It applies to all transmission networks and services

⁹⁷⁸ http://aei.pitt.edu/1199/1/info_society_bangeman_report.pdf, accessed 9 April 2015.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ <https://ec.europa.eu/digital-agenda/en/telecoms-rules>, accessed 15 March 2015.

(including access) for electronic communications including telecommunications (fixed and mobile), e-mail and access to the internet. The Framework is intended to raise standards of regulation and competition across all 28 European Member States' communications markets. It consists of five directives: the "Framework" Directive (2002/21/EC); the "Access" Directive (2002/19/EC); the "Authorisation" Directive (2002/20/EC); the "Universal Service" Directive (2002/22/EC); and the "E-Privacy" Directive (2002/58/EC).

The reform package created new rights and protections for consumers in areas such as equivalence, transparency and telephone number portability. In addition, it removed regulation by reducing the number of areas subject to market reviews, and enhanced competition in the communications sector through furthering the liberalisation of spectrum markets (e.g. promoting spectrum trading) and making express the power of regulators to impose functional separation on dominant operators (a provision inspired by the UK's own experience of functional separation with BT Openreach). The legislation also gave Ofcom new responsibilities in areas such as network security and resilience, and infrastructure sharing, and has extended them in information gathering and enforcement.⁹⁸¹

Body of European Regulators in Electronic Communications (BEREC)

In her 2006 review, Viviane Reding considered the possibility of a single EU-wide telecoms regulator, in the form of a European Electronic Communications Market Authority (EECMA).⁹⁸² The Commission, however, noted that this was a sensitive issue from a political perspective, because it would entail transfer of powers over electronic communications regulation to a supranational body. There would be a strong national resistance to the fact that a trans-national body was regulating domestic issues.⁹⁸³ In the event, proposals for a full-blown regulator were abandoned and, via Regulation (EC) No 1211/2009, the Body of European Regulators of Electronic Communications (BEREC) was established under the revised framework directive (and implementing Regulation (EC) No 1211/2009).⁹⁸⁴

This replaced the European Regulators Group for electronic communications networks and services, which had been established as an advisory group to the Commission in 2002. The new body started operations in January 2010 and became fully functional in the course of 2011. Its task is to contribute to the development and better functioning of the internal market for electronic communications networks and services. It does so by aiming to ensure a

⁹⁸¹ <http://stakeholders.ofcom.org.uk/international/telecoms/framework-review/>, accessed 27 March 2015.

⁹⁸² http://ec.europa.eu/information_society/doc/factsheets/tr3-eutelecommarketauthority.pdf, accessed 12 April 2015.

⁹⁸³ http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2006/sec_2006_0817_en.pdf, accessed 12 April 2015.

⁹⁸⁴ Creation of 'super regulator' delayed in Europe, <http://telecoms.com/11169/creation-of-super-regulator-delayed-in-europe/>, accessed 12 April 2015.

consistent application of the EU regulatory framework and by aiming to promote an effective internal market in the telecoms sector. Furthermore, BEREC assists the Commission and the NRAs in implementing the EU regulatory framework for electronic communications. It provides advice on request and on its own initiative to the European institutions and complements at European level the regulatory tasks performed at national level by the NRAs. The NRAs and the Commission are required to take account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.⁹⁸⁵

Conférence Européenne des Postes et Télécommunications (CEPT)

Another body which works alongside the EU is the European Conference of Postal and Telecommunications Administrations (CEPT). This body was established in 1959 by the incumbent monopoly-holding national postal and telecommunications administrations of 19 countries. The current membership stands at 48. Its activities include co-operation on commercial, operational, regulatory and technical standardisation issues. There is a Memorandum of Understanding between CEPT and the European Commission to support on-going activities on harmonisation of the radio spectrum. The Commission is a Counsellor to CEPT.

CEPT works via two main committees: one for postal issues and one the Electronic Communications Committee (ECC). The ECC brings together the radio and telecommunications regulatory authorities of the CEPT member countries. The committee is supported by a permanent office, the European Communications Office (ECO), which was opened in May 1991 and is located in Copenhagen, Denmark. The ECO supports the work of ECC in radio communications and provides a centre of expertise. All EU Member States delegate radio spectrum experts to work in the CEPT committees and various working groups.⁹⁸⁶

The European Telecommunications Network Operators' Association (ETNO).

Alongside BEREC is the pan-European trade association, the European Telecommunications Network Operators' Association (ETNO). Since its foundation in 1992, it has regarded itself as the voice of Europe's telecommunications network operators and the principal policy group for European electronic communications network operators. It has 50 members and observers from 35 countries, which collectively account for a turnover of more than €600 billion, employing over 1.6 million people.⁹⁸⁷ Although members are not restricted to the EU, the organisation is active in responding to Commission and BEREC consultations.

⁹⁸⁵ http://berec.europa.eu/eng/about_berec/what_is_berec/, accessed 27 March 2015.

⁹⁸⁶ <https://ec.europa.eu/digital-agenda/en/mandating-europe%E2%80%99s-spectrum-experts>, accessed 27 March 2015.

⁹⁸⁷ <https://www.etno.eu/home/about-us>, accessed 8 April 2015.

European Telecommunications Standards Institute (ETSI)

Another important body is the European Telecommunications Standards Institute (ETSI). It was established in Sophia Antipolis in France in 1988 and produces globally-applicable standards for information and communications technologies, including fixed, mobile, radio, converged, broadcast and internet technologies. It is responsible for standards which include GSM, DECT, Smart Cards and electronic signatures.⁹⁸⁸ ETSI is a not-for-profit organisation with membership standing at around 700 organisations, drawn from 64 countries and five continents. These include equipment manufacturers and network operators in Europe and globally, as well as administrators, service providers, research bodies and users. It is recognised by the EU as an official European Standards Organisation.⁹⁸⁹

Backing up the Institute in providing research services is Eurescom, the European Institute for Research and Strategic Studies in Telecommunications. It is a private organisation based in Heidelberg, Germany, supported by 16 network operators, including *Deutsche Telekom*, *France Telecom* and the BT Group.⁹⁹⁰ It manages very substantial funds on behalf of the European Commission (€24,304,064 in 2013), for multiple projects.^{991,992}

The International Telecommunication Union (ITU)

Cooperation and standard-setting is also undertaken at a global level, on an intergovernmental basis. Initially, this was managed by the International Telegraph Convention, founded in 1865. Its functions were taken over and extended in 1947 when the Convention became a United Nations specialised agency, renamed the International Telecommunication Union (ITU).

Based in Geneva, the ITU allocates global radio spectrum and satellite orbits, develops the technical standards that ensure networks and technologies seamlessly interconnect, and strives to improve access to ICTs for "underserved communities" worldwide. Uniquely among UN agencies, it has both public and private sector membership. In addition to its 193 Member States, ITU membership includes ICT regulators, leading academic institutions and some 700 private companies.⁹⁹³ The 28 Member States of the European Union (EU) are voting members of the ITU and the European Commission is a non-voting

⁹⁸⁸ <http://www.etsi.org/about/what-we-do>, accessed 12 April 2015.

⁹⁸⁹ <https://joinup.ec.europa.eu/catalogue/repository/etsi-european-telecommunications-standards-institute>, accessed 27 March 2015.

⁹⁹⁰ <http://www.eurescom.eu> and <http://en.wikipedia.org/wiki/Eurescom>, both accessed 22 April 2015.

⁹⁹¹ http://ec.europa.eu/budget/fts/index_en.htm, accessed 22 April 2015.

⁹⁹² <ftp://ftp.cordis.europa.eu/pub/actsline/docs/stanrela.pdf>, accessed 22 April 2015.

⁹⁹³ <http://www.itu.int/en/about/Pages/overview.aspx>, accessed 27 March 2015.

sector member. The EU contributes to ITU's work as a sector member and provides funding to some of its technical co-operation activities.⁹⁹⁴

In terms of sector governance, the ITU operates as a treaty organisation, working through International Telecommunication Regulations (ITRs), agreed via a specially convened World Administrative Telegraph and Telephone Conference (WATTC) in 1998, on the basis of a proposal from the International Telegraph and Telephone Consultative Committee (CCITT), serviced by the ITU Administrative Council and the General Secretariat.^{995,996} The ITRs are intended to facilitate "global interconnection and interoperability" of telecommunications traffic across national borders. ITRs can be updated and changed at further World Conferences on International Telecommunications.

An important part of the ITU is its Telecommunication Standardisation Sector (ITU-T), one of the three sectors. Its products are Recommendations (ITU-T Recs) - standards defining how telecommunication networks operate and interwork. ITU-T Recs have non-mandatory status until they are adopted in national laws. However, levels of compliance are high, due to international applicability and the high quality guaranteed by the ITU-T's secretariat and members from the world's foremost ICT companies and global administrations.⁹⁹⁷

The Internet Corporation for Assigned Names and Numbers (ICANN)

The digital market also includes the internet. A crucial part of its top-level management is the Internet Corporation for Assigned Names and Numbers (ICANN). This is not a governmental body. Rather, it is a non-profit organisation, created in September 1998 and based in Los Angeles, California. Its purpose is to help preserve the operational stability of the Internet; to promote competition; to achieve broad representation of the global Internet community; and to develop policies appropriate to its mission.⁹⁹⁸

Its primary responsibility is to administer the huge and complex interconnected network of unique identifiers that allow computers on the Internet to find one another. Much of its work has concerned the Internet's global Domain Name System (DNS), including policy development for internationalisation of the DNS system, introduction of new generic top-level domains (TLDs), and the operation of root name servers. The numbering facilities ICANN manages include the Internet Protocol address spaces for IPv4 and IPv6, and assignment of address blocks to regional Internet registries. ICANN also maintains registries of Internet protocol identifiers.

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http://www.eeas.europa.eu/delegations/un_geneva/eu_un_geneva/economic_social/itu/index_en.htm, accessed 27 March 2015.

⁹⁹⁵ <http://www.itu.int/osg/spu/stratpol/ITRs/mel-88-e.pdf>, accessed 8 April 2015.

⁹⁹⁶ <http://www.itu.int/en/general-secretariat/Pages/default.aspx>, accessed 8 April 2015.

⁹⁹⁷ <http://www.itu.int/en/ITU-T/publications/Pages/recs.aspx>, accessed 14 April 2015.

⁹⁹⁸ <https://www.icann.org/resources/pages/what-2012-02-25-en>, accessed 8 April 2015.

Additionally, the organisation performs the technical maintenance work of the central Internet address pools and DNS Root registries pursuant to the Internet Assigned Numbers Authority (IANA) function contract.

On September 29, 2006, ICANN signed a new agreement with the United States Department of Commerce (DOC) that moved the organisation further towards a solely multi-stakeholder governance model. On October 1, 2009 the U.S. Department of Commerce gave up its control of ICANN, completing the organisation's transition to a fully independent body.⁹⁹⁹ Final decisions are made by a Board of Directors, comprising 21 members. Fifteen have voting rights and six are non-voting liaisons. The majority of the voting members (eight) are chosen by an independent Nominating Committee and the remainder are nominated members from supporting organisations. ICANN then has a President and CEO who is also a Board member. This official directs the work of ICANN staff who are based across the globe, and helps co-ordinate, manage and finally implement the different discussions and decisions made by the supporting organisations and advisory committees.

The World Wide Web Consortium (W3C)

The main internet regulator is the World Wide Web (abbreviated to W3) Consortium. Founded and currently led by Tim Berners-Lee, the consortium is made up of member organisations which maintain full-time staff for the purpose of working together in the development of standards for the World Wide Web. As of 10 April 2015, W3C had 397 members. It seeks to enforce compatibility and agreement among industry members in the adoption of new standards defined by the W3C. Incompatible versions of hypertext markup language (HTML) are offered by different vendors, causing inconsistency in Web pages displays. The consortium tries to get all those vendors to implement a set of core principles and components which are chosen by the consortium. W3C also engages in education and outreach, develops software and serves as an open forum for discussion about the Web.¹⁰⁰⁰

Amongst the standards maintained is the SOAP specification, via the XML Protocol Working Group of W3C. (XML denotes "eXtensible Markup Language" and is a self-defining means of representing data as text.) Originally an acronym for Simple Object Access Protocol, SOAP is a protocol specification for exchanging structured information in the implementation of web services in computer networks. It uses XML Information Set for its message format, and relies on other application layer protocols, most notably Hypertext Transfer Protocol (HTTP) or Simple Mail Transfer Protocol (SMTP), for message negotiation and transmission.¹⁰⁰¹

The WTO and telecoms

⁹⁹⁹ <http://en.wikipedia.org/wiki/ICANN>, accessed 8 April 2015.

¹⁰⁰⁰ http://en.wikipedia.org/wiki/World_Wide_Web_Consortium, accessed 14 April 2015.

¹⁰⁰¹ <http://en.wikipedia.org/wiki/SOAP>, accessed 14 April 2015.

Telecommunications services are a global market worth over US\$1.5 trillion in revenue. Mobile services account for roughly 40 percent of this, while mobile subscribers worldwide currently outnumber the use of fixed telephone lines by more than two to one. Over the past decade, the market has witnessed far-reaching changes, with the introduction of competition into a sector that was once principally a monopoly.

Commitments in telecommunications services were first made during the Uruguay Round (1986-94), mostly in value-added services. In post-Uruguay Round negotiations (1994-97), WTO members negotiated on basic telecommunications services. Since then, commitments have been made by new members, upon accession to the WTO, or unilaterally at any time.

A total of 108 WTO members have made commitments to facilitate trade in telecommunications services. This includes the establishment of new telecoms companies, foreign direct investment in existing companies and cross-border transmission of telecoms services. Out of this total, 99 members have committed to extend competition in basic telecommunications (e.g. fixed and mobile telephony, real-time data transmission, and the sale of leased-circuit capacity). In addition, 82 WTO members have committed to the regulatory principles spelled out in the "Reference Paper", a blueprint for sector reform that largely reflects "best practice" in telecoms regulation.¹⁰⁰²

Also at global level is the International Institute of Communications (IIC), which was established in 1969. The IIC is an independent, not for profit policy forum for the converging telecoms, media and technology industries. Membership offers a discussion framework and professional network for senior level strategists working at the intersection of business and public policy. It provides a neutral platform on which topics can be explored and the policy agenda can be shaped.¹⁰⁰³

17.2 A global industry

In what is a global industry, sub-regional actors such as the European Union necessarily play only a small part in the overall regulation of the digital market, and then often in a secondary role. An example of this is the development of the mobile phone market, and the emergence of the GSM standard in the 1980s – the initials themselves standing for Global System of Mobile communications – illustrating that it has global application.

Although the system originated in Europe, its technical development owes very little to the activities of the EU. However, there were two important preparatory instruments. The first was Council Directive 86/361/EEC "on the initial stage of the mutual recognition of type approval for telecommunications terminal

¹⁰⁰² https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm, accessed 8 April 2015

¹⁰⁰³ <http://www.iicom.org/about-the-iic>, accessed 8 April 2015.

equipment" and the second was Council Directive 87/372/EEC, which reserved specific frequency allocations for "cellular, digital, land-based mobile communications".^{1004,1005} The frequency allocations had been proposed by the European Conference on Posts and Telecommunications (CEPT), covering the 25 MHz bands of 89MHz for uplink - mobile to base station, and 935–960 MHz for downlink - base station to mobile.

Work by then had already begun on a European standard for digital cellular telephony in the European Conference of Postal and Telecommunication Administrations (CEPT). The task was entrusted to a committee known as *Groupe Spécial Mobile* (GSM), aided by a permanent nucleus of technical support personnel based in Paris. In February 1987, it produced the first GSM Technical Specification. This was then supported by the "big four" ministers of France, Germany, Italy and the UK. In the Bonn Declaration, they agreed that Europe should have a single standard for mobile communications. Mobile network providers in all four countries were invited to co-operate in order to provide commercial services that met this standard by 1991.¹⁰⁰⁶

The Declaration was formalised as a Memorandum of Agreement (MoU), rather than legislation or a formal treaty, which was tabled for signature in the September. This drew in mobile operators from across Europe to pledge to invest in new GSM networks to an ambitious common date, precipitating its rapid development. In 1989, the *Groupe Spécial Mobile* committee was transferred from CEPT to the European Telecommunications Standards Institute (ETSI), which remains responsible for controlling and developing the standards.¹⁰⁰⁷ These have grown as the system has matured, and the document listing specifications and technical reports now runs to 32 pages.¹⁰⁰⁸

The first GSM systems were in operation by 1991 with Vodafone launching the UK's first commercial service in the same year. Having been deployed throughout Europe, GSM allowed smooth roaming from country to country. By 2005, networks accounted for more than 75 percent of the worldwide cellular market, serving 1.5 billion subscribers.¹⁰⁰⁹ Currently, terrestrial GSM networks cover more than 90 percent of the world's population. Globally, it is represented by the GSM Association.¹⁰¹⁰

¹⁰⁰⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986L0361&from=EN>, accessed 19 April 2015.

¹⁰⁰⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31987L0372&from=en>, accessed 19 April 2015.

¹⁰⁰⁶ <http://www.gsmhistory.com/wp-content/uploads/2013/01/4.-Bonn-Ministers-Declaration.pdf>, accessed 19 April 2015.

¹⁰⁰⁷ <http://www.etsi.org/technologies-clusters/technologies/mobile/gsm>, accessed 19 April 2015.

¹⁰⁰⁸ http://www.etsi.org/deliver/etsi_ts/141100_141199/141101/11.01.00_60/ts_141101v110100p.pdf, accessed 19 April 2015.

¹⁰⁰⁹ <http://en.wikipedia.org/wiki/GSM>, accessed 19 April 2015.

¹⁰¹⁰ http://en.wikipedia.org/wiki/GSM_Association, accessed 19 April 2015.

Despite its now global application, GSM is regarded as a European success, although there are concerns that "Europe" is becoming complacent. The US has opened up a large lead in deployment of next-generation technologies; by the end of 2013, nearly 20 percent of US connections were on 4G LTE networks, compared to fewer than two percent in the EU. Meanwhile, average mobile data connection speeds in the US are now 75 percent faster than those in Europe and by 2017 will be more than twice as fast. And the US is also stretching its lead over Asia.¹⁰¹¹

17.3 The post-exit scenario

In one of the most important areas of the digital market – mobile communications – developments have not depended on the intervention of the EU. Even if its legislation facilitated the initial development, GSM emerged through intergovernmental co-operation and industry initiatives. Now that the system is truly global and is being exploited internationally, the UK needs to work at that level. It gains no special advantage from EU membership.

Systems and technology are so complex and developing with such rapidity that the regulatory "reach" of the EU is relatively limited. Standards are primarily generated by the private sector. This has seen the growing phenomenon of Transnational Private Regulators, where non-governmental bodies regulate the conduct of private actors across jurisdictional boundaries. They work primarily through standards, which are voluntary, at least as a matter of formal law.¹⁰¹² Additionally, we are seeing the emergence of global "super regulators" in the form of the World Standards Cooperation Alliance, which was established in 2001. This comprises the International Electrotechnical Commission (IEC), the International Organisation for Standardisation (ISO) and the ITU. Its objective is "to strengthen and advance the voluntary consensus-based international standards systems of IEC, ISO and ITU", and sets a new level of global governance.¹⁰¹³

An independent UK, therefore, should not experience any significant difficulties outside the EU. In fact, confronted with the might of the US internet giants, the EU considers Europe to be at a disadvantage. The current EU's digital commissioner, Günther Oettinger, has complained that Europe's online businesses were "dependent on a few non-EU players world-wide" because the region had "missed many opportunities" in the development of online platforms. He has argued that the EU should regulate Internet platforms in a way that allows a new generation of European operators to overtake the dominant US players.¹⁰¹⁴

¹⁰¹¹ <http://www.mobileworldlive.com/former-fcc-chair-genachowski-warns-on-4g-complacency>, accessed 19 April 2015.

¹⁰¹² http://www.eesc.europa.eu/resources/docs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi_12062014.pdf, accessed 19 April 2015.

¹⁰¹³ <http://worldstandardscooperation.org/about.html>, accessed 19 April 2015.

¹⁰¹⁴ *Wall Street Journal*, 14 April 2015, EU Digital Chief Urges Regulation to Nurture European Internet Platforms, <http://www.wsj.com/articles/eu-digital-chief-urges-regulation-to-nurture-european-internet-platforms-1429009201>

On that basis, the UK has little to lose outside the remit of the EU, although there is one issue of significance. As a member of the EU, the UK has full voting rights on issues dealt with by BEREC. As a member of EFTA/EEA, the UK would lose voting rights and assume observer status only. This status, shared by all EFTA members, is regarded as unsatisfactory, and representations have been made for full participatory status, but without voting rights.^{1015,1016} To that effect, EFTA/EEA States have asked the EU to amend the BEREC Regulation, in order to ensure the necessary level of participation. As yet, this issue has not been resolved.¹⁰¹⁷ If it is still outstanding at the time of Article 50 negotiations, then participation rights should be on the agenda for discussion.

The effects of exclusion from BEREC, however, are likely to be marginal. On technical matters, EU Member States normally work with CEPT, to which the UK will continue to have full access, while the position with global bodies is likely to improve. When dealing with bodies such as the ITU, European states tend to develop their technical positions with CEPT before negotiating with the rest of the world. They then base their approaches on consolidated European positions ("European Common Proposals").

EU Member States, however, cannot negotiate as independent members, as they are bound by their obligations under the EU Treaties and by the *acquis*. Therefore, the development of technical positions in CEPT is complemented by the consideration of overall EU interests in negotiations. To support these on technical-regulatory issues, the Commission uses the Radio Spectrum Policy Group (RSPG), a high-level advisory body of Member States' representatives, to provide opinion, advising the Commission of the European policy interests.^{1018,1019} As a non-EU member, the UK will be able to take an independent negotiating position if it is in the national interest to do so.

As to UK involvement in the Single Market in telecoms, the push towards market liberalisation pre-dated EU intervention, with the privatisation of British Telecom and the break up of its monopoly. In this, the regulator Ofcom used competition law powers under the Enterprise Act 2002 - itself a result of EU Directives - to come to an agreement with BT over a separate network access division called Openreach. This led to the formation of a company which would offer its wholesale products on an equivalent basis to both external customers and itself.

¹⁰¹⁵ <http://www.efta.int/sites/default/files/documents/eea/eea-efta-comments/2013/2013-11-04-eea-efta-comment-on-the-telecommunications-single-market.pdf>, accessed 12 April 2015.

¹⁰¹⁶ <http://www.efta.int/eea/news/eea-efta-comment-proposed-regulation-concerning-european-single-market-electronic>, accessed 12 April 2015.

¹⁰¹⁷ <http://www.efta.int/sites/default/files/publications/annual-report/annual-report-2014.pdf>, accessed 12 April 2015.

¹⁰¹⁸ <https://ec.europa.eu/digital-agenda/en/wrc-setting-worlds-radio-spectrum-rules#commission-role>, accessed 14 April 2015.

¹⁰¹⁹ https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/comm_WRC12_2011_0180_en.pdf, accessed 14 April 2015.

The establishment of Openreach and its relationship with external customers at the time was unique to the UK within the EU. Its experience was studied by regulators in other European countries who experienced similar competition problems arising from the presence of a large incumbent telecommunications operator, such as *France Telecom*. Viviane Reding, the European Commissioner who in 2006 was responsible for the telecommunications portfolio, took inspiration from the UK in seeking to enforce "structural separation" of incumbent telecom operators, splitting their service and infrastructure divisions across the European Union, to create an "open access" model for network infrastructures.¹⁰²⁰

The Commissioner's ambitions in this respect were not realised, as there was no enthusiasm to make this a mandatory requirement, as had done the Commission with railways. The new telecoms Directive 2009/140/EC, which was enacted on 25 November 2009, therefore, simply contained a power permitting NRAs to impose structural separation on vertically integrated companies, as an "exceptional measure", where there was a failure to achieve effective competition and "important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets".

Watering this down still further, the Commission stressed that the use of the power "must not harm incentives to invest in the network, entail any potential negative effects on consumer welfare or prevent appropriate co-ordination mechanisms between the different separate business entities".¹⁰²¹

The Commission failure in this respect keeps the UK ahead of the field in terms of market liberalisation, presenting no serious problems in maintaining the degree of regulatory convergence necessary for participation in the Single Market. The UK market is fully accessible to all comers.¹⁰²² On the other hand, the Commission's view of the state of the telecoms market is that, while EU intervention has improved competition, there is no functioning Single Market.¹⁰²³ There is little likelihood of damage to UK interests from working within the wider framework of the EEA.

Working within that framework, trade in hardware would continue to be regulated by the Radio Communications and Telecommunications Terminal Equipment (R&TTE) Directive, now re-enacted as the 2014 Directive 2014/53/EU. This comes into force in June 2016.¹⁰²⁴ The Directive encompasses all products which use the radio frequency spectrum (e.g., car

¹⁰²⁰ http://europa.eu/rapid/press-release_SPEECH-06-422_en.htm?locale=en, accessed 9 April 2015.

¹⁰²¹ <http://www.oecd.org/daf/competition/50056685.pdf>, accessed 9 April 2015.

¹⁰²² <http://councilforeuropeanstudies.org/files/Papers/Thatcher.pdf>, accessed 12 April 2015.

¹⁰²³ http://europa.eu/rapid/press-release_IP-10-644_en.htm?locale=en, accessed 14 April 2015.

¹⁰²⁴ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_153_R_0002&from=EN%20, accessed 19 April 2015.

door openers, mobile communications equipment like cellular telephones, CB radios, broadcast transmitters, etc.) and all equipment attached to public telecommunications networks (e.g., ADSL modems, telephones, telephone switches).

The EEA Agreement also lays down common technical regulations in the field of information technology, telecommunication and data processing, including satellite television broadcasting and high definition television. Liaison is maintained by the EFTA Working Group on Technical Barriers to Trade, assisted by the Expert Group on Telecommunications Equipment.¹⁰²⁵ Through these portals relationships are maintained with bodies such as ETSI.¹⁰²⁶ EFTA and the EU also share guidelines on standardisation.¹⁰²⁷

17.4 UNECE - WP.6 and a new way of regulating

Given the complexity and extent of regulation in the telecoms sector, one potential problem on EU withdrawal is the loss of influence over the formulation of new regulation. Fortunately, this is unlikely to occur, as the sector has been at the forefront of what amounts to a revolution in technical regulation, leading to dramatic changes in the regulatory environment. The driver of change has been UNECE, which has been developing and continues to develop an "International Model" of regulation, through its WP.6 Working Party on Regulatory Cooperation and Standardisation Policies.¹⁰²⁸

WP.6 calls itself a forum for dialogue among regulators and policy makers, where a wide range of issues is discussed, including technical regulations, standardisation, conformity assessment, metrology, market surveillance and risk management. It makes recommendations that promote regulatory policies to protect the health and safety of consumers and workers, and preserve our natural environment, without creating unnecessary barriers to trade and investment. While they are non-binding, they are widely implemented in UNECE member states and beyond.¹⁰²⁹

Pioneered in relation to the telecoms industry, the "International Model" relies on the WTO Agreement on Technical Barriers to Trade (TBT), creating a framework for the practical implementation of technical harmonisation, drawing from existing schemes for good regulatory practice, as catalogued by the WTO, which themselves set out the formal mechanisms for implementing

¹⁰²⁵ <http://www.efta.int/eea/policy-areas/goods/product-sectors/it-telecom-data>, accessed 19 April 2015.

¹⁰²⁶ <http://www.efta.int/eea/policy-areas/goods/standardisation-mra-technical-cooperation/standardisation>, accessed 19 April 2015.

¹⁰²⁷ http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/document/guidelines/joint_news_release_en.pdf, accessed 19 April 2015.

¹⁰²⁸ http://www.unece.org/fileadmin/DAM/trade/wp6/Recommendations/Rec_L.pdf, accessed 20 April 2015.

¹⁰²⁹ <http://www.unece.org/trade/wp6/aboutus.html>, accessed 20 April 2015.

the Agreement on TBT.¹⁰³⁰ The organisations involved include APEC, ASEAN, OECD, UNECE and the World Bank.¹⁰³¹

At this stage, the "Model" provides a set of voluntary principles and procedures for sectoral application for countries that wish to harmonise their technical regulations. Some international technical regulations exist, but they tend to be cumbersome and burdened with details and have proven to be difficult to prepare and, as a consequence, can be difficult to amend once in place. Furthermore, detailed agreements between a large number of regulatory authorities are frequently difficult to obtain, and such regulations tend not to achieve full consensus.

Under the aegis of UNECE, therefore, interested countries are brought together to discuss and agree a regulatory framework comprising what are called "common regulatory objectives" (CROs). These, it is considered, might be easier to compile and might more easily find consensus. Then, when it comes to the detailed requirements that implement common regulatory objective, recourse is had to the international standardising bodies, which provide a forum for all interested parties (including regulatory authorities), and have established a degree of trust at the international level.

On a procedural level, when the need for regulatory convergence has been identified and supported by governments, the "model" suggests starting a dialogue. The starting point is not existing national technical regulations but a discussion and agreement on which safety, environmental or other legitimate requirements should be met by technical regulation. On the basis of such "agreed and concrete legitimate concerns" – which become the "common regulatory objectives" - countries then agree which existing international standards could provide for technical implementation or, where necessary, the elaboration of new international standards.¹⁰³² The degree to which there is reliance on international standards can be seen by the CRO on GSM.¹⁰³³

Whenever a new or revised technical regulation is being prepared, regulators then follow the principles in the WTO/TBT Agreement, adopting the relevant international standards. A wide range of telecom standards have now been agreed, in relation to personal computers (PCs); PC peripherals, legacy Public Switched Telephone Network (PSTN) terminals; Bluetooth, Wireless Local Area Network (WLAN); Global Standard for Mobile Telecommunication (GSM); and International Mobile Telecommunications.¹⁰³⁴ Further sectoral

¹⁰³⁰ <http://www.unece.org/fileadmin/DAM/trade/wp6/documents/ref-docs/W341.pdf>, accessed 20 April 2015.

¹⁰³¹ <http://www.unece.org/fileadmin/DAM/trade/wp6/documents/ref-docs/W341.pdf>, accessed

¹⁰³² <http://www.unece.org/fileadmin/DAM/trade/ctied7/trd-03-007a1e.pdf>, accessed 20 April 2015.

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http://www.unece.org/fileadmin/DAM/trade/wp6/SectoralInitiatives/Telecom/cros/drCROp2GSM_justif030710.pdf, accessed 20 April 2015.

¹⁰³⁴ <http://www.unece.org/trade/wp6/SectoralInitiatives/Telecom/CROs.html>, accessed 20 April 2015.

initiatives have been concluded on earth-moving machinery, equipment for explosive environments and pipeline safety.¹⁰³⁵

To an extent, though, there is nothing new about this system – it reverts to the original process used by the European Union, where directives set out the regulatory objectives, leaving implementation to Member States. In this context, the process has moved up from the sub-regional EU to global level, coordinated by UNECE and other regional and world bodies. This is the new reality, where the EU is simply a bit player on a larger stage – one on which all players are equal. And this is achieved without even a hint of QMV.

17.5 Escape from "little Europe"

The current regulatory framework in the EU is described as lacking the incentives to invest and showing clear signs of obsolescence. Specifically, it is too narrowly focused on legacy applications, centred on traditional voice telephony, text messages and broadcast TV. Furthermore, the legislative process is regarded as being inherently slow, leading to inappropriate multi-year/multi-step iterative procedures that fail to keep pace with market and technology evolution.¹⁰³⁶

Further commentary suggests that here is no such thing as an EU telecoms (or eComms) single market, with "significant flaws" being identified in the EU system. The fragmentation between national markets is usually profound, and at times extreme. The institutional framework and the allocation of tasks between the EU and national levels are simply not designed to accomplish what the EU must do under the treaty: establish a single market and ensure that it functions properly.¹⁰³⁷ Adrian Baschnonga, lead analyst for global telecoms at the accountancy firm EY, has complained of lack of clarity and confusing regulatory frameworks, warning that Europe's telecoms industry is lagging behind the US.¹⁰³⁸

ETNO argues that regulatory distortion of competition in three areas is discouraging investment in advanced telecommunication networks.¹⁰³⁹ It is calling for pan-European solutions and a strong, centralised regulator.¹⁰⁴⁰

¹⁰³⁵ <http://www.unece.org/tradewelcome/areas-of-work/working-party-on-regulatory-cooperation-and-standardization-policies-wp6/sectoral-initiatives.html>, accessed 20 April 2015.

¹⁰³⁶ <http://www.serentschy.com/why-europes-telecom-sector-needs-regulatory-modernization/>, accessed 22 April 2015.

¹⁰³⁷

http://aei.pitt.edu/15769/1/PB_No_231_Pelkmans_&_Renda_on_Single_eComms_Market.pdf, accessed 22 April 2015.

¹⁰³⁸

<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/telecoms/10657050/Complex-regulation-leaves-EU-telecoms-lagging-behind.html>, accessed 22 April 2015.

¹⁰³⁹ https://www.etno.eu/datas/publications/studies/BCG_ETNO_REPORT_2013.pdf, accessed 22 April 2015.

¹⁰⁴⁰ Lehr, William and Thomas, Kiessling (1999), "Telecommunication Regulation in the United States and Europe: The Case for Centralized Authority," in *Competition, Regulation and Convergence: Trends in Telecommunications Policy Research*, S. E. Gillett and I. Vogelsang

Neither is forthcoming from the EU, and despite challenges from US internet giants, there is no enthusiasm from Member States for a centralised solution.¹⁰⁴¹ Crucially, though, the Commission itself acknowledges that the electronic communications sector operates at a global scale. It notes that the web (and the services that trade on it) go beyond the EU's borders, and concedes that, as markets become more competitive, the regulatory framework needs to evolve.¹⁰⁴² By the same logic that the EU argues for its own intervention in matters which transcend Member State borders, therefore, a trade that operates at global level demands global solutions. And it is in that domain that UNECE operates, with its "International Model" and its Common Regulatory Objectives.

That the UK telecoms industry is regarded as a success is largely due to the BT *Openreach* model, which gives competitors equal access to the infrastructure, leading to increased investment and propelling the UK ahead of Germany, France, Italy and Spain for superfast broadband coverage and take-up.¹⁰⁴³ Competition, rather than "critical mass", seems to be the driver of that success, together with a responsive system for developing common standards. This owes little to the EU, suggesting that Britain's withdrawal will have relatively little impact.

(Eds.), Lawrence Erlbaum Associates, Mahwah, NJ, 1999,
http://people.csail.mit.edu/wlehr/Lehr-Papers_files/LehrKiesslingTPRCVolume.PDF, accessed 22 April 2015.

¹⁰⁴¹ <http://www.spiegel.de/international/business/eu-wants-to-challenge-google-with-new-digital-strategy-a-978521.html>, accessed 22 April 2015.

¹⁰⁴² Telecommunications Single Market - COM(2013) 634, 11 September 2013,
<https://ec.europa.eu/digital-agenda/en/news/communication-commission-european-parliament-council-european-economic-and-social-committee-a-0>, accessed 22 April 2015.

¹⁰⁴³ *Financial Times*, 16 March 2015, UK telecoms market is a success story,
<http://www.ft.com/cms/s/0/f04e4a06-c9b1-11e4-b2ef-00144feab7de.html#axzz3Y3VKB1gb>, accessed 22 April 2015.

PHASE FIVE

Global trading

18.0 Trading with the rest of the world

The global economy is being re-shaped at breakneck speed. In the past decades, political systems have changed, new players have emerged on the markets, as well as new materials, new technologies and workers who are better skilled than ever. To compete in this fast-changing economy requires regulation that promotes growth, better access to markets and the availability of new sources of energy.

Cut EU Red Tape: Report from the Business Taskforce
February 2014¹⁰⁴⁴

By this penultimate phase of our six-phase programme, all the structural issues have been addressed, leaving the way clear to look at Britain as a global trader. As we have seen earlier, organising trade in continental Europe, adopting formal structures around UNECE, would not replicate European Union arrangements, in that there would be no external trade policy. Britain would thus be free to act on its own account in relations with the rest of the world. Alternatively, it could act with EFTA, or take collective action through *ad hoc* alliances.

Nevertheless, there are sometimes gains to be made from negotiating as part of a formal bloc, not least for the protection afforded in times of financial crisis, and routinely on matters of common interest, as a means of spreading the administrative burden. This was emphasised by an Icelandic Agriculture and Fisheries official, whose own ministry was often hard put to field staff to attend all international meetings of interest. In an attempt to overcome this, his ministry worked closely with the Nordic bloc, and especially with Norway, in order to share the load. The added strength and resource of the UK, to help further spread the load, was seen as potentially advantageous.¹⁰⁴⁵

However, there are also disadvantages to formal collective action, so the UK government will need to keep its options open. It needs the flexibility to make arrangements which give it the advantages of EU membership while

¹⁰⁴⁴ <https://www.gov.uk/government/publications/cut-eu-red-tape-report-from-the-business-taskforce/cut-eu-red-tape-report-from-the-business-taskforce>, Accessed 15 May 2014.

¹⁰⁴⁵ Author's interview with Sigurgeir Thorgeirsson, *op cit*.

minimising the disadvantages. It also needs to avoid the disadvantages it might suffer as an independent actor, while making the most of opportunities presented by changes in global trading patterns. Analysis of global trade patterns (Figure 30) certainly suggests that the greatest growth potential lies in Asia, compared with US-Europe trade which has declined nearly 40 percent in 20 years.¹⁰⁴⁶

In this context, it is often argued that, despite the high-profile intervention of successive British prime ministers, the EU has been unable to formalise a trade agreement with China, while Iceland concluded an agreement in 2013, the first European country to do so, followed by Switzerland in the same year.^{1047,1048} It is thus held that, outside the EU, the UK should follow in the footsteps of Iceland and Switzerland, and secure a free trade agreement with China. This, though, is not necessarily the most productive approach as, when dealing with China, appearances can be deceptive. While it is true that there is no formal FTA in place with the EU, China did formalise an MRA on conformity assessment procedures, on 16 May 2014.¹⁰⁴⁹ This, and other agreements on Customs co-operation, have considerably eased the flow of trade.

Furthermore, China tends to resort to Memoranda of Understanding, making agreements which do not have the status of full-blown treaties. One example is the MoU on financial information services, concluded on 13 November 2008, which removed the requirement for foreign financial information suppliers to supply their services through an agent. They were henceforth allowed to supply directly to their clients who, in turn, were not subject to any licensing requirements or similar approvals.¹⁰⁵⁰ Internally, in a Communist society, such agreements have binding effect. And, while each MoU deals with narrow specifics, collectively they add up to a substantial area of co-operation.

There are also co-operation agreements, as in the EU-China Cooperation Plan in Agriculture and Rural Development, agreed "under the auspices of the annual bilateral Agricultural Dialogue to enhance cooperation in the fields of sustainable agricultural production, organic agriculture, rural development and agricultural research". This paved the way for the free trade in organic produce between the EU and China.¹⁰⁵¹

¹⁰⁴⁶ World Trade Report 2013, http://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf, accessed 15 January 2014.

¹⁰⁴⁷ *Daily Telegraph*, 15 April 2013, Iceland first European country to sign free trade agreement with China, <http://www.telegraph.co.uk/finance/economics/9995525/Iceland-first-European-country-to-sign-free-trade-agreement-with-China.html>, accessed 18 January 2014.

¹⁰⁴⁸ Reuters, China, Switzerland sign free trade agreement, 6 July 2013, <http://www.reuters.com/article/2013/07/06/us-china-trade-idUSBRE96503E20130706>, accessed 18 January 2014.

¹⁰⁴⁹ http://europa.eu/rapid/press-release_IP-14-555_en.htm, accessed 22 April 2015.

¹⁰⁵⁰ http://europa.eu/rapid/press-release_MEMO-08-707_en.htm?locale=en, accessed 22 April 2015.

¹⁰⁵¹ http://europa.eu/rapid/press-release_IP-12-592_en.htm, accessed 22 April 2015.

This notwithstanding, China is party to multiple agreements with the EU - 65 over term, including 13 bilateral agreements, ranging from trade and economic co-operation, to customs co-operation. None of these are of the simple, tariff reduction variety. Additionally, China tends to foster multilateral relations, working actively through G20, where it agreed with the EU the 2020 Strategic Agenda for Cooperation.¹⁰⁵² Reinforced by 60 high level and senior officials dialogues on topics including industrial policy, education, customs, social affairs, nuclear energy and consumer protection, this makes for powerful relationships which do not show up on the WTO books.¹⁰⁵³

This suggests that there is a great deal of flexibility in negotiating relationships with trade partners. The outcome of any negotiations does not need, necessarily, to be a formal free trade agreement. Furthermore, any arrangements made do not necessarily have to be fixed for all time. Nor do they have to be geographically-orientated. They could involve *ad hoc* alliances, such as the Cairns Group, described as: "a unique coalition of 19 developed and developing agricultural exporting countries with a commitment to achieving free trade in agriculture". It could be a useful ally in WTO talks.¹⁰⁵⁴ There are also particular advantages to be gained from closer ties with the Anglosphere and with Commonwealth members (some of which are Cairns Group members), reversing the tide of "institutional contempt" displayed by successive governments.¹⁰⁵⁵

18.1 The Commonwealth

The modern Commonwealth, with its 53 members and about a third of the world's population, connects at least half a dozen of the world's fastest-growing and most dynamic economies, accounting for some 20 percent of world trade. The grouping offers new consumer markets and generates investment capital from its high saving societies. In Africa, massive hydrocarbon resources are becoming commercially recoverable and transforming the prospects of countries across the continent.

According to Lord Howell, chair of the Council of Commonwealth Societies, none of this means that the Commonwealth can replace the EU. He avers that the two worlds complement each other, and a Britain that is alert and agile is ideally placed to work both systems to its benefit.¹⁰⁵⁶ However, those opportunities exist outside the EU. At the recent Commonwealth Business Council Forum gathering in Sri Lanka, China reportedly sent a 70-strong delegation. Japan and several Gulf States also turned up with large contingents.

¹⁰⁵² http://eeas.europa.eu/china/docs/20131123_agenda_2020_en.pdf, accessed 22 April 2015.

¹⁰⁵³ http://eeas.europa.eu/china/docs/eu_china_dialogues_en.pdf, accessed 22 April 2015.

¹⁰⁵⁴ See: http://cairnsgroup.org/Pages/wto_negotiations.aspx, accessed 16 December 2013.

¹⁰⁵⁵ *The Daily Telegraph*, 30 October 2013, Ministers are still treating the Commonwealth with contempt, <http://www.telegraph.co.uk/comment/10415127/Ministers-are-still-treating-the-Commonwealth-with-contempt.html>, accessed 8 December 2013.

¹⁰⁵⁶ We've neglected the Commonwealth and Britain's prosperity has suffered, *CityAM*, 11 December 2013, <http://www.cityam.com/article/1386727043/we-ve-neglected-commonwealth-and-britain-s-prosperity-has-suffered>, accessed 11 December 2013.

They sensed the business opportunity which policy makers in an independent Britain might also seek to exploit.¹⁰⁵⁷

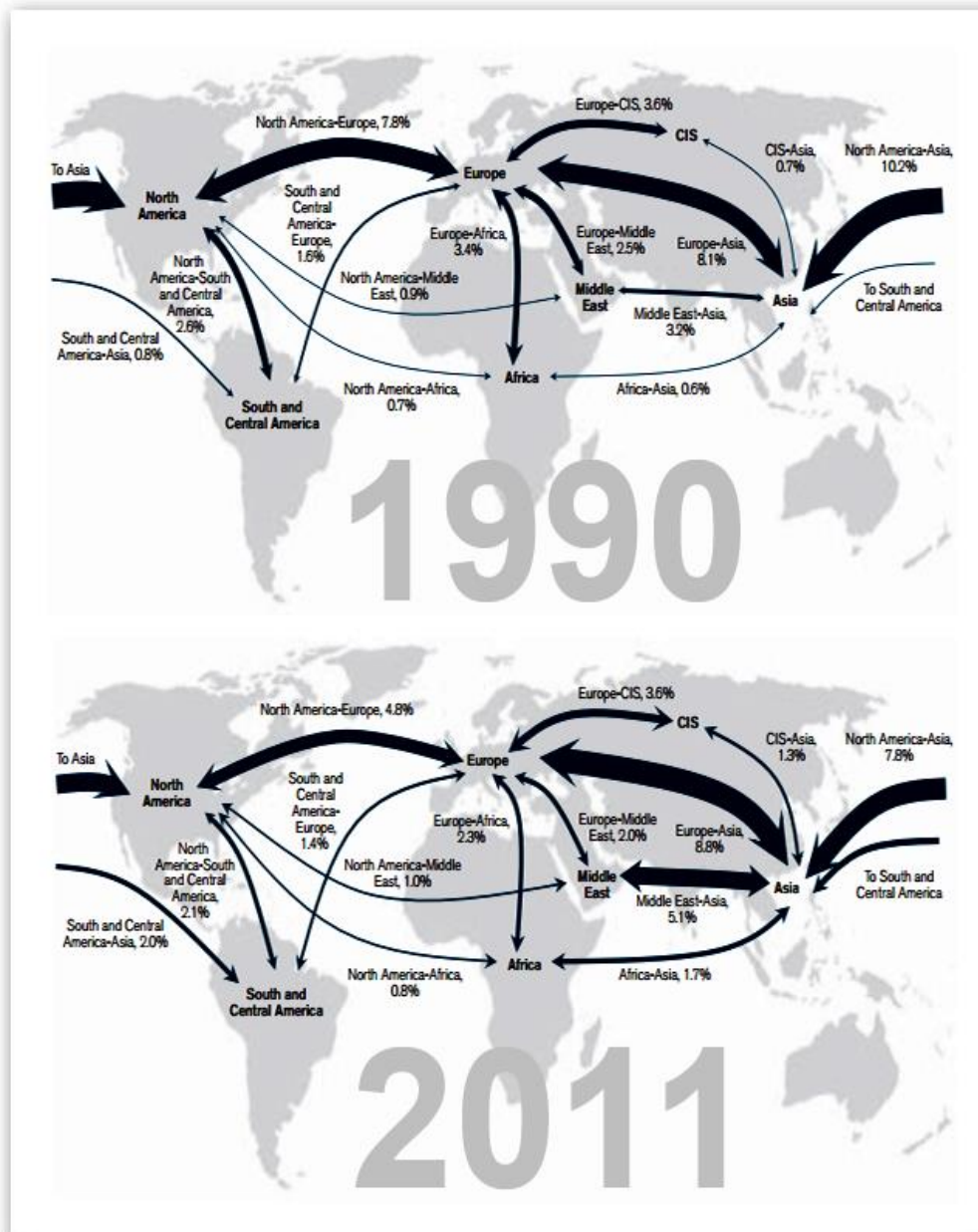


Figure 30: Share of total trade between geographical regions in world trade: 1990-2011 (percentage). Source: World Trade Report 2013. WTO Secretariat.

Despite this, rejoining the global system as it stands is not the whole – or even any - answer for Britain. Over the last decades, there has been an unprecedented increase in the speed of communications, movement of goods and people, but there have not been commensurate improvements in global and regional institutions and organisations. The structures and modes of operation of

¹⁰⁵⁷ <http://www.cityam.com/article/1386727043/we-ve-neglected-commonwealth-and-britain-s-prosperity-has-suffered>, accessed 13 May 2015.

organisations are very far from optimal, nor even coherent. There is no geographical consistency. There are no standard structures to trading arrangements and there is no agreement on legal provisions. Accountability is often poor, and visibility of partners' affairs is often obscured. It would be tempting to ignore some of the formal, established structures, and even discontinue membership or support for some of them. Some would even entertain secession from the United Nations. Yet, according to an unprecedented joint study by the US National Intelligence Council and the EU's Institute for Security Studies, three effects of rapid globalisation are driving demands for more effective global governance.¹⁰⁵⁸ In particular, the rise of China, India, Brazil and other fast-growing economies, its report says,

... has taken economic interdependence to a new level. The multiple links among climate change and resources issues, the economic crisis, and state fragility – "hubs" of risks for the future – illustrate the interconnected nature of the challenges on the international agenda today. Many of the issues cited above involve interwoven domestic and foreign challenges. Domestic politics creates tight constraints on international cooperation and reduce the scope for compromise.

The shift to a multipolar world is complicating the prospects for effective global governance over the next ten years. The expanding economic clout of emerging powers increases their political influence well beyond their borders. Power is not only shifting from established powers to rising countries and, to some extent, the developing world, but also towards non-state actors. Diverse perspectives on and suspicions about global governance, which is seen as a Western concept, will add to the difficulties of effectively mastering the growing number of challenges.

To remain an influential player, Britain will need to recognise how the shifts in power and influence affect its status. It will then need to learn how to work with new actors in the global community to improve arrangements for dealing with trade and other matters in this "multipolar world". But arrangements must be compatible with Britain's new-found independence, and be politically sustainable. The assumption is that its politicians and trade negotiators will aim for a greater degree of autonomy in dealing with global agencies while seeking to retain the benefits of existing economic and trade agreements with other countries or other groups of countries outside the EU/EEA.

In this respect, the government may find itself confronting major reforms in foreign and trade relations that are heavily influenced by domestic policy. This may become a crunch issue. The essence of the EU is that legislation agreed in Brussels is binding on national and local governments and is superior to national law. Agreements which replicate this may not be acceptable. The longstanding antipathy to the EU's supranational power will require that new

¹⁰⁵⁸ Global Governance 2025: At a Critical Juncture, EU, Institute for Security Studies, Paris November 2010, http://www.iss.europa.eu/uploads/media/Global__Governance_2025.pdf, accessed 9 December 2013.

relationships are based on an intergovernmental model, with any formal trading agreements relying on consensus rather than majority rule.

Whatever provisions are made, Britain will remain party to a bewildering multiplicity of agreements, some of which will deliver actionable instruments. OECD members, for instance, agree directives which are legally binding on their signatories, in much the same way that EU directives bind member states. Such instruments will then have to be processed into useable law. As an independent nation, Britain will no longer be able to rely on the EU to do the job and, in the absence of alternative arrangements, will be committed to expensive, time-consuming duplication. That carries the risk of divergence from standards applied elsewhere in the same region.

18.2 Transatlantic trade relations

An important part of any post-exit settlement will be the formalisation of trade relations with the United States. Depending on the timing of British exit negotiations, the EU-US talks known as the Transatlantic Trade and Investment Partnership (TTIP) will be in progress or may have come to a conclusion. The status of any talks, or their outcome, will have considerable relevance to Art. 50 negotiators. They will either determine the post-exit trade relations or, directly or indirectly, they may influence the shape of future talks.

The TTIP talks in progress at the time of writing started in July 2013. They offered considerable promise. The European Commission claimed that an agreement could boost the EU's economy by €120bn, the US economy by €90bn and the rest of the world by €100bn - an extra €545 in annual disposable income for a family of four in the EU, on average, and €655 per family in the US.^{1059,1060}

What would be crucial to any withdrawal negotiations is the claim that, with Britain outside the EU, it may not benefit from TTIP.¹⁰⁶¹ That claim might not be true as the EU and the US are already relatively open towards each other in terms of investment and trade, which is reflected in relatively low tariff levels. The main effect might be, therefore, to act as a blockage. If talks are still ongoing by the time the UK enters into its own exit negotiations with the EU, the US administration might not be prepared to undertake talks with a soon-to-be separated UK, until it has concluded a deal with the EU.

This introduces a considerable degree of uncertainty into the mix, as UK negotiators may wish to wait until the outcome is known before deciding on

¹⁰⁵⁹ See: <http://ec.europa.eu/trade/policy/in-focus/ttip/>, accessed 10 December 2013.

¹⁰⁶⁰ Reducing Transatlantic Barriers to Trade and Investment, An Economic Assessment, Centre for Economic Policy Research, London, http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf, accessed 10 December 2013.

¹⁰⁶¹ *The Guardian*, EU exit would put US trade deal at risk, Britain warned, 27 May 2013, <http://www.theguardian.com/business/2013/may/27/eu-exit-risks-us-trade-deal>, accessed 16 December 2013.

what action should be taken. Options potentially available are either to seek an independent trade deal with the US or, with the agreement of the EU, seek to piggyback on the TTIP agreement.

It remains to be seen, however, whether the UK will actually want to participate in TTIP in its final form. The agreement is targeting technical barriers to trade, and it is set to address domestic regulations on both sides of the Atlantic, with the intention of seeking a higher degree of regulatory convergence than has hitherto been achieved. In theory, even though regulation might not directly affect cross-border activities, it does bear a cost on trade and investment. Nevertheless, the parties have recognised that many regulations, unlike tariffs, cannot simply be removed. They often serve important and legitimate domestic objectives such as product safety and environmental protection. Thus, the aim was to reduce costs through partial regulatory convergence and cross-recognition of standards.¹⁰⁶²

However, there is no indication that TTIP will lead to any reduction in regulation on either side of the Atlantic. According to Ambassador Michael Froman, US Trade Representative, the proclaimed goal of the agreement was "to take two advanced, industrialised, highly regulated economies and bring them closer together and bridge the differences in how we regulate".¹⁰⁶³ Furthermore, since small businesses had more to gain from reducing regulations than larger firms, because they were less able to afford compliance and lobbying departments, TTIP was thought most likely to favour the corporate sectors in both the US and the EU.

Furthermore, the EU has proposed the creation of a "Regulatory Cooperation Council" that would bring together US and EU regulatory agencies to monitor the implementation of commitments. Its task would be to prepare and publish an annual "Regulatory Programme", in which would be set out the priorities for regulatory cooperation. With joint working groups, it would also consider and analyse submissions from EU and US "stakeholders" or submissions from either Party on "how to deepen regulatory cooperation towards increased compatibility for both future and existing regulatory measures".¹⁰⁶⁴ But this was not a novel approach. Other EU trade agreements, such as the South Korean FTA, had used a similar mechanism.¹⁰⁶⁵

Furthermore, like the South Korean FTA, TTIP was unlikely to stand on its own. Alongside the South Korean FTA stood a broader 64-page "framework" agreement on political objectives. This provided a basis for "strengthened

¹⁰⁶² Transatlantic Barriers, *op cit*.

¹⁰⁶³ Office of the US Trade Representative, World Trade Centre Denver, 23 June 2014, <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2014/June/Remarks-by-USTR-Michael-Froman-at-the-World-Trade-Center-Denver>, accessed 10 July 2014.

¹⁰⁶⁴ <http://corporateeurope.org/sites/default/files/ttip-regulatory-coherence-2-12-2013.pdf>, accessed 15 July 2014.

¹⁰⁶⁵ For an overview, see "The EU-Korea Free Trade Agreement in Practice", European Commission 2011, http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf, accessed 15 July 2014.

cooperation" covering such issues as human rights, non-proliferation of weapons of mass destruction, counter-terrorism, climate change and energy security.¹⁰⁶⁶

In piggybacking on TTIP, the UK might find itself committed to issues to which it might prefer not to subscribe, in addition to which, the Regulatory Cooperation Council, if approved, might become a transnational rule-making body from which the UK, outside the EU, would be excluded. This would make a direct agreement between the UK and the US a better option, if it was on offer.

On the other hand, as long as the WTO's Doha Round remained stalled, TTIP was the biggest if not the best opportunity for expanding world trade. It had the potential to set regulatory standards for the rest of the world, dictating the agenda even for non-members by writing the rules for what amounted to a new global trading order.

It was suggested, therefore, that the real focus of TIPP was China, to the extent that US Secretary of State John Kerry asserted that it would seek to "establish a way of doing business that can serve as the global gold standard".¹⁰⁶⁷ The European Commission seems to have confirmed that, declaring that by harmonising US and EU standards the purpose of TTIP is to "act as a basis for creating global rules".¹⁰⁶⁸ Angela Merkel seemed on a similar wavelength, asserting that, by concluding TTIP, the parties would be better able to set high standards for future global trade agreements.¹⁰⁶⁹ German Foreign Minister Steinmeier asked "if the US and Europe don't lead the way how will we work things out on the global scale?" He called TTIP "a huge opportunity to shape the rules of the next phase of globalisation".¹⁰⁷⁰

It is not just politicians who make this point. The German Marshall Fund claims that both the US and the EU are losing global influence. TTIP "could constitute an excellent measure against this new shared challenge ... [by allowing them to continue] to define an important portion of the rules underpinning the rules based international order ... [and] face a set of new and emerging challenges in the economic realm".¹⁰⁷¹ At the Woodrow Wilson Centre, Samuel Benka

¹⁰⁶⁶ "South Korea", European Commission, 2014, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>, accessed 30 June 2014.

¹⁰⁶⁷ John Kerry, "On the Occasion of Europe Day", US Department of State, 8 May 2014, <http://www.state.gov/secretary/remarks/2014/05/225839.htm>, accessed 15 July 2014.

¹⁰⁶⁸ "FAQ on the EU-US Transatlantic Trade and Investment Partnership (TTIP)", European Commission, 17 June 2013, http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf, accessed 15 July .

¹⁰⁶⁹ "Chancellor Merkel: Transatlantic Trade Agreement Would Energize Global Economy", US Chamber of Commerce, 2 May 2014, <https://www.uschamber.com/blog/chancellor-merkel-transatlantic-trade-agreement-would-energize-global-economy>, accessed 15 July 2014.

¹⁰⁷⁰ "Transatlantic Ties for A New Generation: Why They Are Important and What We Need to Do About Them".

¹⁰⁷¹ Trine Flockhart, 14 October 2013, "Can TTIP be 'An Economic NATO? '" <http://blog.gmfus.org/2013/10/14/can-ttip-be-an-economic-nato/>, accessed 15 July 2014.

argued that "the greatest benefit" of TTIP is that "it can enable the US and the EU to negotiate a truly 21st century agreement that can be a template for other agreements and even for the World Trade Organisation itself".¹⁰⁷²

At the London School of Economics, Robert Basedow observed that "[the] predicted humble economic benefits of TTIP – a maximum of 0.5 percent of GDP – underscore that the agreement is primarily about setting the regulatory agenda of world trade for future decades. The underlying idea is that the American and European economies jointly represent such a large share of global GDP that third countries will emulate regulatory approaches taken under TTIP".¹⁰⁷³ The number of politicians, officials, and experts who have made a similar assertion is impressive.

This notwithstanding, there is no certainty that a TTIP agreement will be reached. Progress is not going to be easy. Within the European Parliament and elsewhere, resistance to regulatory harmonisation is building. "In America, the prevailing impression is that EU consumer protection regulations only exist to keep American products off the European market", says Green MEP Martin Häusling.¹⁰⁷⁴

But, even without involvement of the UK in the latter stages of any negotiations, participation in the partnership is still possible. In April 2013, EU Trade Commissioner De Gucht told Icelandic Foreign Minister Skarpheðinsson that benefits would be available to "... its closest trading partners - for example: those already operating on the internal market through the EEA Agreement" – such as Iceland.¹⁰⁷⁵ Of Switzerland, it is said that, if it liberalises its highly-protected agriculture, it too could join the TTIP.¹⁰⁷⁶ In other words, it is being readily conceded that being outside the EU is no bar to participating in the TTIP. If Britain adopts the EFTA-EEA route, it will be able to take advantage of the partnership, if it wishes to do so.

¹⁰⁷² Samuel Benka, "What Are the Benefits of TTIP?", Woodrow Wilson Centre, 3 February 2014, <http://americatradepolicy.com/what-are-the-benefits-of-the-ttip/#.U7sTRrGmUs3>, accessed 15 July 2014.

¹⁰⁷³ Robert Basedow, "Far From Being a Threat to European Democracy, the US-EU Free Trade Deal is an Ideal Opportunity to Reform Controversial Investment Rules and Procedures", *LSE Comment*, The London School of Economics and Political Science, 2 July 2014, <http://blogs.lse.ac.uk/europpblog/2014/07/02/far-from-being-a-threat-to-european-democracy-the-eu-us-free-trade-deal-is-an-ideal-opportunity-to-reform-controversial-investment-rules-and-procedures>, accessed 15 July 2014.

¹⁰⁷⁴ Euractiv, MEP: TTIP negotiations threaten European consumer protection, 16 December 2013, http://www.euractiv.com/trade/mep-ttip-negotiations-threaten-e-interview-532363?utm_source=RSS_Feed&utm_medium=RSS&utm_campaign=EurActivRSS, accessed 16 December 2013.

¹⁰⁷⁵ Statement following the meeting between Commissioner De Gucht and Icelandic Foreign Minister Skarpheðinsson, 9 April 2013, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=884>, accessed 10 December 2013.

¹⁰⁷⁶ <http://www.europeaninstitute.org/images/stories/programs/p.nell.june4th2013.europeaninstitute.pdf>, accessed 10 December 2013.

This notwithstanding, two of the major sectors earmarked for attention are the pharmaceutical and motor manufacturing industries. Auto-related sales currently account for some ten percent of total trade between the EU and the US. Under the TTIP, they would represent the largest share of auto production and sales ever covered by a single trade agreement.¹⁰⁷⁷

However, Asian interests would ensure that EU-US regulatory convergence would be quickly factored into what is being styled as the "US-EU-Asia Trade Triangle". As part of the triangle, the US is committed to completing a Trans-Pacific Partnership (TPP).¹⁰⁷⁸ It aims to bring together Asia's tiger economies (minus Hong Kong), entrenched and emerging ASEAN tigers, Latin American nations, and all three NAFTA partners (US, Canada, and Mexico).

The TPP has driven Asian-Pacific cooperation, particularly through free trade talks among the ASEAN states and FTA partners (Australia, China, India, Japan, Korea and New Zealand). Eventually, their target is a Regional Comprehensive Economic Partnership (RCEP), a free trade area among the leading nations in East, South and Southeast Asia, plus Oceania. It will embrace more than three billion people, delivering a combined GDP of some \$17 trillion and accounting for 40 percent of world trade.¹⁰⁷⁹

Although RCEP excludes the United States, there are cross-links between Asia and the US, and between Asia and the EU, giving the convergence process a global dimension. The eventual outcome of the TPP-TTIP-RCEP nexus, therefore, will result in convergence between all the trading blocs. British manufacturing and services will be drawn into the slipstream of this process, which may be accelerated if the 12-year WTO logjam can be broken.

The formal adoption of the Bali Ministerial Declaration, on 7 December 2013, opened the way for the resumption of the Doha Round with its rules-based multilateralism.¹⁰⁸⁰ What is known as the trade facilitation agreement should allow regulatory convergence to bleed into the WTO. With Britain able to take a direct part in the WTO process, it should not be troubled by lack of EU membership. Nevertheless, there are still many hurdles to surmount. As of the end of December 2015, only 63 of the 108 necessary WTO members had ratified the Bali agreement.¹⁰⁸¹ The advance of the multilateral trading system had, effective, slowed to a glacial pace. WTO Director General Roberto

¹⁰⁷⁷ See: http://www.uschamber.com/sites/default/files/grc/PhRMA_0.pdf and http://www.acea.be/news/news_detail/press_release_automobile_industry_welcomes_the_opening_of_eu-us_trade_talks, accessed 10 December 2013.

¹⁰⁷⁸ <http://www.ustr.gov/trade-agreements/free-trade-agreements>, accessed 10 December 2013

¹⁰⁷⁹ The Emerging US-EU-Asia Trade Triangle, 14 October 2013, <http://www.chinausfocus.com/finance-economy/the-emerging-us-eu-asia-trade-triangle/>, accessed 10 December 2013.

¹⁰⁸⁰ See: http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm and <https://mc9.wto.org/draft-bali-ministerial-declaration>, accessed 10 December 2013.

¹⁰⁸¹ WSJ, 21 December 2015, The WTO Struggles in Nairobi, <http://www.wsj.com/articles/the-wto-struggles-in-nairobi-1450720701>, accessed 22 December 2015.

Azevêdo complained in Nairobi that one successful multilateral negotiation in 20 years was "not good enough".

18.3 Enforcement and dispute resolution

Alongside any free trade agreements is the need for better dispute resolution. Undoubtedly, better systems would secure more uniform implementation of trade law, but there is considerable unease over the growing remit of international courts and quasi-judicial bodies, and their potential to override national legislatures. There is actually no best system, and no agreement on what might be the best way to go, which leaves this as an unresolved issue, but one very high up in the list of priorities.

In some quarters, there is fundamental disagreement with the notion that, as the world becomes more complex, we need more and more regulation at higher and higher levels. This might especially apply to financial services, where it has been suggested that the efforts should be directed at the co-ordination of resolution mechanisms.¹⁰⁸²

Dispute resolution, to use the generic term, is becoming the fault line between advocates of bilateral free trade agreements and the WTO/UN-administered multilateral rule-based system. It is argued that effort devoted to improved dispute resolution could be more cost-effective than effort devoted to regulatory convergence and harmonisation. Nevertheless, this shows signs of remaining a contentious area, in particular as we see the transition to dispute settlement between states and corporate entities – the issue of investor-state dispute settlement (ISDS).¹⁰⁸³

Some bilaterals, such as the TTIP and TPP, seek to rely on ISDS, which is regarded as an improvement on WTO procedures. But it is also described disparagingly as "a sort of offshore tribunal whereby private investors will be able to sue either the EU or US in front of a tribunal made up of fellow corporate lawyers if those jurisdictions introduce laws that could result in a loss of investment".¹⁰⁸⁴ This, plus other secretive aspects of the TPP agreement, has a Bloomberg opinion-writer dismissing it as a "corporatist power grab".¹⁰⁸⁵

NGOs have an active role in making EU law and, through the United Nations system, in brokering environmental agreements. To facilitate this, they receive official recognition and considerable funding from the EU and member state

¹⁰⁸² Booth, Philip, *International regulation - institutionalising systemic risk*, <http://www.iea.org/blog/international-regulation-institutionalising-systemic-risk>, accessed 27 October 2013.

¹⁰⁸³ See: http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf, accessed 11 December 2013.

¹⁰⁸⁴ European Environmental Bureau, Newsletter # 70, December 2013, <http://www.eeb.org/EEB/?LinkServID=CADFCE19-5056-B741-DBA130A08A0A11D0&showMeta=0>, accessed 17 December 2013.

¹⁰⁸⁵ <http://www.bloomberg.com/news/2013-12-19/pacific-trade-deal-needs-more-wikileaks.html>, accessed 21 December 2013.

governments.¹⁰⁸⁶ They see ISDS as a threat to the ability of European legislators "to set their own environmental standards, as well as standards protecting consumers, workers, public health etc", and "very useful for companies seeking to reverse regulations that protect the environment and people at the expense of corporate profits".^{1087,1088}

These issues are far from straightforward, leading UNCTAD to offer ideas for reform, while the European Commission has felt obliged to suspend TTIP talks *pro temp*, pending a period of consultation on dispute procedures.^{1089,1090} But, whether it is the ECJ, the EFTA court, the WTO dispute procedure, the UNECE compliance committee, the Court of Human Rights, or ISDS, each system has strengths and weaknesses. The book is not closed on which system offers the best potential, and the issues are wide open to debate. An independent Britain would be able to take an active part in that very necessary debate.

18.4 Unbundling

The ability to act independently offers the prospect of "unbundling" - seeking sector-specific (or even product-specific) solutions. These can replace ambitious free trade agreements that promise much but are often able to deliver little. Rather than promoting geographically anchored bilateral deals and then seeking to justify them with estimated (and often exaggerated) gains, potential savings might be identified by sector, with the more valuable targeted first. Currently, motor vehicles, electrical machinery, chemicals, financial services, government procurement and intellectual property rights are thought to be the most promising.¹⁰⁹¹

High-profile initiatives such as TTIP seek to deliver value by dealing simultaneously with multiple issues, aiming for agreements between nations and geographically-anchored entities. Arguably, many of these are too ambitious and not realisable within the timescales set.¹⁰⁹² Relying on

¹⁰⁸⁶ European Commission, COM(2011) 874 final, 2.12.2011. Proposal for a Regulation ... on the establishment of a Programme for the Environment and Climate Action (LIFE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0874:FIN:EN:PDF>, accessed 17 December 2013.

¹⁰⁸⁷ European Environmental Bureau, *op cit*.
<http://www.eeb.org/EEB/?LinkServID=CADFCE19-5056-B741-DBA130A08A0A11D0&showMeta=0>, accessed 17 December 2013.

¹⁰⁸⁸ Friends of the Earth Europe, The TTIP of the anti-democracy iceberg, http://www.foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf, accessed 21 December 2013.

¹⁰⁸⁹ http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf, accessed 21 December 2013.

¹⁰⁹⁰ Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement, 21 January 2014, http://europa.eu/rapid/press-release_IP-14-56_en.htm, accessed 11 February 2014.

¹⁰⁹¹ ECORYS, *op cit*.

¹⁰⁹² Karmakar, Suparna, Prospects for regulatory convergence under TTIP, October 2013, Breugel, <http://www.bruegel.org/publications/publication-detail/publication/800-prospects-for-regulatory-convergence-under-ttip/>, accessed 27 December 2013.

unbundling, prioritising specific sectors and aiming for limited but clearly defined reductions in very specific NTMs, could deliver more tangible results. Furthermore, sector- or subject-specific agreements with global reach can be unconstrained by geography.¹⁰⁹³

"Unbundling" is sometimes known as the "single undertaking" approach.¹⁰⁹⁴ Agreed bilaterally, such agreements (mainly dealing with tariffs) are also called Partial Scope Agreements (PSAs). They have been particularly popular in South America.¹⁰⁹⁵ Not only are such deals less likely to create gaps for organised crime to exploit, as they focus on technical issues, they also pose less of a challenge to sovereign entities.

Treating sectors separately means that cross-cutting synergies are lost, but agreements are easier to reach, with speedier delivery of results. Speed is of the essence. If a deal is to succeed, one observer remarked, "it needs to do so quickly. If it is to fail, it needs to do so even more quickly".¹⁰⁹⁶ TTIP, on the other hand, is set to absorb years of effort. And despite the huge range of products and potentially billions-worth of savings, it has to address such issues as the controversial US practices of chlorinating chicken carcasses or administering growth hormones to beef cattle.¹⁰⁹⁷

Unless agreement can be reached on these, the entire deal might founder after many years of endeavour.¹⁰⁹⁸ And even then, there are probably irreconcilable differences on animal welfare standards, especially on issues such as battery cage sizes for laying hens, on flock density for meat birds and for stock densities and welfare conditions for higher mammals.

Britain, as a major player in most of the arenas covered by TTIP, is in an excellent position, with its transatlantic "special relationship" to argue for less ambitious but ultimately more successful sector-specific agreements.

An example is the initiative on the classification, packaging and labelling of dangerous substances. As we noted previously, this was originally defined by the EU for its own member states. In 1992, the legislative lead was transferred

¹⁰⁹³ Globally Harmonised System of Classification and Labelling of Chemicals (GHS), *op cit*.

¹⁰⁹⁴ http://www.academia.edu/4940136/Sub-Federal_Governance_and_Global_Harmonisation_of_Policies_Some_Issues_for_Consideration accessed 24 December 2013.

¹⁰⁹⁵ *Trinidad & Tobago Guardian*, 10 May 2012, <http://www.guardian.co.tt/business-guardian/2012-05-09/what-partial-scope-agreement>, 30 March 2015.

¹⁰⁹⁶ <http://www.raps.org/focus-online/news/news-article-view/article/2478/regulators-industry-discuss-potential-impact-of-imdrf.aspx>

¹⁰⁹⁷ Congressional Research Service, US-EU Poultry Dispute on the Use of Pathogen Reduction Treatments (PRTs), <https://www.fas.org/sgp/crs/misc/R40199.pdf>, accessed 24 December 2013.

¹⁰⁹⁸ Greenpeace, EU-US trade deal poses potential threat to European food safety and environment standards, <http://www.greenpeace.org/eu-unit/en/News/2013/Transatlantic-Trade-and-Investment-Partnership-TTIP-A-Threat-for-European-Food-Safety-and-Environment-Standards/>, accessed 24 December 2013.

to the UN Conference on Environment and Development (UNCED), through which it eventually emerged as the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). The first version of the code was formally approved in December 2002 and published in 2003. This, plus revised editions, has been adopted as EU law.

18.5 Transnational organised crime

Over the past two decades, as the world economy has globalised, so has its illicit counterpart. The global impact of transnational organised crime (TOC) has risen to unprecedented levels. Criminal groups have appropriated new technologies, adapted horizontal network structures that are difficult to trace and stop, and diversified their activities. The result has been an unparalleled surge in criminal enterprises.

As many as fifty-two activities fall under the umbrella of transnational crime, from arms smuggling to human trafficking to environmental crime. These crimes undermine states' abilities to provide citizens with basic services, fuel violent conflicts, and subject people to intolerable suffering. The cost of TOC is estimated to be roughly 3.6 percent of the global economy, or \$2.1 trillion (USD) in 2009.¹⁰⁹⁹

This figure is by no means settled. According to the United Nations Office for Drugs and Crime (UNODC), annual turnover of transnational organised criminal activities such as drug trafficking, counterfeiting, illegal arms trade and the smuggling of immigrants is around \$870 billion. Even then in 2009, this was six times the amount of official development assistance, comparable to 1.5 percent of the global domestic product, or seven percent of the world's exports of merchandise. Drug trafficking is the most lucrative form of business for criminals, with an estimated value of \$320 billion a year. Human trafficking brings in about \$32 billion annually, while some estimates place the global value of smuggling of migrants at \$7 billion per year. At \$250 billion a year, counterfeiting is also a high earner for organised crime groups.¹¹⁰⁰

The problem from the trading perspective is that attempts to free up the international movement of goods often have the unfortunate side-effect of creating opportunities for criminals. Therefore, no independent trading policy can be complete without structured components aimed at reducing system vulnerabilities and improving enforcement, all directed at containing the growth in TOC. There is simply no point in freeing up trade and reducing "red tape" if the main beneficiaries are criminals of one type or another. Better constructed cost/benefit analyses might lead the way here, costing in the impact of criminal

¹⁰⁹⁹ <http://www.cfr.org/transnational-crime/global-regime-transnational-crime/p28656>. See also: http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf, both accessed 9 September 2014.

¹¹⁰⁰ UN News Center, New UN campaign highlights financial and social costs of transnational organisedorganized crime, 16 July 2012, http://www.un.org/apps/news/story.asp?NewsID=42480#.VF_RoTSsWNM

activities, and policing to set against benefits which might accrue to the legitimate economy.

In this context, it should not be forgotten that the purpose of regulation is often to prevent catastrophic failure or serious crime, or to enable authorities to penalise crime when it has been detected and the perpetrators apprehended. In terms of failure, the cost of the world financial crisis was estimated by the IMF to be \$11.9 trillion (USD) and while some have argued that poor regulation was in part responsible, the current round of regulation is most definitely aimed at preventing another crisis.¹¹⁰¹ In these circumstances, short-term cost/benefit ratios are not the issue. They can mislead analysts into thinking that an economic advantage is necessarily the main or sole purpose of regulation.

The regulatory failures discussed above have brought with them some recognition that free trade has a downside, in terms of facilitating transnational organised crime. The problems are widespread. The proliferation of free trade zones, for instance, facilitates crime and tax avoidance. FTAs are also responsible for increased cross-border crime. Yet relatively little attention is being given to the problems arising from them.^{1102,1103} Here, there is an interesting contrast between TTIP, which aims to "boost" the global economy by around €310bn, when TOC income may have reached more than \$3 trillion a year.^{1104,1105} International trade in counterfeited goods and piracy alone is expected to grow from \$360bn (based on 2008 data) to as much as \$960bn by 2015.¹¹⁰⁶

It is germane to ask whether the advantages of systems currently adopted are being outweighed by the disadvantages. One commentator suggested that the very essence of democracy was under threat.¹¹⁰⁷ To what extent the situation can be improved by the efforts of a single country is questionable. Nevertheless, an independent Britain will have greater freedom to raise issues

¹¹⁰¹ *The Daily Telegraph*, IMF puts total cost of crisis at £7.1 trillion, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5995810/IMF-puts-total-cost-of-crisis-at-7.1-trillion.html>, accessed 30 December 2013.

¹¹⁰² World Economic Forum, Global Agenda Council on Organised Crime, *Organised Crime Enablers*, July 2012, http://www3.weforum.org/docs/WEF_GAC_OrganizedCrimeEnablers_Report_2012.pdf, accessed 27 December 2013.

¹¹⁰³ Transnational organised crime, terrorism, and criminalized states in Latin America: an emerging tier-one national security priority. Strategic Studies Institute Monograph, 2012, <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB1117.pdf>, accessed 27 December 2013.

¹¹⁰⁴ <http://ec.europa.eu/trade/policy/in-focus/ttip/>, *op cit*.

¹¹⁰⁵ Millennium Project, *State of the Future, 2012 (Executive Summary)*, <http://www.millennium-project.org/millennium/SOF2012-English.pdf>, accessed 27 December 2013.

¹¹⁰⁶ International Chamber of Commerce, *Global Impacts Study*, <http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/BASCAP-Research/Economic-impact/Global-Impacts-Study/>, accessed 27 December 2013.

¹¹⁰⁷ *The Guardian*, Organised crime: the \$2 trillion threat to the world's security, 12 September 2007, <http://www.theguardian.com/world/2007/sep/12/topstories3.mainsection>, accessed 27 December 2013.

in global forums than as part of the EU, where the "common position" dictates the line taken. Where the balance of advantage lies is unknown, but there is a debate which must be had before Britain can determine its own priorities and the direction of its post-exit settlement.

One of those areas must be a review of the VAT system. In respect of carousel fraud, regulation is already being shaped by the need to prevent criminals exploiting the VAT system, in an attempt to stem multi-billion annual losses.¹¹⁰⁸ Estimated at 12 percent of total VAT revenue, EU-wide fraud may have cost €90-113bn a year in the period 2000-2006 and more than €100bn in 2012, accounting for over €1 trillion in just over a decade.^{1109,1110} As such, regulation might be considered as insurance – its "premiums" as part of the cost of doing business. Furthermore, regulatory convergence is not necessarily intended to improve local efficiency, *per se*, but to improve the ability of global supervisory bodies to detect early signs of market failure or fraudulent activity.¹¹¹¹ This is easier to do when common standards are in place.¹¹¹²

18.6 Immigration and trade policy

Insofar as there is a correlation between prosperity and population stability, and a further correlation between international trade and prosperity, it can be argued that international trade policy is one means by which migration pressure can be reduced. Currently, with trade policy ceded to the EU, the priority is not directed at containing migrant flows. More usually, the policy serves to intensify migration pressures, causing an increase in flows to Europe.

An example of that perversity lies in the fate of Kenya, which plays a significant role in African migration.¹¹¹³ In some great measure, it acts as a "hub", attracting inwards migration from its own border regions and neighbouring countries, its relative stability and prosperity acting as a magnet to more troubled populations.¹¹¹⁴ But, while the country has graduated to a level above that of Less Developed Country (LDC), it lacks the breadth and

¹¹⁰⁸ Council of the EU, 22 July 2013, Council approves measures to tackle VAT fraud, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/138239.pdf, accessed 12 January 2014.

¹¹⁰⁹ *Finfacts*, European Union continuing to struggle in fight to reduce VAT fraud, Michael Hennigan, 3 September 2013, http://www.finfacts.ie/irishfinancenews/article_1026481.shtml, accessed 3 January 2014.

¹¹¹⁰ Eurostat, Tax revenue in the European Union, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-002/EN/KS-SF-12-002-EN.PDF, accessed 3 January 2014.

¹¹¹¹ <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/106/10611.htm>

¹¹¹² House of Lords, European Union Committee, The role of the EU in global supervision and regulation, <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/106/10611.htm>, accessed 30 December 2013.

¹¹¹³ <https://www.iom.int/cms/en/sites/iom/home/where-we-work/africa-and-the-middle-east/east-africa/kenya.default.html?displayTab=contact-us>, accessed 28 June 2014.

¹¹¹⁴ <http://www.migrationpolicy.org/article/kenya-what-role-diaspora-development>, accessed 28 June 2014.

economic resilience to absorb large numbers of migrants, and integrate them. Thus, if it is to contain an African problem in Africa, without it spilling over into Europe, the country needs significant levels of support.

Currently, as part of the five-nation East African Community (EAC), alongside Tanzania, Uganda, Rwanda and Burundi, the country has been negotiating with the EU for twelve years on a new Economic Partnership Agreement (EPA) to update the non-WTO compliant Cotonou Partnership Agreement (CPA). The objective is to encourage the community to open up to 83 percent of the Cotonou markets to European imports, at the same time gradually eliminating tariffs and fees.

If this agreement has the effect of improving economic prosperity, promoting greater employment and speeding up development, it will do much to reduce migration pressures. In any event, an agreement is vital. Kenya has built a significant trade with the EU, becoming by 2001 the EU's biggest source of flower imports, having overtaken Israel as market leader.¹¹¹⁵ Goods are currently permitted to enter the EU Single Market tariff-free but, in the absence of a pact, they could be subjected to a 16 percent duty.¹¹¹⁶

However, the EU has been accused of imposing a series of technical barriers, including rigorous inspections at destination – despite goods meeting buyer standards.¹¹¹⁷ The flower and vegetable growing industries have also had to deal with what they consider to be the arbitrary banning of a popular and effective pesticide, estimated to have cost growers up to €170 million or 20 percent of their export earnings. The loss could have been avoided had the transition to new pesticides been managed better.¹¹¹⁸

Some observers believe that the EU is using agreements on trade to leverage changes in governance on tax matters, environment and sustainable development.¹¹¹⁹ With the country obliged to open its markets to EU member states, the Kenyan government could lose between 5.5 and 15 percent of its revenues once the EPAs had been concluded.¹¹²⁰

Former Tanzanian President Benjamin questioned whether a deal promoting the export of raw materials helped the transition to real industrialisation. EAC states needed to develop more extensive manufacturing bases in order to move

¹¹¹⁵ See: <http://news.bbc.co.uk/1/hi/business/1820515.stm>, accessed 28 June 2014.

¹¹¹⁶ <http://www.the-star.co.ke/news/article-169986/flower-growers-back-planned-eu-trade-law>, accessed 28 June 2014.

¹¹¹⁷ <http://www.eureferendum.com/blogview.aspx?blogno=78250>, accessed 28 June 2014.

¹¹¹⁸ See: <http://www.capitalfm.co.ke/business/2012/01/dimethoate-banned-to-meet-eu-standards/> and <http://www.hortibiz.com/hortibiz/nieuws/eu-relaxes-rules-for-companies-kenya/>, accessed 28 June 2014.

¹¹¹⁹

<http://www.businessdailyafrica.com/Delays+in+EU+trade+agreements+hurt+flower+production/-/539546/1901236/-/r57eub/-/index.html>, accessed 28 June 2015.

¹¹²⁰ <http://www.nation.co.ke/Features/smartcompany/SA-and-EU-deal-a-blow-for-Kenya/-/1226/1677630/-/hnaqgz/-/index.html>, accessed 28 June 2014.

on from economic reliance on low-value commodity exports. To give their nascent industries a chance to grow, they need to protect their home markets with tariff walls, keeping out selected ranges of cut-price goods from developed economies.

In its trade policy, therefore, the EU was doing the African states no favours. Through the EPA, the EU was able to demand consultation on decisions relating to financial services and financial policy in areas such as current account and capital account management; all other service sectors; technology policy and intellectual property, including traditional knowledge and genetic resources; personal data protection and use; competition and investment and government procurement. The EPA was thus regarded as an attack on national sovereignty.¹¹²¹

The EU nevertheless insisted that the EAC should agree to a progressive reduction of all barriers to EU imports. It was thus being suggested that the EU was holding the EAC "at gunpoint". An October 2014 deadline was set, with no concessions on offer, and subsequently forced through by a threat of imposing tariffs on the vital flower trade.^{1122,1123} With 40 percent of Kenyan trade going to the EU, flower exports – worth over £300 million annually - were a crucial economic activity for the country. The country could stand to lose roughly 500,000 jobs directly and indirectly if the agreement was not concluded.¹¹²⁴

Also required by the EU was the adoption of the WTO "Most Favoured Nation" (MFN) status which would govern tariffs imposed on EU imports. This would prevent the adoption of preferential deals with other nations and tie the hands of EAC partners whom they regarded as their trading partners. Instead, the EAC wanted a bespoke deal. If it was forced to concede MFN status to the EU, any deals offered to other partners, such as China, would also be claimable by Europe. In effect, the EU is dictating the external trade policy of the bloc.

Under the current arrangements, MFN rules were not applied to ACP member countries, so Kenya and its associated countries were allowed to trade with nations outside the EU under whatever terms could be agreed. Yet, under EAC proposals, the EU was demanding more stringent measures. Failure to conclude an agreement would lead to the imposition of significant EU import duties on Kenya's flower industry, while competitors such as Colombia, Tanzania, Uganda, Rwanda, Burundi and Ethiopia would continue to enjoy their duty-free status. The Kenya Flower Council noted that this could undermine the industry's competitiveness and market share.

¹¹²¹ *Ibid.*

¹¹²² <http://allafrica.com/stories/201402101226.html>, accessed 28 June 2014.

¹¹²³ *The Guardian*, 16 January 2015, EU trade agreements threaten to crush Kenya's blooming flower trade, <http://www.theguardian.com/sustainable-business/2015/jan/16/kenya-flower-trade-eu-pressure>, accessed 3 February 2015.

¹¹²⁴ <http://www.cnbc.com/news/east-africa/2014/02/21/kenya-flower-industry-under-threat/>, accessed 28 June 2014.

What is not fully appreciated is that, with limited tax gathering capabilities, these countries actually need tariffs as a relatively easy and predictable tax to collect, and they are also used as a tool for industrial development. Tariffs or import duties are used by countries to create a wedge between domestic and foreign products in order to create advantage for locally produced goods. These help sustain local businesses that are at an early stage of development. Most West African countries' bound tariff rates for agricultural products at the World Trade Organisation (WTO) are about 99 percent.¹¹²⁵

For instance, Ghana's bound tariff on poultry products is 99 percent while its applied tariff is currently 20 percent. With the advent of the EPA, Ghana loses its right to protect local poultry farmers using tariffs as a tool because no new duty can be imposed and the current rate cannot be raised.

The second provision that deprives West Africa member states of the needed funds for development is the restriction on export taxes. Export taxes are used by countries to make particular raw materials available for local use, typified by the Ghanaian tax on scrap metal. This was applied to ensure local manufactures were well supplied. Similarly, Kenya taxes the export of raw leather to ensure that the product is available for local use. In the early stages of its development, even the UK imposed export taxes on raw wool and hides in order to promote its own industrial development.

In November 2014, this arrangement brought criticism from Germany's Africa Commissioner, Günter Nooke. "Economic negotiations should not destroy what has been built up on the other side in the Development Ministry", he said in a radio interview. Germany and Europe contributed large sums of tax money toward various development programmes in Africa, Nooke explained, but the economic agreement with African states cancels out these efforts. "The African countries cannot compete with an economy like Germany's. As a result, free trade and EU imports endanger existing industries, and future industries do not even materialise because they are exposed to competition from the EU".¹¹²⁶

According to Green MEP Ska Keller, the EPA hurt regional trade, and did not leave partner countries any room to develop their own industries, create jobs and thereby pull people out of poverty. "Developing countries have a gun pointed at their chest – either they sign or their market access to the EU is restricted", Keller said. "The EPA is the opposite of development cooperation". The EU was effectively practicing its own brand of imperialism, demanding that before they grant any favourable trade concessions to a third party with a share of global trade in excess of 1.5 percent, the West Africans must consult the EU.

¹¹²⁵ <http://www.aljazeera.com/indepth/opinion/2014/06/west-africa-europe-trade-agree-2014621155835409177.html>, accessed 29 June 2014.

¹¹²⁶ <http://www.euractiv.com/sections/development-policy/eu-africa-free-trade-agreement-destroys-development-policy-says-merkel>, accessed 10 December 2014.

This gravely undermines national sovereignty and South-South cooperation.¹¹²⁷ As pointed out by the African Union and UN Economic Commission for Africa, this provision is controversial for a number of reasons. Invoking MFN status goes against the principles of the Enabling Clause of the WTO. This expressly provides for the possibility of preferential agreements among developing countries. Also there is no WTO rule that requires the inclusion of the MFN clause in a free trade area like the EPA. The EU's own experience proves this point. In the EU-Mexico free trade agreement signed in 2001, there is no MFN clause.

Pointing the way to a post-exit strategy, therefore, the UK has substantial trade with Kenya on its own account. As part of the EU, it is unable to use this as leverage to secure any effect. The UK is simply not at the table. As an independent state, it would be able to direct trade policy specifically to easing migration pressure – something Kenya itself wants. As part of its own nation-building process, and economic development, it needs to keep more of its people, and attract labour from its neighbours. It cannot afford the constant drain of people to Europe, any more than the UK is prepared to deal with them when they arrive.

At a broader level, trade relations between African states and China are variously reported as a mixed blessing but, in recent times, countries such as Tanzania have turned to China for roads, power plants, a gas pipeline and a huge new port. India and China have become leading investors and the country's top trading partners. Competition from China is often seen as harmful to Western interests, especially as African governments have become often adept at playing potential partners off against each other.¹¹²⁸

Elsewhere, though Chinese intervention has been seen as helpful to the cause of maintaining stability. In Afghanistan, it made pledges of \$327 million in aid through 2017, more than the \$250 million contribution it has so far offered since the fall of the hard line Islamist Taliban regime in 2001.¹¹²⁹ Thus, there is a certain convergence of interest between Western powers and China. The economies of less developed countries could benefit from a breakout from the current Euro-centric (and even US-centric) perspective.

18.7 Integrating agreements

The previous narratives illustrate a three-way relationship between migration, trade and stability. Generally, however, international agreements dealing with migration, refugees and related matters tend to be dealt with entirely separately, in isolation from other policy domains. Since obligations on migration stem largely from UN treaties and the problems have global dimensions, there has

¹¹²⁷ http://ssc.undp.org/content/ssc/about/what_is_ssc.html, accessed 30 April 2015.

¹¹²⁸ <http://www.ft.com/cms/s/0/0e1a6852-1e55-11e4-ab52-00144feabdc0.html#axzz3HczSuHYv>, accessed 2 November 2014.

¹¹²⁹ <http://www.reuters.com/article/2014/10/30/us-usa-china-afghanistan-idUSKBN0IJ0C120141030>, accessed 2 November 2014

been a tendency to move beyond the geographically-limited forum of the EU and look for global solutions.

Furthermore, there are now other players in the field. The OECD, the ILO and the G20 have all taken active roles in policy development. The ILO has been particularly active, working with the UN to produce the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force in July 2003.¹¹³⁰ No EU Member States have signed or ratified it, although the European Parliament and the European Economic and Social Committee (EESC) have strongly encouraged them to do so.¹¹³¹

To assist the international community in dealing with migration issues, there is the International Organisation for Migration (IOM), founded in 1951. It counts 55 member states, including the UK, as members, and a further 11 states hold observer status, as does the EU and the Council of Europe. The organisation has offices in over 100 countries, and declares its function as "promoting humane and orderly migration for the benefit of all. It does so by providing services and advice to governments and migrants".¹¹³²

Then, to provide "the framework for the formulation of a coherent, comprehensive and global response to migration issues", on 9 December, 2003 the Global Commission on International Migration was launched in Geneva by the UN Secretary-General and a number of governments. With 19 Commissioners, it began its activities on 1 January 2004.¹¹³³ Four more years saw the emergence of the Global Forum on Migration and Development, a UN initiative intended "to address the migration and development interconnections in practical and action-oriented ways".¹¹³⁴ Currently, there are suggestions that a World Migration Organisation is needed, analogous to the WTO.¹¹³⁵

The WTO is, in fact, already marginally involved in migration issues through the so-called "Mode IV" provisions of the General Agreement on Trade in Services (GATS), thereby demonstrating the relationship between trade and the movement of people.

In theory, Mode IV refers to the presence of persons of one WTO member in the territory of another for the purpose of providing a service. It does not concern persons seeking access to the employment market in the host member, nor does it affect measures regarding citizenship, residence or employment on a

¹¹³⁰ <http://www.un.org/documents/ga/res/45/a45r158.htm>, accessed 4 May 2014.

¹¹³¹ See p.39 <http://www.publications.parliament.uk/pa/ld200506/ldselect/lducom/58/58.pdf>, accessed 4 May 2014.

¹¹³² <https://www.iom.int/cms/about-iom>

¹¹³³ <http://www.gcim.org/>, accessed 5 May 2014.

¹¹³⁴ See: <https://www.gfmd.org/en/process/background>, accessed 9 January 2014.

¹¹³⁵ See, for instance, http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TS8b.pdf, accessed 9 January 2014.

permanent basis.¹¹³⁶ In practice, it is regarded as a mechanism gradually to introduce free movement on the EU model, although at a global level, creating linkage between trade and migration issues.¹¹³⁷

There lie the clues to the future management of immigration. The issues are not resolved solely (or at all) by erecting barriers and turning Britain into an inward-looking fortress. That simply creates a different set of problems, not least increased illegal immigration and the growth of the black economy. Rather, it is becoming increasingly evident that mass migration is a complex of different problems, many with global dimensions. There is no single solution: what is required is a series of measures as complex and diverse as the problems they address. They need a global as well as the sub-regional perspective offered by the EU.

As with other issues, Britain needs to be part of the global dialogue. Supplementing local activity on its own specific problems, it needs to be working directly with international agencies such as the Geneva Migration Group and the IOM.¹¹³⁸ And while it needs the freedom to act locally in support of the national interest, effective measures will often need to be integrated with regional and global initiatives. The overview and the degree of co-ordination necessary can hardly be attained while the UK is locked into the narrow constraints of the EU, having to filter its requirements through the consensus mechanisms provided.

Assuming the UK is able to take what one might call the integrated global approach, this has significant domestic and political dividends. It enables withdrawal to be presented as something far more important than the ability to impose largely ineffective border controls. It affords the opportunity to interact with the global community and address the root causes of the problems, something which the EU has manifestly failed to do. And it is at the global level that the UK belongs. That is where many of the problems will be solved.

18.8 The eight-point programme

Following on from the Article 50 exit agreement, we posited that further negotiations should involve the eventual abolition of the EEA. It would be replaced by an overarching regional body based on UNECE. EFTA would be expanded to create a sub-regional free trading area for those European countries which wished to co-operate closely on trade and allied matters but which had no enthusiasm for the EU's brand of political and economic integration.

¹¹³⁶ Movement of Natural Persons, http://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm, accessed 7 May 2014.

¹¹³⁷ For an exploration of the issues, see for instance, https://www.princeton.edu/~pcglobal/conferences/wtoreform/Betts_Nicolaides_memo.pdf, accessed 7 May 2014.

¹¹³⁸ See: <http://www2.ohchr.org/english/bodies/cmw/GMG.htm> and <http://www.iom.int/cms/en/sites/iom/home.html>, both accessed 5 May 2014.

These are essentially structural issues. They are not an action programme for exploiting Britain's new-found independence. For the sake of convenience, and to afford a degree of coherence to a post-exit programme, we can extract many of the points we have previously discussed and assemble them into a specific programme, bringing us to phase three of the plan. This is the payoff, the point at which we are able to benefit from leaving the EU. It is also the rationale for leaving the EU – allowing the UK to reassert itself on the world stage as an independent player, taking a leading role in developing and enhancing the global trading system.

Collecting disparate elements into a single programme, including issues raised in this chapter, we emerge with eight key targets, summarised in Table 4. Taken as a coherent whole, they form a global programme, albeit anchored at the national level in the first instance.

The national aspect is strongly identified with the first element in the line-up - the programme of repealing and replacing unnecessary and unwanted EU regulation. In the first instance, the focus will have been on the 15,000 or so measures outside the Single Market *acquis*. In time, as we have already suggested, we will see the transition from the EU-based agriculture, fishing, regional and other policy areas, to UK-generated policies, and the repeal of the associated EU legislation. Areas which will retain high levels of government intervention, such as agriculture and fishing, will require a replacement body of law.

The process that will have started immediately upon the UK's exit from the EU will be part of the continuous process triggered by our withdrawal but will eventually be absorbed into routine governance. However, this very process requires of government and its agencies a fundamental review of the entire legal framework, cataloguing for what would probably be for the first time the full extent of EU law as it applies to the UK. Only then can the process of replacement or renewal start to take effect.

Alongside the replacement of law comes the task of improving the regulatory system, in many instances changing the philosophical bases on which regulations rest. However, rather than allow controls and restraints on transnational organised crime to be treated separately, they should be fully integrated into the regulatory and administrative systems, given much higher priority than currently afforded. Costs of potential criminal activity should be factored into assessments of the cost-benefits of trading arrangements.

The global programme of regulatory convergence should nevertheless continue, although distinction needs to be made between proscriptive and enabling legislation. Clearly, the focus should be on enabling regulation, while removal of proscriptive measures should be encouraged. However, far greater account needs to be taken of the effects of regulatory hysteresis and more emphasis might be placed on convergence through better enforcement, alongside

harmonisation of legislation. In all cases, mechanisms adopted should be prioritised according to expected outcome.

	Actions	Target
1.	Regulatory repeal and replacement	Agriculture, fisheries and regional policy - more efficient/localised and less regulation
2.	Better regulatory systems	Risk-related measures; targeted outcomes; emphasis on functionality; better, more timely intelligence
3.	Tackling transnational organised crime	Emphasis on total effect of trade deals; focus on vulnerabilities to crime improved enforcement
4.	Convergence and harmonisation	Targeted activity; high value sectors recognition of regulatory hysteresis; emphasis on cost-benefit
5.	Improved dispute resolution	Development and reform of Investor State Dispute Resolution: greater transparency
6.	Unbundling	Sector-specific deals to reduce TBTs rather than relying on FTAs ... sub-sector deals, if appropriate
7.	Modifying freedom of movement	Development of global policy on migration; global co-ordination on "push" and "pull" factors
8.	Capital and payments control	Restoration of tax sovereignty; reduced money laundering and corruption

Table 4. the eight-point programme for continuous development

Fifth on our list is the matter of dispute resolution - an arcane but vital area of the global trading system. In many respects, trade agreements are no better or worse than the dispute systems which are employed. Investment in better or more equitable systems is, therefore, worthwhile.

When it comes to "unbundling", this more or less becomes short-hand for a major overhaul of the global trading system. The post-WWII settlement saw the re-emergence of multilateralism, with GATT and then the WTO, only to have

the movement founder on the Doha round, from which it has yet to recover. On the other hand, geographically-anchored bilateralism has proved a poor substitute: free trade area negotiations get bogged down in ever longer negotiations, while older deals atrophy and fail to develop. Seeking sector or even product-specific deals, in the form of partial source agreements, thus seems a possible way forward and might guide UK international trade policy.

Turning to freedom of movement and related matters, this is one of the more complex issues, amongst many others. In the shorter term, modification of the agreement on freedom of movement defined by the EEA Agreement is not a prospect. There is, however, as we have demonstrated, more flexibility than generally appreciated to reduce the flow of migrants from within the EU. In dealing with migrants from outside the EEA, withdrawal from the EU is of less importance than dealing with ECHR provisions, and with international conventions and other agreements. In order to resolve issues, the UK needs to be fully engaged at a global level, but needs also to integrate diverse policies, where they have impacts on "push" or "pull" factors.

Finally, on the matter of free movement of capital and payments, it is essential that the UK regain such controls as are necessary to regain tax sovereignty, to control money laundering and to limit corruption (and transnational organised crime generally), as well as terrorism.

PHASE SIX

Domestic reform

19.0 Domestic reform

When the State calls for defenders, when it calls for money, no consideration of poverty or ignorance can be pleaded, in refusal or delay of the call. Required, as we are universally, to support and obey the laws, nature and reason entitle us to demand that in the making of the laws, the universal voice shall be implicitly listened to. We perform the duties of freemen; we must have the privileges of freemen ...

Extract from the original Chartist petition, 1836¹¹³⁹

The plan so far deals largely with external matters, but the fact of withdrawal from the European Union also affords an opportunity to undertake a series of domestic reforms. These form the sixth and final stage of this exit plan.

Specifically, this stage confronts the idea that there is little point in recovering powers from the EU, only to hand them back to the same institutions that gave them away in the first place. Further, even without EU influence, the UK is an overly centralised state, so the repatriation of powers from Brussels only for them to reside in London or one of the other devolved capitals affords fewer benefits to individual citizens than might be imagined. To a certain extent, the effect of restoring a degree of "independence" would simply be to swap one ruling class for another, with very little by way of beneficial effects for ordinary people.

Without then any further changes, there would also be nothing to stop the same institutions which gave away our powers from repeating the process. After all, the reason the UK joined the EEC, and then approved and ratified subsequent treaties, was because the British government decided to pursue the path of European political integration, and because Parliament permitted it. Except for the one exception of the 1975 referendum, the people were not consulted and their permission was not sought.

A return of the UK to the status of an independent state, therefore, is hardly sufficient. Mechanisms need to be sought to ensure that neither government nor Parliament can repeat a situation where the nation is conjoined with a supranational construct without the permission of the people. That would

¹¹³⁹ <http://www.chartists.net/The-six-points.htm>

require some fundamental changes to the UK constitution, with the installation of a more active form of democracy, affording a significant transfer of power from the organs of state to the people.

In order to determine what changes and transfers might be required, and indeed desirable for the better governance of the UK, a small working group of concerned individuals was set up in Harrogate in July 2012 to prepare a programme, which came to be known as The Harrogate Agenda (THA). This was framed in terms of six demands, modelled on the Chartist petition of 1836 and, while THA was not framed specifically with EU withdrawal in mind, it has been used as the basis for the post-exit domestic reforms suggested in this chapter.

In short, the demands framed by THA were these: the recognition of the people's sovereignty; improvements in local democracy; separation of powers; people's consent to laws and other government action; the prohibition of taxes and levies without consent; and the convening of a constitutional convention. An exploration of these demands, and their assembly as a coherent reform package, then forms the bulk of this chapter.

Given that the EU is slated as an anti-democratic construct, it needs to be stated at this point that the essence of reforms proposed is directed towards strengthening the democracy of the nation. The starting point for this was to revisit the basic definition of democracy, taken to mean "people power". Democracy, in fact, stems from the Greek word, *dēmokratía*, comprising two parts: *dēmos* "people" and *kratos* "power".¹¹⁴⁰ Without a *demos*, there is no democracy. But if people do not have power, there is no democracy either.

Looking at the nature of governance before the UK joined what was to become the EU, it is fair to say that, in terms of the definition chosen, the UK has never really enjoyed a fully functioning democracy.

The current system includes the vestiges of what is known as "representative democracy", effectively a misuse of the word democracy. Power is nominally vested in MPs who are theoretically held to account in periodic elections. However, general elections can turn on the sentiment of as little as four percent of the electorate, decided by floating voters in marginal constituencies. In by-elections, an MP can be returned to Parliament by less than twenty percent of the electorate. Local elections routinely engage even less of the electorate

In practice, power is diffuse. Even once we have left the EU, it would be shared by unaccountable local administrations, by the executives (governments) based in the capitals of the United Kingdom, and their agencies. MPs and most certainly councillors individually have very little power. That which they have they rarely exercise independently on behalf of the people. Mostly, they follow their party whips, the power residing in the party system.

¹¹⁴⁰ <http://en.wikipedia.org/wiki/Democracy>

These and other defects suggested that maintenance of the status quo following UK withdrawal was not an option. Rather, it was considered that the nation should rely more on the system of direct democracy adopted by the Swiss which, with other attributes, formed The Harrogate Agenda. The first element of this was to settle the question of where sovereignty resided.

19.1 Recognising the people's sovereignty

One consequence of Germany losing the Second World War was that the successor state to the Third Reich had imposed upon it a new constitution, in which British legal experts had a part to play. It is thus highly significant that Article 20 of that constitution (the Basic Law) declares that all state authority comes from the people. Although not specifically stated, the effect of this was to recognise that the German people are sovereign.

Despite the British effectively bequeathing this principle to a nation it had a hand in vanquishing, it does not apply to the people of the United Kingdom. Instead, the doctrine of "Parliamentary sovereignty" affords Westminster the supreme legal authority in the UK, permitting it to create or end any law. Generally – EU law notwithstanding - the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change.¹¹⁴¹

Once the UK has left the EU, therefore, there would be nothing to stop MPs asserting their authority in the name of parliamentary sovereignty, and directing the executive to seek re-admission to the EU – or permitting the executive to conclude re-entry agreements. Thus, any final exit settlement must include a specific domestic element which asserts – or re-asserts - the sovereignty of the British people, enabling them to block any attempt by Parliament to over-ride their wishes.

Most likely, the procedure to give effect to a recognition of popular sovereignty might take the form of a declaration of sovereignty. This formal recognition would affirm that power resides with the people and that governments in all their manifestations and levels are subordinate to the people.

19.2 Improved local democracy

What applies nationally must apply locally. All politics is local, a former US Speaker of the House, Tip O' Neill, once famously said. He went on to say that politicians must appeal to the simple, mundane and everyday concerns of those who elect them into office.¹¹⁴² It is those personal issues, rather than big and intangible ideas, which most voters care most about, contradicting the notion that, in local elections, people are casting votes to "send a message" to the highest levels.

¹¹⁴¹ <http://www.parliament.uk/about/how/sovereignty/>

¹¹⁴² http://en.wikipedia.org/wiki/All_politics_is_local

That may be the case in the United States, where there are still some vestiges of grass-roots democracy. But in Britain, the very idea that we have local democracy is a fiction. We have local authorities which function mainly as central government agencies. Their main task is to administer centrally-defined law at local level.

In the UK, local government units - whether counties, second-tier districts or unitary authorities - have no independent existence or powers. They are defined through Acts of Parliament and owe their existence, their boundaries and their powers to the *diktats* of central government. They are funded primarily from the centre and the nature of monies which can be collected locally is directed by the centre, as well as the amounts and terms of collection.

This, by any definition, is a top-down society. But it is also one which has become increasingly so over time. Local elections are little more than opinion polls on the performance of central government, without even the benefit of random sampling techniques. There is no point in getting excited over the election of local officials when almost the entire extent of their powers is determined by national law.

Therefore, the aim must be to invert the entire structure of the British state. Instead of the top-down systems, we need to start locally and create structures built from the bottom-up. The fundamental building blocks of our democracy should become independent local units which owe their existence to the people who live within their boundaries. Instead of being statutory bodies – i.e., defined by statute, from which they derive their powers, under the control of central government – they become constitutional entities. Their existence, powers and revenue-raising capabilities are defined by the people via the medium of constitutions, approved by local referendums.

These local authorities – which could be counties, cities or the former county boroughs – become independent legislatures in their own right. Whereas local authorities were once permitted to make by-laws, defined by central government, true local government makes its own laws in its own name. Each district makes all the laws for matters exclusive to its area, using powers defined by its own constitution, applicable within its own boundary.

Some might think that local authorities are too small to become legislatures, but size is not an issue. Few people for instance, realise that Iceland, with a population of 313,000, boasts fewer people than the London Borough of Croydon (363,000) and very substantially less than the Metropolitan District of Bradford (501,000).

Yet Iceland is a sovereign nation. It has its own government, its own parliament, its own laws, its own police and even its own fishing policy and navy to enforce it. Despite its small size, the country does tolerably well, with a GDP of \$12.57 billion (146th in the world) and a GDP *per capita* of \$38,500,

the 24th highest in the global league (higher than the UK's \$36,600, the 33rd highest). It also has its own local government, with 59 local municipalities.

In Norway, which has approximately five million inhabitants, there are 428 municipalities and 19 county authorities. More than half the municipalities have less than 5,000 inhabitants and only 14 have more than 50,000. The largest municipality is Oslo, which is also a county. It has approximately 620,000 inhabitants. The smallest is Utsira with 209 inhabitants.

In the UK, political figures seem to have a poor grasp of the meaning of the word "local", in the context of democracy. This was seen during the elections of police commissioners in England and Wales during 2012.¹¹⁴³ The elections were cited as an example of *local* democracy yet, by way of an example, just one of the areas for which a commissioner was to be elected, West Yorkshire, has a population of 2.2 million people in an area of nearly 800 square miles. There are over 100 *countries* in the United Nations with smaller populations. The candidate elected in this area was Labour's Mark Burns-Williamson, a man who polled 114,736 first preference votes from an electorate of just over 1.6 million. That gave him an effective mandate of 7.1 percent – another example of democratic failure.

What might be appropriate for England, in a post-exit environment, therefore, could be areas with populations in the order of 300,000 to 500,000, making up 150 to 200 administrative units. Each could be responsible for most of their own government, with their own constitutions, sovereign legislatures, laws and revenues. Such units could also assume many of the duties currently undertaken by central government. Those might include such things as the determination and payment of social security and unemployment benefits and the provision of health services currently administered by the NHS, as indeed they used to do.

It follows that all national laws applying to matters which fall within the remit of local government should become local laws. The local legislatures should be able to re-enact them if so desired, or they can repeal or revise them.

A consequence of this would be that the functions of central government would be drastically reduced. The centre would mainly concern itself with foreign policy and relations, including the framing of international law and making treaties. We would see the centre take a hand in making maritime law, controlling deep water fisheries, and dealing with national security and defence. In what would effectively become a federal-style body, central government would also concern itself with cross-border crime (where the perpetrators operate in two or more police districts), and serious, organised crime.

Then comes the inevitable question of who pays, and more particularly how. Control of taxation is at the heart of true localism, to which effect we believe

¹¹⁴³ *The Guardian*, 6 November 2012 <http://www.guardian.co.uk/uk/2012/nov/06/police-commissioner-elections-turnout>

local governments, structured as constitutional bodies, should become the primary revenue collectors. We would envisage that they collect most if not all the taxes from people and enterprises resident or operating within their areas of jurisdiction.

Instead of the system where only a fraction of their income is collected locally via Council Tax and charges, with the balance made up from grants from the centre, local authorities would collect their own taxes, such as Council Tax, but also income tax, sales taxes, corporation taxes and most other taxes currently collected by the centre. After they had taken what they needed to fund their own operations, they would remit the surplus to central government, acting as collection agents for the centre.

By this means, rather than the centre subsidising local government, the relationship would be reversed. Equity would be achieved by having poorer authorities remitting less, *per capita*, to the centre. The richer authorities, like the City of London, would pay more. The funding would be managed on the same basis as the precepts currently collected locally, from which are paid the police, fire services and transport authorities.

Only in extreme emergencies would we expect any transfers of funds from centre to local authorities, such as in the case of a major natural disaster. A system of top-down transfers is not essential. Norway manages a system of wealth transfer between local authorities, without involving central government. Furthermore, when local taxation prevails, allied with local democracy, there is every opportunity for variable rates and real tax competition between local authorities. That in itself could create downward pressure on taxation.

This is the "small government" which so many people profess to want, but even then – despite the local units being constitutional bodies - that does not guarantee freedom from central government interference. In the United States, there is constant tension between federal and state governments, and the constant encroachment of the centre. Here, as always, the currency of power is money. The federal government, with its own vast income stream - far larger than state revenues - is able to bribe States with cash inducements or bully them by withholding cash.

To overcome this problem, it is suggested that central government should have very limited taxation powers. It should not be allowed to borrow to finance a deficit, except in very exceptional circumstances, and only with the explicit permission of the people. Budgets at local and central levels should be subject to annual referendums, firmly limiting the expansionary tendencies of all governments.

With more power and responsibility being assumed at local level, a reduced workload at the centre might be expected. Fewer MPs might be needed, with a ratio of perhaps 200,000 head of population or more for each representative,

possibly stretching to one per 500,000. Where the United States House of Representatives manages with 435 voting members, the House of Commons might trim its membership to less than 300. The House of Lords would be proportionately reduced – with perhaps only a hundred or so working members needed.

Details of how and under what conditions individual MPs (and members of the upper house) are selected might be left to the electors of the county, set out in each local constitution and implemented by the local legislatures. Instead of being paid from central funds, MPs might be paid by their counties. It would be for the people of each county to decide how much to pay their representatives, how much should be allowed by way of expenses, and how they should be held accountable. Constituencies which want to introduce a method of MP recall should be permitted to do so.

19.3 Separation of powers

An important defect in the British system of government is the inadequate separation of powers. This stems from the country's transition from rule by an absolute monarch to a system of constitutional monarchy. The executive that emerged to challenge the power of the king now comprises the prime minister and cabinet. But, in holding the power previously held by the king, it has effectively become the king.

In practical terms, members of the ministerial team (including the prime minister) - the core of the executive - are appointed either from MPs in the House of Commons, from the Lords, or - not uncommonly - are appointed to the Lords for the purpose of making them ministers. Thus, as long as Parliament is the body from which the executive is drawn, and as long as members of the executive are also Members of Parliament, there will be imperfect separation between the two bodies.

To achieve a clear distinction between the legislature (Parliament) and the executive (Government), prime ministers and their ministers should no longer be Members of Parliament. Prime ministers should be elected in their own right, a process which would reflect the increasingly presidential nature of general election contests.

Direct election would correct a manifest unfairness in current arrangements exemplified by Prime Minister David Cameron who gained office by virtue of 33,973 votes in the 2010 general election. All those votes were cast in the constituency of Witney, which boasted 78,220 electors. The rest of the nation was not allowed to vote for the man. He may have been elected as an MP, but he was not elected as prime minister. Furthermore, since he holds office on the back of 10,703,654 Conservative votes, from an electorate of 45,844,691, his franchise represents only 36 percent of the votes cast. This is less than a quarter (23 percent) of the overall electorate.

In any event, the use of the Commons as the recruitment pool for most of the ministers (and the prime minister) has a highly corrosive effect on the institution. Although the main functions of parliament should be scrutiny of the executive, and to act as a check on its power, all MPs who have ministerial or secretarial positions hold dual roles as members of the executive and the legislature. Inevitably, there is a conflict of interest.

Typically, there are around 140 ministers, whips and other office-holders in the Commons.¹¹⁴⁴ Collectively, they are known as the "payroll vote", people who may be assumed to vote with the government. They will automatically defend its policies and actions.¹¹⁴⁵ But the problem is far worse than this arithmetic would suggest. Add the Parliamentary Private Secretaries (PPS) and the "greasy pole climbers" who have hopes of preferment but have not yet been promoted, and the number climbs to 200 or so. When it comes to holding the government to account, all these people are compromised.

Even this is by no means the full extent of the problem. The fact that the Commons is the main pool for recruiting ministers - and the only prime ministerial pool - also changes the dynamics of the institution. Many people who enter parliament have no intention of remaining MPs for their entire careers. They want to join the government. Parliament is not an end in itself, but a path to ministerial office. This should not be the case, and the institution is attracting the wrong type of people.

To maintain the separation, ministers and other office holders must not be members of parliament. If members become ministers, they must resign as MPs. As a consequence, prime ministers must appoint their own ministers - from whatever source they choose - subject to parliamentary confirmation and dismissal. This has the added advantage of widening the recruitment pool.

Mention here must be made of the Monarch, who remains head of state, with roles and duties unchanged. Furthermore, the office of prime minister keeps the title. The fact that prime ministers are elected does not, *per se*, turn them into presidents.

There are then other details we need to establish. One is the period of office and the number of times an individual can stand. Arguably, the US system of four years per term and a maximum of two terms is a good model. But the detail is not important at this stage, even if it could become so later. Sufficient at the moment is the principle - that we should have elected prime ministers. They and their ministers must be separate from Parliament and held to account by it.

19.4 The people's consent

The power to make law, and especially to reject it, is a measure of sovereignty. If the people have the power to demand that specific laws be made, or if they

¹¹⁴⁴ <http://www.number10.gov.uk/the-coalition/the-government/>, accessed 30 May 2014.

¹¹⁴⁵ <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03378.pdf>

can refuse to accept new laws, this is known as direct democracy – the only true form of democracy. The most obvious and common mechanism for expressing this is the referendum, for which there are three possible applications.

The first is in the framing of new laws, where electorates propose and then vote for specific laws, the outcomes binding on the legislatures. Switzerland and California are notable examples, the latter's system involving a "ballot proposition", a public petition under the "initiative system", which can end up with a referendum on a new law.

However, laws created by popular demand are problematical. They can create inconsistencies and anomalies within the legal code, and contravene treaties. To an extent, such problems can be avoided by requiring proposals to be compatible with the constitution, as judged by a constitutional court or commission. A greater handicap, though, is that the process is prone to abuse by well-funded lobby groups and by the popular press or television. This exposes law-making to the rule of the mob, a process that can end with tyranny. Therefore, we need checks and balances.

As it stands, there is rarely a problem in getting laws made under the current system. A hue and cry is often sufficient to force the legislature into action. All too often, though, the outcome is bad or ill-conceived law. Contemporary examples include gun laws brought in after Dunblane and dangerous dog legislation initiated after children had been mauled.

To enable the public voice to be heard, we see no reason why a "take note" referendum could not play a part in raising issues, calling for legislatures to consider new laws. A formal requirement for referendums could even be included in a written constitution, although such referendums should not be binding.

The second application for referendums should address a crucial deficiency in the system: the absence of restraint on legislative incontinence. Official systems make too many laws so, rather than making it easier to produce new ones, it should be made harder. There also needs to be a mechanism to get rid of laws no longer wanted.

However, to prevent excessive use of referendums, the signatures of at least one tenth of the relevant electorate might be required before any referendum could be held. Where the referendum is to block a national law, an additional hurdle could be a time limit, requiring the signatures to be collected within one month of Royal Assent. Then, an Act might only be overturned if the majority of all *electors*, and not just of those who turned out, vote down a measure. That would identify those occasions when Parliament had truly defied the considered will of the people. Referendums would then occupy their rightful place as a barrier to tyranny when normal political safeguards fail. But, as an *in extremis* measure, they do not become an obstacle to reasoned reform or the legitimate actions of an elected parliament.

Currently, once Bills have gone through all their stages in Parliament, the Monarch gives Royal Assent and they take effect. In this context, the Monarch is nominally sovereign (even if there is no occasion when a reigning Monarch would refuse assent). The people have no say in the matter, a lack of involvement that brings in the second application for referendums. If the people are sovereign, they must be directly involved in law-making. Every law must have the consent of the people and no law should come into force without that consent. Furthermore, consent should not be a rare event. It should apply to every law.

Nevertheless, it makes sense to limit the frequency of referendums: there could hardly be one for every new law. Instead, the Statutory Instrument (SI) approval procedures could be adapted for popular approval of laws. SIs are approved by Parliament through either "positive" (sometimes called "affirmative") or "negative" resolutions.¹¹⁴⁶ The bulk is subject to negative resolution, meaning that it is "laid" before Parliament for forty sitting days and if at the end of the period there is no motion to annul (known as a prayer), the law is automatically deemed approved.

Using this procedure as the basis of expressing popular consent, there would be an opportunity for the public to lodge objections to any Act of Parliament, before Royal Assent. Once an SI had been laid, there would be a period during which objections could be lodged by the public. If a threshold level of signatures was reached within a requisite time, there would be a referendum. Otherwise, as with the SIs under current Parliamentary procedure, the law would automatically be deemed approved.

A positive resolution would be required for constitutional measures, or any law which had the effect of changing the constitution. On these rare occasions, new law would trigger a referendum and a "no" vote would stop it taking effect.

That leaves the question of what should happen to existing legislation - whether Acts of Parliament or SIs - that no longer command popular support. One possibility is the "sunset clause", where laws expire after a defined period unless renewed. But, if a law is needed, it should remain on the statute book. Allocating an arbitrary expiry date, requiring continued legislative input to keep law in force, merely adds unnecessary complications and increases workload.

As an alternative, a formal complaint could be raised against any existing law by any citizen at any time. If, within a prescribed period, this attracted a set number of signatures, a referendum would be held. A majority vote against the law would secure its removal from the statute book – although one would expect the hurdle for calling a referendum to be set quite high.

¹¹⁴⁶ <http://www.parliament.uk/documents/commons-information-office/I07.pdf>

Then, what applies to national level should, of course, apply locally. Laws made by local sovereign legislatures should have their laws subject to either positive or negative procedures, and there should be provision for removing existing laws. In all cases, referendums would be triggered by smaller numbers of signatures, possibly based on a proportion of the electorate. A figure of ten percent has been discussed.

Another important area where public involvement is crucial is the ratification of treaties. As experience with EU treaties demonstrates, international treaties can be back doors into the statute book, by-passing democratic systems. They become an indirect way of making rules which bind us, over which there is then no popular control.

Some treaties, nevertheless, are minor affairs, with little but administrative consequences. Others, such as the Lisbon Treaty, have major constitutional effects. Thus, any proposed EU treaty or treaty change which would transfer powers from the UK to the EU is now subject to a mandatory referendum via the European Union Act 2011.¹¹⁴⁷

All other treaties subject to ratification are laid before Parliament for 21 sitting days, formerly in accordance with the Ponsonby Rule, introduced in 1924, and now under the Constitutional Reform and Governance Act 2010.¹¹⁴⁸ During that period, a formal demand may be made for a debate and, in certain circumstances, a vote might be held. Absence of a motion to refuse ratification is taken as approval, making this very similar to the negative resolution procedure used for SIs.

The most logical way to secure direct democratic approval for such treaties is to adopt the same procedures used for approving new laws. Firstly, there has to be a requirement that no treaty (of any nature) can take effect until it has received popular approval. Then, those such as EU agreements which alter or add to the constitution would require positive assent, by way of a referendum, as mandated by the European Union Act.

For the rest, negative resolutions might apply. Time would be allowed to lodge a sufficient number of objections and if the requisite number was reached, a referendum would be held. If the threshold for objection is set relatively high, there should be few spurious or unnecessary calls to reject minor treaties.

For existing treaties, there should be provision for popular abrogation, although there are complications. Under international law, once a treaty is agreed and ratified, it remains in force unless there is specific provision for expiry. There is no way for the public to intervene.

¹¹⁴⁷ http://www.legislation.gov.uk/ukpga/2011/12/pdfs/ukpga_20110012_en.pdf, accessed 22 April 2015.

¹¹⁴⁸ http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_ponsonbyrule and http://www.legislation.gov.uk/ukpga/2010/25/pdfs/ukpga_20100025_en.pdf, accessed 15 July 2014.

Such a system has to change. An ancient privilege, the Crown prerogative, must not be used to bind and obligate a free people. That it is so used is evidence that we are not a free people. Agreements with the United Kingdom should only be valid if her peoples are party to them. Nor is it sufficient that Parliament alone should have the power to decide on behalf of the people. Obligations and expense must be borne by the people as a whole. It is, therefore, the people who should have the last word.

This brings us to the third and last element which would require public approval: certain types of decision made by government or official bodies - by elected and appointed officials, including ministers and judges. Clearly, there could not be a referendum for every one (or even a tiny number) of the hundreds of thousands of decisions made each day. The type of decision amenable to challenge would have to be restricted. Mainly, the "negative" resolution procedure would have to apply, where decisions are deemed to have been approved unless challenged.

With certain types of formal decisions, such as planning approvals – and even, maybe sentences handed down by judges for certain types of criminal case - one could see referendums triggered by a set number of objections, with a majority vote enabling a decision to be rejected. In effect, this would be a form of popular judicial review, turning the public as a whole into a jury of last resort.

19.5 No taxation or spending without consent

Another way of locking in local democracy is the idea of annual referendums on government budgets, national and local. This extends the principle established during the American Revolution of no taxation without representation. This rejects taxation (and spending) without specific consent. In the relationship between the British people and their governments, the people thus take control, which is achieved primarily by holding the purse strings.

At the heart of any government's power is money. That is how parliament emerged as a force in the land, going as far back as 1215 when the tenants-in-chief secured the first draft of the *Magna Carta* from King John. The concession that more than anything else reduced the power of the monarchy was the principle that kings were no longer entitled to levy or collect any taxes (except the feudal taxes to which they were hitherto accustomed), save with the consent of his royal council. He who controls the money controls the Monarch.

The principle of financial control survives to this day. In place of the Monarch, the executive must refer to parliament each year for approval of its budget. Without that, it runs out of money. Our problem – and the nub of all our problems – is that this process has become a ritual. No parliament has rejected a budget in living memory, and none is likely to do so.

The public, therefore, takes control of the budgets. Every annual budget must be submitted to the people for approval, by means of a referendum. The politicians must put their arguments, and the people must agree, before any government can levy any tax or spend any money in the relevant period. Confronted by government demands for cash, the people have the power to say no. Crucially, though, this system applies nationally as well as locally, giving voters the power to reduce central government taxation. It also enables voters to control spending.

As for costs of local referendums, in the 1999 experiment Bristol spent £120,000 on each poll.¹¹⁴⁹ Milton Keynes estimated £150,000. Tower Hamlets Council has estimated that a stand alone referendum might cost up to £250,000 but, if combined with council elections, it would cost around £70,000 extra. Costs of a principal local authority organising a referendum are thus estimated to be in the range of £85,000-£300,000.¹¹⁵⁰ Translated nationally, the total cost of local budget referendums would be between £30-60 million.

Another possibility is that the software on current lottery terminals could be adapted to allow their use for voting. A system that handles £6.5 billion in annual ticket sales could very easily handle around 40 million votes in a referendum. An additional online facility affords a quick, cheap system of conducting referendums. Such systems are not only desirable but also necessary to minimise costs and disruption. Furthermore, they lie within the realms of possibility. E-voting has been trialled in Norway, and although security issues have yet to be resolved, work continues.¹¹⁵¹

To bring down costs even more, Swiss and Californian practices could be adopted, where – if need be - voting on two or more issues is combined, perhaps to fall in the same period as the annual budget referendum. With that, there is no reason why multiple referendums should be time-consuming, disruptive or expensive.

What then concerns doubters is that, should the people fully exert their power, government might be deprived of funds altogether. But there is nothing to stop safeguards being adopted to avoid this – in the short-term, at least. There should be no problem in having a fixed date for a referendum, with the vote held well before the financial year for which each budget applied. If a budget was then rejected, there should be enough time for governments to resubmit, and again seek approval.

If a budget was again rejected, and it was too late to resubmit before the start of a financial year, there could, for example, be a system where permitted income stood at a proportion of the previous year's figure, with adjustments made once a budget was approved.

¹¹⁴⁹ http://news.bbc.co.uk/1/hi/uk_politics/1170631.stm, accessed 22 April 2015.

¹¹⁵⁰ <http://www.parliament.uk/documents/impact-assessments/IA11-010BA.pdf>, accessed 22 April 2015.

¹¹⁵¹ <http://www.bbc.co.uk/news/technology-28055678>, accessed 22 April 2015.

In the USA, however, if Congress does not eventually approve the budget, the administration can no longer pay its bills. That tends to concentrate minds. In this case, the people could stop the money, giving them a continuous power. By contrast, a one-off referendum, offered by the government for its own tactical advantage, is to concede power to the centre. Power resides with the body which decides whether there will be a referendum, and then determines the questions. When there are annual referendums as of right, power resides with the people.

Without people power, the politicians decide how much they are going to spend, and demand that the people pay their bills. Consultation is meaningless as there is no legal means of refusing to pay if the responses are ignored – as they so often are. After the event, voters are then graciously allowed to hold our elected representatives to account at elections. But can anyone really assert that the current election processes change anything, or indeed are capable of changing anything?

19.6 A constitutional convention

The idea of a codified constitution is a popular one and the Swiss constitution, which enshrines limited direct democracy, might be a starting point. However, that document, which runs to 76 pages, does not necessarily provide a model for the UK. It is a composite document that comprises only in part a constitution. Mainly, it is a Bill of Rights.¹¹⁵²

A constitution should be directed primarily at governments and state agencies. Strictly speaking, it should be limited to defining the extent of their powers and the manner in which they shall be exercised. It can be read alongside a Bill of Rights, and individual rights can be enshrined in a constitution, although separate documents might be preferable. From the outset, though, it was clearly evident that the task of codifying every part of our constitution (or even starting from scratch) was not one which The Harrogate Agenda group could or should manage.

Nevertheless, a constitution must be framed – to use the US phrasing - by "we the people". This is not something government can do. Those who frame a constitution – or who commission the task to be done - have to be the sovereign entity. And the very fact that the people lay down the rules under which governments must operate is *de facto* recognition of that sovereignty.

The constitution, by its very nature, should beget certain safeguards, such as restrictions on the ability to amend it, ensuring that it retains its original purpose. It must also have a protector, which usually comes in the form of a constitutional court. This protector would have the power to strike down any

¹¹⁵² <http://www.admin.ch/ch/e/rs/1/101.en.pdf>, accessed 22 April 2015.

law or action of government (and any other impost, for that matter) that is unconstitutional.

However, the experience of the US Supreme Court, and its tinkering with the US constitution, does not inspire confidence. Arguably, the ultimate court should be the people, who should be able to strike out any law or impost – such as a treaty – which they deem to be unconstitutional. If a law with constitutional effect is accepted by the people, it becomes part of, and thereby changes, the constitution. The same should also apply to court judgements.

As to a new, written constitution, the appropriate move might be for a reformed Parliament, one from which the executive had been excluded, to convene and then host a convention with a view to framing a consolidated document. A draft constitution might then be published, discussed, modified as necessary and ratified by referendum. As to the content of this constitution, its shape or form, it is premature to seek a determination.

19.7 Progressing the Agenda

Putting this domestic agenda into the broader context, it is germane to note that the system of direct democracy that we propose is not compatible with membership of the EU. It confronts one of the core principles of the EU, as specified in Article 10, which states that: "The functioning of the Union shall be founded on representative democracy" and that: "Citizens are directly represented at Union level in the European Parliament". Direct democracy – real democracy - and the EU cannot co-exist.

Therein lies the relevance of what we call The Harrogate Agenda. We see little value in withdrawing from the EU if it only means returning reclaimed powers to the political elites who held them previously. This just perpetuates systems which are no more democratic than the EU. Whether our government is in Whitehall or Brussels – or in anywhere else - actually makes very little practical difference if there is no democracy. What matters, therefore, is that power is transferred from the political elites to the people. It is the distribution and exercise of power that determines whether we have a democracy, not its location.

As to Parliament, its function should not be to provide a distressingly shallow gene pool from which ministers are recruited. The antidote to the contempt with which politicians are regarded is for Parliament to do its job as the protector of the people, rather than the supporter of governments and the provider of its management personnel.

The main tasks of Parliament in a post-exit UK are preparing legislation for public approval, the scrutiny of government, and then the representation of the people to government. For these things to happen, the institution has to attract the right people and be properly structured. As long as its main function is to

provide ambitious politicians with the means to enter government, it can never properly perform its core duties.

People have been led to believe that representative democracy is the only way our country can be governed. This is no longer true – if it ever was. By setting out a particular form of direct democracy, The Harrogate Agenda offers something that is rarely seen – real power. And that power is defined by the ability to make real choices, permitting people to accept or reject proposals made by our governments, their institutions and servants, at national and local levels.

20.0 Discussion and conclusions

We need to resume our seats at the top tables, and with the advent of globalisation, these are no longer in Brussels where the "little Europeans" reside. We need to break out of this claustrophobic cockpit and rejoin the world.

Richard North
Closing words of "The Norway Option"

At the very start of this exit plan, we asserted that, within the framework of Article 50 negotiations and the political environment in which they were to be conducted, there would be very little flexibility as to what solutions might be adopted in the short-term. This, we trust, has been adequately demonstrated and supported throughout the body of this book.

The particular constraints we identified were the need to secure the continuation of the Single Market and the need for a speedy conclusion to negotiations. The most practical way of achieving both priorities, we argue, is to adopt an off-the-shelf solution for managing trade relations with the EU. This we believe is preferable to the "Swiss/bilateral" or the "free-for-all" WTO options. Our chosen option, we maintain, should be accompanied by block repatriation of EU law and a mechanism for continuing third-country agreements. These three elements, we believe, are sufficient to sustain a workable exit agreement for the UK.

Nevertheless, we accept that there are disadvantages to our choice, but there are disadvantages with any choice. There is no such thing as a perfect or optimum solution. If the objective is to withdraw speedily from the European Union, then compromise is necessary. However, as we have sought to make very clear, in the short term, the advantage/disadvantage calculus is not the issue. Our choice of route is preferred because it is the only practical route. Simply, there is no other option which will enable us to meet the negotiating priorities.

20.1 The essence of the plan

This notwithstanding, we have shown that, in respect of the Norway option, the disadvantages are much overstated. They are raised, amongst others, by those who seek continued British membership of the EU. Resistance is also

encountered from those who prefer the Swiss option – or its variations - and have invested their reputations in having their personal choices accepted. Most of the naysayers then emphasise the supposed loss of influence in the Norway option. As we have shown, though, the decision-shaping opportunities and the high-level access to regional and global bodies would give Britain far greater influence than is generally acknowledged.

Even though none of the proposed exit options are optimal, therefore, any one has the advantage of easing our exit from the EU. Thus, rather than dwelling on problems – which are inherent in all systems and all solutions – we assert that the proposed settlement should be treated as what it is, a holding solution which provides a base from which to develop more acceptable, longer-term solutions. Thus, the immediate exit plan is not to seek unattainable perfection but to broker an interim plan which takes us towards our final objectives.

In this context, the phase one is part of a broader strategy, opening the way for the longer-term solutions that are the real substance of the plan. As part of the Article 50 process, though, we have suggested that negotiators set up further talks to achieve these long-term solutions. Some, of course, have longer timescales than others. High priority will be the addressing of those policy elements which have a direct bearing on immigration and asylum, which is the second phase of our plan. These might include re-orientation of trade policy, third country fishing agreements and aid policies, with a view to reducing "push" factors. The diverse "pull" factors within the control of the British government will also be addressed.

One crucial longer term aim is the replacement of the EEA Agreement or its shadow proxy with a more enduring settlement, a development of such importance that we would have no hesitation in labelling it "phase three" of our plan. This involves establishing an expanded single market area and agreements on political co-operation, freed from the dominance of Brussels. In order further to weaken the grip of the EU on standard-setting for the whole of Europe, we have proposed a different way of administering a single market, through UNECE, covering the whole of continental Europe and some adjacent states, leading to the abolition of the EEA as an adjunct to the EU.

Perforce, talks must extend well beyond the EU and encompass regional and global players, and non-state actors. To ease the way, we have suggested a twin-track approach in which short term political matters necessary to secure withdrawal are decoupled from the longer-term needs. In that context, we have identified the need to secure an economically neutral transition, and argue for pursuing the longer-term issues outside the Article 50 framework.¹¹⁵³

¹¹⁵³ There is something of a precedent for two-stage negotiations in the Anglo-Irish Treaty of 6 December 1921, in which the Irish Free State gained its independence. As part of the treaty, the Irish ceded to Britain three deep water ports on the Irish mainland, called "Treaty Ports". These were not returned until 1938 under a separate agreement with the Dublin government. This illustrates that independence can be achieved, with further negotiations on outstanding issues resumed at a later date.

The exit agreement, therefore, must include a commitment to the ongoing talks we have suggested, an option that would give negotiators more flexibility in the event of a referendum on the Article 50 settlement. Preferably, any talks should continue without a break, to keep up the momentum. The fact of ongoing talks, though, would convert "Brexit" from an event into a process, not dissimilar to the progressive nature of European integration.

To that extent, we are dealing with something new. In its analysis of British options, the think-tank *Open Europe* asserts that none of the commonly argued possibilities for leaving the EU are workable, including its version of the "Norway Option".¹¹⁵⁴ The same goes for a more recent evaluation by the Centre for European Reform.¹¹⁵⁵ What both reports have in common is that their authors do not consider interim solutions or a multi-phasic extraction process. They are effectively looking for wholly unrealistic "big bang" solutions, and most often present the single-stage withdrawal as the only way of managing our exit.

Thus, as we have sought to make clear, and now re-emphasise, although our initial exit settlement is used only as an opening gambit – in the sense of the word used in chess. This is phase one. While dealing with immigration and the refugee crisis is phase two, we advance to phase three with the idea of abolishing the EEA and co-opting UNECE to managing a genuine, continent-wide Single Market. This might also take in the expansion of EFTA, partners permitting, allowing it to blossom into an alternative trading area for those countries which lack enthusiasm for EU-style political and economic integration.

Should the EEA route not materialise because of the refusal of EFTA members to accept UK membership, we have posited the alternative of a "shadow EEA". This is a less attractive option, but one which is still workable. The result would be not dissimilar to the trade component of the Association Agreements on offer to Eastern Partnership countries.¹¹⁵⁶ If the EU is prepared to offer such a deal to countries such as Ukraine, Moldova and Georgia, then it hardly seems unreasonable to expect that the UK could, at the very least, benefit from a similar deal.

¹¹⁵⁴ *Open Europe*, Trading places: Is EU membership still the best option for UK trade? June 2012, http://www.openeurope.org.uk/Content/Documents/2012EUTrade_new.pdf, accessed 10 December 2013.

¹¹⁵⁵ Centre for Economic Reform: The economic consequences of leaving the EU, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report_smc_final_report_june2014-9013.pdf, accessed 10 June 2014.

¹¹⁵⁶ See: http://www.eeas.europa.eu/ukraine/docs/eu_ukr_ass_agenda_24jun2013.pdf, for details of the Eastern Partnership, see here: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf, both accessed 22 April 2014.,

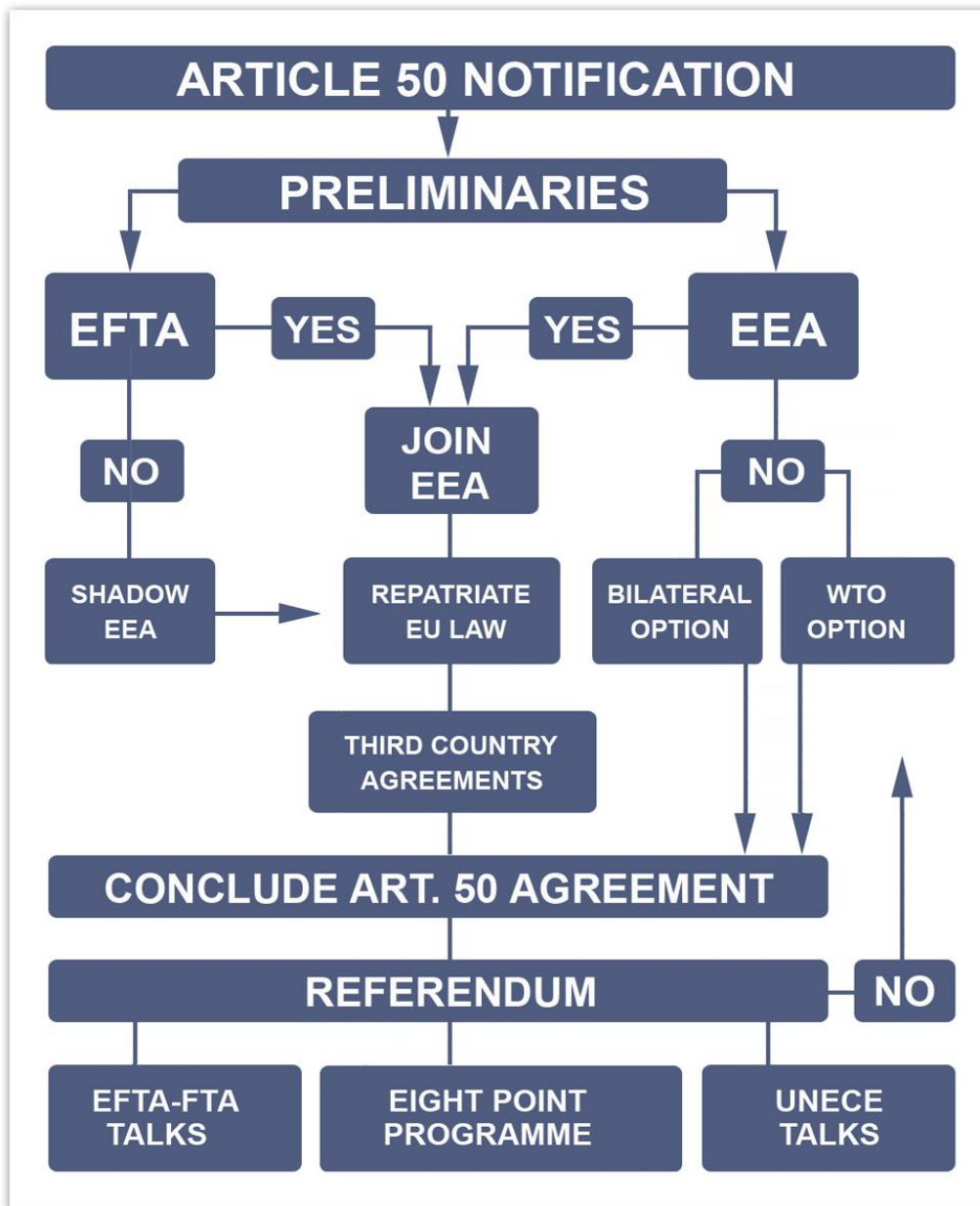


Figure 31: the "Market Solution showing trade relations: the steps are based initially on securing the "Norway Option", followed by renegotiation of the EEA Agreement

This gives a depth to our plan, in that there is a serious fall-back position. The UK is not dependent on a single, fragile option. And, from there, we have crafted a series of flexible responses and have suggested a doctrine of continuous development, involving the eight-point programme which we have discussed in detail, forming the longer-term component of the plan. In its totality, it is illustrated in Figure 31 above.

Here, we have to stress that nothing here, specifically, is entirely new, in the sense that there is nothing new under the sun. But we believe that the combination of measures in our plan is new. It comprises six-phases which

we call Flexcit, standing for flexibility and continuous development. This market solution is a process rather than an event. It is the essence of our plan.

Nevertheless, we must keep in mind that the immediate objectives of leaving are political: re-acquiring the freedom to manage our own affairs and make our own decisions. With that in mind, we have drawn attention to the "double coffin-lid" phenomenon, whereby Britain breaks through "little Europe" only to discover another layer of control. Withdrawal will expose Britain to the full benefits of globalisation, making it more visible and giving it a higher public profile. It will have to remake its arrangements and strengthen its presence on global bodies.

As to making its own decisions, the ability to transcend the narrow remit of the EU and to deal directly with global institutions is the difference between working with doctrinaire supranationality and flexible intergovernmentalism. The latter permits agreements to be accepted or rejected on their merits, unlike the "all or nothing" approach of the EU. But, where there are choices, there are consequences. Britain will make its choices on the global stage and will be able to see what follows from them. It will no longer need to hide behind the EU, blaming it for unpopular decisions which would have to be taken anyway.

20.2 The withdrawal dividend

Leaving the European Union is often seen in terms of delivering tangible dividends, with much made of saving the cost of EU regulation and membership contributions. More realistically, our analyses suggest that contributions may have to continue for some time, while expectations of cost savings from reduced regulation might be unrealised in the short-term.

Nevertheless, there will be those who will continue to expect dividends, but those that will accrue (if any) are impossible to estimate with any accuracy. It may even be that costs outweigh any immediate gains. When looking for gains from removing regulation, the distinction must be made between what is theoretically possible and that which is realistically attainable. Economist Tim Congdon, for instance, asserts that regulation and resource misallocation costs amount to 8¼ percent of GDP, or about £120bn.¹¹⁵⁷

But such costs do not necessarily equate with attainable savings. Much of the existing legislation will have to be kept in place, either because of EEA membership, domestic regulatory requirements or international obligations. Development of replacement policies then will take time, slowing down the realisation of cost savings. The amount actually clawed back will be a fraction of the headline figure.

¹¹⁵⁷ How much does the European Union cost Britain?

<http://www.timcongdon4ukip.com/docs/UKIP%20Cost%20of%20the%20EU.pdf>, 2 June 2014.

Sadly, some claims as to potential savings are over optimistic to the point of fantasy, based on wishful thinking rather than rooted in reality. This we saw in Chapter 5, when Capital Economics conjured up a gain of €326 billion to the Netherlands economy, purely on the basis of repatriating EU law. According to their way of thinking, an EU law magically costs less than half the amount to enforce once it changes its identity and becomes Dutch.¹¹⁵⁸

The reality is that reliable data on costs of regulation (and therefore savings accrued reducing it) are hard to come by. That much is evidenced by the prestigious Institute of International Finance calling upon the FSB to "commission academic work on the economic costs and benefits" of international regulation.¹¹⁵⁹ The absence of firm data suggests that analysts should avoid seeking to impose certainty where none exists. Estimates of projected savings should be treated with considerable suspicion, especially as so much regulation is increasingly of global origin, with the costs and benefits so diffuse as to be beyond the reach of analysis.¹¹⁶⁰

Nevertheless, some argue that the savings are to be had from changing the regulatory philosophy rather than abolition of specific controls. In terms of the financial services sector, for instance, there is a case to be made for more shareholder involvement rather than additional statutory regulation. There are thus calls for institutional shareholders to exercise their power to greater effect.¹¹⁶¹ There are other savings to be had from harmonisation at a global level. KPMG argues that the global insurance industry could save "up to \$25 billion annually" from harmonised regulation and consistent requirements.¹¹⁶²

Overall, with NTMs estimated to add more than 20 percent to trade costs, much of that due to the regulatory burden, cutting regulatory costs by a quarter is considered realistic.^{1163,1164} Applied to the global pharmaceutical industry, with a turnover worth close to USD\$1 trillion (2014), that could deliver annual savings in the order of \$50 billion without fundamental changes in the regulatory system.¹¹⁶⁵ Elsewhere in the healthcare industry, there is \$0.5 trillion

¹¹⁵⁸ *Op cit*, <https://www.capitaleconomics.com/data/pdf/NExit.pdf>, accessed 20 April 2014.

¹¹⁵⁹ Anon, Institute of International Finance (IIF), (June 2013), Promoting Greater International Regulatory Consistency, <http://www.iif.com/download.php?id=ck5cytlYNBw>, accessed 29 December 2013.

¹¹⁶⁰ See Appendix 3 for some further examples.

¹¹⁶¹ *Citywire*, 11 March 2010, Bootle: greater shareholder governance is more effective than regulation, <http://citywire.co.uk/money/bootle-greater-shareholder-governance-is-more-effective-than-regulation/a387219>, accessed 20 November 2013.

¹¹⁶² <http://www.icaew.com/en/technical/financial-services/financial-services-faculty/harmonised-rules-could-save-insurers-billions>, *op cit*.

¹¹⁶³ Anon, Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis, ECORYS Nederland BV, 11 December 2009, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf, accessed 27 December 2013.

¹¹⁶⁴ ECORYS, *op cit*. A 25% alignment of NTMs and regulatory convergence is assumed to be realistic.

¹¹⁶⁵ <http://www.abpi.org.uk/industry-info/knowledge-hub/global-industry/Pages/industry-market.aspx>, accessed 24 December 2013.

tied up in inventory. Common standards applied globally could reduce obsolescence and inventory redundancy, cutting the amount of cash tied up in unnecessary stock and attendant storage costs, potentially saving \$90-135 billion (USD) annually.¹¹⁶⁶

Crucially, this is little more than informed guesswork. Actual deliverables depend on many things, including political will and sector politics. Here, the example of EU-US relations is not encouraging. These trading partners have been discussing regulatory harmonisation in key traded products/sectors for over two decades, since the adoption of the Transatlantic Declaration in 1990. Their continued inability to reduce NTMs implies that many of the projected gains from TTIP may remain unrealised.^{1167,1168} Some of the claims made seem to belong in the realms of political propaganda rather than economics.

Thus, the withdrawal dividend – as we saw with repatriation of the fishing policy – is unlikely to come from "big bang" measures. In the short-term, we do not expect to see any significant cost savings. Rather, we see slow but important gains accruing from continuous development, arising from the schemes we have discussed in this book.

However, the government will only be obliged to show immediate economic gains if the reasons for withdrawal have been presented as an economic exercise. If the reasons are, as we assert, primarily political, it should suffice to show that there is no economic penalty. If unavoidable, some relatively small additional costs might even be tolerable, as the price of independence. Enhanced democracy, along the lines suggested by The Harrogate Agenda, becomes a realistic possibility.

Originally, it has been said, membership of the European Union was presented to the electorate as the panacea for our supposed ills. Instead, it has turned out to be a fundamental and probably irreversible betrayal of the primary principle of Churchill's whole life and career: that no foreign power should ever be able to tell the British people what to do.¹¹⁶⁹ Fortunately, EU membership is far from irreversible. Its end would represent a decisive rejection of supranationalism and a return to co-operation between sovereign governments. It would be a celebration of healthy nationalism and independent government.

Although trade, economics and allied matters may be vitally important, they must always be the servants of the people, never their masters. The exit plan must serve the people, not fulfil the aspirations of a narrow band of

¹¹⁶⁶ Strength in unity: The promise of global standards in healthcare. McKinsey & Company 2012.

http://www.gs1.org/docs/healthcare/McKinsey_Healthcare_Report_Strength_in_Unity.pdf, accessed 24 December 2013.

¹¹⁶⁷ http://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf, accessed 27 December 2013.

¹¹⁶⁸ Karmakar, *op cit*.

¹¹⁶⁹ Dr David Starkey, *Daily Mail*, 17 August 2012, <http://www.dailymail.co.uk/debate/article-2190031/What-colossus-teach-today-s-political-pygmyes-facing-harsh-realities.html#ixzz2nZQq71vE>, accessed 16 December 2013.

campaigners. It is far more than economics and must address the very fundamental issue of how we are governed. And, if the plan succeeds in restoring a degree of governance to the peoples of the United Kingdom, that will be the real exit dividend.

20.3 A different approach

In so far as there are savings to be made, we rely on our eight-point programme for delivery. There, we suggest different ways of doing things. Instead of setting out specific programmes, and then calculating possible savings, we would suggest adopting a targeted approach. In this, we suggest a first step of establishing a savings target. A figure, say, of \$250 billion saved annually from the global regulatory bill is not unrealistic. From there, one might select ten uncontentious sectors, where opportunities for cost-savings could be explored.

This could be far more productive than seeking to unite Europe and the United States over chlorine-washed chickens and hormones in beef as a condition of reaching an all-embracing trade deal. With an expanded EFTA as its power base, renewed and improved links with the Commonwealth, relations with the Cairns Group, and a trading partnership with the EU, plus its special relationship with the US, a "networked" Britain would be in a unique position to broker agreements on potential targets and priorities.

The essence, though, is that the UK should be looking to work with global partners, aiming for savings on a global scale from which we then benefit proportionately: the greater the savings globally, the greater the national savings. This is a dynamic which creates an incentive to work within the global system.

In dealing with that system, though, Britain will have to come to terms with its chaotic nature. Sooner or later, the intrinsic (or perceived) discontinuity between bilateralism and rule-based multilateralism will have to be resolved. Britain could lend powerful support to rationalisation, helping to shape stable institutions, while improving their visibility and accountability.

From an entirely different perspective, a chaotic system without a unified structure is not necessarily a bad thing. It prevents any one body acquiring too much power, and inhibits different bodies from joining together to create an overarching world government. Britain can adopt a *laissez faire* response to this global disorder and work with it, purely on the basis that an efficient, well-organised hierarchical system is the very last thing the world needs. And the contrast with the EU obsession with institutional structures would make a refreshing change.

That notwithstanding, we see merit in getting closer to the original Churchillian hierarchy. A loose structure of national, sub-regional, regional and global entities would allow for a logical division of responsibilities, and a more easily understandable architecture. Britain as part of EFTA, feeding into UNECE

which thence feeds into global institutions, and *vice versa*, has a certain symmetry and provides us with the answers that we need.

Perversely, therefore, the answer to the ordered, sub-regional supranationalism of the EU is the chaotic, global intergovernmentalism of a Churchillian world order. This will be bolstered by a regional organisation empowered to act in an administrative capacity only, with no pretensions of being a government, and no capability to become one.

What we are looking for, therefore, is a Europe of administrative hierarchies rather than concentric circles, thereby containing the political ambitions of the EU and dislodging Brussels from its self-assumed position as the government of Europe. The outcome is a multi-centric global system, relying on rule-based institutions tasked with managing their specific and separate sectors. Combined with enhanced local democracy, we see the beginnings of a workable system that transforms world trade, without risking damage to fragile systems of democracy.

Ironically, the very thing that would keep the UK out of the European Union, should it ever be tempted to rejoin, would be the adoption of direct democracy via The Harrogate Agenda. Observers have already noted that Switzerland's direct democracy would be weakened should the country join the European Union, because policy areas covered by EU competences would be removed from the scope of citizens' initiatives.

That prospect, however, looks highly unlikely, not only politically but also constitutionally. For Switzerland to join the EU - just like joining the European Economic Area, which was rejected by voters in 1992 – it would require the backing not only of a majority of the voters but also the cantons. In 1992, 50.3 percent of voters rejected joining the EEA (the same share that approved caps on immigration in February 2014) – but it was also rejected by 16 of the 23 cantons. Given the large number of German-speaking rural cantons in which anti-EU sentiment is concentrated, it appears quite unlikely that any attempt to join the EU would be approved, even if a majority of voters backed it.¹¹⁷⁰

Thus does domestic reform in the UK become a central part of the exit plan. It is our safeguard against a return to a system which never had democratic assent in the first place. The ultimate guarantor of democracy becomes the people, enjoying a similar system of direct democracy which has been so successful in keeping Switzerland out of the EU.

20.4 Conclusion

With that reference to direct democracy, we come to the conclusion, in which we can summarise the salient points of this "Flexcit" plan. In so doing,

¹¹⁷⁰ *European Voice*, EU membership "a threat to direct democracy", 15 May 2014, <http://www.europeanvoice.com/article/imported/eu-membership-a-threat-to-direct-democracy-/80909.aspx>, accessed 15 May 2014.

however, we must stress once again that the plan must be taken as a whole, that being greater than the sum of its parts.

As the debate on exit plans continues, what we tend to see is an emphasis on the immediate exit mechanism. What the specific advocates (and critics), who take us thus far and no further, fail to realise are two important things. Firstly, of all these options, none are ideal, and none provide a whole solution for the needs of a post-exit Britain. Secondly, the process of negotiating an exit – through the Article 50 procedure – is only the start.

Inasmuch as joining the (then) EEC by adopting the Treaty of Rome was the start of a process of economic and political integration, so the act of leaving the Community is likewise only the start of a process. It is best looked upon as a process of divergence from the EU, permitting us to re-create our own path over what will inevitably be several decades. Therefore, our exit plan does not stop with the legal process of withdrawal from the treaty organisation that is the EU. It encompasses the larger ongoing process which deals with the subsequent divergence.

That, as we remark in this book, makes "Flexcit" unique. We do not stop with advocating or supporting a single exit mechanism, as in the "Norway option", which we suggest as an opening gambit. Ours is a strategy of flexible response and continuous development. The plan deals with an ongoing process rather than a single event. It is flexible in the sense that we allow for a range of responses in order to accommodate the uncertainties with which negotiators doubtless will be presented.

Furthermore, although we advocate use of the "Norway Option" as our opening gambit, we do not rely on it. Rather, it is exactly as we frame it – an option. Should, for whatever reason, the EFTA/EEA route be closed to us, we have fallbacks, in the development of a "shadow EEA Agreement", either by adopting unilaterally the EEA *acquis* or by using another "off-the-shelf" package, such as the association agreements offered to Ukraine and other eastern European countries. And as a longstop, we have the Australian process.

Only when we are past the immediate hurdle of the formal exit from the EU, with an exit agreement signed and ratified, does the work really start. We look to a longer-term settlement, and in particular the creation of a genuine, Europe-wide single market, possibly relying on the Geneva-based UNECE rather than starting afresh and reinventing the wheel. The essence here is to break the already weakening grip of Brussels as the standards-setter for the European trading area. And in so doing, we should be able to expose international bodies to greater scrutiny and accountability.

But it is this idea of a six-phase plan, integrating disparate points, which makes the market solution what it is. We start with phase one – the process of leaving the EU. We then move on to phase two – sorting out immigration and asylum. Phase three has us launching a genuine European single market, breaking free

from the EU-centricity of Brussels and building a European village where every "house" is equal. In phase four, we address the task of rebuilding independent policies, and phase five has us reinvigorating global trade, with the adoption and implementation of an eight-point programme.

But there is then a sixth phase – the implementation of a process of domestic reform. As we have remarked earlier in the book, simply to withdraw from the EU and hand over the powers acquired by Brussels back to the parliament that gave them away in the first place is not a particularly attractive proposition.

If we are objecting to the EU on the grounds that it is an anti-democratic organisation which does not permit democratic self-government, then simply replacing the autocrats in Brussels with their Westminster and Whitehall equivalents is not enough. Withdrawal must be accompanied by serious and far-reaching domestic reforms which strengthen democracy in the UK – and by the introduction of mechanisms to prevent our representatives ever again handing power to a supranational body.

Appendix 1 - Abbreviations

AIFMD	Alternative Investment Fund Managers Directive
ASEAN	Association of Southeast Asian Nations
BCBS	Basel Committee on Banking Supervision
BEREC	Body of European Regulators of Electronic Communications
BIP	Border Inspection Post
CAP	Common Agricultural Policy
CBI	Confederation of British Industry
CER	Centre for European Reform
CETA	Comprehensive Economic and Trade Agreement
CFP	Common Fisheries Policy
CHP	Combined Heat and Power
CRO	Common Regulatory Objective
DEFRA	Department of the Environment, Food and Rural Affairs
EAC	East African Community
ECA	European Communities Act
ECJ	European Court of Justice
ECHR	European Convention of Human Rights
ECOSOC	Economic and Social Council (UN)
EDA	European Defence Agency
EEA	European Economic Area
EEAS	European External Action Service
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
ETSI	European Telecommunications Standards Institute
FAO	Food and Agriculture Organisation (UN)
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FMA	Fisheries Management Authority (proposed)
FSB	Financial Stability Board
FTA	Free Trade Area (or Agreement)
FTT	Financial Transaction Tax
FUD	Fear, Uncertainty, Doubt
FVO	Food and Veterinary Office (DG Sanco)
GAMM	Global Approach to Migration and Mobility
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised Scheme of Preferences
HACCP	Hazard Analysis and Critical Control Points
IAS	International Accounting Standards
ICANN	Internet Corporation for Assigned Names and Numbers
IEA	Institute of Economic Affairs
IFRS	International Financial Reporting Standards
ICAO	International Civil Aviation Organisation

ICES	International Commission for the Exploitation of the Sea
ICT	Information and Communications Technology
IGC	Intergovernmental Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
IOSCO	International Organisation of Securities Commissions
IPPC	International Plant Protection Convention
ISDS	Investor-State Dispute Settlement
ISO	International Organisation for Standardisation
ITRs	International Telecommunication Regulations
ITU	International Telecommunications Union
LDC	Less Developed Country
MFF	Multiannual Financial Framework
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NHS	National Health Service
NTM	Non-tariff measure
OECD	Organisation of Economic Cooperation and Development
OMC	Open Method of Coordination
OSCE	Organisation for Security and Co-operation in Europe
PSA	Partial Scope Agreement
QMV	Qualified Majority Voting
RCEP	Regional Comprehensive Economic Partnership
SEFRA	Self-financing Regulatory Agency
SMEs	Small and Medium Enterprises
SNA	[United Nations] System of National Accounts
SPS	Sanitary and PhytoSanitary measures
STOR	Short Term Operating Reserve
SVP	Swiss Peoples Party
TAC	Total Allowable Catch
TBT	Technical Barriers to Trade
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
THA	The Harrogate Agenda
TOC	Transnational organised crime
TPR	Transnational Private Regulator
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCED	UN Conference on Environment and Development
UNCTAD	UN Conference on Trade and Development
UNECE	UN Economic Commission Europe
UNEP	UN Environment Programme
VCLT	Vienna Convention on the Law of Treaties
WFD	Water Framework Directive
WLAN	Wireless Local Area Network
WTO	World Trade Organisation

Appendix 2

Globalisation of Regulation

Some further examples of the relationship between EU and international standards, illustrating the strengthening role of international standard-setting, replacing or supplementing EU initiatives.

1. Conservation of wildlife: The EU's primary control is Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora, known as the Habitats Directive. It was adopted in 1992. However, the Directive is also the means by which the European Union meets its obligations under the Convention on the Conservation of European Wildlife and Natural Habitats (The Berne Convention).

The main aim of the Habitats Directive is to promote the maintenance of biodiversity by requiring Member States to take measures to maintain or restore natural habitats and wild species listed on the Annexes to the Directive at a favourable conservation status, introducing robust protection for those habitats and species of European importance. In applying these measures Member States are required to take account of economic, social and cultural requirements, as well as regional and local characteristics.¹¹⁷¹

2. Money laundering: EU controls are currently based on Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC. However, these are currently under revision with a new proposal for a directive on the "prevention of the use of the financial system for the purpose of money laundering and terrorist financing" currently going through the ordinary decision procedure.

The new EU rules "are to a large extent based on international standards adopted by the Financial Action Task Force (FATF) and, as the Directive follows a minimum harmonisation approach, the framework is completed by rules adopted at national level".¹¹⁷²

¹¹⁷¹ <http://jncc.defra.gov.uk/page-1374>, accessed 8 February 2014.

¹¹⁷² European Commission, COM(2013) 45 final of 5 February 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0045:FIN:EN:PDF>, accessed 8 February 2014.

FATF is an intergovernmental body set up by the G7 at its summit held in Paris in 1989. It currently has 36 members, and participates with 180 countries. It is recognised as the global standard-setter for measures to combat money laundering, terrorist financing, and (most recently) the financing of proliferation.¹¹⁷³

Its purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. For its legal base, it relies, *inter alia*, on the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention).

Working in Paris with a secretariat provided by the OECD, it has produced 40 recommendations for countering money laundering and terrorist financing, augmented by a further nine, providing the framework which is in the process of being adopted by the EU.¹¹⁷⁴

3. Wildlife trade regulation: the protection of species of wild fauna and flora by regulating trade is facilitated at EU level by the EU Wildlife Trade Regulations. Currently these are Council Regulation (EC) No 338/97 (the Basic Regulation), Commission Regulation (EC) No 865/2006 (as amended by Commission Regulation (EC) No 100/2008, Commission Regulation (EU) No 791/2012 and Commission Implementing Regulation (EU) No 792/2012)) and Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97. In addition, a Suspensions Regulation is in place to suspend the introduction into the EU of particular species from certain countries.

In addition to this core legislation, a Commission Recommendation to Member States (Commission Recommendation No 2007/425/EC identifying a set of actions for the enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, commonly referred to as the "EU Enforcement Action Plan") specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations.¹¹⁷⁵

However, the Commission readily acknowledges that this legislation has been enacted to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed in 1973. It aims to ensure that international trade in specimens of wild animals and plants does not

¹¹⁷³ <http://www.fatf-gafi.org/topics/financingofproliferation/>, accessed 30 April 2015.

¹¹⁷⁴ See http://www.journal-iostudies.org/sites/journal-iostudies.org/files/JIOS201121final_5.pdf, <http://www.oecd.org/newsroom/2789371.pdf> and http://europa.eu/rapid/press-release_MEMO-12-113_en.htm?locale=en, accessed 9 February 2014.

¹¹⁷⁵ http://ec.europa.eu/environment/cites/legislation_en.htm, accessed 9 February 2014

threaten their survival. It accords varying degrees of protection to more than 30,000 species of animals and plants. CITES works by making international trade in specimens of selected species subject to certain controls. These include a licensing system that requires the authorization of the import and (re-)export of species covered by the Convention.¹¹⁷⁶

4. Control of occupational exposure to asbestos: at EU level, occupational risk of exposure to all types of asbestos is regulated by Directive 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work.¹¹⁷⁷

Coming into force in the UK as the Control of Asbestos Regulations 2012, the main cost arises from the lack of distinction between the more dangerous forms of asbestos (amphibole) and the relatively less dangerous white asbestos (chrysotile). All types are treated as a single, generic product, with no distinction as to treatment.

As a result, farmers are particularly exposed to exorbitant costs, because some 50,000 British farms have buildings containing asbestos cement made from white asbestos, which must eventually be replaced. Total cost to industry is estimated at £6 billion. However, the reason why no distinction is made between types is because, along with other types, white asbestos is classified by the World Health Organisation (WHO) as a "Class 1 carcinogen".

WHO, though, is not the organisation of record when it comes to risk assessment. This devolves to the International Agency for Research on Cancer (IARC). Based in Lyon, France, with an annual core budget of €41 million, it is the specialised cancer agency of the WHO.¹¹⁷⁸ This agency, through its "working groups", sets out the basis for policy in its Monograph 100, the full version of which runs to 526 pages.¹¹⁷⁹

It is this work which justifies the classification of all types of asbestos as a "Class 1 carcinogen" and the IARC classification stands as the most authoritative statement.

The EU law is further "informed" by the ILO, which has produced its own code of practice on asbestos, which is constantly updated, and used as a model for national (and regional) regulatory systems.¹¹⁸⁰ The ILO, in turn, is "informed" by the International Commission on Occupational Health (ICOH). Founded in

¹¹⁷⁶ http://ec.europa.eu/environment/cites/home_en.htm, accessed 9 February 2014.

¹¹⁷⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:330:0028:0036:EN:PDF>, accessed 9 February 2014.

¹¹⁷⁸ <http://www.iarc.fr/en/about/index.php>, accessed 9 February 2014.

¹¹⁷⁹ <http://monographs.iarc.fr/ENG/Monographs/vol100C/mono100C.pdf>, accessed 9 February 2014.

¹¹⁸⁰

http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/normativeinstrument/wcms_107843.pdf, accessed 9 February 2014.

1906 in Milan as the Permanent Commission on Occupational Health, it is now recognised by the United Nations as a non-governmental organisation (NGO) and has close working relationships with ILO, WHO, UNEP and ISSA.¹¹⁸¹

The policy of the ICOH is to support "a global ban on the mining, sale and use of all forms of asbestos ... to accomplish the elimination of asbestos-related diseases". There, it links back to the IARC monograph which asserts that chrysotile causes malignancies of the lung, pleura and peritoneum. Therefore, it says, amphibole-only bans are inadequate; asbestos bans need to include chrysotile (white asbestos) as well.¹¹⁸²

By such means is the loop closed, with EU law driven by a number of international bodies which, collectively, define the provisions of the current directive.

5. Pressure vessels: equipment such as pressurised storage containers, heat exchangers, steam generators, boilers, industrial piping, safety devices and pressure accessories is widely used in the process industries (oil & gas, chemical, pharmaceutical, plastics and rubber and the food and beverage industry), high temperature process industry (glass, paper and board), energy production and in the supply of utilities, heating, air conditioning and gas storage and transportation.

Such safety critical equipment could not be used without conformity with the highest level of regulatory approval, not least in order to secure insurance cover. In Europe, equipment must conform to the Pressure Equipment Directive 97/23/EC (the PED), which initially came into force on 29 November 1999. From that date until 29 May 2002, manufacturers had a choice between applying the PED or applying existing national legislation.

From 30 May 2002 the PED became obligatory throughout the EU, together with the directives related to simple pressure vessels (2009/105/EC), transportable pressure equipment (99/36/EC) and Aerosol Dispensers (75/324/EEC).

The PED arises from the European Community's Programme for the elimination of technical barriers to trade and is formulated under the "New Approach to Technical Harmonisation and Standards". Its purpose is to harmonise national laws of Member States regarding the design, manufacture, testing and conformity assessment of pressure equipment and assemblies of pressure equipment.

It therefore aims to ensure the free placing on the market and putting into service of the equipment within the EU and the EEA. Formulated under the

¹¹⁸¹ http://www.icohweb.org/site_new/ico_about.asp, accessed 9 February 2014.

¹¹⁸²

http://www.icohweb.org/site_new/multimedia/news/pdf/ICOH%20Statement%20on%20global%20asbestos%20ban.pdf, accessed 9 February 2014.

New Approach the directive provides for a flexible regulatory environment that does not impose any detailed technical solution. This approach allows European industry to develop new techniques thereby increasing international competitiveness.¹¹⁸³

When it comes to an "international code", the American Society of Mechanical Engineers (ASME) describes the "ASME Boiler and Pressure Vessel Code" as precisely that.¹¹⁸⁴ It is certainly considered to be a *de facto* international code, by virtue of it being adopted by US-owned or affiliated fabricators around the world. And it is also the basis of many companies' specifications, such as international oil companies, who base their contracts on specifications that require use of the ASME code.

The specifics of the code are such that conformity covers the basic principles of the PED, which effectively means that, short of relatively minor variations, the ASME and PED codes cover the same ground. Overlaying these codes, though are two ISO standards: ISO 16528-1 Boilers and Pressure Vessels, Part 1: Performance Requirements; and ISO 16528-2 Boilers and Pressure Vessels, Part 2: Procedures for Fulfilling the Requirements of ISO 16528-1. Conformity with these ensures basic cross-compliance with either standard.¹¹⁸⁵

To complicate matters further, conformity with the European harmonised standard EN 13445 (Unfired Pressure Vessels) is accepted as demonstrating conformity to the Essential Safety Requirements of the PED.

Differences between the US and European codes, however, are assessed in terms of offering "a technically and economically competitive design route for most types of equipment", although it was also noted that in some cases the reported cost differences for different manufactures were larger than the cost differences resulting from the application of the various codes.¹¹⁸⁶

What this amounts to is that, to all intents and purposes, the ASME code can serve as a global standard. In the absence of the PED, European (including British) manufacturers would be adopting the US code. No savings would accrue from abolition of the Directive.

¹¹⁸³ European Commission, DG Enterprise and Industry, Pressure Equipment Directive (PED): overview, <http://ec.europa.eu/enterprise/sectors/pressure-and-gas/documents/ped/>, accessed 9 February 2014.

¹¹⁸⁴ ASME Boiler and Pressure Vessel Code (BPVC) 2013, https://www.asme.org/getmedia/1adfc3df-7dab-44bf-a078-8b1c7d60bf0d/ASME_BPVC_2013-Brochure.aspx, accessed 9 February 2014.

¹¹⁸⁵ US National Board of Boiler and Pressure Vessel Inspectors, 80th General Meeting Presentation: Joe Brzuszkiewicz, 9 June 2011, <http://www.nationalboard.org/NationaBoardNews.aspx?NewsPageID=312>, accessed 9 February 2014.

¹¹⁸⁶ European Commission, Summary "Comparative Study on Pressure Equipment Standards", http://ec.europa.eu/enterprise/sectors/pressure-and-gas/files/comparative_study_summary_07_2004_en.pdf, accessed 9 January 2014.

6. Environmental impact assessments: these are procedures that ensure that the environmental implications of decisions are taken into account before the decisions are made.

They can be undertaken for individual projects, such as a dam, motorway, airport or factory, on the basis of Directive 2011/92/EU (known as "Environmental Impact Assessment" – EIA Directive) or for public plans or programmes on the basis of Directive 2001/42/EC (known as "Strategic Environmental Assessment" – SEA Directive).

The common principle of both Directives is to ensure that plans, programmes and projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. Consultation with the public is a key feature of environmental assessment procedures.¹¹⁸⁷

The recitals to the Directives themselves, however, readily attest as to their origin, as does the Commission communication setting out proposals for an amending directive. The existing legislation, says the Commission, sets minimum requirements for the environmental assessment of projects throughout the EU and aims to comply with international conventions (e.g. Espoo, Aarhus, Convention on Biological Diversity).¹¹⁸⁸

These are the Convention on Environmental Impact Assessment in a Transboundary Context, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and the Berne Convention. Reference is also made though to the Rio Declaration on Environment and Development framed during the 1992 Earth Summit, and specifically to Principles 17 and 19.

Respectively, these require environmental impact assessment, as a national instrument, to be undertaken for "proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority", and "prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect".¹¹⁸⁹

¹¹⁸⁷ European Commission, Environment, <http://ec.europa.eu/environment/eia/home.htm>, accessed 10 February 2014.

¹¹⁸⁸ European Commission, COM(2012) 628 final of 26 October 2012, on a proposal for an amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. http://ec.europa.eu/environment/eia/pdf/com_628/1_EN_ACT_part1_v7.pdf. accessed 10 February 2014.

¹¹⁸⁹ Report of the United Nations Conference on Environment and Development, Rio De Janeiro, 3-14 June 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, accessed 10 February 2014.

Thus, the provisions of the diverse Directives satisfy international obligations to which the UK is party, and which would continue to apply even if the UK left the EU.

7. Pesticide residues: a huge list of legislation produced by the European Commission testifies to the immense level of regulatory activity in defining the various pesticides used for plant protection and, to protect public health, the maximum residues permitted in various circumstances, especially in food and water.¹¹⁹⁰

Currently, via the European Food Safety Authority, the EU is undergoing a process of harmonising pesticide Maximum Residue Levels (MRLs) and has replaced the previous legislation concerning MRLs for about 250 active substances, as envisaged in Regulation (EC) No 396/2005. For the remaining compounds, which are still in use either in or outside the EU, Member States had established specific national MRLs. Temporary EU-level MRLs have been set for these substances as a first step in the harmonisation programme.¹¹⁹¹

Behind what appears to be this exclusive EU activity, however, is the Joint FAO/WHO Meeting on Pesticide Residues (JMPR). With *Codex Alimentarius*, this body has since 1963 been providing panels of scientific experts to help harmonise the key endpoints for substances in use.¹¹⁹² With little or no public acknowledgement, the European Commission is now utilising this facility, via the Codex Committee on Pesticide Residues, to produce MRLs which will enable the EU to complete its legislative harmonisation programme.¹¹⁹³

Interestingly, the programme is also being assisted by the OECD which is working on the preparation of standardised testing guidelines and which, through its Environment Directorate, and its Joint Meeting of the Chemicals Committee and the Working Party on Chemicals, Pesticides and Biotechnology, has produced detailed technical guidelines on the testing and assessment of pesticide residues.¹¹⁹⁴

These, as well as guidelines on a wider range of guidelines dealing with chemicals falling within the registration provisions of the REACH directive,

¹¹⁹⁰ European Commission, Health and Consumers, Pesticide Residues, http://ec.europa.eu/food/plant/protection/pesticides/legislation_en.htm, accessed 11 February 2014.

¹¹⁹¹ European Food Safety Authority, Pesticide MRL harmonisation programme, <http://www.efsa.europa.eu/en/mrls/mrlharmonisation.htm>, accessed 11 February 2014.

¹¹⁹² The Joint FAO/WHO Meeting on Pesticide Residues (JMPR), <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/pests/jmpr/en/>, accessed 11 February 2014.

¹¹⁹³ Scientific support for preparing an EU position in the 44th Session of the Codex Committee on Pesticide Residues (CCPR), <http://www.efsa.europa.eu/en/efsajournal/doc/2859.pdf>, accessed 11 February 2014.

¹¹⁹⁴ OECD, ENV/JM/MONO(2007)17, [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=env/jm/mono\(2007\)17&doClanguage=en](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=env/jm/mono(2007)17&doClanguage=en), accessed 11 February 2014.

have been adopted by the European Commission as the definitive analytical standards.¹¹⁹⁵

Although some national authorities (such as the US) retain their own standards for local application, the JMPR guidelines have, for the purpose of international trade, become the *de facto* global standards, and the basis of EU legislation.

¹¹⁹⁵ European Commission, Directorate General Health and Consumer Protection, SANCO/3029/99 rev.4, http://ec.europa.eu/food/plant/protection/evaluation/guidance/wrkdoc12_en.pdf, accessed 11 February 2014.

Appendix 3

Article 50 text

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention.

In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Appendix 4

EU-Swiss Relations

This is the text of the press release of the European Commission, of 10 February 2014, following the referendum of the previous day.¹¹⁹⁶

Switzerland is a very close neighbour of the EU – geographically, politically, economically and culturally. It is the EU's third largest economic partner (trade in goods and services taken together), after the US and China, ahead of Russia and Japan. In turn, the EU is by far the most important trading partner for Switzerland, accounting for 78% of its imports and 57% of its exports in goods in 2011. In commercial services and foreign direct investments, the EU's share is equally dominant. This is to the mutual benefit, and Switzerland has a policy of promoting itself as a stepping stone to the EU, thanks to the significant degree of integration it has with the EU internal market.

Furthermore, over a million EU citizens live in Switzerland and another 230,000 cross the border daily for work. About 430,000 Swiss live in the EU.

The cornerstone of EU-Swiss relations is the free trade agreement of 1972. As a consequence of the rejection of EEA membership in 1992 by the Swiss people, Switzerland and the EU agreed on a package of seven sectoral agreements signed in 1999 (known in Switzerland as "Bilaterals I"). These include: free movement of persons, technical trade barriers, public procurement, agriculture and air and land transport (road and rail). In addition, a scientific research agreement fully associated Switzerland into the EU's framework research programmes.

A further set of sectoral agreements was signed in 2004 (known as "Bilaterals II") covering, *inter alia*, Switzerland's participation in Schengen and Dublin, and agreements on taxation of savings, processed agricultural products, statistics, combating fraud, participation in the EU Media Programme, the Environment Agency, and Swiss financial contributions to economic and social cohesion in the new EU Member States. In 2010 an agreement was signed on

¹¹⁹⁶ http://europa.eu/rapid/press-release_MEMO-14-100_en.htm, accessed 12 February 2014.

Swiss participation in EU education, professional training and youth programmes¹¹⁹⁷.

Current key issues

Swiss referendum on mass immigration, 9 February 2014: Free movement of persons is a central pillar of our relations with Switzerland, and part of our overall package of ties.

The popular vote in Switzerland of 9 February 2014 in favour of an introduction of annual quantitative limits to "immigration" (this includes cross-border commuters, asylum seekers, job seekers from the EU and third countries) calls into question the EU-Swiss agreement on the free movement of persons, requesting that the Swiss Federal Council "renegotiate" this agreement with the EU. Implementing legislation for this initiative will now have to be enacted by the Federal Council within three years. The Federal Council has indicated that the first stage of the legislative process (*Vernehmlassung*, comparable to a Green Paper) is to be expected this year [2014].

Institutional and horizontal questions

The EU and Switzerland are bound by more than hundred bilateral agreements. The Council of the European Union has made the conclusion of any further agreements giving Switzerland access to the internal market – the world's largest – subject to the solution of longstanding institutional issues notably regarding better surveillance and dispute-settlement mechanisms. Negotiations on an institutional framework were scheduled to start following adoption of the mandate.

Pending negotiations currently ongoing concern the EU-Swiss electricity agreement, participation in the Horizon 2020 Framework Programme for Research and Erasmus+ (Education, Training, Youth and Sport) programme, with negotiations planned for participation in the Creative Europe (culture and audio-visual) programme.

While the EU Single Market law is clearly an evolving instrument, Switzerland considers that it has signed international agreements only as covered by the law existing at the time of signature. This leads to a reoccurring question of how to deal with post-agreement developments of the *acquis*, including interpretations by the Court of Justice of the European Union (ECJ). At the same time, insufficient surveillance and dispute settlement procedures exacerbated this issue.

The ensuing incoherence of internal market rules creates discrimination issues for investors, businesses and citizens, a structural challenge that the EU seeks to

¹¹⁹⁷ See: http://eeas.europa.eu/switzerland/index_en.htm for more details. To this day, the EU and Switzerland have concluded over 120 bilateral agreements. The highly complex relationship is managed by dozens of joint committees and subgroups.

remedy. In the Council Conclusions on relations with EFTA countries of December 2012, Member States reiterated the position already taken in 2008 and 2010 that the present system of "bilateral" agreements had "clearly reached its limits and needs to be reconsidered". The horizontal issues related to the dynamic adaptation of all agreements to the evolving acquis, the homogenous interpretation of the agreements, but equally the need for independent surveillance, judicial enforcement and dispute settlement need to be reflected in EU-Switzerland agreements.

A resolution of these horizontal issues is necessary before the EU is ready to conclude new agreements giving Switzerland access to further areas of the Single Market (e.g. on electricity). On the basis of a common non-paper of January 2013, both sides have prepared their negotiating directives for a new institutional framework that should address these issues, covering current and future agreements. The Swiss mandate was adopted in December 2013, while the EU mandate is still under discussion in Council.

Free movement of workers and right to supply services freely between the EU and Switzerland has existed since 2002, to clear mutual benefit.¹¹⁹⁸ However, the extension of the agreement to Croatia is now being questioned with yesterday's acceptance of the mass immigration initiative.

In addition, problems persist with some flanking measures that Switzerland introduced unilaterally in 2006 to protect its labour market. The EU considers a number of restrictions imposed as manifestly incompatible with existing agreements. In 2012 and 2013, Switzerland also re-introduced quota on long-term permits for nationals specifically from eight new Member States (plus 15 Member States in 2013) via the activation of the so-called "safeguard clause". This has prompted strong criticism from the EU for their discriminatory effect and incompatibility with the EU-Swiss agreement.

Further problems may arise in the implementation of the initiative to "expel criminal foreigners", adopted by referendum in 2010 for the implementation of which a draft law will be discussed by Parliament shortly.

Tax Transparency: Since 2005, there has been an EU-Swiss agreement on the taxation of savings, with a withholding tax on the savings income of EU residents for which a Swiss bank acts as paying agent. In May, the Commission was given the mandate to re-negotiate this agreement with Switzerland, with a view to broadening its scope and reflecting international developments in the field of tax transparency, including the global shift towards automatic exchange of information. These negotiations were launched in Bern on 17 January 2014,

¹¹⁹⁸ It was extended to the new Member States by protocols signed in 2004 and 2008 respectively. For the EU-15 plus Cyprus and Malta, the transition period came to an end in 2007. For Member States that acceded to the EU in 2004, the transition period ended in 2011. Switzerland has in both cases the possibility to take safeguard measures until 2014. For Bulgaria and Romania the end dates are in 2016 and 2019, respectively.

very soon after Switzerland received its own mandate to participate in these talks.

Fair tax competition and respect of state aid rules: The Commission has been in a dialogue with Switzerland to promote EU principles of tax good governance and address cases of harmful tax competition. The aim is to secure a Swiss commitment and timetable to phase out certain harmful regimes that do not comply with fair tax competition standards. Progress will be reported to Member States in June 2014.

As with other third countries, negotiations were concluded on a co-operation agreement in competition law enforcement (exchange of information), and are underway on the emission trading scheme (ETS). The EU and Switzerland recently concluded negotiations on Swiss participation in the GALILEO satellite navigation system. This agreement was signed in December 2013.

Appendix 5

The 1975 Alternative

An extract from the 1975 Labour Research Department pamphlet: "In or Out".

Supporters of our staying in the Common Market say that if we leave we shall be on our own and out in the cold, deprived of the friends we need. The truth is exactly the opposite. Only by leaving can we recover the powers that are needed for entering into equal trading relations with all countries in the world.

Freed from the restraints of the Common External Tariff, the Common Commercial Policy and the Common Agricultural Policy we shall be able to re-establish our former trading links with low-cost food suppliers and to enter into new links whenever suitable.

We shall be able to resume our former relations with the countries that used to belong to the European Free Trade Area – Sweden, Norway, Portugal, Austria and Switzerland – by entering into an agreement for an industrial free trade area with them, as indeed the EEC has done.

We should also be able to enter into an agreement with the EEC for industrial free trade, for it will be in their interest as well as ours to retain their trading links with us. We shall not be out in the cold at all; but we shall abandon our membership of a regional trading bloc and the use of its bargaining power to support its multinational companies.

These measures will stop the diversion of our trade into the Common Market caused by our membership of it, and in addition we shall be free to take positive measures to increase our trade with developing countries and socialist countries and others who have a greater need for our manufactured goods than the EEC countries who make the same sorts of goods as we do.

We shall have the power to impose selective import controls which have now become a necessity in order to overcome our huge balance of payments deficit. We shall also be able to enter into long-term trading agreements for the purchase of food or commodities on favourable terms. In short, outside the Common Market we shall be able to plan our foreign trade instead of having to leave it in the hands of blind market forces.

Released from the burden of the CAP we shall be free to buy our food wherever it is cheapest including the EEC, and shall be able to restore the deficiency payments system which is best suited to the needs of our famers,

Freed from the restraints of the Rome Treaty and its competition policy we shall be able to extend public ownership and advance towards socialism at a pace determined solely by the British people and their parliamentary democracy.

Our problems would never be overcome, of course, if we left the Common Market only to pursue the disastrous type of policy favoured by the Tory party in the years 1970-74, relying on competitive market forces combined with state support for the multinationals. Our withdrawal from the Common Market only makes sense if we use the opportunities it will give to make fundamental economic and social changes.