SPEECH BY THE RT HON LORD OWEN TO THE INSTITUTE OF POLICY RESEARCH, UNIVERSITY OF BATH, 18 JANUARY 2018

The EU-UK negotiations over a Withdrawal Agreement from the EU have gone far enough to show we can find a way for a smooth, not a hard, exit. That is an exit with a sufficient period to negotiate a Free Trade Agreement that does cover financial services, the largest part of the UK economy, and sets the parameters of an ambitious Free Trade Agreement, giving sufficient time during a transition to adapt to WTO trading. The need for such a transition was highlighted by Prime Minister Theresa May in January 2017 and elaborated on perceptively by the Official Opposition spokesman, Keir Starmer. But this is a very ambitious agenda and will be difficult to achieve. It will need a greater sense of national unity to achieve; a greater readiness on this issue of overwhelming national importance to put to one side party politics or personal preferences. In addition, we need provision in case there is no agreement by October 2018 for a more limited, less ambitious default transition before embarking on WTO trading in 2021.

The EU-UK document 'On Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union' which was published on 8 December 2017 is a sensible document. It contains a clever use of words like 'negotiators' that challenges the 'hand me down' nature of Article 50. The well-chosen wording 'Orderly Withdrawal' in this document can reasonably be interpreted as an injunction to have no 'cliff edges'. In para.49 and in para.50 the document uses the expression 'in the absence of agreed solutions' in the context of Northern Ireland that opens the door for using the same term again in the next EU-UK document on Phase 2 relating to the transition.

The Phase 1 document wisely states in para.49 that 'The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship.' That means being 'good neighbours', as envisaged in Article 8 which accompanies Article 50 and will cover in its widest sense security and cooperation over terrorism and a host of other issues, like education, health and regulation where there are economies of scale that do not affect essential sovereignty. The EU-UK document also describes in para.96 the negotiations as being a process whereby "the UK on the condition of an overall agreement under Article 50 on the UK's withdrawal, taking into account the framework for the future relationship, including an agreement as early as possible in 2018 on

transitional arrangements" will leave the EU on 30 March 2019 and the status quo by the end of December 2020. Yet this document is already being significantly changed on a politically explosive issue, namely free movement of labour. A Brussels source spoke bluntly on 15 January 2018, "The deal in December did specify March 2019 for free movement rights. That was then. Now as part of the discussion on transitional arrangements that has changed." Countries like Poland have obviously expressed their concerns to their negotiators about free movement and they will now argue that free movement into the UK should continue to the end of the transition in December 2020. It is also clear that Norway is worried about some aspects of the transition. The UK must recognize that both Norway and Iceland cannot be cut out of meaningful consultation. These are important countries for the UK because of oil, gas and fishing. They are also our partners in NATO and above all old friends. We should start talking to them formally soon on the EEA.

While there is no reason to take a principled exception to the December 2017 EU-UK Joint Report, there is every reason to challenge the EUCO-27 document of 15 December and in particular what some critics call the 'vassal state' proposal. Para 4 of the EUCO-27 guidelines reads:

> "Such transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, clearly defined and precisely limited in time. In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries."

The reason I think that the European Council wanted to state such an absolute status quo for the transition is that they suspect the UK's vision of a bespoke transition and with some justification for it, as yet, contains no detail on the legal format in which it will take place. Drawing on my experience of the EU since 1976 I judge it will be impossible to get the European Council to change this position without the UK proposing a detailed 'managed divergence' approach to the Single Market in the transition.

In challenging the Article 50 guidelines adopted by the 'European Council 27' on 15 December last, it is urgent that the UK puts forward its own transitional or standstill arrangements. The UK will regain considerable sovereignty on leaving the Treaty of Lisbon in 2019, and we should not immediately surrender all major aspects of that restored sovereignty during a transition period. Yet that is precisely what para 4 of the EUCO-27 proposal would entail. This was, some believe, an opening position by the European Council to demonstrate that their position against cherry picking was a determined one brooking no exception. But it is possible for both the EU and the UK to keep some cherries to their mutual advantage provided the framework is balanced and fair.

In responding, therefore, to the EU wish for the Withdrawal Agreement to be "clearly defined and precisely limited in time" the UK Government would be wise to state now that they are ready to rely for legislative purposes during the transition chiefly upon the European Economic Area Agreement during the transition to which we are a contracting party. This does not resolve all issues – transitory status quo arrangements for agriculture and fisheries will still be required – also while the Customs Union is allowed under the EEA neither Norway, Sweden nor Liechtenstein thought it necessary to take it up. The Withdrawal Agreement it is clear from the outset is for the transition and no longer than the transition period which is currently planned to end no later than 30 December 2020. We can set aside legal arguments as to whether or not a contracting party to the EEA Agreement ceases to be one if they leave the EU by making provision for the small amendments that make it clear that the UK will continue to be a contracting party to the EEAA within the Withdrawal Agreement. As such an amended EEA Agreement will respect our sovereignty, as it does for Norway, Iceland and Liechtenstein.

On Tuesday 16 January Professor Baudenbacher, a judge of the EFTA Court and President until last year, in giving evidence to the House of Lords Select Committee indicated that the EEA-EFTA option for the UK's transition period is potentially feasible, even given the short timescale.

Necessary UK guarantees as to how the UK will handle in the transition period such aspects as related matters on Free Trade Agreements or implementing new agriculture

and fishing policies could be dealt with by Protocols to the EEAA. It is a standard mechanism: the EEAA currently has 49 of them, the last of them dealing with arrangements for Ceuta and Melilla, the two Spanish enclaves in North Africa. The problem is that David Davis in a letter to me dated 21 December believes that EEA membership will always

> "mean the UK having to adopt at home – automatically and in their entirety – new EU rules. Rules over which, in future, we will have little influence and no vote. Such a loss of democratic control could not work for the British people. We will therefore not be pursuing an off-the-shelf arrangement."

The EEA option for the transition I am proposing is not an "off-the-shelf" arrangement. It is being advocated as a structured response to the European Council's guidelines. It fills in the detail of how the UK Government would approach their wish for

> "a bold and ambitious Free Trade Agreement that is of greater scope and ambition than any such existing agreement. We want to have the greatest possible tariff-and barrier-free trade with our European neighbours, as well as to negotiate our own trade agreements around the world"

We admittedly may not reach agreement on such an ambitious negotiation. But some, not all, the dire forecasts of the EU about a cliff edge ending in March 2019, which David Davis takes such exception to in his letter to the Prime Minister that has subsequently leaked, might happen. Fortunately, we are in a governmental negotiation involving serious politicians who can ensure it will not happen by having for the UK a fall back of continued EEA membership during the transition to December 2020 with the EU and the UK and non EU members of the EEA adapting by Protocols the EEA Agreement. This would be done in way that would allow for a 'managed divergence' during the transitional period. It would be a more tightly constrained de-coupling than the UK might wish to negotiate but it is likely to satisfy the scepticism expressed by Chancellor Merkel about 'managed divergence'. In this enabling respect and in many other respects it is manifestly superior to the opening EUCO-27 proposal. And far better for all concerned than abandoning any transition period and starting to trade entirely under the WTO rules without a period of 21 months to adapt after leaving the EU.

The EEA-transition option has significant advantages for the EU, as well as the UK. Any legal controversy would be simply put to one side about the UK continuing in the EEA outside the EU. Were this to meet opposition it could mean the UK using international dispute resolution concerning the interpretation of international Treaty law. If that happens, so be it: the UK has an excellent case and can be reasonably

confident of a favourable outcome. The non EU EEA members would not be accepting the UK as a permanent member of the EEA and this being written into the Withdrawal Agreement should ease some of Norway's concerns.

The EEAA covers financial services and City of London matters in its Annex IX. We are 'in the tent' as an EEA member legislatively now and in negotiating a legal framework for the transition the UK would find it easier – as would the EU - to amend EU legislation and negotiate for 'equivalence' (in each case for EEA purposes) by virtue of Article 102. In the transition period if we have differences in EEA areas of negotiation we can notify a 'right of reservation'. This is much better than the EUCO-27 guidelines, which give us no power at all. The quid pro quo for the EU would be the EEA financial mechanism where the UK would use their payments schemes; these are direct transfers to poorer member states but that can be adjusted.

The EU, with some justification, will ask for significantly higher payments from the UK for financial services access during the transition and some are demanding they be made direct to Brussels, which would be possible. The clearer the framework of mutuality in an FTA on financial services, the weaker will be any arguments for payments in perpetuity. Discussions should start now between the Governor of the Bank of England and the President of the ECB so that they can feed in their views into the transitional Article 50 negotiations.

On freedom of movement, which I have already referred to, the EEAA gives the UK some discretion, and I think the Government should be up front in the negotiations about whether we should be able to use it in a measured, experimental way by seeking greater control of flows, but with no intent of doing anything that is contrary to the spirit of the EEAA. Here some of the proposals of Migration Watch could be very relevant. But the UK may have to accept the EU's blocking amendment in this area and in truth many people believe in the UK that limitation will need to be slowly implemented anyhow in the transition.

This EU-UK negotiation could have longer term benefits for the EU as well, in that it demonstrates that afterwards making adjustment to EEAA membership rules could benefit other countries. For example, those not wanting to join the Eurozone or countries that might find Eurozone membership difficult under any new Eurozone

restructuring. It has always been a mistake to not recognize the point that free movement of labour may be necessary for a Eurozone to work efficiently, but it is not necessary to the same extent for EEAA membership where a country has no intention of joining the Eurozone. The negotiations will touch on tricky political issues for the future but 'managed divergence' could become a very important process for Europe as a whole.

On negotiating trade agreements, the UK must get back the ability to negotiate and sign, at least heads of agreement, more or less straightaway. This the EEAA does allow. But we might in negotiation have to accept the concession during the transition that agreements actually concluded would not be implemented. Another argument for keeping this period of transition as short as feasible.

Similarly, UK agriculture and fisheries policy will take a while to reform. They are not covered by the EEAA, so we have potentially full freedom immediately to start working on these areas and consulting beyond the UK with EU partners. This will be welcomed in Scotland and Northern Ireland. If we are asked by the EU to put constraints on the speed of our adjustment on agriculture, since we are talking of a four year domestic transition, we could probably make concessions here to the EU on timing during the transition at little cost to ourselves and in some ways we are committed in the Phase 1 agreement to do this.

There has been much talk about areas of economic activity such as financial services, auto, pharma, telecoms, agriculture, etc. which fall into one of the following baskets.

Basket 1: Full alignment/harmonisation – effectively allowing things to stand as they are now.

Basket 2: Rough equivalence of regulation (negotiated mutual recognition – national regulations deemed OK if similar purposes and similar effects).

Basket 3: Non aligned (effectively means that standard FTA arrangements would apply, without enhancement, or alternatively that the areas of activity would fall outside the agreement entirely.

It is clearly right for the EU and the UK to try for such a basket approach provision but

the more ambitious our objective the more it becomes a necessity to provide in the Withdrawal Agreement that if the negotiators fail to agree at the last moment there is a default mechanism ready for the UK and that mechanism is continuing as a Non EU member of the EEA until December 2020 while an FTA is agreed.

By way of comparison with the EEA: Agriculture and fisheries are already in basket three and the 'right of reservation' (as it is now called) allows non-EU states to reject chunks of legislation if they want to, which would put them in basket 3.

Also Article 102 of the EEA Agreement allows for equivalence (basket two): the word 'equivalence' is in the actual text of the Agreement.

During the detailed bargaining period ahead we will need far greater unity in Parliament and the country than has yet emerged. But that sense of unity, of getting on with the task is gaining ground. It is already clear that a hard Brexit is not wanted by virtually anyone, and certainly not the EU 27 who know they will be damaged. Nor is it wanted by the British Government or the Official Labour Opposition.

The more ambitious and comprehensive the Withdrawal Agreement for the UK the more substantial will be the extra sums the UK will need to contribute to the current seven year EU Budget which runs until 2020. Without a FTA the UK would not pay over and above the lower EEA basic requirement during the transition.

Failure of people in the UK to distinguish between transition issues and end-state issues has been, and continues to be, a real problem for the negotiations ahead. Transition via predominantly the EEA would, quite manifestly, be better for all concerned in the UK to what the European Council put on the table in December for the standstill period. For the UK it would curb any legal action over the EEA, which might be in prospect for April 2018. [The earlier Article 127 case in November 2016 against the UK Government was not accepted since the High Court ruled the case was brought too early on which to adjudicate]. However, if the Government maintains its present refusal to continue its right to stay in the EEAA, the lawfulness of the Government's conduct will be challengeable in UK Courts from 29 March 2018 onwards. Such a challenge, if made, would directly raise the question of contracting party status and the applicability of the EEAA, but these are matters of international law not capable of being resolved by the

domestic courts or the ECJ. Although the High Court might well offer an opinion on the matter as part of its own reasoning on the domestic lawfulness question, if that action does, in the event, proceed, it would likely end up involving the international dispute resolution procedures indicated by the Vienna Convention, the only place, unlike the ECJ, where this sort of legal dispute can be finally resolved.

The EEA transition option plainly gives the UK more power and control over subsequent developments than would the European Council's proposal of last December. But it would also be easier for EU members. It follows precedent and in some parts would be bespoke but it means much of the legal provision is contained in a well understood international treaty with its own legal framework. It ought to unite all shades of Leave opinion, and attract some Remainers who recognise the need in practical negotiations to start to respect the referendum decision.

END