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In this paper, Professor Barnard sets out the possible future options for the UK-EU relationship. This includes a future trade agreement, no future trade agreement (the trading on WTO terms), the conclusion of a series of UK-EU "mini deals" and the possibility of extending the transition period beyond 31 December 2020.

Future scenarios post Brexit

Catherine Barnard

1. Introduction

The UK ceased to be a Member State of the EU on 31 January 2020. After three years of negotiations, Brexit was in fact an orderly affair: the Withdrawal Agreement, initially negotiated by Theresa May and renegotiated in part by Boris Johnson, covered the three 'big ticket' items: citizens' rights, the financial settlement and the Northern Ireland border. A '[no-deal](#)' Brexit which many in the Westminster Parliament deeply feared, was therefore avoided.

The [Withdrawal Agreement](#) (WA) also made provision for the UK to enter into a transition period, currently due to expire on 31 December 2020. During this period, the UK remains subject to EU rules but does not participate in any of the EU institutions (no British MEPs, no UK Commissioner, no British judges at the Court of Justice). This period is intended to allow the UK and the EU to negotiate the future UK-EU relationship. The bare shape of the future relationship has already been agreed in the non-legally binding [Political Declaration](#) which accompanied the Withdrawal Agreement.

At domestic level, the EU (Withdrawal) Act 2018 had the effect of turning off EU law, converting most of the pre-existing law into UK law and giving the government the powers to 'correct' existing UK law so that it can function in the post Brexit world. Significant amendments were made to the 2018 Act by the EU (Withdrawal Agreement) Act 2020 which incorporated the Withdrawal Agreement into UK law and turned back on EU law, via the vehicle not of the European Communities Act 1972 but the 2020 Act, for the duration of the transition period.

So what happens at the end of the transition period? This report sets out the options which are available to the UK/EU. It assumes that the UK and EU will respect their international commitments already made under the Withdrawal Agreement and so each of the options identified starts from this premise. The options considered are:

1. A no trade deal Brexit on 1 January 2021 (section 2)
2. A UK-EU trade deal Brexit on 1 January 2021 (or later) (section 3)
3. An extension of the transition followed by a trade deal or a no trade deal Brexit (section 4)

We shall consider these in turn. Section 5 concludes.

2. A no trade deal Brexit on 1 January 2021

2.1 Introduction

For many, a ‘no *trade* deal Brexit’ (as opposed to a ‘no deal Brexit’ which never happened following the successful conclusion of the WA) by is what constitutes a true Brexit and what, they argue, the British public voted for. There were many predictions as to how bad a ‘no deal’ Brexit would be for the economy.¹ There were also serious concerns about the implications of a border on the island of Ireland.² Given that a ‘no deal’ Brexit has been avoided, with the successful conclusion of the ‘Withdrawal Agreement’, some argue that leaving with a no trade deal Brexit is possible because the UK can fall back on WTO terms, and this will provide an adequate safety net to ensure that the UK continues to trade successfully, just like the US does with the EU. It will also mean that the UK will be free to enter into free trade agreements (FTAs) with other countries and this will help to deliver the UK’s plans to be a global trading nation.

So what does trading on WTO terms mean? The UK in a Changing Europe published a brief report on trading on WTO terms in 2018³ and it is currently being updated⁴. This section draws on some aspect of this report.

¹ See eg <https://ukandeu.ac.uk/wp-content/uploads/2018/11/The-economic-consequences-of-Brexit.pdf>

² See eg <https://www.theguardian.com/uk-news/2019/aug/22/northern-ireland-police-chief-simon-byrne-warns-brexit-hard-border-could-revive-paramilitary-groups>.

³ <https://ukandeu.ac.uk/research-papers/what-would-trading-on-wto-terms-mean/>

⁴ The following draws on this draft revised report.

Terminology

Without a free trade agreement with the EU, UK-EU trade will be based *only* on WTO terms. Even with an agreement, there may still be some areas where the EU and UK end up relying on WTO rules. WTO rules and WTO terms are not the same.

WTO Rules

WTO *rules* are agreements negotiated and agreed by consensus among WTO member governments. They have two components:

- **rules**, on, for example what kinds of subsidies are allowed, and how legal disputes are settled. The [latest edition](#) of the rules is around 550 pages.
- **commitments** that individual governments make to open their markets and limit agricultural subsidies. These are different for every country. The combined commitments of all WTO members probably run to around 30,000 pages.

The UK's post-Brexit schedules submitted for certification replicate the concessions and commitments which were applicable to the UK as an EU member. A number of WTO member states have raised objections to the submitted schedules. As of 1 February 2020, the UK continues to engage in discussion and negotiations with certain members of the WTO regarding certification.

Negotiations will also be needed on what are called 'tariff quotas'. These allow limited quantities of a product to be imported at a low or even zero tariff, while anything above the quota is charged a much higher duty. The quotas currently apply to the EU as a whole – including the UK – so they need to be divided up, and doing so for the 100-odd tariff quotas that currently exist is already proving [complicated](#).

WTO rules apply to all trading relationships between WTO members even if they negotiate additional agreements among themselves. For example, a UK-EU free trade agreement would still have to comply with WTO rules.

WTO terms

WTO *terms* is a way of describing a trading relationship based only on WTO rules – so with no additional bilateral free trade agreement. Anyone trading on WTO terms is governed by a key [WTO principle](#): a state must treat its trading partners equally, or as a 'most favoured nation' (MFN). If the UK charges 10% duty on cars from China, it has to do the same on cars from all other WTO members, except where it has a free trade agreement. This non-discrimination principle applies to the full range of tariffs and regulatory controls. It also applies to services.

The WTO has a second important non-discrimination principle called "national treatment". This means giving foreigners or foreign companies the same treatment as the country's own nationals or companies.

2.2 Issues with trading on WTO terms only

Given the protection offered by the WTO system this might indicate that a no trade deal Brexit would not be so bad. Others would disagree.

There are various reasons why trading on WTO terms only would not be good for the UK. *First*, no major trading nation trades solely on WTO terms. Even though the US does not have a trade deal with the EU there are a number of side agreements that facilitate EU-US trade. The UK will not have those arrangements in place on 1 January 2021.

Secondly there are major sectors where the WTO has no reach. For example, air transport services are governed by a specific [annex](#) of the General Agreement on Trade in Services (GATS). However, as the WTO says, the annex excludes from the agreement the largest part of air transport services: traffic rights and services directly related to traffic.⁵

Thirdly, the WTO's rules on services are far less developed than they are for goods and this will hit the UK since more than 80% of UK economic output (and 45% of exports) comes from services. While goods trade involves tangible products physically moving across a border, services are more complicated, from setting up a branch in a foreign country, to flying the customer into the country (as with tourism) or an expert out to provide the service. Once a good has been imported, it cannot be treated worse than a domestic good. Under WTO rules for services, however, such 'national treatment' is optional. Member countries are free to discriminate against foreign services and bar them from accessing their domestic market. The only limitation is that they must discriminate against all other members equally.

Fourthly, enforcement is significantly more difficult under the WTO than under EU law. Because the WTO is an organisation of governments, citizens and companies can access its dispute settlement procedures only via their governments. This means that companies and businesses must persuade their governments to bring a claim on their behalf; under EU law they can bring claims themselves. Given how expensive, complex and political WTO litigation is, governments filter complaints and only a very small number of them are brought before the WTO panels. Furthermore, because claims can be brought only against states, if a breach of trade rules is committed by a competitor company, the WTO dispute resolution system is generally of no help.

There is a further practical problem about enforcement. The US has been a longstanding critic of the WTO appellate body because of its tendency to make laws rather than simply enforce them - thus encroaching on national sovereignty. Last December the US blocked the appointment of new judges to the WTO appellate body. As a result, there is currently only one judge, leaving the WTO unable to adjudicate trade disputes. The crisis raises a question as to how the UK would be able to enforce trade rules against the EU in case the UK falls back on the WTO framework. Relying on WTO rules would mean that there may be no recourse to legal redress for the UK in case the EU violates its trade obligations, for example, by imposing higher tariffs on UK imports.

Finally, the economic impact of trading on WTO terms is serious. My colleague, Jonathan Portes, estimates that 'the direct impact would be to reduce UK GDP and income per head by 3.3% over ten years (that is, in ten years' time GDP would be 3.3% lower than it otherwise would be). However, with plausible estimates of the indirect impacts - in particular the hit to productivity resulting from less international trade - that impact would rise to 8.1%. This estimate is broadly consistent with the government's own impact assessment, which estimated a negative impact of 7.6% of GDP.'

Given these problems with trading solely on WTO terms- which will affect the UK and the EU - some argue that the EU will do mini-deals with the UK to soften the blow. Some point to the fact that the EU appeared to be offering this in the event of a no deal Brexit; it will do so again in the event of a no trade deal Brexit.

⁵ https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm

2.3 Mini deals

There are three problems with the mini-deal argument.

First, at the moment Michel Barnier has not got a mandate to negotiate them. The EU is a system based on law and the negotiations are being conducted under Article 218 TFEU which requires a mandate to be given to the negotiator (see section 3.1 below). This mandate could, of course change, so this is not an insuperable problem.

Second, mini deals would not benefit from the Article XXIV carve out for FTAs and customs unions under WTO law. This is because mini deals will not satisfy the ‘substantially all trade’ requirement in Article XXIV.8 which provides:

- (a) A *customs union* shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
- (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to *substantially all the trade* between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A *free-trade area* shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories. (emphasis added)

So any such mini deals could be challenged unless the benefits were extended to all the EU’s trading nations under the MFN principle.

Third, what the EU prepared for in the event of a no deal Brexit in 2018-19 were in fact unilateral concessions. First, the EU published a number of [preparedness notices](#) across all major areas identifying the legal issues raised by the UK becoming a third country. These are still of interest in the event of a no trade deal Brexit.

Second, it published a number of contingency measures (summarised [here](#) and, for the detail of the law, [here](#)), making concessions to the UK. Take, for example, road haulage. Currently, UK drivers enjoy full market access to the EU (eg London to Paris) and cabotage across the EU (eg Paris to Rome) under Regulation (EC) No 1072/2009 and Regulation (EC) No 1073/2009 of the European Parliament and the Council. The only other available legal framework that could provide a basis for the carriage of goods by road between the Union and the UK after the withdrawal date was the multilateral quota system of the European Conference of Ministers of Transport (ECMT). However, as the EU noted, ‘due to the limited number of permits currently available under the ECMT system and its limited scope as regards the covered types of road transport operations, the system is

currently inadequate to fully address the road freight transport needs between the Union and the United Kingdom'. So, in order to prevent serious disruptions, a temporary set of measures enabling road haulage operators as well as coach and bus service operators licensed in the UK to carry goods and passengers by road between the UK and the remaining 27 Member States, or from the United Kingdom to the territory of the United Kingdom transiting one or more Member States. These '[temporary phasing out measures](#)' were due to come into force on 30 March 2019 and expired on 31 December 2019,⁶ ie a concession lasting 9 months only.

These concessions could be resurrected and they might be if no trade deal is struck by December 2020 and no extension is agreed, but only if it looks like a trade deal could be negotiated down the line.

2.4 Northern Ireland Protocol

(a) The Content

In the event of a no deal Brexit, the Ireland/Northern Ireland (NI) Protocol, included in the WA, will apply and has been drafted expressly in anticipation that there is no UK-EU FTA (ie a no trade deal Brexit).⁷ Unlike the original Protocol negotiated by Theresa May, under which the UK as a whole would stay in a customs territory with the EU (the so-called 'backstop'), the version of the Protocol negotiated by Boris Johnson introduces a 'frontstop'. This means that NI is part of both the UK's customs territory and the EU's customs union. However, this is not quite how it is portrayed by Protocol.

Article 4 provides that Northern Ireland will be part of the UK's customs territory. This means that it will benefit from the provision of any FTAs that the UK negotiates with, for example, the United States. It will also be included in the UK's WTO Schedules. However, as [Weatherill](#) points out, despite the language of Article 4 that is not what the Protocol in fact *does*. De facto, Northern Ireland is part of the EU's customs territory. This is because Article 5(3) locks Northern Ireland into the entirety of EU Customs' regime. Northern Ireland will also fall in the 'single regulatory zone on the island of Ireland'⁸ (Article 5(4)). So Northern Ireland will align with 287 specific EU Regulations listed in Annex 2 on agri-food products and manufactured goods. As Weatherill points out, NI-EU alignment is extended by the Protocol to cover other key trade rules including those concerning the EU's customs regime, VAT and excise rules, those governing the single electricity market and state aid rules in respect of measures which affect the trade between Northern Ireland and the EU which is subject to the Protocol.

The system found in the Protocol will apply, even in the event of a no trade deal Brexit, but only for as long as Northern Ireland consents to it (Article 18).

⁶ Regulation (EU) 2019/501 of the European Parliament and of the Council of 25 March 2019 on common rules ensuring basic road freight and road passenger connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union OJ [2019] L 85/39.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf, [14].

⁸ Ibid [15]

(b) Checks

The effect of the provisions of the Protocol is that there will have to be checks on goods going from GB to NI, not least because of the presumption in Article 5(2) that ‘a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good will not be subject to commercial processing in Northern Ireland and fulfils criteria to be established’ in due course by the Joint Committee.

But it is not just East-West trade that will be affected. Again as Weatherill points out, West to east trade within the UK (NI-GB) is affected too: ‘What the Protocol does – via, once again, evasive language buried in Article 6 - is to require that the normal formalities applicable to goods leaving the EU’s customs territory shall apply to goods leaving NI for GB. Pursuant to [Regulation 952/2013](#) on the EU Customs Code that means the completion of an exit declaration.’

This has practical implications: the UK will need to make the preparations necessary to meet its obligations under the Protocol, ‘entailing most of all the construction of border infrastructure at west-facing ports in England, Scotland and Wales as well as at ports in Northern Ireland’⁹. So far none of this seems to have been done and this raises questions about the short time frame before the end of 2020 when transition is due to come to an end. This is discussed further in see section 4 below.

3. A trade deal Brexit on 1 January 2021

The outcome that the government says it is working to is for a trade deal Brexit by the end of the year. Given the UK’s red lines (in summary, no free movement of persons, no role for the Court of Justice and no customs union), the UK-EU agreement will be an free trade agreement (FTA) as defined in Article XXIV.8(b) GATT, cited at section 2.3 above. The potential content of a trade deal is considered in section 3.2 below. However, first we consider the question of process (section 3.1)

3.1 The Process

In order to conclude a trade deal, the EU needs to be given express powers to act. In the jargon this is known as the legal basis. Just as Article 50 provided the legal basis for the EU to negotiate the divorce text, the Withdrawal Agreement, Article 207 or Article 217 TFEU give the EU the power to conclude an FTA. Article 218 TFEU lays down the process. The text of these provisions can be found in Annex I.

Article 207 TFEU

Article 207 TFEU concerns free trade agreements between a third country (ie non-Member State) and the EU, acting in the framework of its ‘common commercial policy’:

The common commercial policy shall be based on ... the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

⁹ <http://eulawanalysis.blogspot.com/2020/03/the-protocol-on-ireland-northern.html>

The names of the [agreements](#) negotiated under Article 207 TFEU can vary depending on what the partner wants. They may simply be called Free Trade Agreements (FTAs), such as the [EU-Singapore FTA](#) or the [EU-South Korea FTA](#). Alternatively, they may be called Comprehensive Economic Trade Agreements (CETAs) or Economic Partnership Agreements. The recent free trade agreement with Canada was a CETA.

Article 217 TFEU Association Agreements

Article 217 TFEU also concerns agreements with third countries, but usually in the context of deeper and closer arrangements. These are called Association Agreements (AAs). Article 217 TFEU provides:

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Association Agreements were signed with Ukraine, Georgia and Moldova in 2014. According to the Commission, these three AAs represent ‘the most extensive form of co-operation offered by the EU to its non-candidate neighbours to date. [They] foresee far reaching political and economic integration with the EU by significantly deepening political and economic ties.’

The political and cooperation provisions of the [Association Agreement](#) (AA) with Ukraine have been provisionally applied since November 2014. The AA also contains a [Deep and Comprehensive Free Trade Agreement](#) (DCFTA) which the EU and Ukraine have provisionally applied since 1 January 2016. Such agreements often involve the partner country accepting most of the EU’s *acquis communautaire*, i.e. most rules concerning the single market and other parts of the EU legal order.

It will ultimately be a political decision whether the future deal the UK wishes to adopt will be under Article 207 as a free trade deal (which as the Canadian CETA shows can be broad in scope) or as an Association Agreement (deeper but suggests ever closer cooperation with the EU) or possibly both. The EU negotiating mandate cites [Article 217](#) as the legal basis.

Article 218 TFEU: the process

Article 218 lays down the process for negotiating and concluding these association agreements. In summary, it states that the Council of Ministers (ie ministers of the Member States):

- must authorise the opening of negotiations, following a recommendation from the Commission and, depending on the subject of the agreement envisaged, nominate the Union negotiator, normally the Commission (Art 218(3)). In the case of the UK-EU negotiations, this mandate has already been given to the Commission by [Council Decision](#).
- may adopt negotiating directives ie instructions to the negotiator, normally the Commission. It can also designate a special committee which the Commission must consult with as the negotiations proceed (Art 218(4)); in the case of the UK-EU negotiations, negotiating mandate (‘the directives’) can be found [here](#).
- must authorise the signing of agreements, on a proposal from the negotiator, and, if necessary, the provisional application of the agreement before its entry into force (Art 218(5)); and must conclude the agreements, following a proposal by the negotiator ((Art 218(6)).

Prior to adopting the decision concluding the agreement, the Council must, in various circumstances, obtain the consent of the European Parliament. In these cases, the European Parliament must deliver its opinion within a time-limit which the Council sets, depending on the urgency of the matter.

The European Parliament must also be 'immediately and fully informed at all stages of the procedure' (Article 218(10)). A separate '[Framework Agreement](#)' between the Commission and the Parliament gives further detail on how the two institutions should work together, including sharing negotiating Directives and allowing Members of the European Parliament (MEP) to participate as observers during negotiations.

Voting

The Council must act by a qualified majority vote (QMV) throughout the procedure (Art 218(8)). This means agreement is needed from 72% of the 27 member states (representing at least 65% of the total population of the 27 Member States). However, the Council must act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act, as well as for association agreements. So the UK-EU FTA is likely to be subject to unanimous voting. This means that any Member State, including Spain, Poland or Hungary can block the AA, possibly for internal political reasons.

If there is a change in legal basis to Article 207, then in terms of voting on the negotiation and conclusion of the agreements under Article 207(3), the Council must act by a qualified majority. However, unanimity is required for the negotiation and conclusion of agreements in, for example, the fields of:

- trade in services (Considered crucial by many in the UK);
- the commercial aspects of intellectual property
- foreign direct investment
- where such agreements include provisions for which unanimity is required for the adoption of internal rules (this is rare). Unanimity is also required in respect of agreements in
- trade in cultural and audio-visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
- trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

Mixed agreements

Where the agreement, whether under Article 207 or 217, contains provisions that fall under Member State responsibility ('competence'), individual Member States also have to ratify the agreement according to their national ratification procedures. These are known as mixed agreements; the EU-Canada CETA was adopted as a mixed agreement as was the EU-Ukraine Association Agreement. The Court has ruled that the [EU-Singapore agreement](#) could not, in its current form, be concluded by the EU alone, because some of the provisions (on investment) envisaged fell within competences shared between the EU and the Member States.

Thus 27 national parliaments must agree and, in a federated system like Belgium, 6 regional parliaments have a say. Any FTA or AA with the UK would probably be a mixed agreement. There is

power to bring it into force provisionally pending its ratification. In the past, the UK has pushed for as many of these international agreements as possible to be concluded as mixed agreements to ensure state control over the EU's activities.

The need for national ratification of any future trade deal was recognised by Theresa May in her Florence speech: 'And such an agreement on the future partnership will require the appropriate legal ratification, which would take time'. This is one of the reasons why there may be a need for an extension of the period of transition to allow time for the ratification process to take place.

The role of the Court of Justice

Article 218 provides that a Member State, the European Parliament, the Council or the Commission may obtain the Opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. This is important because the Court is the ultimate arbiter of what can be done under which provision of the Treaty and how. So, for example, the EU-Singapore Free Trade Agreement was considered by the [Court of Justice](#) under this provision.

The Court has also been [asked](#) to consider questions about the compatibility of aspects of the Canadian CETA, specifically its provisions on investor protection, with EU law. Any AA or FTA with the UK therefore must comply with the technicalities of the Treaty: 'Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised'.

Domestic implementation

Part 2 of the Constitutional Reform and Governance Act (CRAGA) 2010 provides the process for domestic ratification of any FTA. Section 20 sets out the main procedure, based upon the convention known as the Ponsonby Rule, to be adopted in relation to treaties before they are ratified on behalf of the United Kingdom. In essence, a Treaty cannot be ratified unless (a) a Minister of a Crown has in the first instance laid before Parliament a copy of the treaty, (b) the treaty has been published in a way that he or she thinks appropriate and (c) 21 days have expired without either House having resolved that the treaty should not be ratified. In urgent situations that process can be dispensed with.

3.2 The Content of any UK-EU FTA

The UK and EU have both produced negotiating mandates [here](#) and [here](#), summarising their position on key issues. The Institute for Government has produced a useful table which is reproduced in Annex II setting out the competing objectives. In summary, the UK and the EU are aiming for a simple FTA based mainly on goods, with zero tariffs and zero quotas (a so-called zero, zero arrangement). The UK does not want regulatory alignment with the EU which means there will be the need for border checks. The ambition for services is limited – currently not much more than is currently provided by the WTO GATS agreement. The ambition for a mobility framework is also limited, although slightly greater for young people. The EU would like a single agreement with a governance mechanism covering the entirety of the text. The UK would like different agreements or at least the governance mechanisms being applied to only part of the text.

However, all of this is dependent on whether the UK is prepared to reach agreement on the Level Playing Field (LPF), fish and, indeed, governance (ie 'effective management and supervision, dispute

settlement and enforcement arrangements, including appropriate remedies’).¹⁰ So far, the LPF provisions have been the most controversial. The EU has said:

... the envisaged agreement should uphold common high standards, and corresponding high standards over time with Union standards as a reference point, in the areas of State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, relevant tax matters and other regulatory measures and practices in these areas.

As the IFG points out (see Annex II), the UK will not agree to measures that go beyond a typical FTA and so while it will make commitments to international standards and avoid distorting trade, it will not apply EU standard in these fields, especially not dynamic standards. In particular, the UK does not want these provisions to be subject to [dispute resolution](#). The UK also does not want a role for the Court of Justice (there is a residual role for the Court in the WA).

So there is much to negotiate and, due to Covid, the six rounds of negotiations have been reduced to three before June and they have gone from meetings in person to meetings online. All of this has prompted discussions about extending the transition period. The next section looks at this question and starts by considering what is meant by transition.

4. Extending the transition

4.1 Transition

During the transition period¹¹ which, according to Article 126 WA, is intended to last until 31 December 2020, ‘Union law shall be applicable to and in the United Kingdom during the transition period’ and the UK is make provision to that effect (Article 127(1)). There are, however, some exceptions to the ‘status quo’ application of EU law. These include:

- the Euro¹²
- Article 11(4) TEU on the citizens’ initiative
- Some provisions on citizens’ rights¹³
- In the event of an agreement during transition on CFSP and CDP matters that will replace Chapter 2 of Title V TEU¹⁴

¹⁰ <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>, [17]

¹¹ The UK government under Theresa May insisted on referring to it as an implementation period, suggesting that the period would allow for a new trade arrangement to be implemented. In fact it is more maintain the status quo.

¹² (a)provisions of the Treaties and acts which, pursuant to Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, Protocol(No 19) on the Schengen acquis integrated into the framework of the European Union or Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, or pursuant to the provisions of the Treaties on enhanced cooperation, were not binding upon and in the United Kingdom before the date of entry into force of this Agreement as well as acts amending such acts;

¹³ point (b) of Article 20(2), Article 22 and the first paragraph of Article24 TFEU, Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, and the acts adopted on the basis of those provisions.2.

¹⁴ In the event that the Union and the United Kingdom reach an agreement governing their future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy which becomes applicable during the transition period, Chapter 2 of Title V of the TEU and the acts adopted on the

- Enhanced cooperation matters¹⁵
- Participation in new measures under the Schengen acquis¹⁶

Article 126(6) WA says that ‘Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.’

The transition period has been given effect to by s.1B of the 2018 Act which allows EU law to have the same effect in domestic law in much the same way as it did before Brexit but through the conduit pipe of the Withdrawal Agreement and not through the EU Treaties and the European Communities Act 1972.

4.2 Extending transition

Before July 2020

A number of voices, including Brexiter voices, have started to call for the government to seek an extension to the transition period. The advent of Covid 19 has removed the government capacity to deal with the negotiations and, as the Freight Transport Association has said,¹⁷ ‘Our first priority is always to deliver for our customers, and there is simply not enough capacity available to plan the major structural changes needed to implement a successful departure from the EU, as well as the myriad of other planned legislation changes on the horizon, as well as dealing with unprecedented pressures caused by COVID-19.’ However, so far the government is adamant that there will no extension request.¹⁸ That said, what would be the process?

Article 132 WA allows for the possibility of an extension to the transition period. It provides:

1. Notwithstanding Article 126,¹⁹ the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years.

The following points should be noted:

- The Joint Committee must decide
- It can decide only once

basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement.

¹⁵ Art. 127(4)

¹⁶ 5. During the transition period, in relation to measures which amend, build upon or replace an existing measure adopted pursuant to Title V of Part Three of the TFEU by which the United Kingdom is bound before the date of entry into force of this Agreement, Article 5 of Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union and Article 4a of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice shall continue to apply mutatis mutandis. The United Kingdom shall not, however, have the right to notify its wish to take part in the application of new measures pursuant to Title V of Part Three of the TFEU other than those measures referred to in Article 4a of Protocol No 21.

¹⁷ <https://fta.co.uk/media/press-releases/2020/march/logistics-needs-transition-extension-to-counter-co>.

¹⁸ <https://www.bbc.co.uk/news/uk-politics-52313042>.

¹⁹ Article 126 WA provides: There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.

- The extension can be ‘up to 1 or 2 years’ which creates space for an extension of less than a year (the Commission is said to contemplate six months) or a ‘flexextension’ allowing the transition to come to an end earlier than that.
- No procedure is laid down in the treaty as to how that decision is to be reached.
- Provision is made in the article for budgetary contributions (Article 132(2) and (3) WA)

However, following Boris Johnson’s commitment in the Conservative manifesto that he would not be asking for an extension, this commitment was enshrined in law by s.33 of the 2020 Act which introduced a new provision (s. 15A) in the 2018 Act. This provides:

15A Prohibition on extending implementation period

A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period.

That said, the Henry VIII clause in s.41 allows the Minister to make Regulations²⁰ which amend pre-IP legislation, including the 2020 Act itself.²¹ This can be done by negative resolution.²² Changing of the date of IP completion day and time (currently ‘31 December 2020 at 11.00 pm’ (s.39(1) EU (WA) Act 2020), can also be done by negative resolution.²³

Some argue that it would be unconstitutional to use secondary legislation to amend s.15A, and the Henry VIII power should be read narrowly. Also, reading the legislation in this manner undermines the purposes of the Act. However, it is worth noting that when it comes to the law, context is everything. In the *Christchurch Borough Council* case [2018] [EWHC 2126 \(Admin\)](#), for example, the Henry VIII clause at issue did not expressly include an ability for measures to have retrospective effect (changing things already done in the past). It was argued that it could not be used to do precisely that, given the need to read Henry VIII clauses narrowly? The Court disagreed. The retroactive effect here did not give rise to any unfairness. So the measures enacted under the Henry VIII clause were valid.

What, then, if regulations to amend s.15A were backed by a general consensus in Parliament to recognise the need for more time, as Covid-19 had meant that the UK had not had the time to negotiate the good future trade deal it desired? [Alison Young and I](#) have argued that s.41 could be used.

Clearly, having an Act of Parliament repealing s.15A and amending IP completion day would be the cleanest and neatest way of extending transition. But no one anticipated coronavirus in Autumn

²⁰ Schedule 4, paragraph 6.

²¹ (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act.

(2) The power to make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment.

(3) In subsection (2) “enactment” does not include primary legislation passed or made after IP completion day.

²² Sched 4, para. 6. ‘A statutory instrument containing regulations under section 41(1) is subject to annulment in pursuance of a resolution of either House of Parliament.’

²³ Sched 4, para. 5 ‘A statutory instrument containing regulations under section 39(4) is subject to annulment in pursuance of a resolution of either House of Parliament.’

2018 when the Withdrawal Agreement was finalised. And no one anticipated that coronavirus would not only hinder negotiations, but also prevent Parliament from sitting in the usual way.

After July 2020 but before December 2020

What if the effects of the coronavirus outbreak are felt for longer than anticipated and the negotiations really are going nowhere or the logistics companies really are not ready and insufficient customs agents have been appointed or trained.²⁴ What then? This really is unknown territory. If the government ask for an extension then in, say, November 2020 what is the legal vehicle to do it at EU level? The following possibilities have been suggested

- (1) Try using Article 50. Under international law it has been argued that this would constitute an amendment to an existing agreement so Article 50 could still be used as a legal basis. However, many EU lawyers argue that Article 50 was turned off, for the UK, on Brexit day, 31 January 2020.
- (2) As a variation to the above, the EU/heads of state and government and the UK could enter into an international agreement outside EU law to agree to an extension. However, this seems difficult legally because what an extension of the transition would extend EU law and so the EU would need a legal basis to act which takes us back to the problem in (1). There are a number of other legal bases in the Treaty such as Articles 207 and 217, but again these might well need unanimous agreement of the Council and if the agreement touches areas of Member State competence then it will be a mixed agreement requiring national and regional ratification. The Court of Justice may also be required to give its opinion under Article 218(11) TFEU.
- (3) Reach an agreement with the EU by 31 December 2020 which envisages a fairly lengthy implementation period to turn off existing rules of EU law and to enter into the new arrangements. However, this is likely to be a mixed agreement (see section 3.1 above) which would need ratification by all Member States which would have to be done by the early Autumn 2020.

All of this points to a need for a decision to be taken by 30 June 2020.

5. Conclusions

While the world is rightly focused on coronavirus and the complex health, economic and social implications arising from this, the Brexit transition clock ticks down. There are some major decisions to be made. It may be that the government considers that the price of an EU-UK trade deal is not worth paying in terms of limits on national sovereignty²⁵ and so the UK will head for a no-trade deal Brexit. Or the UK may decide that the economic shock caused by Coronavirus is so great that the UK economy cannot afford a further shock. However, even if it is able to do a trade deal with the EU there will still be an enormous amount of preparatory work to do to implement that trade deal on the ground. And this is where the pressure may well be felt. There simply is not the capacity in the

²⁴ See eg <https://gwtimpex.co.uk/customs-clearing-shipping-brexit/>.

²⁵ <https://reaction.life/david-frost-speech-in-full-britains-brexit-position/>

public or private sector to deliver this. Hence the increasingly vocal calls for an extension to the transition. As Armstrong and Menon put it²⁶

Some argue that the pandemic strengthens the case to end transition, to free us to sign new free trade agreements around the world in order to revive our recuperating economy. This requires us to rediscover our competitive spirit and reach a mutually favourable agreement with the US and the other nations that will follow.

However, these arguments are unpersuasive. Essentially, they amount to sacrificing our existing trading relationship with the EU, accounting for about half our total trade, for hypothetical and problematic future deals with the US and others in very short order. Given the uncertainty about the future of world trade, this would be a risky moment to make trade with by far our biggest trading partner more difficult, while pinning our hopes on being able to increase trade with the rest of the world.

²⁶ https://www.theguardian.com/commentisfree/2020/apr/19/coronavirus-complications-december-brexit?CMP=share_btn_tw.

Annex I: Text of Articles 207, 217 and 218 TFEU

Article 207 TFEU

(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Article 217 TFEU

(ex Article 310 TEC)

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Article 218 TFEU

(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.
2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.
3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.
5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.
6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

- (a) after obtaining the consent of the European Parliament in the following cases:
 - (i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Annex II: Summary of the UK and the EU's position on key issue

Source: <https://www.instituteforgovernment.org.uk/explainers/future-relationship-uk-eu-mandates>

Area	UK mandate	EU mandate	What does this mean?
Coverage and format	<p>The government wants a balanced agreement that:</p> <ul style="list-style-type: none"> • is in the interests of both sides • takes account of shared interests • respects the legal orders. <p>The UK wants a comprehensive free trade agreement (FTA) covering substantially all trade to be supplemented with additional agreements. Those separate agreements would cover fisheries, aviation, energy, internal security, irregular migration, mobility and social security, nuclear co-operation and security of information.</p> <p>Each agreement should have its own governance and dispute settlement arrangement.</p>	<p>Currently, the EU appears to be proposing an association agreement using Article 217 of the EU Treaty. This would require unanimity in the Council and the consent of the European Parliament, but not necessarily the approval by national and regional parliaments.</p> <p>Rather than sectoral deals, the EU wants a broad agreement with three components:</p> <ul style="list-style-type: none"> • governance framework – i.e. an institutional framework to manage the relationship and resolve any disputes • economic partnership covering trade provisions • internal and external security co-operation including law enforcement, police co-operation and security and defence co-operation. <p>The main agreement will not cover Gibraltar. The UK and EU can explore separate agreements for Gibraltar – but this would require Spain's prior approval.</p> <p>The content of the final deal</p>	<p>The UK and EU want the final agreement to cover more than trade</p> <p>The UK wants separate agreements covering different sectors. Each agreement would have its own governance arrangement. The EU wants one deal with one governance arrangement and has ruled out any sectoral deals.</p>

Area	UK mandate	EU mandate	What does this mean?
		will determine the legal basis and voting requirements on the EU side.	
Goods	<p>There should be no tariffs and quotas (quantitative restrictions on imports).</p> <p>The UK will maintain its own rules and regulations. There should be regulatory co-operation to address technical barriers to trade. This should include mutual recognition of conformity assessment, allowing UK authorities to assess for EU standards.</p> <p>The UK suggests the possibility of ‘equivalence’ in some areas of agrifood based on agreements between the EU and New Zealand and the Canada–EU free trade agreement.</p> <p>There should be “modern rules of origin” based on what has been recently agreed in the EU–Japan FTA.</p>	<p>The mandate aims to remove all tariffs and quotas.</p> <p>It also underlines the importance of legal commitments to a level playing field over time. The EU wants the UK and the EU to meet “corresponding high standards” using EU standards as a benchmark.</p> <p>The EU expects regulatory coherence on technical barriers to trade and food safety rules.</p> <p>The EU wants to maintain its standard approach to rules of origin – the mechanism through which traders prove their goods are eligible for preferential tariffs.</p> <p>The EU and UK should work closely to address any issues that impact the island of Ireland.</p>	<p>Both sides want to remove tariffs and quotas. The EU says its offer is contingent on the UK meeting sufficient level playing field provisions over time. The UK sees it as a reciprocal commitment, which should recognise existing precedents.</p> <p>Both sides want to cooperate to minimise regulatory barriers. But that approach would not commit them to adopting particular regulations above and beyond what has already been agreed as part of global treaties.</p> <p>The UK’s ask for equivalence agreements and mutual recognition would not remove regulatory barriers completely but they would simplify some requirements around checks and certification. The EU’s mandate does not suggest this is on offer.</p> <p>On rules of origin, the EU would prefer to offer a standard, more restrictive approach to rules of origin.</p>
Services	The agreement should include measures to minimise barriers to cross-	The agreement should go “beyond” existing commitments made to the rest	Most FTAs do not liberalise services much beyond global

Area	UK mandate	EU mandate	What does this mean?
	<p>border trade in services based on precedents such as the recently negotiated EU–Japan deal.</p> <p>It would include provisions on audio-visual services. The UK would also like to build on existing precedents in the area of digital services.</p> <p>The UK would like “a structured process” for withdrawing equivalence in financial services. This would seek to provide more certainty for business that the EU could not unilaterally remove equivalence without following a proper process.</p>	<p>of the World Trade Organization (WTO).</p> <p>Taking into account the EU’s previous FTAs, the deal should have broad coverage but also provide for exceptions and limitations. Audio-visual services would be excluded.</p> <p>The EU would look to grant unilateral equivalence mechanisms and decisions for financial services.</p>	<p>commitments and the EU does not see this as an exception. The commitment to cover a lot of sectors also doesn’t suggest meaningful access – and the EU is clear that there will be limitations.</p> <p>The two sides’ asks are broadly compatible but the UK is more ambitious than the EU. The UK is seeking to go beyond global commitments or precedents in a number of areas, such as in digital, professional and business services and equivalence.</p>
Intellectual property	<p>The FTA should go beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and World Intellectual Property Organization (WIPO) conventions.</p> <p>The UK will “keep its approach under review” when it comes to recognising new geographical indicators (GIs, which are a place-based trademark of certain goods).</p>	<p>The FTA should go beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and World Intellectual Property Organization (WIPO) conventions.</p> <p>It should preserve current high levels of protection of intellectual property, with mechanisms for co-operation and exchange of information. It should also keep the same level of protection for geographical indications as set out in the Withdrawal Agreement.</p>	<p>Geographical indicators (GIs) are likely to be key ask from the EU. They were a contentious issue during the first phase of negotiations.</p> <p>The UK has agreed to recognise EU GIs listed in the Withdrawal Agreement. But it may not continue to do so for new GIs.</p>
Public procurement	<p>The UK will develop a separate and independent policy for public procurement. It is not included in the mandate.</p>	<p>The EU wants to negotiate an agreement that goes beyond the WTO Government Procurement Agreement (GPA) to include other sectors such as utilities.</p>	<p>The EU wants the final deal to cover public procurement; the UK does not.</p>

Area	UK mandate	EU mandate	What does this mean?
Mobility	<p>The UK is prepared to co-operate on border-crossing arrangements and social security co-ordination. All agreements must be mutually beneficial and reciprocal but based on precedent.</p> <p>The UK also wants agreement on mutual recognition of professional qualifications.</p>	<p>Any mobility agreement must treat every member state equally and must be reciprocal. Social security arrangements should be agreed.</p> <p>The EU also wants agreement on mutual recognition of professional qualifications.</p>	<p>Both sides have broadly similar opening positions.</p> <p>The EU will oppose any move to award visas on a differential basis to individual member states.</p> <p>Both want an agreement on mutual recognition of professional qualifications.</p>
Transport	<p>Both parties should agree a Comprehensive Air Transport Agreement and Bilateral Aviation Safety Agreement. UK and EU airlines should be able to operate services between both parties without restrictions on frequency and capacity.</p> <p>The UK and EU should continue to allow commercial road vehicles like hauliers to operate to, from and through each other's territories with no quantitative restrictions. The UK should not have to follow EU standards on road matters and be free to regulate its own domestic haulage and transport industry. It would do so in a way which will accommodate the situation on the island of Ireland.</p> <p>The UK has said nothing on rail transport.</p>	<p>On aviation, the final arrangement will be based on what the EU grants other third countries. It could be phased in gradually.</p> <p>One area left open is the 'fifth freedom' of the sky, allowing UK carriers to fly between the UK and EU, including one stop-off.</p> <p>There should be bilateral access for UK-EU road freight, but the UK's rights and benefits should not be at the same level as between EU member states – particularly on cabotage and the ability to operate within member states.</p> <p>The UK and EU should, if necessary, address issues arising from the Channel Tunnel and the Belfast-Dublin Enterprise Line.</p> <p>The EU and UK should address market access for the international maritime transport sector.</p>	<p>The EU believes the UK should have less access to EU air space than currently. The UK accepts the need for co-operation in some areas but favours bilateral agreements in accordance with EU precedent.</p> <p>The EU envisages bilateral access for road freight. The UK is seeking greater regulatory freedom and rejects the need for restrictions on freight numbers.</p> <p>The EU places two caveats on any transport deal: the UK must accept level playing field commitments as well as further alignment on "common levels of protection" (in the form of non-regression clauses).</p>

Area	UK mandate	EU mandate	What does this mean?
Energy	<p>The UK will consider an agreement on energy, but will not enter into an agreement if it does not allow the UK to strike an independent energy policy. If an agreement is to be struck, it would allow more efficient trade, more technical co-operation and further work on decarbonisation – but the UK has prepared for the prospect of no agreement.</p> <p>The UK would consider linking its carbon-trading scheme to that of the EU if it were mutually beneficial.</p> <p>The UK and EU should uphold international treaties and security standards. There should be an agreement on civil nuclear provisions which would enable UK–EU co-operation, nuclear trade, combined research and the continued supply of medical radioisotopes.</p>	<p>The UK and EU should work together to address double pricing and establish an open, non-discriminatory and stable energy market. Both parties should co-operate to provide sustainable energy solutions.</p> <p>The UK will leave the EU internal market on electricity, but mechanisms should be put in place to facilitate trade in electricity across borders. There should be non-discriminatory access to energy networks and a framework to allow for technical co-operation. An agreement requires UK acceptance of level playing field requirements.</p> <p>Civil nuclear provisions should respect international treaties and maintain high safety standards, including on radiation. Any agreement should facilitate trade in nuclear materials and equipment between the UK, the European Atomic Energy Community (Euratom) and member states. There should be a free exchange of necessary information and facilitate exchange of skilled workers.</p>	<p>The EU makes level playing field rules a prerequisite for deeper co-operation on electricity and gas. The UK believes that an energy agreement should be entered into only if the UK can maintain an independent energy policy.</p> <p>Both parties are in broad agreement on nuclear provisions and have an interest in preserving research co-operation.</p>
Fisheries	<p>Any agreement must reflect the fact that the UK is to become an independent coastal state. The UK wishes to open up annual negotiations on fishing quotas and access and would not accept the ‘relative stability’ mechanism under the Common Fisheries Policy. It would favour a zonal attachment, which is</p>	<p>The UK and EU should uphold existing reciprocal access, stable quota shares (which can only be adjusted with the consent of both parties) and set either annual or multi-annual total allowable catches.</p> <p>Partnership should reflect ‘continued responsible fisheries’ in line with principles of EU law, in particular those underpinning the Common</p>	<p>There is a clear gulf between the UK’s and the EU’s positions. The EU wants to manage fisheries in the same way as now; the UK wants annual negotiations on access to waters.</p> <p>The EU has also reiterated a desire to agree provisions on</p>

Area	UK mandate	EU mandate	What does this mean?
	<p>the basis for Norway's fisheries agreement.</p> <p>Any EU vessel granted access to UK waters would have to abide by UK rules. The UK will work with the EU to ensure fishing sustainability.</p> <p>Both parties should share vessel monitoring data.</p>	<p>Fisheries Policy.</p> <p>Access to waters and quota shares will affect other aspects of the economic relationship, in particular the extent to which the UK and EU can agree tariff-free and quota-free trade in goods.</p>	<p>fisheries by 1 July 2020. The UK government ignores this.</p> <p>The EU sees an agreement on fishing rights as a fundamental part of the economic relationship.</p> <p>The UK has underlined that its preferred option is in line with EU precedent for other coastal states.</p>
Level playing field	<p>The UK will not agree to measures that go beyond a typical FTA. The government will make commitments to international standards and avoid distorting trade.</p> <p>In particular, the UK does not want these provisions to be subject to dispute resolution.</p>	<p>The EU has argued that the UK's proximity and economic interdependence means there must be robust level playing field commitments over time. These should be commensurate with the overall partnership.</p> <p>The language is particularly strong on state aid.</p> <p>In other areas, the mandate states that the EU's broad regulatory approaches should be maintained and that the UK should not go regress from EU standards in place at the end of the transition period.</p>	<p>The level playing field appears to be the starkest areas of difference between the UK's and EU's opening positions.</p> <p>The UK doesn't want commitments that go beyond normal agreements with EU partners; the EU argues that the UK should be treated differently due to its geographic proximity and the economically interdependence of the two sides.</p> <p>The EU appears to want something close to what Theresa May agreed to as part of the previous Withdrawal Agreement: including non-regression of current standards, and for the UK public bodies taking the place of the EU Commission to enforce them.</p>

Area	UK mandate	EU mandate	What does this mean?
			The UK on the other hand does not want its commitments to be enforceable by dispute resolution.
Data	The UK is seeking an EU data adequacy assessment. It will allow EU data to flow into the UK on a transitional basis while it conducts its own assessment. It wants to seek arrangements for co-operation between regulators.	The EU expects both parties to commit to a high level of personal data protection and to respect the EU's decision making on adequacy decisions. This would be a necessary condition to share information in the area of law enforcement and judicial co-operation . The EU would look to grant adequacy to facilitate exchange of information.	The UK accepts that the EU will decide whether to give the UK data adequacy, but expects this to be granted as it currently follows EU rules.
Internal security	The UK wants a framework for law enforcement and criminal justice co-operation focusing on operational capability. It should include a mechanism for sharing and acting on real-time data, similar to the current system. The European Court of Justice (ECJ) and EU legal order "must not constrain the autonomy of the UK's legal system in any way". Nor should it involve a role for the ECJ in disputes. Finally, the agreement should not require the UK to continue participation in the European Convention on Human Rights (ECHR).	The EU wants close law enforcement and criminal justice co-operation , although it should take into account the UK's status as a non-Schengen third country. The EU wants to explore exchange of Passenger Nation Record (PNR) data and on DNA and fingerprints of suspected and convicted individuals (Prüm). The UK should be able to co-operate with Europol and Eurojust in line with arrangements for other third countries. The EU also proposes streamlining the extradition process and supplementing relevant Council of Europe conventions. The partnership should be unpinned by commitments to fundamental rights. If the UK ever left the ECHR, then any co-operation should be	Both the UK and EU want to agree mechanisms to allow criminal justice and policing co-operation to continue. The EU has said that the UK will be limited by its status as a third country, and by its being outside the Schengen area. Despite this, in certain areas it wants to make an exception: no other non-Schengen country is part of Prüm, and the proposal for reciprocal exchange of PNR data would go further than the arrangement for other third countries. In Theresa May's Chequers white paper , she committed to remaining part of the ECHR – but the current

Area	UK mandate	EU mandate	What does this mean?
		terminated. It would also be suspended if the EU repealed the data adequacy provision.	government appears to be stating it will not commit to remaining part for the purposes of this deal.
Foreign policy, security and defence	<p>The UK is ready to discuss co-operation in areas of mutual interest, including on asylum and illegal migration.</p> <p>It is ready to consider participation in certain EU programmes, if it is in its interest to do so.</p> <p>The UK is open to substantial foreign policy co-operation but does not see the need for an institutional framework.</p>	<p>The UK and EU should explore new dialogues on foreign policy and be prepared to share information, including on sanctions – these dialogues could be set up before the end of the transition period.</p> <p>The UK could participate in EU defence missions and projects on a case-by-case basis. The UK and EU should explore opportunities for joint research in the area of defence.</p> <p>Any participation in EU projects and programmes must accept ECJ oversight for matters of EU law.</p> <p>The EU is open to UK access to some aspects of the EU's Galileo space programme.</p> <p>The EU and UK should work closely to tackle global pandemics and the fight against climate change.</p>	The EU and UK are open to UK participation in EU programmes and instruments.
Governance	<p>Any agreement must respect the sovereignty of both parties and the autonomy of their legal orders.</p> <p>It cannot include any regulatory alignment, any jurisdiction for the ECJ over UK laws or any supranational control in any area, including the UK's borders and immigration</p>	<p>The EU wants an institutional framework that covers all areas of co-operation. This should include:</p> <ul style="list-style-type: none"> • regular policy dialogues • a joint committee (and sub-committees) with an equal number of UK and EU representatives to oversee, review and manage their relationship – as well as 	The EU and UK agree on the need for a governance and dispute-settlement arrangement . The government wants appropriate governance and dispute-settlement arrangements for every deal it strikes with the EU. The EU is more specific, wanting one framework to cover the

Area	UK mandate	EU mandate	What does this mean?
	<p>policy.</p> <p>The UK government wants governance and dispute settlement arrangements for its trade deal with the EU as well as for separate agreements covering specific sectors.</p>	<p>to resolve disputes.</p> <p>This framework must respect the legal orders of the UK and the EU.</p> <p>The UK and EU should seek to resolve disputes by mutual consent. If they cannot, they would refer the dispute to an independent arbitration panel. The decision would become binding on both parties. If the dispute covers a matter of EU law, the EU would refer the dispute to the ECJ, whose ruling would be binding on the arbitration panel.</p> <p>The UK and EU could seek financial compensation if either side has failed to comply with the decision of the arbitration panel within a reasonable timeframe. They also would reserve the right to suspend parts of any agreement with the UK in case of gross breach of the agreement.</p>	<p>whole agreement.</p> <p>The EU and UK agree that there should be an independent arbitration panel to resolve disputes.</p> <p>The EU wants the arbitration panel to refer to the ECJ for any dispute relating to matters of EU law. The UK does not want a role for the ECJ in decisions relating to the future relationship.</p>

Friday, February 28, 2020