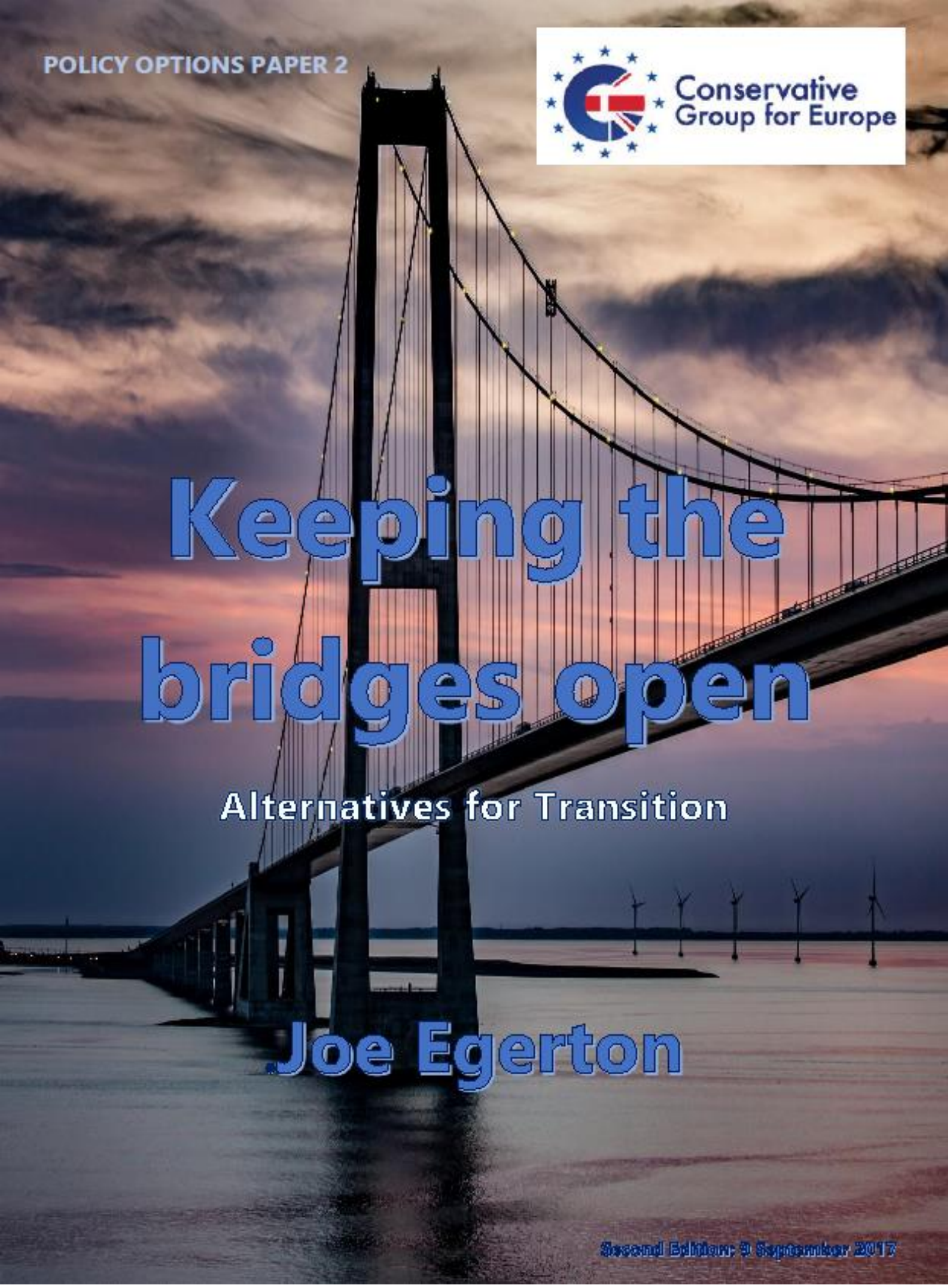
POLICY OPTIONS PAPER 2

Conservative Group for Europe



Keeping the bridges open

Alternatives for Transition

Joe Egerton

Second Edition: 9 September 2017

About the Conservative Group for Europe

We believe that:

It is in the interests of the United Kingdom, Europe and the wider world that the UK maintains the closest possible political, economic and security relationship with its friends, partners and allies in the European Union.

We aim to:

- *promote a positive relationship between Britain and the European Union;*
- *encourage knowledge and understanding of the European Union amongst Conservatives;*
- *develop ideas and proposals for Conservatives regarding their policy on the European Union and related issues;*
- *support links between Conservatives and like-minded parties across Europe and particularly within the European Parliament and other European institutions such as the Council of Europe.*

Among the ways we do this are:

- *undertaking research and studies;*
- *publishing pamphlets and other papers.*

We are an outward looking group,

- *maintaining links with like-minded political, business, not-for-profit, academic, research and cultural organisations, both at home and abroad.*

POLICY OPTION PAPERS set out the results of research and studies and form a basis for discussions with other organisations. They are published to offer Conservatives and others objective information and to present choices that they may find helpful in developing their own thinking.

POLICY OPTION PAPERS do **not** constitute a statement of position by the CGE.

The CGE has no authority to make statements on behalf of the Conservative and Unionist Party.

The ideas put forward for debate and discussion are the responsibility of the individual author or authors, and do not represent a collective view.

There is no requirement for an author to belong to or support the Conservative and Unionist Party.

After a paper is published, the CGE will usually arrange an occasion at which members can discuss the ideas put forward. The author or authors are encouraged to present and discuss their ideas as widely as they wish.

Foreword to the first edition

By the Rt Hon Dominic Grieve QC MP

Chairman of the Conservative Group for Europe

It is a great pleasure and a privilege for me to have become the Chairman of the Conservative Group for Europe.

The constitution of the CGE opens with the statement:

> *It is in the best interests of the United Kingdom, Europe and the wider world that the UK maintains the closest possible political, economic and security relationship with its friends, partners and allies in the EU*

One of the tasks that the CGE has set itself is "to develop ideas and proposals for Conservatives regarding their policy on the EU. The CGE commits to doing this "by undertaking research and publishing papers".

Under my predecessor Neil Carmichael, whose presence in Parliament is much missed, we published a post-referendum Policy Options Paper, ***Seeking the Common Good***. This looked at the broad principles that its author Edward Bickham, a former special adviser to Douglas Hurd, considered should shape the UK's approach to the negotiations for a Withdrawal Agreement. We are now publishing our second Policy Options Paper by Joe Egerton, ***Keeping the Bridges Open***. This discusses the options for Transition.

There is now near universal recognition that, whatever the eventual arrangement between the EU and the UK, unless some transitional arrangements are made the consequences threaten to be disastrous for us. In particular there is no realistic possibility of having operational customs arrangements in place to handle the current volume of trade across the Channel and the North Sea.

In his article of 27th August, Sir Keir Starmer has joined, a bit discordantly, the chorus of calls for a transitional arrangement, describing it as a "period of purgatory" that we need to go through first before leaving the EU successfully.

We can certainly agree with Sir Keir that purgatory is better than a long journey to damnation. This paper tries to take forward the debate on how we avoid a bad end.

There are three key points that we think can bring together most in our Party with those outside of it who have the public interest at heart.

> First, we must move from generalities to a formalised Transition Agreement with both our EU and EEA partners.

Second, the content of the agreement needs to be an objective assessment of what will benefit everyone - ourselves, the EU27 and the three EEA states. Each detail cannot be defined now. But we should be able to agree the approach and this paper suggests how this can be shaped.

Third, as this paper emphasises, there is urgency of getting this done. The evidence is overwhelming that each day without agreement sees key decision takers in industry and commerce make decisions that cause economic loss to our country. Companies cannot invest to take up new opportunities that a trade deal can offer until they know what they are. Individuals, on whom we depend for the operation of our economy, health service and social care services, will choose to go unless given certainty as to their immediate future after Brexit. The longer the uncertainty, the greater the risk that our EU 27 partners may see advantages to limiting transitional arrangements as it increasingly suits their aspirations to attract businesses away from our shores.

I am therefore very grateful to Joe Egerton for writing this paper so that the various options can be better evaluated. It is of course a *policy options paper* and not a policy paper itself. The CGE will itself hold meetings so it can be discussed by its members. But I hope this paper will be of interest to anyone who wants to see unnecessary damage avoided as the UK leaves the EU. If so it can help shape the consensus we need around a realistic set of policies to serve our national interest.

Dominic Grieve QC MP

29th August 2017

Definition:

In this paper, "**Transition Agreement**" means a formalised, binding Agreement between the UK and the EU (and potentially the EFTA states) that sets out "**transitional arrangements**" which are the substantive matters agreed; "**interim period**" is the phrase used by the British government, clearly signifying that transitional arrangements are not permanent but designed to avoid unnecessary costs in leaving the EU.

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CHANGES IN SECOND EDITION

This paper has been revised by:

- Incorporating comments on the EU Withdrawal Bill following first day of the second reading debate with specific reference to our chair, the Rt Hon Dominic Grieve QC MP
- Revising the discussion of the impact on the devolution settlement in light of an article on the Constitution Unit blog by Professor Tierney and statements by the Brexit Secretary – the EU Withdrawal Bill will create a situation in which a London Minister can change the law of Scotland but the Scottish Parliament can change it back by primary legislation. Presumably the Minister can then change it back to what he wanted and the Scottish Parliament reverse him again. This may seem farcical but it risks ending in tragedy by shattering the devolution settlement.
- Expanding the comments on the PRA's letter to the Chair of the Treasury Select Committee following the publication of ***Impact of Brexit on cross-border financial services contracts*** by UK Finance and AFME. There is clearly a very serious possibility that if there is no Transition Agreement then there will be serious damage to the banking sector. The new paper gives huge credibility to the PRA warning that banks may become unable to lend on the scale required to fund UK firms.
- Drawing on the latest BCC survey, showing that the economy is NOT picking up as fast as commentators have suggested it would and questioning the conventional wisdom that the devaluation will bring substantial benefits
- Incorporating comments made on (1) vulnerability of service industries – the first edition materially understated the problems that service companies will face and did not draw attention to the probability that a large number may have arrangements that allow then to start shifting staff and resources in 2018 if they do not have the certainty of a Transition Agreement and (2) the internet related industries; the first edition did not summarise a detailed economic analysis in Douglas McWilliams' ***Flat White Economy*** that showed that the recovery of the London economy post 2007 was largely due to the boom in internet related companies and it did not explain how vulnerable these are to the severe restrictions on Free Movement that the leaked Home Office paper envisages.

The overall effect of these changes is to underline:

- the necessity of a structured Transition Agreement being put in place as a priority
- amending the EU Withdrawal Bill so as to:
    - enable the UK to remain in the EEA after leaving the EU to keep the EEA Agreement open as the basis of a Transition Agreement
    - tackle the problems identified by Dominic Grieve and others over the legal structure after Brexit

THE ARGUMENT IN BRIEF

Three questions answered

Keeping the bridges open provides answers to three questions:

- What problems require transitional arrangements?
- How can a Transitional Agreement be structured to give certainty?
- How are the EU institutions (both Council and Parliament) and the individual nation states whose consent will be required to be persuaded to agree to transitional arrangements that they may regard as simply protecting the UK from the consequences of its own stupidity?

LET US DISAGREE WELL

The analyses and recommendations set out in CGE POLICY OPTION PAPERS are the responsibility of the author – in this case Joe Egerton. The CGE believes that such papers help to clarify thinking on the choices that have to be made in the Article 50 negotiations. We do not ask every reader to agree with an author's analysis – but we share with the Archbishop of Canterbury a belief that, when we do not agree, we should disagree well.

To be "agreed early" – the government's goal

Paragraph 5 of the government's Future Partnership Paper ***Future customs arrangements*** says***:***

> *…both the UK and the EU Member States would benefit from time to fully implement the new customs arrangements…it would help both sides to minimise unnecessary disruption and provide certainty for businesses and individuals if this principle were agreed early in this process.*

The really important words are "*agreed early*".

But it is not just "*the principle*" of what is called "*an interim period*" that needs to be agreed. Companies are already moving investment and staff elsewhere and cancelling or delaying investment because they do not know what the regulatory and fiscal environment will be after Brexit. Individuals with skills and experience industry, commerce, academia, the NHS and our social services need are leaving or deciding not to come because they do not know what future they have as resident aliens in the UK.

Unless there is a transition period and a great deal more thought is given to the enforceability of cross-border contracts, a particular danger to the UK's banking system. In a letter to the chair of the Treasury Committee, the PRA raised the possibility that the banks' ability to lend might be constricted. UK Finance has just published a paper jointly with AFME (**Impact of Brexit on cross-border financial services contracts**) that draws attention to the fact that, unless something is done, contractual arrangements underpinning long term financial arrangements will cease to be effective after Brexit. This implies a substantial impairment of the UK banks' balance sheets. Unless the progress on strengthening the banking system since 2007 is to be put in reverse, creating major risks for the economy and taxpayers, the banks will have to be re-capitalised or have to reduce or potentially even stop lending. Risk and compliance officers should already be considering revising the risk assessments of existing contracts and questioning future contracts. Their task will not be assisted – indeed they will, if they act conscientiously be bound to increase risk loadings – unless the EU Withdrawal Bill is amended to remove what Dominic Grieve described as odd and vague wording "that is a recipe for disaster" relating to the approach the Supreme Court is to take. As Thomas

Hobbes observed without law and enforceable law, there is no commerce because "the fruits thereof are uncertain."

There is no possibility at all of a smooth transition taking place in March 2019 to a world in which the UK is no longer part of the EEA. Even moving from the EU to the EEA in so short a time is highly problematic – over half the EU body of law, *the acquis*, would cease to apply overnight, including the EURATOM treaty and its associated international agreements.

What is a Transition Agreement? How long should it run for?

Keeping the bridges open explains why a single, fully structured, comprehensive Transition Agreement is urgently needed – encapsulating and making binding a number of transitional arrangements. It explains why it is so important for both service and manufacturing industries as well as for individuals and families that the Transition Agreement runs at least until 2022, and draws attention to the benefits of one that runs until 2024.

What are the options for achieving a Transition Agreement?

Keeping the bridges open analyses the possible ways of implementing a Transition Agreement. It sets out the formidable difficulties in achieving a bespoke agreement and argues that there are only two realistic alternatives:

1. To build on the UK's existing membership of the EEA. A number of MPs and commentators refer to "the Norwegian option". Maintaining the UK's status as a contracting party to the EEA Agreement (which requires the government to change its current position, as articulated by the Brexit Secretary in reply to the first question he answered in the Commons on 7th September 2017) would resolve some, but not all, the problems posed by Brexit. This paper explains some of the issues that this would pose and identifies important gaps (EURATOM, Open Skies) that would be created by leaving the EU and could not be filled by the EEA Agreement.

2. To use Article 50 to extend the UK's membership of the EU until a seamless transition to post-Brexit arrangements is possible.

Why should the EU agree?

Although ***Keeping the bridges open*** identifies many of the costs and benefits of the two alternatives, it does not recommend either because any Transition Agreement requires the positive support of the EU27. Instead it recommends that the government urgently publish a White Paper, obtains the endorsement of the House of Commons and launches a charm offensive to win support for a Transition Agreement from the EU27 and other interested parties. A Transition Agreement needs to be sold to the EU – and ***Keeping the bridges open*** calls for a concerted effort by civil society alongside a government charm offensive.

Keeping the bridges open contains an analysis of financial arrangements that would greatly reduce any "divorce settlement" and thus address a key EU27 demand. At present the benefits to the EU of a Transition Agreement that deals with financial issues, avoids dislocation to EU citizens and is consistent with the interests of European businesses outweigh any gains that Brexit might offer, although these are growing daily. The EU has a pragmatic reason to enter into a Transition Agreement with the UK – the arguments for this need to be made.

The EU Withdrawal Bill – an additional issue

There has been surprisingly little comment on the interaction between the **EU Withdrawal Bill** and the idea of a transitional period, despite the obvious need to amend the Bill to allow for a Transition Agreement. This is perhaps a consequence of the idea of "an interim period" being rather nebulous and a reluctance to face up to the hard choices – set out in this paper – that will have to be made.

There are, as this paper shows, some considerable problems with bringing in any "interim period" if the Bill is enacted as it stands. The business managers are, for good or ill, pressing ahead with the Second Reading and as some legislation is essential to implement withdrawal from the EU, even those MPs who already see the serious defects in the Bill are supporting it at Second Reading. The Brexit Secretary has indicated his willingness to make changes.

There is now going to be a major problem for the business managers. The government is in a minority in the Commons and the DUP is not obligated to support in Committee. Making amendments will be a tricky process. The government's position in the Lords is even worse – it could only amend with the consent of a large number of non-Conservative peers. This means that the government will have to remedy some of the serious failings – and, as the economic cost of uncertainty over Brexit arrangements will mount daily, there are good reasons for dealing with defects as soon as possible.

In addition to dealing with the legal issues identified by Dominic Grieve and others the Bill must be amended in Committee to permit a Transition Agreement to be put into effect. Unless there is an Agreement that the UK will remain in the EU after 2019 (by a European Council resolution under Article 50, passed before Third Reading) it is imperative that the Bill is amended to allow the UK to leave the EU but remain in the EEA. Otherwise the Bill will leave the Commons having closed down one of the only two viable options for a Transitional Agreement.

The Henry VIII clauses

The most contentious and objectionable parts of the Withdrawal Bill are the so called Henry VIII clauses, allowing ministers to change the law without the assent of the House of Commons. It is these that justify Dominic Grieve's comment "It is in many respects an extraordinary monstrosity of a Bill." As he and Sir Oliver Letwin pointed out, the worst defects of the Bill can be cured.

Much attention as given to the extent to which the Henry VIII powers allow the government to change the law of England and indeed the constitution. They also allow the government to change the law of Scotland, but they do not appear to prevent the Scottish Parliament from using its powers to enact primary legislation. To the pleasant surprise of those who opposed the restoration of a separate Scottish Parliament, a sustainable devolution settlement may have been reached following the vote against independence in the 2014 Scottish referendum – despite having voted to Remain, majority opinion in Scotland seems to favour maintaining a quasi-federal United Kingdom. In these circumstances Westminster's legislating to provide that a London minister can unilaterally change the law of Scotland by decree while allowing the Scottish Parliament to reverse him by legislating itself is reckless in the extreme. This is a recipe for a running battle between London and Edinburgh that could very easily shatter the devolution settlement and break up the United Kingdom.

One obvious way to avoid this is to have a long Transition Period, probably by obtaining an extension of the two-year period under Article 50, so that the changes that leaving the EU requires can be worked out while a process is agreed that allows for proper scrutiny by both Parliaments and the Welsh Assembly, and, if it is resumed, Stormont.

A very uncomfortable precedent.

On 20th April 1653 Cromwell dismissed the Rump Parliament. Having famously told the Commons "You have stayed too long for any good you have done – in the name of God, go" he went on to say "You are no parliament".

Does not the proposal that ministers may change the law without the assent of the Commons say "you are no longer a Parliament"?

The most formidable opponents of the European Communities Bill were Enoch Powell, Michael Foot and John Biffen, and their fundamental objection was that the Bill would end the sovereignty of Parliament. All three would have been appalled and horrified at a proposal that ministers should be able to change the law by decree.

Thomas Salmon's account of the dismissal of the Rump Parliament

[Cromwell] commanded the Speaker to leave the Chair, and told them they had sat long enough, unless they had done more good, crying out "You are no longer a Parliament, I say you are no Parliament". He told Sir Henry Vane he was a Jugler [sic]; Henry Martin and Sir Peter Wentworth, that they were Whoremasters; Thomas Chaloner, he was a Drunkard; and Allen the Goldsmith that he cheated the Publick: Then he bid one of his Soldiers take away that Fool's Bauble the mace and Thomas Harrison pulled the Speaker of the Chair; and in short Cromwell having turned them all out of the House, lock'd up the Doors and returned to Whitehall.

A Transition Agreement might allow the Henry VIII clauses to be dropped

The drafters of the Bill appear to believe that the Henry VIII clauses are only needed for a period of two years from the date of withdrawal. The Henry VIII clauses could surely be massively modified if not dropped if there is a Transition Agreement that allows a longer period to make legislative changes.

WHY A WHITE PAPER ON TRANSITIONAL ARRANGEMENTS IS NEEDED NOW

There is now a widespread consensus – including many Brexiteers - that transitional arrangements are unavoidable. However, while the government's official position and future partnership papers have recognised the need for "an interim period", the government has not published a detailed policy paper.

Sir Keir Starmer, the opposition spokesman, has recently obtained a good deal of press coverage with an Observer article also endorsing the need for a transitional period. Unsurprisingly Sir Keir presented his proposals as very different from the government's. They certainly are very different from what Mr Corbyn said on the Andrew Marr programme on 23 July 2017. Whether they differ significantly from the advice the Chancellor of the Exchequer is giving the Prime Minister is less certain.

On 7th September 2017, both during Brexit questions and the Second Reading Debate, Mr David Davis conveyed his acceptance of the principle of a transitional period and indeed went out of his way to acknowledge that Sir Keir Starmer's question on this subject was "a very legitimate and sensible question."

The Unveiling of an Idea

21 July	BBC reports the DEFRA Secretary Michael Gove as saying that the Cabinet is 'united' over EU Transition Deal
23 July	The International Trade Secretary, Dr Liam Fox, on the Andrew Marr programme, indicated that a period might be needed for new customs arrangements to be introduced
27 July	The Home Secretary, Amber Rudd, writing in the FT, sets out "A post-Brexit immigration system that works for all."
28 July	The Chancellor of the Exchequer, Philip Hammond, on the Today Programme says "there must be business as usual, life as normal" for Britons as the UK leaves the EU.
13 August	The Sunday Telegraph carries a joint article by Mr Hammond and Dr Fox recognising the need for interim arrangements for a period after the UK has left the EU
15 August	Government publishes a future partnership paper on Customs and includes a proposal for "an interim period"
16 August	Government publishes "a position paper" on Northern Ireland and Ireland that emphasises the importance of the "interim period" revealed in the Customs paper.
27 August	Sir Keir Starmer writing in The Observer states that Labour's policy is to remain in the Customs Union and in the Single Market for a limited period while the UK leaves the EU
29 August	The Times reports that Mr Hammond has advised the Prime Minister that firms "will begin to implement contingency plans for a hard Brexit" at the year end.

While there is agreement in principle, there is no authoritative statement as to what a Transitional Agreement entails in detail or how it is to be achieved. Mr Davis has explained that there is a problem over fitting discussions on a transitional agreement into the present negotiations.

The cerebral Brexiteer Mr Peter Lilley reluctantly accepts that a short transitional period might be needed to bring new systems into operation. He hit the nail on the head when he observed in article published by the Daily Telegraph on 2 August 2017:

> *Ask its proponents what "transition" is supposed to achieve and each gives a radically different answer – if any.*

Mr Lilley's article concluded with a characteristically effective punchline:

> *Remainers rely on a "transitional" deal like drunks lean on a lamppost – more for support than illumination. It is time they spelt out what problem it would solve, how and why the EU would agree to it.*

Keeping the Bridges Open spells out what the problems are that a Transition Agreement will solve, identifies the two alternatives for achieving one - building on the UK's membership of the EEA and

using Article 50 to extend the two-year period before the treaties cease to apply - and concludes with proposals to gain support for them from the EU27. The thrust of ***Keeping the bridges open*** is that we need to move forward from loose discussion of what arrangements might be desirable to a definitive Transition Agreement between the UK and the EU27, and we need to do so rapidly.

The next step should be for the government to publish and the House of Commons to endorse a paper that sets out definitive proposals and supports them with a full analysis – the function of a traditional White Paper. Until that is done, there can be no realistic prospect of obtaining the necessary support of the EU27, Norway and Switzerland to what almost everyone in the UK now accepts in principle is essential.

However, although a White Paper is essential, some issues of principle need to be addressed urgently. The House of Commons is to debate the EU Withdrawal Bill on 7th and 11th September and it is at present envisaged that the House will vote on whether to give it a Second Reading at the end of that debate.

The EU Withdrawal Bill versus transitional arrangements

As it stands, the Withdrawal Bill will make agreeing transitional arrangements with the EU an even more difficult task than it is already:

- There are no provisions for keeping UK and EU law in line during a transitional period if the UK leaves the EU before that period begins
- It terminates the UK's membership of the EEA simultaneously with the UK's membership of the EU, thus eliminating one of only two viable frameworks for transitional arrangements
- The Henry VIII clauses will remain operational for two years after the Withdrawal Agreement comes into effect, so transitional arrangements that extend the UK's membership of the EU will extend these dictatorial powers beyond the last date for the next general election.

There is a case for postponing Second Reading until after the House of Commons has approved a White Paper on a Transition Agreement. If the government had a large majority in both Houses, then it might be able to amend the Withdrawal Bill to remedy its defects. The government is in a minority in both Houses. Unless there is cross party agreement on managing Brexit – for instance by establishing a Commission along the lines proposed by the Archbishop of Canterbury - the opposition parties are likely to seize the opportunities created by a Withdrawal Bill that is not fit for purpose to bring the government down. Amendments – even if entirely consistent with Sir Keir Starmer's Observer article – may provide opportunities for Parliamentary mayhem.

If the Second Reading debate does start on 7th September, the minister who opens it must give a clear account of how the government envisages a Transition Agreement being brought into effect before the UK and indeed the rest of Europe suffers from any further delay.

PROBLEMS A TRANSITIONAL ARRANGEMENT SHOULD SOLVE

These can be identified under four broad headings:

1. Legal certainty
2. Systems and physical infrastructure
3. Maintaining investment
4. EURATOM and other international agreements

Legal certainty

There will be a large number of arrangements between businesses and individuals that will continue to operate after Brexit. It is essential that there is legal certainty that the contracts which underpin these arrangements continue to operate, that mechanisms for resolving disputes remain effective and that when necessary judgments and decisions by arbitrators can be enforced. The Lord Chief Justice has strongly emphasised the need for these issues to be resolved before Brexit takes place.

The outgoing President of the Supreme Court, Lord Neuberger, has raised the issue of how decisions of the European Court of Justice are to be regarded by British judges after Brexit. He has emphasised the need for clarity and warned that if Parliament does not legislate clearly and unambiguously judges will still have to make decisions and may face politically motivated criticism.

The British and EU negotiating positions on the rights of EU citizens are currently irreconcilable – the EU is demanding that the ECJ has a role that the UK is refusing. Given the UK's dualist stance on the effect of international agreements (discussed in greater detail later) the EU negotiators have a point; an international agreement (such as the clauses in the Withdrawal Agreement dealing with rights of EU citizens) will have no direct effect on UK law but depend on the willingness of Parliament to legislate to give them effect. So if this or a future Parliament legislated against the letter or spirit of the Withdrawal Agreement a situation could arise in which the EU had no means of protecting the rights of EU citizens. One possible solution would be the use of the EFTA Court – but it may be necessary for there to be some transitional arrangements agreed for any court to be able to make binding decisions to avoid the danger of political criticism of judges identified by Lord Neuberger.

Concerns about the banking sector

The PRA is on record as expressing concern about the possibility that Brexit may harm the banks' ability to lend.

One potential problem is the lack of legal certainty for existing contracts, affecting a wide range of financial products. UK Finance and AFME published a paper ***Impact of Brexit on cross-border financial services contracts*** on 8th September 2017 which goes into some detail about the need for contractual arrangements to remain enforceable after Brexit. One of the mechanisms identified is a Transition Agreement, although there also need to be long term arrangements. Quite clearly some of the issues identified by Dominic Grieve and others on the first day of the Second Reading of the EU Withdrawal Bill are highly relevant, but the Westminster Parliament has no power to amend the law of the EU or any of EU27 member states or of the three EEA states (Norway, Lichtenstein and Iceland) to fully resolve the problems caused by Brexit. Time is clearly necessary.

This is really serious for all UK businesses that rely on the banking system for finance. If the problems are not resolved, the assets of UK banks (their loan book) will be impaired. That would cause them

to reduce – even stop – lending and potentially to wind in existing loans and cancel undrawn facilities unless one of two things were done. One option would be to increase the capitalisation of the banks – which is expensive and likely to increase costs for industrial and commercial borrowers. The other is to relax rules specifying the amount of capital banks should hold. That has two disadvantages. First it increases the risk in the system and the risk of tax payers having to bail out the banks again. Second by making UK banks less credit worthy it is likely to increase their cost of capital and have adverse effects on their ability to borrow from other banks. We do not need a crystal ball – we can read the book – to know why all of this is very bad news.

Systems and physical infrastructure

Dr Fox was obviously right in his Andrew Marr interview to recognise the need for administrative and IT systems to be in place whatever the trading, customs and other arrangements are. All our existing trade and border systems are designed around the assumption that the four freedoms of EU membership will continue. If the Treaties were to cease to apply in March 2019 many systems would be incapable of coping with WTO requirements. Any bespoke arrangements will also give rise to the need for systems and verification processes.

This is not just a matter of updating IT systems (complex and costly though that is) but of adding infrastructure and physical resources. This may require complete new facilities – for example, the cliffs behind the Port of Dover limit the space for lorries and indeed other vehicles. The Irish land border presents a different but equally intractable physical challenge – it is 400 miles long with countless open crossing places.

One thing can be ruled out – going back to paper forms, unless of course we are also willing to reduce the number of vehicles carrying goods to 1970 levels. The main thrust of current thinking is to rely on IT, including number plate recognition software, remote scanning, etc. There are examples of successful applications of scanning linked to data bases and payment systems – for instance, scanning has eliminated the toll booths on the Dartford crossing. But the scanners only collect vehicle registration numbers – they do not collect information on who is driving, how many passengers are in cars or what lorries contain.

Creating new systems – IT as well as physical – is not going to be easy or quick. At present we have no idea what will actually be required. We will not know until we have reached agreements with the EU 27 over a number of areas. It will only then be possible to specify system requirements. Moving from specification to delivery is only easy when there is an existing, proven system that delivers what is required already operating somewhere else. Otherwise rushing to design and implement a system is a recipe for expensive failure. New systems need to be prototyped and revised. Operators need to be trained. Equipment needs to be sourced. All of this takes time and big systems are notoriously costly and prone to failure. The UK Government's track record of managing the introduction of complex new IT systems in a hurry does not inspire confidence and, as Private Eye has rather gleefully observed, the National Audit Office has doubts as to whether HMRC's new customs system (designed only to meet the limited needs under EU membership) will be fully functional by 2019.

We cannot risk an exit from the EU before we have put in place and tested systems to allow trade to continue to flow. We know what happens when Calais is closed by a strike – Operation Stack. The M20 becomes a lorry park. If the systems designed to allow physical trade with the continent delay transit then we will have Operation Superstack, with lorries heading for Dover and the Channel Tunnel parked on the M2 as well as the M20 and lorries heading for Felixstowe parked on the A14. Assembly

plants, functioning on the basis of 'just in time' arrival of components, will be brought to a halt as those components fail to arrive on time. Transport costs will escalate as drivers are forced to break journeys to rest. Food will perish. Pollution will mount.

Dr Fox is almost certainly mistaken in implying – as he seemed to do on the Andrew Marr show - that that transition from existing systems to the new and more complex systems a bespoke agreement or WTO rules will require can be completed in a few months from finalising the Withdrawal Agreement. It was also surprising that Mr Lilley wrote in his Telegraph article:

> *Whether the EU will apply the same or different rules to us may not be known until late in the day. HMRC should prepare to operate whatever rules emerge and encourage companies trading with the EU to familiarise themselves with these procedures*.

In the early 1980s, as research secretary of the then very respectable Bow Group, I was exceptionally fortunate that Peter Lilley, a former chairman, was willing to advise on papers submitted for publication. Nobody read with greater care or took more trouble to comment. One of these papers – that Peter Lilley powerfully supported – was "The Big Steal". It was a trenchant attack on plans of the precursor of HMRC, the Inland Revenue, to throw millions at big IT companies without putting proper processes and controls in place to avoid the taxpayer being taken for a ride. I am astonished and appalled that my old friend should aid and abet another round of IT profligacy.

It would be altogether better for everyone involved (including the EU 27) if the new relationship is defined and transitional arrangements put in place that allow the time needed to get IT systems working – preferably without providing a massive surge in income to IT suppliers and consultants.

Maintaining investment

The director general of the CBI, Carolyn Fairbairn, has called for a long transitional period. She is undoubtedly right. Mark Carney, the Governor of the Bank of England, has observed that companies are investing significantly less than the generally benign financial conditions would suggest. The overall picture is of an economy where people are not choosing to invest.

This picture is reinforced by the latest BCC (British Chamber of Commerce) survey. The BCC does not detect evidence that the economy is significantly benefitting from a theoretical effect of a devaluation – firms (and individuals) switching to UK suppliers. I am not surprised. When I was Economics Director of the BCC the pound appreciated owing to the impact of North Sea oil and Sir Geoffrey Howe's monetary policy. There was a big shake out of employment and as Kenneth Clarke has recorded in his memoirs a lot of industrial companies abandoned activities that depended on use of old equipment. There a lot of complaints but interestingly very few firms cited competition from imports. There is a simple reason for this. Changing suppliers is not a cost-free exercise. It can be very expensive and as invoices from old suppliers have to be paid while new suppliers may well want some money upfront the impact on cashflow can be negative. It is particularly difficult to change suppliers of equipment that requires servicing. Short term exchange rate movements may well make supply of commodities more or less attractive and a devaluation allows manufacturers to increase margins by holding prices constant. But investment is the key to long term growth and the BCC is clear that uncertainties around Brexit is causing decisions to be put off and projects to be cancelled.

BMW's decisions on the electric Mini illustrate how top level management of transnational companies with significant investment and employment in the UK but based outside the UK are responding to the uncertainties around Brexit.

BMW is going to assemble the electric Mini in the UK where it currently assembles petrol Minis. It has substantial investment in its assembly process at Cowley, a skilled workforce, a proven system for bringing in components (including from UK suppliers) that will be used in both electric and petrol Minis and a proven system for distributing the finished car. However BMW is now going to transport electric motors, batteries and related transmission equipment to Cowley so that the electric Mini can be assembled alongside the petrol Mini.

If BMW had announced an intention to build the motors for the electric Minis here or to build a battery factory that would be serious new investment in the UK. BMW has not. It is simply using human and physical investment that it has already made. To have done anything else would make little commercial sense. The long term options for re-location remain unaffected – when fundamental re-design of the Mini takes place (for instance when Minis become driverless) BMW's options will be open. If BMW does not like the post-Brexit environment in the UK it will use its money to build new production lines elsewhere. The fact that BMW is building motors and batteries elsewhere suggests a deliberate plan at best to keep its options open and at worst to withdraw from the UK when it replaces the Mini with a completely new model.

The reality is that manufacturing companies do not suddenly stop or re-locate production when the top management decides to withdraw from a location. They continue production until the models produced become obsolete or the equipment used to manufacture or assemble becomes uneconomic. Once equipment is installed its resale value usually becomes negligible – although its economic value (the discounted value added its use generates) will be large. The equipment is a sunk cost. Unless it can be easily and cheaply moved the company will go on producing in the location in which it is installed as long as it can do so profitably. Requirements to pay redundancy reinforces the case for staying in a location but cutting costs by stopping research and limiting training and recruitment as far as possible. Wages may well be lower – a company that plans to close a plant in a few years has no need to maintain morale by fully rewarding effort and skills. Relocation also takes time – a factory may have to be built and certainly will need to be equipped. A workforce will have to be recruited and trained. New logistics arrangements are needed.

Most of the time companies do not relocate. They replace equipment as it wears out or as a new machine or IT system offers higher profitability. These investment decisions are taken on an expectation that the investment will last a certain period and its economic value is calculated on that basis. Suppose a company decides to invest £1M. In all probability the day after the equipment is installed its resale value will be under £100,000 – and will remain at a low figure throughout its life. But over a four-year period it is expected to generate £2M cash for the company. The economic value of the investment on the day it comes on stream will be less than £2M – how much less will depend on when the cash is generated and the discount rate applied, which should reflect a view on risks.

The problem that Brexit has created is uncertainty at the point of decision, whether that be a decision to replace (or modernise) existing facilities or invest for new production. There is uncertainty over trade with the rest of the EU – not just because there might be WTO tariffs from March 2019 but because regulations could change. This is a very major consideration with pharmaceuticals but it

applies to many other sectors as well – for example plastics sold as components. There is also the possibility of delays, new and complex certification requirements, and many other factors. Of course there were uncertainties before the referendum – for example over exchange and interest rates, energy prices, and so on; Brexit has not created uncertainty, but it has added to it.

Because Brexit was largely undefined (and still is) there are rather a lot of uncertainties. A company considering our £1M investment is likely to assess its value by using a number of scenarios. Some are relatively easy to identify – one might assume zero tariffs with the EU and WTO tariffs. Others are much harder – how exposed is the investment to Operation Superstack for instance? For some investments that is manageable – the risk may be eliminated by holding stocks of components at a cost that can be factored in. For others – for instance food processing – the risk may be that processing will have to stop or production thrown away and a number of scenarios will be generated based on how often that happens. Immigration controls may create even greater uncertainties. Will a Belgian lorry driver have to hand over to a British driver at Dover? A British driver to a German at Calais? Will service engineers be able to travel freely? Is it possible to offer a career path to, say, an Italian who knows all about outlets in Milan but wants to progress to a senior position in marketing?

Such uncertainties may mean that investment in the UK is simply not considered. We should remember that a very large number of companies are now foreign owned, with decisions being in distant cities by people who fly in and out of London but have no roots here. It is not that they are "citizens of nowhere" – their home is elsewhere. Such individuals must be tempted throw their hands up and say "why bother?" Even firms located here with directors who were born here and live here are facing fundamental uncertainties as is shown by research conducted by a team working with Christchurch University at Canterbury examining the state of preparedness of companies in Kent.

The Prudential Regulation Authority (PRA) has required firms it authorises (the more significant financial firms in the UK) to tell it what they are doing to prepare for Brexit. These firms that are critical for the functioning of the entire economy. In the letter to the chair of the Treasury Select Committee in which the PRA identified as an area of concern the ability of banks to continue to lend given the risks being created by Brexit, the PRA has also confirmed cross-sectoral risks the PRA had previously identified, specifically issues relating to the continued servicing and performance of existing contracts and restrictions on data transfers and the link to corporate planning processes:

> *It is clear that these are significant issues for many firms, and that planning assumptions (in particular, whether these issues are expected to be resolved by the authorities or by individual firms) vary considerably.*

The variation in planning assumptions demonstrates the depth of the uncertainty created by Brexit.

Transitional arrangements that really did deliver a situation in which nothing changes for a company for a considerable time – say three years - after March 2019 could be very valuable. Directors will look at the period in which it expects to operate the investment and may well say "We know there will be no tariffs, no divergence of regulation and all our people can move freely across EU borders for three years. We will have some tariff issues in year four that we can live with. Yes, we may have regulatory divergence and problems over staff at some point, but we will look at that when we have to decide on a replacement for the equipment we are putting in now." The longer the transitional arrangements are in place the more willing companies will be to make investments that have to operate for several years to yield value.

The service sector

Although the service sector does not invest in the same capital equipment that manufacturing and pharmaceuticals need, service companies make similar decisions.

The UK service sector is a strong exporter. However it is frequently unable to export a service in the way in which a manufacturer exports a product. This is because the Single Market in services is not complete in the way it is in goods. A service company will often have to either invest in an establishment in each member state where it seeks to operate or enter into an arrangement with a company that is already established. There is a considerable degree of mutual recognition of qualifications, but there are still practicing or contract requirements.

This makes the service sector highly dependent on the ability of individuals to work in the individual member states. Later in this paper, I describe the EEA Agreement in some detail and show that the provisions for free movement of goods are dealt with in one part of the Agreement, free movement of services and of workers in another. This is no accident. The drafting of the Agreement reflects the actualité I have just explained.

The implication of this is that a Transition Agreement (or indeed a final agreement) that limits free movement of workers will not in practice permit free movement of services. The service sector generally is highly vulnerable to any restriction on free movement of people.

This is especially true of the internet based sector. This is a very important sector of the London economy and increasingly important to other cities. It is a sector in which the UK has a strong competitive advantage. I have called it the internet based sector because it is actually rather hard to define – a very large number of activities are carried out in this sector. Unlike the legal, accounting and other professions, however, there are no organisations equivalent to the Law Society, the Bar Council, the Institute of Chartered Accountants and other bodies who grant their members a status that can easily be ascertained. As a result those who work in the internet related sector are significantly more at risk if barriers against movement of people are erected.

As long as the UK remains in the EU or Part III of the EEA Agreement applies (see later discussion) the UK will continue to export these services without too much difficulty. Withdraw from both and there will be very serious problems. The service sector is very much at risk – and the sector that is the most dynamic is most at risk – unless there is a long Transition Agreement.

Impact on the City

There is already worrying evidence that the Brexit vote has hit employment in the City. Morgan McKinley Financial Services has estimated that despite modest improvement after the election, the year to June 2017 saw a 23% year-on-year decrease in jobs available and a 49% year-on-year decrease in professionals seeking jobs. Earlier this year, Hakan Enver, the operations director, warned:

> *Brexit has pushed institutions into two camps. On one side we've got the 'business as usual' team, and on the other we have the institutions that are tired of the government's humming and hawing and have already begun to move jobs to other EU countries. It's the latter group that's contributed to the quarter drop in jobs available.*

Unlike an assembly plant, human beings can decide to up sticks and move. Most have notice periods of one or three months. The fall in the number of professionals seeking jobs, Enver has suggested, is attributable both to the number of EU nationals seeking to relocate but also a wider disillusion among Millennials. Millennials are aging into experienced or mid-level positions, making them a central focus of hiring across the financial services sector. Despite being among the most impacted by Brexit, Enver records that they complain that they were largely ignored by Conservative candidates in the election:

> *Millennials are integral to the future of the British workforce. We've already alienated countless EU nationals, we can't well afford to alienate a generation of creative and ambitious Britons, too.*

The loss of high earning (and high tax paying) EU professionals has also been identified by an Open University survey of 400 British based firms. 90% reported difficulty recruiting skilled staff since Brexit. The survey further found that the skills gap costs British businesses £2bn a year, a hefty price tag in an already uncertain economy:

> *It is now time for action to be taken to prevent a further brain drain of talent out of London. This situation will get worse, more and more candidates are relocating back to their home nations or alternatively making it clear to their employers that once an opportunity arises to relocate, they would like to be considered.*

Investment includes investment in human capital. This applies to the service sector as much, perhaps more, than manufacturing. Accounting firms provide an example – although the graduate entry is employed it is also trained (or formed). Another example is health care – the NHS is suffering from under investment in the training and formation of doctors and nurses. But it also applies to manufacturing. Manufacturers like BMW have invested huge sums in developing the skills of their Cowley workforce. Any big organisation thinking about its long term future in the UK will necessarily have to think about recruitment, development and retention. We are talking again about long term commitments. The debate over the rights of EU citizens and free movement is as important as the debate over tariff and non-tariff barriers.

The Treasury and the Bank of England have considerable resources to draw data together and provide as reliable a picture of what is happening in the real economy as most other commentators. It is unsurprising that The Times of 29th August has reported that the Chancellor of the Exchequer is warning the Prime Minister that companies will start to implement contingency plans for a hard Brexit if they are not given reassurance in the next few months. Indeed Mr Hammond would be unfit for his great office if he were not to tell the Prime Minister this uncomfortable fact.

We should reject the suggestion that transitional arrangements will prolong uncertainty. Once clear destinations have been defined in agreements with the EU and with other states – once, for instance, trade agreements are in place between the UK and EU and the UK and USA – there should be a degree of certainty on which companies can rely. At present, the only certainty is that leaving the EU will terminate the UK's participation in numerous agreements between the EU and third party states on which companies currently rely. Surprisingly little attention has been paid to the fact that new arrangements will even be needed with Norway and Switzerland.

Transitional arrangements in these circumstances provide time for implementation and adjustment. This time may allow companies to obtain a return on existing investments. Once the content of a

new agreement is known – for instance an agreement between India and the UK – then firms can start the process of investing to take advantage of new opportunities. This can too take time.

A new trade agreement with another country will not produce a sudden flood of orders. Companies will need to build up distribution networks and need to market – which takes time. In particular, we should not be misled by the rapid penetration of the UK car market by European imports in the 1970s following the entry into the Common Market. The removal of tariffs undoubtedly played a part, but so did the gross incompetence of British Leyland, the nationalised near monopoly UK producer. Not content with progressively abandoning the Triumph and Rover 2000 ranges, the only British executive cars that offered an alternative to BMWs, the quality and range of the smaller family cars was inferior to those offered by Volkswagen, Renault and Peugeot. Then BL decided to "rationalise" its distribution network. Garages that were dropped by BL were offered contracts by continental manufacturers and grabbed them. To cap it all, BL was incapable of meeting demand for the one winner in its range, the XJ6. It was the complete uselessness of BL, not the free tare deal represented by membership of the Common Market, that allowed continental manufacturers to grow UK market share. We cannot expect the same favourable conditions in any country with which a free trade deal is struck.

Transitional arrangements that gave individuals and companies confidence that nothing much will change as a result of the UK leaving the EU should do something to limit the decline in investment in both physical and human capital that is currently taking place, and reduce the outflow of skilled EU citizens. The further ahead individuals and companies can plan the less the damage done by Brexit.

EURATOM

The government has published a position paper, ***Nuclear materials and safeguards issues*** ("The Nuclear Paper") which explains that when the UK gave Notice of its intention to leave the EU in March 2017, it also gave Notice of its intention to leave EURATOM. The institutional structure of EURATOM is complex – it was established under a separate agreement from the EEC and parts of the Treaty establishing EURATOM are still effective. However that Treaty has been amended so that the governing institutions of EURATOM are those of the EU – the Commission, the Council, the European Parliament and the ECJ. The phrase "European Parliament" appears 46 times in the EURATOM Treaty ("national parliament(s)" appears 17 times), "Commission" appears 261 times, "Council" 133 times and "European Court" 133 times. The provision for leaving EURATOM is Article 50 of the TEU.

International transfer of nuclear material, technology and know-how is for obvious reasons strictly controlled. The key concept the Nuclear Cooperation Agreement ("NCA"). These are made between states which have incorporated into their domestic legislation a prohibition of nuclear trade with entities in other states with which there is no NCA. One of the functions of EURATOM is to act as an "umbrella" organisation for its member states – so instead of each member having separate agreements with, for instance, the USA, an NCA between the USA and EURATOM allows nuclear trade between the USA and all EURATOM's members.

Achieving new NCAs – the Nuclear Paper identifies a number that will be needed - is a complex and time consuming task. The UK will have to put in place new regulatory structure. Then this will have to be approved by International Atomic Energy Authority. Only after inspections are completed and arrangements approved can the UK negotiate an NCA with another state. Apart from the prodigious cost and diversion of resources that this will involve, there is a real timing problem.

Turning off the lights

The UK currently imports fuel from the USA and relies on nuclear technology and know how to operate its existing nuclear stations. If the UK leaves EURATOM an NCA with the USA will have to be put in place, as is recognised in the Nuclear Paper, but there is no discussion of any problems that might be encountered in achieving an NCA. A proper and transparent planning process for leaving EURATOM should have provided a narrative dealing with the issues this would give rise to, the possible risks and in particular an assessment of the possibility of denial of fuel (fissile material) or components for the UK's existing reactors, currently producing around one sixth of the UK's electricity. Such an assessment should have included an analysis of potential loss of output and plans to deal with it. The Nuclear Paper seems to take for granted that the UK will obtain NCAs before the UK leaves EURATOM, presumably on the day it leaves the EU.

The worst case scenario of a loss of capacity would be a widespread failure of the grid. This may be a highly improbable outcome. The problem is that there is no detailed, objective assessment to tell us what the risks are. Such an assessment needs to be made quickly. It needs to be subjected to proper scrutiny. If there are significant risks to generating capacity from leaving EURATOM then these may be mitigated by transitional arrangements. The Nuclear Paper is inadequate and the sooner the government is required to explain itself more fully before a Select Committee the better.

Nuclear medicine

In England, around half a million scans for diagnosis are performed every year using imported radioisotopes and more than 10,000 patients across the UK receive cancer treatments using these materials. The isotopes have short half-lives so cannot be stored. The UK is currently able to import these from research reactors in Netherlands, Poland, Belgium, France, Germany and the Czech Republic. Widespread concern has been expressed – including by the Royal College of Radiologists – over continued access if the UK leaves EURATOM.

There are two areas of uncertainty which are not completely resolved by the Nuclear paper.

First, it is not completely certain that the UK would be able to obtain radioactive isotopes needed to treat cancers, cardiovascular and brain disorders until an NCA was agreed with EURATOM. The government does not accept that this is a problem. In response to a Parliamentary Question on the issue in June 2017, the Minister for Universities, Science, Research and Innovation, Joseph Johnson, said: "Medical radioisotopes are not special fissile nuclear material, and are not subject to international nuclear safeguards. Therefore, their availability should not be impacted by the UK's exit from Euratom." However it is unclear what will happen if other EU member states interpret their obligations differently and decline to supply or place restrictions on supply. Will the UK still be able to refer the disputed issues to the ECJ? If not, what alternative mechanism exists? If so, what would the status of the UK be – how, for example, would the principle of reciprocal rights and obligations be applied?

Second, there is an uncertainty over obtaining all the isotopes needed. In response to shortages between 2008 and 2010, the Euratom Supply Agency was given a more prominent role in overseeing the supply chains. This gives rise to a possibility that even if EU 27 states can legally supply the UK after the UK leaves EURATOM, if shortages arise, the Supply Agency may give the UK lesser priority than EU (EURATOM) member states.

People are going to die if the NHS is unable to obtain the isotopes it needs. The risks of dislocation of supply of nuclear medicine should have been dealt with fully in the Nuclear Paper. They have not

been. As soon as it is fully constituted, the Commons' Health Committee should launch an Inquiry, demand that the evidence on which Mr Johnson relied in giving his answer is produced to it and invite the Royal College of Radiologists and the Euratom Supply Agency to give evidence.

Nuclear research and development

Leaving EURATOM will terminate the UK's participation in a number of research arrangements.

EURATOM and the UK jointly fund JET – the Joint European Torus project – located at Culham in Oxfordshire. The project is now closely linked with ITER - the International Thermonuclear Experimental Reactor. ITER is a project to build the world's largest tokamak. The ITER agreement was signed in 2006 by China, the EU, India, Japan, South Korea, Russia and the US, and building of the tokamak has been underway in France since 2010. The official start of ITER operation is scheduled for December 2025. EURATOM also funds DEMO which is a demonstration fusion power reactor planned to follow ITER by 2050. The UK is a key participant in ITER and sends information, results and design studies from its JET programme to the French site. This cooperation will continue throughout the Brexit process but it is unclear what the impact of Brexit will be on this cooperation and the continuation of these programmes. However British participation in these projects demands the free movement of scientists and technologists and even if this is eventually permitted the uncertainty and unpleasantness generated by some more extreme Brexiteers is likely to deter non-British scientists from coming here and lead to British scientists considering moving to a EU establishment to secure future participation in cutting edge research.

In summary, there is a clear risk of the UK, with a very substantial physics and engineering base, being excluded from what may prove exceptionally important research projects creating important opportunities for industry and employment. The Nuclear Paper does not deal in detail with research or for the commercial opportunities that that research might generate although it does refer to recruiting scientists and technicians from the EU, and implies that the government wants contracts to continue to operate and that funding arrangements currently in place continue until they can be replaced with new arrangements without dislocation. These aspirations need to be supported by a description of how they are to be achieved.

Potential value of transitional arrangements for EURATOM

The entire idea of withdrawing from EURATOM has been questioned by a number of senior Conservative MPs. There are however significant difficulties in remaining a full member of EURATOM while leaving the EU.

Transitional arrangements would deliver significant benefits if:

1. They enabled the UK to remain a full member of EURATOM until NCAs were in place that secured the future supply of fissile material and/or legal uncertainties over access to nuclear medicine were decisively resolved.

2. They enabled all existing research commitments to be completed or underlying agreements to be amended to maintain the UK's role and a framework for continued UK participation in research to be agreed.

An important role for Select Committees

Relevant Select Committees should be asking searching questions with their chairs working together to ensure that both Houses receive reports while the EU Withdrawal Bill can still be amended. The

government members of the Committees should be making it clear to their Whips that the Nuclear Paper falls a long way short of what is required and that they will expect a very substantial improvement in the quality, detail and completeness of memoranda to their committees.

EU Agreements with third parties ("Association Agreements")

According to the Institute for Government, there are more than twenty existing agreements between the EU (or EU and the member states) and third party states. Others have referred to over 50 trade agreements.

These are Association Agreements to which effect is given by Article 217 of TFEU. Unless the UK is in its own right a contracting party to an association agreement (and the UK is, for example, a contracting party in its own right to the EEA Agreement), the UK will on withdrawal from the EU cease to be a party to such an agreement. In respect of each such agreement, the UK's leaving the EU will mean that the UK and the third party no longer benefit from that agreement and if the UK wants to maintain the benefits of the agreement a new international agreement will be required to replicate the benefits. Transitional arrangements made be needed to allow time for existing agreements to be adjusted or replicated. The EU may itself be anxious to secure this if the UK ceasing to be a party to an agreement through its EU membership has an adverse knock-on effect for entities in the EU or the third party state that had relied on the UK's participation in an Association Agreement in making a commercial contract.

The WTO

The UK is a contracting party to the WTO ("World Trade Organisation") agreement in its own right. However the EU has collectively negotiated WTO arrangements. The EU has single quotas for, say, agricultural products; when the UK leaves the EU new quotas for the UK will have to established and that will raise the issue of a reduction in the EU quota – a process referred to as "carving out". That might be problematic – one uncertainty being the rights of individual EU member states to play a part in such matters. The WTO proceeds by consensus. Would, for instance, Poland be able unilaterally to veto a UK agreement under WTO rules unless its demands for extra permits for Polish citizens be met? Or would it need to persuade the EU Council to veto? Would some other WTO member raise issues? Sorting out WTO arrangements could be a protracted process. Transitional arrangements may well be essential while this is done.

Open Skies Agreement

A further area of uncertainty is caused by the potential exclusion of the UK from the Open Skies arrangement negotiated between the EU and the EEA. Under these arrangements a UK carrier can operate flights between non-UK European destinations. So a plane can make a round trip serving a number of destinations efficiently. The Open Skies agreement also includes arrangements that encourage competition on the trans-Atlantic routes.

A worst case scenario under Brexit would be the near complete grounding of flights to EU and US destinations. While something will be done to avoid this, new arrangements will have to be negotiated and they are almost certain to be less favourable. The Norwegian.com saga provides an illustration of just how difficult making arrangements can be when national carriers lobby effectively.

On 22nd August, The Sun newspaper gave some prominence to a "confidential" report compiled "for the government" by major airports and "leaked" to Sky News that warned of a 41% (16.2 million) drop in passenger numbers between March 2018 and March 2019 if no agreement is put in place.

DATA TRANSFER

As the government's Future Partnership Paper, ***The exchange and protection of personal data*** ("The Data Paper"), makes clear this is an area of massive importance to the UK.

There is a large philosophical gap between the EU and USA on the approach to data transfer and data protection. It is, for instance, almost if not completely, impossible to enforce "right to forget" rules in the USA as the First Amendment guarantees freedom of speech without the countervailing rights to privacy one finds in European thinking. There is an even larger gap between the EU and China, or China and the USA.

The UK's current legislative approach is based on EU directives and regulations. These are extended to cover the EEA, creating a European space in which data can be shared under a single set of regulations. After Brexit the UK could go its own way, but there would be seriously adverse consequences of any gap opening up between the UK and the EU/EEA.

The Data Paper seems in paragraph 22 to commit the UK to seeking to obtain confirmation from the EU that its arrangements are "adequate". Although The Data Paper provides a number of reasons for believing that this should not be problematic, some industry commentators have suggested that the time frame will be too tight if the UK leaves both the EU and the EEA in March 2019.

This an area in which Brexit may lead to the UK giving up very important influence on future policy – the UK has played a major part in the development of the common EU/EEA framework. There are suggestions in The Data Paper of the UK playing an international role in future, but it is hard to see how an agreement with a state that is not fully "adequate" – the USA has only a partial adequacy status - could fail to raise issues over the UK's adequacy in the EU's eyes.

Unlike the Nuclear Paper, The Data Paper conveys an impression of considerable awareness and caution based on deep reflection over the problems that Brexit may create. This should be the basis of a productive dialogue with a Select Committee.

TRANSITIONAL ARRANGEMENTS AND A "TRANSITION AGREEMENT"

The transitional arrangements that would benefit the UK – and as will be argued later the EU as well – have to be given legal force. There will need to be a Transition Agreement that gives effect to transitional arrangements.

This uncontentious statement gives rise to two questions

1. How does a Transition Agreement fit into the Article 50 process?
2. What is the process for creating such a Transition Agreement?

The Article 50 process

There is no provision in the Treaties for any transitional arrangement, either under Article 50 of TEU or Article 217 of TFEU. However a consideration of the Article 50 process provides illumination

The United Kingdom has notified the Council of the European Union of its wish to leave the EU under Article 50 (2) of the Treaty on the European Union ("TEU"). Unless something else is agreed before March 2019, under Article 50 (3) the Treaties "cease to apply to the United Kingdom" at that date. That "something else" can either be the Council approving (with the consent of the European

Parliament) a Withdrawal Agreement (in which case the Treaties cease to apply when that Withdrawal Agreement comes into effect) or unanimously agreeing an extension of the two-year time limit.

Article 50(2) provides for a Withdrawal Agreement: "the Union shall negotiate and conclude an agreement with [the UK], setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union." Article 217 of TFEU sets out how agreements – known as Association Agreements – with third parties are to be put in place. It is not entirely clear from the wording of Article 50 (3):

1. whether the Withdrawal Agreement is to encompass trade and other matters; or whether
2. there is to be "an agreed framework", a Withdrawal Agreement limited to such matters as money and citizenship and a separate Association Agreement or Association Agreements.

In the hypothetical situation of everything being done and dusted within two years, there would be no need for a separate Transition Agreement – that is a document that sets out the steps that the EU and UK have agreed will be taken to secure a smooth transition. There would be a single Withdrawal Agreement or a set of agreements (comprising a Withdrawal Agreement and one or more Association Agreements) and transitional arrangements would be embedded in them.

The problem with this is that it is a hypothetical situation. There are other possibilities which would clearly lead to dislocations unless there are transitional arrangements which would need to be incorporated into a Transition Agreement:

1. **No Withdrawal Agreement and no extension of the two-year period under Article 50 (3):** in this case, under Article 50 (3) the Treaties cease to apply to the UK on 27 March 2019. Mr Lilley acknowledged this possibility when he addressed the possibility of EU-UK trade being governed by WTO rules. Dr Fox did not rule out this scenario on the Andrew Marr programme. Some of Mr Boris Johnson's utterances – notably "Go Whistle" – suggest that he too does not rule this scenario out. The No 10 spokespersons have repeatedly pointed to the Lancaster House speech which certainly envisaged this as a possible outcome, albeit a very much sub-optimal one.
2. **A Withdrawal Agreement dealing with a limited range of issues (e.g. a financial settlement and an agreement on the future status of EU citizens and potentially a security agreement) but no trade agreement:** in this scenario, the Treaties would cease to apply, so the present arrangements for agreeing common regulatory standards**,** trade policy, the customs union and other matters would cease to operate.

In either scenario if transitional arrangements can be agreed they will necessarily have to be set out in a Transition Agreement. Both the Treaties and by UK's now complex, devolved legislative process and dualist approach to international law impose constraints on what can be achieved in a short time frame.

A NEW ASSOCIATION AGREEMENT BETWEEN THE UK AND EU?

Theoretically a Transition Agreement could be achieved by way of a new Association Agreement under Article 217 of TFEU which defines "an association agreement" as one "establishing an association involving reciprocal rights and obligations, common action and special procedure with any third party (in this case the UK) or international organisation".

Such an agreement would necessarily have to take effect after the UK left the EU – even if (and this seems to be a possibility the EU Withdrawal Bill does contemplate) the UK withdraws from the EU at noon (12.00) on an agreed date and the Association Agreement comes into effect at 12.00.01 the same day.

While this would mean that the UK had left the EU before the Transition Agreement came into force, as we will see below, there are compelling reasons for not following this route.

Complications in the Treaties

The process for entering into any agreement with a third party is set out in Article 218 of TFEU

A negotiator is appointed and proposes a draft to the Council of Ministers. The Council proceeds by qualified majority so a Transition Agreement at first sight is not at risk from a few smaller states demanding concessions. This, however, depends on the draft Transition Agreement not containing any provision that covers a field for which unanimity is required for the adoption of a Union act (paragraph 8). It also depends on the Council not deciding to proceed by way of unanimity. In any event, the consent of the European Parliament would be required (paragraph 6 (a) (1)).

There is also a realistic possibility that a draft Transition Agreement might be what is called "a mixed agreement". A "mixed agreement" is an agreement which not just creates rights and obligations between the EU and a third party but also creates rights and obligations directly between the member states and a third party. If the Transition Agreement creates rights and obligations with member states that do not operate through the EU then the member states also have to be parties to the Transition Agreement. That means that the draft will have to be ratified by national parliaments.

With the best will in the world and on the most favourable assumptions, putting a new Association Agreement in place is going to be quite a time consuming process. There are clearly going to difficulties over free movement of persons. Difficulties may emerge towards the end of the process – witness Wallonia's ability to obstruct the Canada-EU agreement.

Obstacles at Westminster

The Supreme Court Judge Lord Reed – who dissented from the majority on the Supreme Court in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 ("Miller") and would have allowed the government's appeal against the High Court decision – explained with great clarity in his judgment that the UK has a dualist approach to international law, that is to say international agreements cannot change domestic law without Parliament enacting legislation:

> *57. It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. Professor Campbell McLachlan in Foreign Relations Law (2014), para 5.20, neatly summarises the position in the following way:*
>
> > *"If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."*

The dualist system means that a bespoke agreement in the form of a new Association Agreement would need the assent of the House of Commons and some provisions might require the Scottish Parliament, the Welsh Assembly and (if or when it is restored) Stormont to legislate or at a minimum vote to consent to the Agreement. Transitional arrangements are likely to be attacked from all sides – and the opposition parties may do what they did during the John Major Government's travails over EU policy - put down amendments that Conservative rebels are likely to support to secure the defeat of the government in the Commons. The opposition may be able to incite rebellions from both sides of the European divide. During the Major years, the amendments were designed to appeal to Eurosceptics; and surviving Eurosceptic MPs - perhaps joined more recently elected Leavers - may be invited to express discontent at transitional arrangements that the opposition really endorses or thinks do not go far enough.

Could the Henry VIII clauses in the EU Withdrawal Bill help achieve a Transition Agreement?

The short answer is No. It is highly unlikely that the EU Withdrawal Bill will be on the statute book in time to be of any help in implementing a Transition Agreement of the sort and in the timeframe that is essential.

Some may suggest accelerating the process of the Bill (and potentially amending it) so as to use the Henry VIII clauses to implement a Transition Agreement. This is mistaken. Even if the Bill were enacted in a couple of months, legal challenges will be made against the Henry VIII clauses.

The courts decide

As senior judges have warned, if the law is ambiguous or uncertain judges have to do the best they can – where possible applying previous case law and also looking at Hansard – to decide how the words Parliament enacted apply in a particular case. This will be particularly difficult when as is inevitable an action of a minister in revising or creating a law that prior to the EU Withdrawal Bill would have required primary legislation is challenges in court.

A recent article on the **Constitution Unit** blog makes highly relevant points in discussing the reasoning of Lord Reed in his judgment in **Unison v the Lord Chancellor** [2017] UKSC 51 ("Unison").

Under the heading "**The autochthonous choice of legal sources and common law constitutional rights**", the author of the blog, Christina Lienen of UCL, says:

> The constitutional magic of the judgement happens in paragraphs 64 to 104. By saying that 'the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law', Unison echoes the jurisprudence on common law constitutional rights that was shaped powerfully by other UKSC judgements…. Similar to those cases, Unison displays an emphasis on (a) the historical foundation of these rights by reference to ***Magna Carta***, (b) intellectual authority by reference to Coke's seminal ***Institutes of the Laws of England***, which address the right of access to the courts and (c) case law from the first peak of common law constitutional rights in the 1980s and 1990s, prior to the passing of the Human Rights Act 1998.

Lienen's conclusion provides grounds for anticipating that even if Parliament does enact the Henry VIII clauses, the executive may find, as King Charles I did, that judges will seek – and successfully seek - ways of overturning arbitrary decrees that have not been approved by Parliament:

> In effect, the UK constitution is characterised in Unison as ultimately being founded in the common law, and therefore, controversially, in the hands of the judges, rather than the politicians. Unison in this sense strengthens the notions [of] the rule of law, the separation of powers and the UK constitution displayed in R (Evans) v Attorney General [2015] UKSC 21, and it will at the very least, together with R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, be seen as one of the most important UKSC judgements of 2017.

Senior judges do give great weight to the clearly expressed will of Parliament. In recent judgments on immigration/deportation cases both the Supreme Court and the Appeal Court have as a reason for upholding regulations made by Mrs May as Home Secretary the fact that she and the then Minister for Immigration, Mr Damian Green, had persuaded the House of Commons to accept that to endorse these regulations. Senior judges clearly regard the fact that the House of Commons has debated and endorsed regulations as strong evidence that the regulations are a reasonable way to reconcile the human rights of individuals affected with the proper objective of excluding criminals and other undesirables. One implication of this respect for the Commons is that judges will be far more open to persuasion that they should quash a ministerial decision made by fiat.

Conclusion: The impracticality of a bespoke agreement

In summary, the prospect of having to go through a slow, convoluted and uncertain process to achieve a new Association Agreement that incorporates whatever transitional arrangements may be agreed with the EU is unattractive.

There are compelling reasons for seeking alternative ways to put an Agreement in place as soon as possible. Industry and commerce needs to be given a clear idea of the legal framework in which they will operate after March 2019 in the next few months. This requires some agreement with our EU and/or EEA partners to be obtained ideally this year and certainly by the end of March next year. Even if everyone did eventually agree to a bespoke agreement, the time taken in such a process would negate the value of any transitional arrangements that might be agreed.

THE EEA AS A TRANSITIONAL OPTION?

Membership of the EEA – sometimes referred to as "the Norwegian option" - has been suggested either as a destination for the UK or as a Transitional Agreement. This paper is only concerned with the possibility of the EEA Agreement as a Transition Agreement, one that would be terminated when a final agreement is reached.

Although the EEA Agreement is already in place and the UK is a contracting party, it has the characteristics of an Association Agreement. If the EEA Agreement is to be the Transition Agreement, as the UK left the EU the EEA Agreement would instantly become the effective Transition Agreement. There would in this case be no need for a careful timing arrangement.

Some of those proposing an EEA based solution have suggested that the UK would need to become a member of EFTA. This might be desirable or even essential if the EEA Agreement were to form the basis of a final settlement. The UK becoming a member of EFTA would presumably mean that the EFTA court would be the body that would resolve disputes involving the UK and after the potential use of the EFTA Court was floated by the president of the ECJ The Times of 9th August 2017 put forward some persuasive arguments that this is a sensible way for the UK to proceed. However these issues are outside the scope of a paper on transitional arrangements.

The key facts about the EEA and the EEA Agreement are as follows:

1. The European Economic Area – the EEA – is governed by an agreement or treaty, The EEA Agreement, to which the Contracting Parties are the EU, the EU member states individually (including the UK) and three states called "The EFTA states" (Norway, Lichtenstein and Iceland – Switzerland is a member of EFTA but not the EEA).

2. A Contracting Party may withdraw from the EEA agreement by giving one year's notice under Article 127. The UK government has not yet given this notice and it is arguable that it would need the authority of Parliament to do so. Unless the UK gives notice it will remain in the EEA even after it has left the EU and the parties to the EEA Agreement would be obliged to act as it lays down. There are some significant issues that arise over determining exactly what those obligations are:

    a. Although both the pre-amble to the Agreement and Article 1 state that the objectives of the Agreement are free movement of goods, services, people and capital, the wording of the Agreement dealing with free movement of goods (the topic of Part II of the Agreement) significantly differs from that of the other freedoms (the topic of Part III).

    b. Part II imposes obligations on Contracting Parties (of which the UK is clearly one) in connection with free movement of goods. Article 8.1 provides that free movement of goods between the Contracting Parties shall be established in conformity with the Agreement. Article 10 prohibits customs duties or equivalents between Contracting Parties.

       This is what most manufacturers – certainly the automotive industry – are looking for. A long term bespoke agreement that allowed the motor industry to flourish with the EU 27 would certainly contain some such term.

Provided that the UK has not given the required notice to leave the EEA, even if there is no agreement with the EU27, it is difficult to see how tariff or non-tariff barriers could be erected that dislocated trade in goods. The complex "just in time" supply lines of the motor industry would be safe as would trade in manufactures, pharmaceuticals, electronic equipment and the components of Airbus. This may explain how the government has been able to reassure Nissan and other manufacturers. The UK can get to this position by a unilateral declaration that it will not give Notice to leave the EEA Agreement.

c. Part II does not contain any provision on free movement of services, capital or people. These remaining freedoms are grouped together in Part III. There is an important difference between Part II and Part III. In contrast to Part II's references to "Contracting Parties", Part III of the Agreement prohibits restrictions on free movement of services, capital and people between "EFTA States" and "EC Member States". This gives rise to a problem but one which, if there is agreement in principle to use the EEA Agreement, can surely be resolved with a modicum of good will by consensus to adopt one of these alternatives:

    i. The UK is certainly not "an EFTA State" but it could apply to join EFTA. Whether a successful application would – given the UK's status as a Contracting Party to the EEA Agreement – suffice to make it an EFTA State under the EEA Agreement is a debatable proposition. Amendment of the EEA Agreement might also be required. All of this is possible.

    ii. The UK is at present an "EC Member State", but there is no definition of "EC Member State" in the Agreement itself, although the list of "EC Member States" in the Final Act includes the United Kingdom. There is no provision in the Agreement assigning a specific status to a Contracting Party that has ceased to be a member of EU without becoming a member of EFTA.

    On the one hand, it would be easier and quicker for everyone to agree that "EC Member State" means "A state that is listed in the Final Act as an EC Member State"; on the other hand the UK re- joining EFTA might be seen as resolving some issues over the ECJ.

Importantly, Part III is a whole. If on leaving the EU the UK were to cease to be "an EC Member State" then all obligations under Part III would fall away and only obligations under Part II remain. The UK would neither be able to claim the benefits of free movement of services (including the Passport) nor be compelled to accept free movement of people – which under Article 28 of the EEA Agreement is defined as "free movement of workers" with an emphasis on employment; Article 31 confers rights to set up businesses. On the other hand, if it were accepted or agreed that the UK should be treated as an "EC Member State" for the purposes of the EEA Agreement then there would be both free trade in services and free movement (as defined in the EEA Agreement). The UK could not have one without the other – there is no scope for "cherry picking".

The EEA Agreement does not contain a mechanism for determining the status of the UK after leaving the EU. As there is no procedure for expelling a contracting party, even if the EU27 did not want the UK to remain a contracting party (able to enjoy the rights and compelled to fulfil the obligations

of Part II) the EU27 are stuck with the UK and stuck with Part II. If the EEA Agreement is to be the Transition Agreement then there will have to be consensus on whether Part III is operative. The fact that Part III is constructed in a way that means the UK cannot have the benefits of free movement of services without accepting free movements of persons (as set out in the EEA Agreement) means that both sides would get something they want if it were agreed that Part III does apply and both sides would lose something they value if it were agreed that Part III does not apply. This makes it by no means impossible that there could be rapid agreement that Part III is to apply.

For the sake of completeness, it should be noted that some have argued that if the UK leaves the EU then the territorial area in which the EEA Agreement has effect will no longer include the UK. The basis of this contention is Article 126 (1)'s statement "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community…" The arguments that can be adduced over the meaning "EC Member State" in part III (namely that it means "a state that has been an EU member state when the EEA Agreement came into effect") will be in essence the same as the arguments that "the territories…" mean "the territories to which the treaties applied when the EEA Agreement came into effect". If there is that modicum of good will between the EU 27, the EFTA states and the UK required for a consensus that Part III is to operate then that same goodwill will produce a consensus that Article 126(1) does not prevent the EEA Agreement remaining operative.

A consideration that weighs against using the EEA Agreement as the Transition Agreement

The potentially real disadvantage of using the EEA Agreement as the Transition Agreement is that it might leave too much to be negotiated as "add-ons":

1. It does give the UK membership of EURATOM. For reasons set out earlier, losing membership of EURATOM has serious consequences for the UK.
2. There could be very contentious issues over money – the EEA states pay into the EU budget.
3. The UK would need to work out suitable arrangements over customs – EEA membership does not entail membership of the Customs Union and as the Institute of Directors has pointed out in its invaluable paper "Bridging the Brexit Gap" there are complications that would need to be resolved including arrangements for rules of origin.
4. The EEA is not part of the CAP or Common Fisheries Policy – so if transitional arrangements were needed these would have to be negotiated separately.

There may be some significant gaps that would need to be filled - Dr Richard North's blog for 31 October 2015 said:

> *the very latest count of the EU laws in force (today) stands at 23,076. As a percentage of that number, the EEA acquis of 4,957 acts currently stands at 21 percent. In effect, the EEA (and thus Norway) only has to adopt one in five of all EU laws.*

If the EEA Agreement were to be used as the basis for a final settlement with the EU, one would expect these matters to be addressed as part of the negotiations over the final framework for the EU-UK relationship. But it is really desirable that a Transition Agreement be finalised as soon as practical to avoid economic and social damage.

To repeat an important point already made, the EEA option would require significant amendment to the EU Withdrawal Bill. As the Bill stands at present, it would simultaneously repeal all the legislation needed for the UK to honour its EEA obligations as well as that required for its EU obligations.

EXTENDING THE TWO-YEAR PERIOD UNDER ARTICLE 50?

An alternative way of securing the objectives of a Transition Agreement would be for the UK to remain a member of the EU until the transitional issues had been resolved and systems are in place (and ideally tested) to allow a seamless transition.

Although the politics (both here and in the European Council) would be very challenging, the mechanism is quite simple. Article 50 provides that the two-year period before the Treaties cease to apply may be extended if "the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

Any adjustment to the UK's terms of membership in this period – and a number of leading individuals on both sides have set out desiderata that do require adjustment – would of course have to be agreed under existing arrangements. No adjustment that involved a treaty change can possibly be put in place by March 2019 – even if the Council were rapidly to reach unanimous agreement the ratification processes (possibly including a referendum in the UK) would almost certainly take too long. It is difficult to see how it would be possible for the UK to avoid holding elections to the European Parliament in 2019. The ECJ would also continue to exercise its current powers.

An extension of the time period under Article 50 could be accompanied by:

- Changes that could be implemented by Directives and Regulations under the existing Treaties
- Declarations of intent by the Commission, the UK government and indeed third party states – these could in principle be highly detailed.
- Preparatory measures for eventual withdrawal that are either permitted under the Treaties or which do not come into effect until after the UK leaves the EU. An example of something that is permitted and indeed done by some other EU states is a system of registration for EU citizens who are citizens of another member state; the electoral roll here is an example of a UK system under which local councils should record EU residents over the age of 18.

Financial Arrangements

There would undoubtedly be the most major row in Westminster over money – although there may be one anyhow. The UK would be obliged to continue to make payments into the EU budget.

One immediate consequence of extending the two-year period provided for under Article 50 is that the UK would have a continuing obligation to contribute into the EU budget – although it would also be compelled to pay if the EEA alternative were adopted.

Although the government appears to accept that the UK is bound to contribute at least to the end of 2019 as a result of what has been agreed in the past, some Brexiteers have accepted the suggestion of Mr Martin Howe QC that when the UK leaves the EU all obligations to pay anything instantly cease. The government also seems to have accepted the principle that it should make some further payment in respect of longer term liabilities, although there is so far no agreement on the amount involved.

The current agreement for financing the EU (embodied in a decision of the European Council made in May 2014) is set to run from 2014 to 2020. This is based on a decision of the European Council made in May 2014. The Council decision provided that the arrangements should take effect from January 2014 and does not state when the arrangements set out end. Only some specific provisions applying to named member states (the UK was not one) were stated to run for a limited time from 2014 to 2020, applying that others will continue to apply after 2020 if no new decision is made.

Further, all member states had to ratify the decision in conformity with their own constitutional arrangements. Royal Assent was only given to the legislation needed for the UK to ratify in July 2015. In the meanwhile, The European Communities (Finance) Act 2008 remained in effect. The clear implication of this is what was in place in the EU and in the UK from 2008 continued to operate until every member state had ratified the agreement reached in 2014 and there seems no reason why this principle will not apply to the 2014 decision when the Council agrees a new decision in 2020.

So if the Transition Agreement were to take the form of delaying the UK's exit from the EU under Article 50, the UK's obligation would be to make payments under the 2014 decision until such time as that ceased to have effect. The Treasury would make such payments from the Consolidate Fund and/or National Loans Fund as provided for under the European Communities Act as amended by the European Communities (Finance) Act 2014. This arrangement would continue after March 2019 because the Treaties would only cease to have effect and the ECA would only be repealed when the UK left the EU at the end of the Transition Agreement.

In summary, there seems nothing to prevent the European Council, when it makes its decision on the financing of the EU from 2020, from including an express provision that in respect of the UK alone the decision made in May 2014 was to continue to be in effect. This would mean that the existing statutory authority for the Treasury to make payments would remain in effect until the UK actually did leave the EU and the ECA was repealed. There would inevitably be much screaming of "betrayal" and some Brexiteers might even refuse to pay taxes; but the government would not have to get the Commons to pass new legislation for the Treasury to pay money to the EU until the ECA was repealed.

Summary of argument over finance

Whatever does happen over finance will need the agreement of the UK and the EU. While a payment or payments arising from an EEA based Transition Agreement would require legislation by Westminster – because the ECA would ex hypothose have been repealed – it may be possible to avoid legislation if Article 50 were used to keep the UK in the EU for an interim period. As British ministers would continue to participate in the EU's decision taking mechanism it might be easier to obtain a majority for a Commons Resolution approving a package than to obtain one for primary legislation to pay an ongoing contribution to the EU.

THE OPTIMUM TIMEFRAME FOR A TRANSITION AGREEMENT

The earlier description of how businesses make decisions implies that the longer the transitional period is the fewer economically damaging decisions will be taken.

Similar considerations apply to decisions that individuals and families make – children's education is a major factor, as is the consideration that it takes time to build a career progression.

If we make the not unreasonable assumption that most commercial and personal decisions are made on a four to five year planning horizon then offering the certainty that nothing significant will change in the relevant (to the commercial decision) features of the UK-EU relationship will mean that some decisions to invest in keeping existing activities going will not be affected by the prospect of Brexit if the Transition Agreement runs to 2022 or 2023.

The factors governing decisions, both corporate and personal, are such that significantly greater benefit will accrue from making the Transition Agreement operate for four to five years from the date when the framework for the UK's future relationship with the EU is clarified. That clarification is at least implicitly required under Article 50, so a Transition Agreement that ran until 2023/24 would be substantially more beneficial than one that ran only to 2022.

A further consideration weighing in favour of a 2024 terminus is that the content of new trade agreements is most unlikely to be known before 2019 or 2020 and companies are unlikely to be able to earn much from investing in newly opened markets for some years after that. So a 2024 terminus would reduce the risk of the UK suffering losses in trade with the EU before it is remotely possible for the UK to benefit from anything that may be agreed with third party states. It would be helpful if a Select Committee could take evidence on progress on trade negotiations – perhaps in private –, test the likely benefits that by calling witnesses from industry and commerce and academia and then report on the likely scale and timetable of new trade agreements. Not only would industry and commerce be able to use this report to plan, the cabinet and House of Commons could assess whether there would need to be a further extension of "the interim period" to avoid the UK losing its present open access to the EU/EEA market before it could exploit the opportunities Dr Fox has promised us.

In summary, the shorter the period of transitional arrangements, the greater the economic and social damage to the UK. While there are areas – the long term fission research project ITER is a case in point – where the planning horizon is far longer than any transitional period and specific arrangements may be needed, it would be absurd to allow the period of a Transition Agreement to be so short that there would be widespread need for special arrangements to be made. For most companies, for most individuals, for most families a Transition Agreement should ensure nothing much changes until the UK can make a frictionless transition to the long term environment.

The commencement date for a Transition Agreement

A Transition Agreement based on the EEA Agreement would automatically come into effect as the UK left the EU – the UK's existing membership of the EEA would continue. If the Transition Agreement was one to use Article 50 then there would be no commencement date at all – the UK would remain in the EU for the period agreed by the EU27 and UK. This does not mean that we should delay making an Agreement – every day that passes sees losses to both EU and UK and gives mounting incentives for EU27 states to secure gains from locking in UK businesses that have moved operations.

ARE THE EU27 WILLING TO AGREE TO ANY TRANSITIONAL ARRANGEMENTS?

The short answer is that the EU27, businesses operating in the EU27 and citizens of EU27 member states resident in the UK as EU citizens stand to gain substantially from a Transition Agreement.

Such a Transition Agreement will have to avoid ending Free Movement of individuals while leaving other freedoms in place. The EU will also need some mechanism for enforcement – and the ECJ is seemingly regarded by the UK at present as unacceptable.

But while these are issues that may lead to no deal over a Withdrawal Agreement and may also make a bespoke transition agreement impossible they are not obstacles to the only two alternatives that this paper argues are possible. The EU's insistence on the indivisibility of the four freedoms is irrelevant to a transition agreement based either on the EEA Agreement or an Article 50 extension because all four freedoms will be maintained. There is no possibility under either arrangement of the UK "having its cake and eating it".

The unresolved issues over the role of the ECJ may not be a complete barrier to a Transition Agreement. In CGE POLICY OPTION PAPER 1, ***Seeking the Common Good: Building a new constructive relationship between Britain and the European Union***, Edward Bickham argued that the UK's total rejection of ECJ jurisdiction was misconceived. The UK government's position has been refined – it is now "direct jurisdiction [of the ECJ]", not "Jurisdiction [per se]" that is declared unacceptable. Alternatives to "direct jurisdiction" do exist - there are alternatives, some of which contemplate various possible options for use of the EFTA Court, which is accepted by the EU as a mechanism for resolving some issues with EEA states.

It is probable that **currently** all European states stand to lose more than they stand to gain overall from Brexit dislocation in March 2019 and thus all probably have an interest in delaying any break-up of the single market. The same applies to delaying restrictions of free movement of workers – money that flows from the UK to Eastern Europe as workers here send money back to their families at home is important to those economies and hence to the EU as a whole. In addition, any Transition Agreement is certain to provide for the UK continuing to contribute to the EU budget.

So the simple answer to the question "*Why should the EU27 agree to any transitional arrangements?*" is that it is in the interest of everyone to reach an agreement. None of the EU27 is being asked to conceded any issue of principle in the interest of its exporters. Some of the key decision takers may also be concerned at what might happen to the UK domestically if Brexit causes a surge in unemployment, a drop in tax revenues and serious problems for the NHS and social care, a concern that may be intensified by our political system beginning to show some of the characteristics of the French Fourth Republic. Proximity to President Putin may well focus minds on the desirability of the UK being able to afford its defence budget.

Importantly, these arguments apply as much to a Transition Agreement that precedes a total break without a Withdrawal Agreement under Article 50 as they do to a Transition Agreement that sets a date for a Withdrawal Agreement and related EU-UK trade agreements to come into effect. Even if the UK is going to move to WTO terms, even if there are going to be massive delays at the ports, it makes sense to put off the evil day as existing investments by French and German firms in, for instance, car assembly are fully exploited.

An appeal to all to work to bring about a Transition Agreement

Those in British public life, whether in politics or business or NGOs or the churches, who view with alarm recent developments – rising numbers of hate crimes, a growing divide between the generations, the inability of government to tackle a range of problems because of the time and resources being thrown at Brexit, - could play a significant role in creating a climate of opinion favourable to a Transition Agreement.

The CBI and Chambers of Commerce and Trade Unions all have European associations – they can talk to them about the benefits of a Transition Agreement. There is also considerable scope for appeals to avoid environmental risks.

It is possible to create a climate of opinion that is favourable to transitional arrangements that are designed to prevent unnecessary damage being done. Out of this could emerge a consensus that a Transitional Agreement must be put in place and put in place quickly. The operative word is "quickly". At present no European city has attracted so much financial business from London that it has an interest in breaking up the Single Market. At present decisions that reduce the risk of tariff and non-tariff barriers to trade between the UK and other EEA states will reduce the costs of Brexit to all EEA states. At present an agreement will provide budgetary benefits to the EU.

Pope Francis on building bridges

The title of this paper will remind many of Pope Francis's insistence that the Christian way is to build bridges, not walls.

This Papal mantra hit the headlines when accompanied by a magisterial rebuke to those who would build walls during the American presidential election.

In February this year, the Pope made it explicit that this principle applied to "the social and civil context" and then called for prayers for Moslems persecuted in Burma: "*They're not Christians, but they're good, our brothers and sisters. …. They've been tortured and killed, simply because they are continuing their traditions, their Muslim faith. Let us pray for them.*"

The Archbishop of Canterbury, emphasising the importance he attaches to the reconciliation effected in Europe since 1945, has also used the image of building bridges.

This paper, of course, is about keeping the existing bridges open until new bridges are built. The leaders of Britain's Christian communities are in a strong position to enlist the support of European bishops to help, in Justin Welby's words, "to draw the poison from Brexit". Cardinal Nichols is one of two vice-presidents of the Council of the Bishops' Conferences in Europe and there are institutional structures linking the Anglicans with Christians belonging to the reformed tradition as well as with the Vatican.

CONCLUSION: AN OPPORTUNITY THAT WE SHOULD SEIZE, NOT RISK LOSING

We cannot be sure how long the opportunity to move from discussion of transitional arrangements to a Transition Agreement will last. Every time a major company signals that it might cut back its UK operations the prospect of one or more member states gaining from Brexit increases. EU residents here may start to leave in very large numbers. The ability of the government to command a majority in the Commons – already limited – may disappear and another election may produce another hung parliament. A combination of Brexit uncertainties and the folly of bankers and regulators in allowing a consumer finance crisis to blow up may produce a financial crisis to which the UK and the EU have different policy responses. Who knows what President Trump or President Putin might do or what new crisis might emerge in the Middle East, possibly causing serious divisions between the UK and EU member states.

At this moment there is an opportunity for the UK and EU27 to enter into a Transition Agreement. Whether that is based on the EEA Agreement or an extension of the two-year period under Article 50 is less important than both sides signing up to a binding Agreement that avoids dislocation in March 2019.

Sources

The European Commission publishes its position papers and also agenda papers on the internet. These can be accessed from this webpage:

https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en?field_core_tags_tid_i18n=351

The UK government also publishes its Position and Future Partnership papers on the internet. These can all be accessed from a useful webpage that gives an extensive list of items related to the Article 50 Negotiations:

https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu

To check what **individual ministers** and others have said, I used the Google Search engine, put in the individual's name, and add Brexit and click on NEWS. One weakness of Google is that it seems to prefer free pages to those behind a paywall.

www.Parliament.uk is generally user friendly – although if the quick link to ***Hansard*** is not visible you need to click on "Publications and records" under "Parliamentary Business". Individual Select Committees including the BREXIT Committee have their own webpages – click on "Committees" under "Parliamentary Business". Until the Select Committee members are elected the only material available is from the last Parliament. To see the exchange between the PRA and Treasury Committee chair, you need to go to Nicky Morgan's website: https://www.nickymorgan.org/treasury-select-committee

Christ Church University in Canterbury is home to **CEFEUS**. Its director is Professor Amelia Hadfield. It has published papers on "Making a Success of Brexit" – Helen Whately MP (Con, Faversham) was host and Rosie Duffield (Lab, Canterbury) was present at the launch of ***A Sectoral Appraisal of Small and Medium Sized Enterprises and the Rural Economy in Kent and Medway*** in a Commons Committee Room this July. You can download this report (and see other useful analysis at a county level) from the CEFEUS webpage: https://www.canterbury.ac.uk/social-and-applied-sciences/psychology-politics-and-sociology/cefeus/training/cefeus-latest-reports.aspx

Edward Bickham's CGE policy option paper, ***Seeking the Common Good: Building a new constructive relationship between Britain and the European Union,*** is available in pdf format – email joeegg52@gmail.com to request a copy.

The **Constitution Unit** blog is https://constitution-unit.com/ and Christina Lienen's article is at https://constitution-unit.com/2017/07/28/unison-v-lord-chancellor-the-things-that-landmark-constitutional-cases-are-made-of/

Articles by **Hakan Enver** of Morgan McKinley can be found here: https://www.morganmckinley.co.uk/consultant/hakan-enver?qt-footer_maps=4&qt-footer_maps_mobile_display=3

My own articles are published by the online journal of the British Jesuits, ***Thinking Faith***: www.thinkingfaith.org. No paywall. The search engine is slightly quirky – you need to type my name as "Joe Egerton" and tick "author".

About the author

Joe Egerton is a specialist in regulation – one QC has observed that he knows the FCA rules better than the FCA itself. Most of his clients support the financing of SMEs both in the UK and around the world or advice on investments in FTSE 100 firms and Joe has a deep understanding of industrial and commercial firms as well as the financial service sector.

In the years between Britain joining the EEC ("Common Market") and the advent of the Single Market in 1992, Joe had been a youthful Economics Director of the British Chambers of Commerce, a NATO Research Fellow at Oxford working on civil exploitation of defence technologies and Head of Strategy Services (Financial Markets) for management consulting arm of Spicer & Oppenheim (earlier Spicer & Peglar), a leading accounting group, where he edited their book on preparing for 1992 and arranged a major seminar with chief executives of leading city firms for the then European Commissioner, Leon Brittan.

After S&O was taken over by Deloittes, Joe set up his own consultancy business. After the 1997 election, he was asked to set up ***Justice in Financial Services*** which ran a successful campaign to ensure that access to the Financial Services Tribunal (now subsumed under the Upper Tribunal) should be free and that the FCA should not be able to obtain an award of costs against individuals who took cases before the Tribunal. He continued to advise regulated businesses and expanded his practice into the regulated horticulture, agriculture and food processing sectors, giving him further insights into the areas now central to Brexit.

Joe's first job on graduating was as Research Assistant to the Rt Hon Maurice Macmillan MP. He found himself researching for the Conservative members of the Wealth Tax Select Committee – a team that secured the rejection of Denis Healey's proposals. He is the only survivor of the Union Flag Group's core team – the organisation of backbench Conservative MPs who wrecked the Labour government's Scotland and Wales Bill in 1976. Joe is one of the few people to have hands-on experience of how a government can be forced to abandon legislation by determined backbench MPs. He later applied the knowledge of Parliamentary procedure during a Committee Stage on the Floor of the House to support the Positive European Group of backbench Conservative MPs who supported the Major government during the Committee Stage of the Maastricht legislation.

In 1992, Joe stood as Conservative candidate for Leigh in Lancashire, achieving the highest vote of any Conservative candidate until 2017. More recently, he stood as a Conservative County Council candidate in 2017 in Canterbury. He was awarded the Robert Schuman silver medal for services to European unity in 1985.

Joe has contributed a number of articles to the online Jesuit journal ***Thinking Faith*** on Aquinas and political theology with a particular emphasis on the role of Parliament as a mechanism for giving that consent that Isidore and Aquinas stressed was necessary for laws to be binding in conscience.

Keeping the bridges open

Alternatives for Transition

A CGE Policy Options Paper written by Joe Egerton