Introduction

1. This submission highlights some of the key legal implications of the – at the time of writing – likely possible outcomes of the Brexit negotiations. Please note that this submission does not speak for the University of Edinburgh and does not comment on the University’s Brexit preparations.

Background

2. The current phase of the Brexit negotiations aims to finalise a withdrawal agreement between the EU and the UK. The withdrawal agreement – as evident from the draft published by the European Commission in March 2018 – will deal with four key issues: citizens’ rights; the financial settlement; the Irish border; and a transition (or implementation) phase.

3. Crucially, the current phase of negotiations will not result in an agreement about the future relationship between the EU and the UK; instead, the withdrawal agreement will be accompanied by a political declaration outlining this relationship in broad terms. The actual treaty (or treaties) dealing with the future relationship will be negotiated and ratified between the EU and the UK in the immediate aftermath of Brexit (29 March 2019) during the transition phase due to end on 31 December 2020.

4. In terms of ratification, the withdrawal agreement will need to be ratified on the EU-side by the Council (i.e. representatives from the EU-27) with a qualified majority and after obtaining the consent of the European Parliament. On the UK-side, the EU (Withdrawal) Act 2018 stipulates in section 13 that the UK Government may only ratify the agreement after the House of Commons has passed a resolution approving the withdrawal agreement and the political declaration; and only after an Act of Parliament has been passed on the implementation of the withdrawal agreement.

Preparing for a no-deal Brexit

5. For the purposes of this submission, a no-deal Brexit is defined as a situation where the UK leaves the EU without a withdrawal agreement and without an agreement on the future relationship with the EU. This scenario will occur automatically by operation of law on 29 March 2019, unless either a withdrawal agreement is concluded and ratified or the negotiating period is extended in accordance with Article 50 (3) TEU.

6. In order to assess the legal consequences of a no-deal Brexit, it is useful to distinguish between the internal and the external situations.

7. Internally, the European Union (Withdrawal) Act 2018 (EUWA) – potentially coupled with the Legal Continuity (Scotland) Act should it enter into force – will operate also in the event of a no-deal Brexit. The EUWA will ensure that ‘on exit day’ all EU law currently applying in
the domestic legal order of the UK and Scotland will remain in operation as ‘retained EU law’. This happens independently of whether there is a withdrawal agreement or not.

8. Hence the first potential problem of a no-deal Brexit – that of serious gaps in the statute book – will largely be avoided. However, there is a body of EU rules that only make sense if embedded in the broader EU framework. For instance, the rules on the free movement of goods, services, people, and capital if applied only by the UK have only limited effect as there will be no guarantee that the EU-side will reciprocate them. This means that a trader in goods (e.g. Scotch whisky) may not be able to sell their product to the EU in the same way as before.

9. In a no-deal scenario the UK would have to adopt a number of unilateral measures to manage the fallout from the failure to reach an agreement. Of the four key issues dealt with by the withdrawal agreement – see above – this concerns mainly the status and rights of EU citizens living here. In the absence of a deal they will find themselves in a legal limbo having lost their legal status over night. Unilateral measures – e.g. an Act of Parliament guaranteeing their rights as they would be under EU law – can remove this uncertainty to a large extent. Of course, those elements of the withdrawal agreement that are reciprocal – e.g. the continued possibility for UK courts to refer citizenship cases to the ECJ for a period of eight years – could not be replicated unilaterally.

10. Externally, relations between the EU-27 and the UK would be governed by general international law. There would be no bespoke solution for the Irish border or an agreement on the financial settlement (though the UK would in all likelihood still be considered to owe the so-called ‘reste à liquider’ (mainly pensions for EU staff and other commitments entered into during the UK’s EU membership).

11. Among the treaties in operation would be the various WTO agreements for trade (at least as far as the UK is a party to them) and various international law documents on judicial cooperation (for instance the 1980 Hague Convention on child abduction; or the 1957 Council of Europe Convention on Extradition). There would, in other words, still be a legal relationship between the EU (or its 27 Member States) and the UK although this would be rather basic compared with the relationship under EU law and far less comprehensive.

12. Again, unilateral measures could be adopted to prevent difficulties, e.g. the UK could unilaterally open its borders for trade in goods to avoid long queues at customs and thus potential food shortages. However, these might be problematic under WTO law if applied to EU goods only as WTO law operates according to the most-favoured nation principle, which means that a WTO member must grant every other WTO member the same trading privileges as it grants its most-favoured nation (in the absence of a free trade agreement, of course).

13. On the EU-side one can expect similar unilateral measures to take place. For instance, the EU could consider UK financial services operators as equivalent (at least temporarily) and allow them to continue offering their services in the EU, at least until there is a sufficient financial services infrastructure in place in the EU-27.

14. A no-deal Brexit would also mean no transition phase, which would mean an abrupt change in trading relations and other forms of cooperation. This would prove challenging to prepare for, whereas the purpose of the transition phase is to allow all operators to adapt more slowly to the new EU-UK relationship.
Preparing for transition

15. By contrast with a no-deal Brexit, preparations for the transition phase – currently intended to last until 31 December 2020 – will be relatively straightforward. Transition takes the form of a standstill transition: EU law will continue to operate as before. The UK will be treated as an EU Member State for all practical purposes except that it will no longer have any involvement in the decision-making processes in the EU.

16. That said, there is the practical problem that the transition period is very short. The current draft of the withdrawal agreement does not contain a possibility for extending it, which means that 31 December 2020 presents a second potential cliff-edge. If no deal on the future relationship between the UK and the EU is reached (and ratified) by then, the UK would leave the EU without a deal on that date.

17. A transition of 21 months is extremely ambitious given the scale of the negotiating task ahead. As a comparison, the trade deal with Canada (CETA) took eight years to complete from the start of the negotiations until its (provisional) entry into force. Yet an extension of the transition period would not be easy legally speaking once the withdrawal agreement has been concluded as it could not be based on Article 50 TEU. Instead, an extension would in all likelihood need to be ratified not only by the EU and the UK, but also by all of the EU-27, which would bring with it enhanced unpredictability. For this reason, it is crucial to allow for a possibility of extending transition in the withdrawal agreement itself.¹

Preparing for the future relationship

18. Given the tight transition phase, it is likely that a final deal will not be negotiated until shortly before the end of the transition period and thus its entry into force. This may constitute a big practical challenge for cross-border operators in Scotland. At the same time, it can be expected that the broad outlines of the future relationship will be contained in the political declaration accompanying the withdrawal agreement.

19. While that declaration will not be legally binding, it will likely be specific enough for a prediction of the key parameters of a future economic partnership. There will be a practical need for a degree of specificity because of how the EU operates. First, the EU must base any agreement it signs up to on a legal basis in the Treaties. It is therefore likely that the political declaration will already identify whether the agreement sought will be a free trade agreement (primarily based on Article 207 TFEU – the common commercial policy), an association agreement (based on Article 217 TFEU) or another form of agreement (potentially based on a number of bases). Second, on the EU-side the agreement will be negotiated by the European Commission. The Commission will receive negotiating directives from the Council (i.e. the Member States) and these negotiating directives will give an idea as to what the EU is prepared to agree. Of course, there can still be deviation, but both the political declaration and the negotiating directives will give interested parties a flavour of the general shape the EU-UK relationship is likely to have after the transition period is over.

¹ A draft clause and more background information on this can be found in this publication for the European Policy Centre (by T Lock and F Zuleeg): http://www.epc.eu/pub_details.php?cat_id=17&pub_id=8761.