The purpose of this document is two-fold. First, it sets out the challenges and opportunities of Brexit for members of the Communication Workers Union and for Royal Mail. Second, it analyses current rights at work, their relationship with EU law and how they may be affected by Britain’s decision to leave.

The Impact of Brexit on Royal Mail

The Third Postal Services Directive: Post-Brexit Opportunities and Challenges

In February 2008 the European Parliament and the Council adopted Directive 2008/6/EC (the Third Postal Services Directive), which introduced the legal basis for the accomplishment of the internal market for postal services by providing the last legislative step in the process of gradual market opening. It set a deadline for full market liberalisation of 31 December 2010 for 16 long-term members, including the UK, and 31 December 2012 for the (then) remaining 11 members.

The Directive also strengthened the tasks and competences of national regulatory authorities, changed the manner in which the universal postal service could be provided and financed, required access to certain elements of the postal infrastructure and extended consumer protection provisions, and required the Commission to provide assistance to Member States on its implementation, including on the calculation of any net cost of the universal service. The Directive also requires the European Commission to report on its application every four years.

Perhaps most crucially it demanded the following:

- Member States are required to provide for the collection and delivery of letters and parcels on at least five working days each week, with a specified quality at all points in their territory.
- In the event that the provision of the universal service in a Member State results in a net cost that creates an unfair burden on the universal service provider, the Postal Services Directive sets out ways in which the so-called 'net cost' of the universal service obligation that represents an unfair financial burden for the designated universal service provider(s) can be compensated. However, in order to provide funding and ensure it is compatible with rules on State aid, the costs have to be calculated in a comparable fashion.

Following the Directive’s implementation, the Commission reaffirmed the importance of the European postal market, stating that “the ability to send letters and parcels to arrive within a specified time at a definite price to all parts of the European Union remains a fundamental
contributor to social, economic and territorial cohesion and the development of the single market.” The Commission also argued that “affordable and reliable parcel delivery services” are vital in realising the Digital Single Market’s potential, and require improved competition to do so.

Despite full market opening across the EU by 2013, competition in the letter markets has been slow to develop in most countries and universal service providers have retained majority markets shares. Of the 15 states that fully opened their markets before 2011, eight had over 5% competition in the letters market (by volume) by 2013. Meanwhile, just five countries that opened their markets after 2011 saw competitors capture over 5% of the letters market by mid-2013. Where competition in the letters market has developed, it is more widespread for end-to-end delivery provided by operators who created their own distribution network to deliver directly to recipients themselves. Access competition has developed in Slovenia, Germany and the UK.

In several member states, National Competition Authorities have condemned the provider of the universal service for anti-competitive behaviour in the form of an abuse of a dominant position. Cases include illegal rebates to business customers, margin squeeze and predatory pricing. These practices can have the consequence of foreclosing competition. Market entry and development of competition may also be discouraged through some regulatory practices, such as the imposition of license conditions for new entrants which may go beyond the scope permitted by the Directive.

The picture above is clearly mixed. On the one hand, the European Union has established a clear floor for the postal market, ensuring that collection and delivery will take place on at least five days of the week. However, on the other, it has singularly failed to see the market as monopolistic and has instead promoted competitiveness for its own sake. The result is duplication, a driving down of standards and a threat to terms and conditions: all facets of the British postal market.

When Britain leaves the European Union, the government will be at liberty to reverse the process described above and to develop a more elective policy as to how postal services shall be supported and delivered. For example, new regulations could be established to ensure a level playing field across the sector, diminishing the ability of firms such as Yodel to undercut on prices. Similarly, a reestablishment of sectoral collective bargaining and cross-industry working could help to reverse many of liberalism’s most pervasive features. For example, minimum standards on hours and salaries could be introduced, protecting thousands of workers.

Such changes would, however, only be possible under a Labour Government. In the short to medium term there is a real risk of revanchism and an exacerbation of market liberalisation under the Conservative Party. Indeed, these changes require contextualisation and should be viewed in the round with Labour’s promises to, for example, end zero-hours contracts.
and loosen restrictions on trade union action. Though Brexit offers opportunities to build a postal market that has workers and consumers at its heart, there should be no illusions as to the difficulties of this task.

State Aid and Regulations After Brexit

Allied to the EU’s regulatory framework are its rules governing the application of state aid and the levels of industrial support governments may offer businesses. For the UK, the two main mechanisms of international subsidy control are EU state aid rules and the World Trade Organisation (WTO) anti-subsidy rules. The latter apply to all 164 WTO Members, i.e. the great majority of countries, including all EU Member States and the EU itself, which is responsible for all of its Member States before the WTO. They will continue to apply after Brexit when Britain attains WTO member status. The former, overseen by the European Commission are composed of articles 107–109 of the Treaty of the Functions of the EU and various EU Council and Commission regulations and guidelines. When Britain leaves the EU these rules will cease to apply, unless they are replaced with other instruments that are binding on a post-Brexit Britain.

Both EU and WTO state aid rules are – broadly – aimed at curbing state intervention in the national economy through state aid or subsidies. Such interventions have the following broad characteristics:

- They are governed by the state
- They provide a financial or economic advantage to the recipient
- State resources or finances are used
- Selective/specific industries or individuals will benefit
- They will have a potentially adverse effect on competition and/or inter-state trade

However, where EU rules differ is in their liberal interpretation and focus on their effect on competition. In most cases brought to arbitration it is generally sufficient to demonstrate that:

- Intervention releases the beneficiary (that is the enterprise or entrepreneur) from costs that it would generally have to bear in normal activities
- The beneficiary is either active in trade between EU states or it is conceivable that it is in competition with operators in other member states.

More significant still, under EU state aid rules, any measure that fulfils the criteria above cannot, subject to certain prescribed exemptions, be implemented unless it is notified to, and approved as ‘compatible’ state aid by, the Commission. Aid deemed ‘unlawful’ by the Commission then becomes subject to recovery with interest; essentially resulting in compliance and subsidy control becoming tools of economic uniformity across the EU.

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1 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT
2 Morris Schonberg, Continuity or change? State aid control in a post-Brexit United Kingdom (Herbert Smith Freehills briefing)
The rationale for such procedures is two-fold. First, it is to facilitate freer trade within the bloc and diminish the impact of states on trade. Second, it is to reflect a generalised acceptance that an established baseline is required to enhance competition across borders. It is clear that state aid controls are seen, therefore, as both part of and a conduit to the internal market and complementary to freedom of movement for goods, services, labour and capital. This was affirmed as early as 1961 when a Court of Justice of the European Union judge ruled that state aid “in itself constitutes an obstacle to the most rational distribution of production.”

It is currently impossible to state with any degree of certainty the kind of state aid regulatory framework that will exist between Britain and the EU after Brexit. However, it is instructive to consider the kinds of regulations already in existence between the EU and those states with which it has formalised trade arrangements.

Chief among these is the European Economic Area (EEA) system, which many voices from across the political spectrum have called for Britain to join once it leaves the EU. The EEA’s state aid system runs in parallel to the EU’s, albeit with oversight from the European Free Trade Area Surveillance Authority rather than the European Commission. In this sense, members of the EEA remain part of the EU internal market.

Similarly, EU trade agreements with ‘domestic’ partners i.e. those undertaking and seeking accession feature broadly equivalent terms to the union’s state aid system. Although each agreement is tailored slightly differently, largely to enable a gradual transition to a market economy, their general direction is universal and geared towards harmonisation with the single market.

The third model for comparison can be referred to as WTO-plus agreements i.e. free trade agreements between the EU and other nations. These are not uniform, for example, the EU-Singapore free trade agreement (FTA) prohibits subsidies in relation to services as well as goods, a feature not included in the EU-South Korea agreement. In contrast, the Canada Comprehensive Economic and Trade Agreement (CETA) requires the parties to notify each other every two years in relation to the form, legal basis and amount of certain subsidies that are maintained. It also contains a non-binding consultation mechanism, whereby parties must endeavour to minimise adverse effects of the subsidy on the complaining party’s interests. CETA does not, however, require the parties to implement domestic subsidy legislation or for subsidies to be pre-authorised in the way that they are under EU State aid law.

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5http://kluwercompetitionlawblog.com/2016/12/12/ceta-mean-eu-canadian-competition-policy/
The variation in WTO-plus agreements suggests that should a bespoke free-trade deal between Britain and the European Union be agreed it could include room for structural subsidies. For example, it would be framed to enable support for industries of particular national value or natural monopolies where cost reductions would be beneficial, but which have no impact on other countries. In this sense, Brexit poses an opportunity to evaluate Britain’s economic framework and redefine what a level playing field looks like. It is likely that the UK and EU will be united in their determination to avoid any possible ‘subsidy war’ and to maintain a functioning trading partnership. As such, even under a future Labour government, the opportunities presented for direct subsidies after Brexit will be limited in scope and specific rather than general in nature.

There is a growing body of literature on the impact Brexit may have on the British rail network and its nationalisation. The EU Commission has been clear in its goal of “opening up national freight and passenger markets to cross-border competition” and there is hope that this can not only be resisted, but reversed. This position has been vocally advanced by the RMT and Aslef, both of which called for their members to support a leave vote in the referendum.6

Less conclusive is the opportunity for state aid to be used to support the postal and telecoms sectors. There would, theoretically, be a strong argument in favour of, for example, the roll out of superfast broadband supported by the state. This is not only a natural monopoly, but a driver of economic and social wellbeing. A similar argument could be made concerning the Post Office network, particularly as this has been supported by EU structural funding as a service with a net social benefit. The challenge then is how flexibility in these areas is maintained during negotiations on the terms of Britain’s departure, and ensuring that any future trade deal enables government support for key industries.

An alternative state aid model could reward those organisations that go above and beyond normal regulatory standards with greater access to public contracts or extra support – for example in the form of capital for training or support for socially-beneficial investment. This approach could be developed in conjunction with new models of ownership, in particular consumer/worker-owned mutual and cooperatives and would perhaps prove less objectionable to the EU than direct state control. Royal Mail is one such organisation that could benefit from this and that renationalisation could be linked to substantive investment in socially-beneficial services.

Regardless of the shape of future EU-UK arrangements, it is clear the Labour Party’s ambitious plans to transform the economy would be hindered by a trade deal that prohibits state aid in goods and services. However, this is not to say that selective state aid rules would completely undermine the programme of economic transformation. In this sense,

close scrutiny of government conduct in talks with the EU is required along with a realistic assessment as to what is possible in developing new state aid regulations.

**Risks for Royal Mail**

Before the 2016 referendum BT, in conjunction with the CWU and Prospect Union, released a memo warning its staff on the risks of leaving the European Union. Chairman, Sir Mike Rake told City Am that: "We believe very strongly at BT that it’s important that business puts forward its perspective on the economic risks and realities and advantages - or the other way round - of the EU, so we together with the two main unions are writing to our employees only to explain the position we’ve taken in public around the importance of the EU to the economy of the UK, and directly and indirectly to BT.” The statement was later circulated with countersignatures from chief executive Gavin Patterson, CWU deputy general secretary, Andy Kerr, and Ben Marshall, national secretary for the communications, media and digital sector at Prospect.

The memo’s purpose was not to tell BT staff how to vote, but rather to warn them of the economic turbulence that would follow Britain’s departure and that could reverberate for some years to come. This is particularly true in regard to future foreign investment, the value of Sterling and inflation. It is highly likely that in the short-to-medium term these will have a substantial impact on BT, Royal Mail and those other companies where the CWU has members.

According to a February 2017 study by accountancy group UHY Hacker Young, the UK is losing out on foreign direct investment (FDI) due to the uncertainty following last year’s Brexit vote and now lags behind the global average by 18%.\(^7\) Ernst and Young’s conclusions were more mixed. While it stressed that short-term investment prospects were largely unchanged in the wake of the referendum, the longer-term picture was gloomier.\(^8\) Some 31% of investors expect the UK’s FDI attractiveness to decline over the next three years, while 33% expect it to improve. While these figures are a marginal improvement on October 2016, they are significantly worse than the long-term average, and 50% of investors based in Western Europe expect the UK to become less attractive. Even more concerning is the sharp fall in how global investors rank the UK’s attractiveness on key criteria such as education, transport infrastructure, local labour skills, political stability and access to the European market; year-on-year declines of up to 30% on some of these criteria is unprecedented in the past decade.

Sterling has faced similarly challenging circumstances. Since last June’s referendum it has lost 13% of its value against the dollar with many experts predicting that it will fall further still, particularly in the case of a ‘hard Brexit’ i.e. should Britain leave the Customs Union and

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\(^7\) [http://www.cityam.com/258442/uk-losing-out-foreign-direct-investment-due-uncertainty](http://www.cityam.com/258442/uk-losing-out-foreign-direct-investment-due-uncertainty)

the Single Market. The currency’s falling value may have a net-positive impact on exports, however, in the immediacy it is likely to further undermine business confidence and investment and raise the cost of servicing debts held in foreign currencies. Royal Mail, in particular, will lose out as the company seeks to service a €500 million bond with an operating interest of 2.375% and another 7 years to run.

As previously discussed, the weak pound has also driven up inflation, resulting in declining consumer confidence. Stronger than expected consumer spending patterns have so far staved off some of the darker pre-referendum forecasts, however, there are growing signs that this is abating. Should these trends continue then there is, in the long-term, a risk of stagflation, particularly if the Bank of England opts to increase interest rates. This would effectively be the ‘perfect storm’ of inflation and sluggish growth. Though the short-term consequences of this would undoubtedly be negative, the necessitation of greater government engagement in the economy could potentially reframe the economic debate around Brexit and help support arguments for a stronger role in planning and management.

Less discussed and harder to predict is the relationship between international capital and any future Labour government. Should he be elected, Jeremy Corbyn would act to reconstitute the British economy with the new tools available to an independent Britain. Rebalancing the power of capital could potentially lead to capital flight as investors look to withdraw to territories more favourable to their interests. Moreover, the rise of a progressive government at the heart of Europe, if not the EU, could raise condemnation from supranational organisations such as the International Monetary Fund, Though such grim predictions may be dismissed as fanciful, it should not be forgotten that the Callaghan Government was effectively brought down by international forces and more recently, they have been employed to suppress the Syriza Government’s progressive agenda in Greece.

Perhaps more prescient is the risk of deregulation should the Tories retain power at the next General Election. Freed from the ‘restraints’ of EU regulations, it is possible that liberalisation would increase posing a challenge to Royal Mail’s integrity, enhancing competition in the postal market and undermining rights at work.

Workplace Rights and Brexit

According to Keith Ewing the European Union and its successor the European Economic Community have played an important, though not essential role in the extension of rights at

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work. Though EU law, particularly through the Social Chapter agreed in 1997, has helped to improve the conditions of British workers they have not universally gone as far as statutes agreed by Parliament and will not necessarily do so in the future. It is notable that the EU has eroded workplace rights in nations such as Finland, Greece and Belgium and that leaders in France and Germany look set to continue this trend. Moreover, the rights enjoyed by British workers have not been ceded, but instead won through the struggle of successive generations.

The question then is: what are the likely consequences of Britain’s departure?

1. Ossification - Britain’s legislative inheritance is unlikely to change in the immediate aftermath of withdrawal. Given Britain’s departure, any changes made by the European Parliament or Commission will not apply in UK law.

2. Substitution - The floor of rights enjoyed by workers will largely be preserved in British law; however, access to the European Court of Justice will no longer be possible. The ECJ has had a transformative effect on case law with Professor Ewing suggesting that it has helped to overcome the “conservatism” of the British judiciary. What replaces the ECJ remains to be seen, but an alternative structure will urgently be required.

3. Gradual erosion – Under a Conservative Government, Ewing predicts that rather than a sudden shift in workers’ rights we will instead experience their gradual erosion. Key areas that could be under threat include: access to employment tribunals; caps on discrimination compensation; and holiday pay for part-time and agency workers. For many people these cutbacks will have little impact, suggesting that resistance to them will be limited, however, they will potentially set the tone for years to come.

In a bid to protect and safeguard the rights won to date from erosion the Labour Party has suggested that Britain should not sign a new free-trade agreement unless it includes membership of the EU charter of rights. This is arguably an ambition with several limitations. Should Britain leave the charter and elect a Labour Government it would be possible to overcome articles 16 and 28. The former, on the right to conduct a business, has been used to undermine sectoral collective bargaining while the latter, through the Viking-Lavall case, has diminished the right to strike. Ewing instead proposes that Labour should seek a radical realignment of capital and labour, avoiding the trappings of EU liberalisation while creating structures – particularly through a renewed workplace activism – to ensure that any new gains aren’t lost should Labour lose power. A similar logic may be applied to any future trade deals, which should be developed on the basis of protecting workplace rights and ensuring that there are means of enforcement.

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The division above between a gradual erosion of rights at work and an opportunity for their expansion cannot be understated. A positive vision of a ‘workers’ Brexit’ should be considered a priority for the labour movement. However, there is a vulnerability to this strategy, namely ensuring that the Labour Party is elected at the next General Election. The high stakes at play illustrate the importance of constructive criticism going forward and developing innovative solutions to the undoubtedly challenging circumstances we face.

**Risk and Opportunity: A future held in abeyance**

The purpose of this document was not to be prescriptive, but to outline in broad terms the challenges and opportunities Brexit will pose to the Communication Workers Union and the labour movement more generally.

At a macroeconomic level it seems clear that Britain will face economic dislocation if not difficulties in the short to medium term. Inflation is likely to erode real wages, investment will be stifled and growth limited. There are steps that can be taken by central government to combat each of these, but they are not risk free. Increasing interest rates to protect the pound, for example, will push up mortgage costs and run the risk of slowing growth further still.

For Royal Mail, the threat of growing foreign currency debts is real as is a decline in direct investment. However, free from EU state aid rules, the British Government can again play a more active role and ensure that the state is an active partner. Likewise, throwing off the Third Postal Services Directive will enable market safeguards to be established, preventing the seemingly-inevitable race to the bottom experienced under the EU’s watch.

However, leaving the EU will expose the labour movement to new risks. Should the Conservative Party remain in government in years to come it is likely that Britain’s workplace rights will begin to drift and fall behind our European counterparts. This could have profound ramifications for union organising and political engagement, and necessitates consideration as a matter of some urgency.

To capitalise on the opportunities and safeguard against the challenges, the CWU and the wider union movement will need to offer constructive and robust arguments and to counter the negativism displayed in some quarters. The likelihood of stopping Brexit is minimal, as a union we have an opportunity to get ahead and develop a compelling case for what replaces it.