

Brexit Transitional Arrangements: Legal and Political Considerations

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Key Highlights

- With an agreement on the future UK-EU relationship unlikely to be finalised by March 2019, transitional arrangements are necessary to allow time both for further negotiations and for the implementation of new policies and systems, such as customs and immigration procedures.
- The UK and the EU both seek a time-limited, comprehensive ‘status quo’ transition which extends or replicates existing frameworks. However, there are significant legal and political issues with each available option.
- Indefinite, or time-limited but easily extendable, transitional arrangements are required to prevent a possible cliff-edge at the end of the transition period.
- This paper considers five different options for the post-Brexit transition. It assesses how each one would be implemented in practice, what the legal and policy implications would be, and whether it is politically feasible.

The options

1. **Extension of the EU *acquis communautaire*, without membership**
 2. **An extension of the Article 50 withdrawal negotiations**
 3. **Remaining in the internal market via the EEA Agreement**
 4. **Remaining in the internal market by negotiating a new agreement modelled on the EEA Agreement**
 5. **Entering into a customs union agreement with the EU customs union**
- The most desirable and simplest option, consistent with the UK and EU’s position, is extending the *acquis*, without membership. It would mean minimal disruption to UK-EU cooperation and trade. However, it would entail continued budgetary contributions, ECJ jurisdiction and the primacy of EU law (including free movement). This would raise tensions between the EU’s legal constraints and objectives – to maintain the integrity of the EU legal order and ensure UK compliance – and the UK government’s desire to limit the ECJ’s jurisdiction and seek exceptions or bespoke arrangements.
 - Extending the withdrawal negotiations is also desirable, due to its comprehensiveness and relative simplicity as a transitional arrangement. However, it could be difficult to achieve politically, because of the disruption it may cause to the EU and domestic pressures in the UK.
 - All other options are less comprehensive, more legally complex and more politically fraught.

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Transitional arrangement	Practical implementation	Legal and political implications	Political feasibility
Extension of the EU <i>acquis communautaire</i>, without membership	<ul style="list-style-type: none"> - Article 50 withdrawal agreement would be the legal basis. - Requires approval of European Council (QMV) and European Parliament, but not member states. 	<ul style="list-style-type: none"> - UK-EU cooperation and trade is virtually unchanged. - UK loses decision-making powers and is no longer represented in EU institutions. - UK continues to follow and adopt EU law (e.g. free movement), under ECJ jurisdiction. Principles of direct effect and supremacy of EU law still apply. - Continued contributions to EU budget. 	<ul style="list-style-type: none"> - Consistent with UK and EU positions on the transition. Both sides want a comprehensive, 'status quo' transition based on existing EU frameworks. - Problems will arise if UK seeks opt-outs from specific policy areas, such as fisheries, or opposes ECJ jurisdiction.
Extension of the Article 50 withdrawal negotiations	<ul style="list-style-type: none"> - Article 50 would be the legal basis. - Requires unanimous approval of European Council, but not European Parliament or member states. 	<ul style="list-style-type: none"> - The UK remains a full, participating EU member state, with all of the rights and obligations that entails. 	<ul style="list-style-type: none"> - Consistently ruled out by the UK government. Might be problematic from a domestic political perspective. - Difficult to agree due to Council unanimity requirement. Also disruptive for the EU, with elections and new Commission in 2019. - Feasible option in a crisis situation or as a short-term measure.
Remaining in the internal market via the EEA Agreement	<ul style="list-style-type: none"> - Article 50 withdrawal agreement alone would not be the legal basis. - Amendments to the EEA Agreement would be required, involving the national (and some regional) parliaments of all contracting parties. - The UK might have to join EFTA, requiring unanimous approval of the EFTA states. 	<ul style="list-style-type: none"> - UK remains a member of the internal market and trade in services continues unchanged, due to continued regulatory harmonisation, but UK loses decision-making powers and is no longer represented in EU institutions. - UK would leave customs union and regain sovereignty in a range of areas, such as international trade, agriculture and fisheries. - UK continues following many EU laws and the four freedoms still apply, albeit under EFTA Court and EFTA Surveillance Authority jurisdiction. Principles of direct effect and supremacy of EU law no longer apply. - Continued contributions to EU budget. 	<ul style="list-style-type: none"> - Explicitly ruled out by the UK government. - Would be challenging to gain approval of all parties by March 2019 and might be rejected by the EFTA states as too disruptive. - Could be acceptable to the EU, which is happy with the EEA-model for third party relationships. - However, probably not feasible due to the practical difficulties of implementing it (e.g. treaty amendment).
Remaining in the internal market with a new agreement modelled on the EEA Agreement	<ul style="list-style-type: none"> - Article 50 withdrawal agreement would be the legal basis. - Requires approval of European Council (QMV) and European Parliament, but not member states or EFTA states. (Unless the EFTA Court and EFTA Surveillance Authority were to be used). 	<ul style="list-style-type: none"> - UK remains a member of the internal market and trade in services continues unchanged, due to continued regulatory harmonisation, but UK loses decision-making powers and is no longer represented in EU institutions. - UK would leave customs union and regain sovereignty in a range of areas, such as international trade, agriculture and fisheries. - UK continues following some EU laws and the four freedoms still apply. However, bespoke institutional mechanisms for enforcement and dispute resolution need to be set up. Principles of direct effect and supremacy of EU law no longer apply. - Continued contributions to EU budget. 	<ul style="list-style-type: none"> - More feasible than UK re-joining EEA Agreement due to relative ease of implementation and political agreement. - However, taken alone, this is not a comprehensive transitional arrangement, and is thus not consistent with UK or EU position. - Difficulty of setting up bespoke institutional mechanisms for judicial oversight and enforcement cannot be overlooked.
Entering into a customs union agreement with the EU customs union	<ul style="list-style-type: none"> - Article 50 withdrawal agreement would be the legal basis. - Requires approval of European Council (QMV) and European Parliament, but not member states. 	<ul style="list-style-type: none"> - Free movement of goods and tariff-free trade in goods continues unchanged. - UK continues to follow and adopt the EU's common external tariff, customs policy and associated legislation. ECJ jurisdiction would probably continue. - UK loses decision-making powers and is no longer represented in EU institutions. - If pursued in isolation, budgetary contributions could end. 	<ul style="list-style-type: none"> - As it only covers trade in goods, taken alone, this option is insufficient as a substantive transitional arrangement. It is therefore not consistent with UK or EU position. - It could be politically feasible to agree, although issues would arise over the extent to which the UK can pursue an independent trade policy.

Brexit Transitional Arrangements: Legal and Political Considerations

Piet Eeckhout and Oliver Patel

Introduction

This paper seeks to contribute to the debate on transitional arrangements between the UK and the EU following the UK's withdrawal. Predominantly focusing on transitional arrangements relating to trade and economic relations, it puts forward a range of options for the post-Brexit transition, assessing the legal issues associated with each option, as well as their political feasibility and the key policy implications.

Part one outlines what transitional arrangements are and why they are necessary. It then compares the EU and UK positions on the transition, and asks what the duration of the transitional period could be. Part two outlines the different options for transitional arrangements. It explores each option in detail, assessing how it could be achieved in practice, what the salient legal and policy implications are, and whether it is politically feasible. The five options for transitional arrangements which this paper presents are:

- 1. Extension of the EU *acquis communautaire*, without membership**
- 2. An extension of the Article 50 withdrawal negotiations**
- 3. Remaining in the internal market via the EEA Agreement**
- 4. Remaining in the internal market by negotiating a new agreement modelled on the EEA Agreement**
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Section I: Background Information

What are transitional arrangements?

This paper defines transitional arrangements as any agreements and measures which regulate the terms of the UK's relationship with the EU in the immediate period following withdrawal, and potentially up until the entry into force of a comprehensive agreement on the future relationship (e.g. a free trade or association agreement). Transitional arrangements should function as bridging mechanisms, enabling the UK to withdraw from the EU as smoothly as possible.

Transitional arrangements could be time-limited or indefinite. Broadly defined, transitional arrangements could include provisions in the withdrawal agreement, as well as amendments to existing agreements or even entirely new agreements. This paper predominantly focuses on transitional arrangements related to trade and economic relations. There are many important non-economic EU policies which may also benefit from transitional arrangements; these are briefly addressed in the final section of the paper.

Why are they necessary?

Transitional arrangements between the UK and the EU following the UK's withdrawal will be necessary above all for reasons of time. Article 50 stipulates two years of withdrawal negotiations, extendable only by unanimous agreement of the European Council. It is highly unlikely that trade negotiations and a comprehensive agreement on the future UK-EU relationship can be completed in this time frame. The progress of the negotiations to date supports this view. As of November 2017, eight months after Article 50 was triggered, the talks have yet to move on from the EU's three priority issues: citizens' rights, the financial settlement, and the Irish border.

Talks on the future relationship will not commence until January 2018 at the earliest, and potentially not until March 2018. Yet negotiations need to be completed by October 2018 to allow time for conclusion and ratification of the withdrawal agreement. This leaves a limited amount of time to conclude negotiations and formulate and implement new policies, processes and regulatory systems (e.g. new customs procedures, new agencies, or a new immigration regime). This is especially true for member

states such as France, Belgium and the Netherlands, whose ports receive a high volume of goods from the UK.²

If the UK were to leave the EU without any agreement (i.e. no deal), or with a withdrawal agreement but without substantive transitional arrangements covering trade, this would cause legal uncertainty and disruption in a range of areas. Businesses would face a cliff-edge, as they would suddenly have to trade with the EU (and the rest of the world) under WTO rules. *Inter alia*, this would result in multiple barriers to trade, such as high tariffs (at least for some products), an end to mutual recognition frameworks (including a loss of passporting rights for financial services firms), and burdensome customs checks, including a full customs border in Ireland.

Trading under WTO rules will not necessarily be simple. Although the UK is an independent member of the WTO, it does not have its own schedules (e.g. tariffs and services commitments) upon which trade with the rest of the world could be based, as it is part of the EU's combined schedules. The UK's schedules will need to be certified by WTO members, which requires complex and potentially fraught negotiations. There is an ongoing legal debate about how much of an issue this is, and the extent to which this is merely a technical issue or a sensitive political issue remains to be seen. The US and others have already rejected the UK and EU's plans for dividing the EU's tariff quotas post-Brexit (Hans Von Der Burchard, 04/10/2017, [Politico](#)).

Article 50 and transitional arrangements

Article 50 says little on transitional arrangements. Legally, there is no reason why a free trade agreement could not be negotiated as part of the Article 50 withdrawal negotiations – but it does not have to be.³ Simply put, there is no legal obligation for the EU to take a maximalist approach to the Article 50 negotiations. The EU's position is that the withdrawal agreement should cover practical aspects relating to withdrawal as well as transitional arrangements, but that a comprehensive free trade agreement will be negotiated after the UK's withdrawal.

A constitutionalist reading of Article 50 stipulates that the withdrawal process and agreement needs to be compliant with EU constitutional law.⁴ In this respect, the EU is constrained and should be guided by the relevant provisions and principles of which EU constitutional law is comprised. As such, there is an obligation on the EU – not least due to the principle of loyal cooperation⁵ – to try and ensure that the withdrawal process is as cooperative, smooth and orderly as possible. This entails working towards appropriate transitional arrangements and striving to ensure that there is an adequate agreement with the UK.

What is the EU's position?

While the consequences of no deal or a cliff-edge scenario are likely to be extremely damaging for the UK,⁶ such a scenario would also be harmful for the EU. It is something which the EU wants to avoid, which is why it supports the notion of transitional arrangements.

The European Council negotiating guidelines state that transitional arrangements may well be necessary. The guidelines stipulate that the negotiations should '*seek to prevent a legal vacuum once the Treaties cease to apply to the UK*'. The guidelines also state: '*any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms*.' Crucially, the guidelines refer to one potential option for transitional arrangements: '*Should a time-limited prolongation of Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply*'.⁷

Michel Barnier, the EU's chief negotiator, has repeatedly said that the transitional arrangements should be short and time-limited.⁸ He has also suggested that the transitional period should last until the end of 2020 (i.e. for twenty-one months), as this would cover the EU's budgetary period.⁹ It is unlikely that the EU would accept highly bespoke transitional arrangements, as this would be considered too complex and difficult to negotiate and implement in, and for, such a short period of time.

After the European Council has decided that negotiations can move on to the second phase – possibly in December 2017 – new negotiating guidelines will be published which will outline the EU's position on transitional arrangements in greater detail. Nonetheless, based on the Council's April 2017 guidelines and subsequent comments from Barnier and other EU leaders, it is reasonable to assume that an extension of the EU *acquis*, without membership, is the EU's preferred option for post-Brexit transitional arrangements.

There is undoubtedly a political element to this. The EU is keen to ensure that the UK does not benefit from post-Brexit arrangements which are more attractive than the terms of full membership. EU membership is a type of inter-state social contract which requires full participation by all. As a member state the UK has been able to secure various, significant opt-outs, reflecting its cooperation and integration preferences. It has done so to a degree unsurpassed by any other member state. Post-Brexit arrangements which further improve this partial-integration paradigm are completely antithetical to this social contract, and may prove lethal for sustained European integration: a series of other member states could be tempted to use the Article 50 mechanism to achieve their own 'best deal'.

² James Blitz, 'Every border has two sides' (30/10/2017), *Financial Times*.

³ Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutional Reading' (2017) *Common Market Law Review*, pp. 714-717.

⁴ *Ibid.*, pp. 697-703.

⁵ See [Article 4 \(3\)](#) of the Treaty on European Union.

⁶ The UK in a Changing Europe, '[Cost of no deal](#)' (2017).

⁷ European Council, '[European Council \(Art. 50\) guidelines for Brexit negotiations](#)' (2017).

⁸ House of Lords, '[Michel Barnier oral evidence to the House of Lords Select Committee on the European Union](#)' (12/07/2017).

⁹ 'No 'bespoke' Brexit, transition means 'status quo' – Barnier' (24/10/2017), *Reuters*.

What is the UK's position?

The government's February 2017 Brexit White Paper states that a deal on the future trading relationship should be completed within two years and be part of the withdrawal agreement, followed by a '*phased process of implementation*' to implement the new arrangements.¹⁰ Theresa May's September 2017 Florence speech outlined the UK's position on transitional arrangements in greater detail. May announced that the UK wants '*a period of implementation*' following withdrawal in which '*access to one another's markets should continue on current terms and Britain also should continue to take part in existing security measures.*' She stated that this period should be '*around two years*' in length, but left open the possibility that it could be longer.¹¹

Theresa May and David Davis, the UK's chief negotiator, have repeatedly emphasised that the purpose of the 'implementation period' is to give both the UK and the EU27 time in which to implement practical changes (e.g. customs procedures) and to adjust to the new economic relationship. Both have clarified that they expect the nature of the future relationship to be agreed upon before March 2019 so that the practical changes needed to adjust to this future relationship are known prior to the UK's withdrawal. Davis has explicitly stated that he does not want the implementation period to be a period in which negotiations on the future relationship continue, as the UK's negotiating position would be diminished.¹²

This differs from the EU's position as it assumes that the terms of the future relationship will have been agreed by March 2019, whereas the EU thinks that transitional arrangements are necessary to give the two parties more time to negotiate and agree upon that future relationship. Michel Barnier has suggested that '*several years*' will be needed to conduct and finalise trade negotiations.¹³ This paper argues that transitional arrangements are necessary *both* to allow more time for negotiation on the future relationship *and* to give the UK and the EU27 time in which to implement practical changes, some of which should have been agreed by March 2019.

Despite these differences, an extension of the EU *acquis*, without membership, appears to be consistent with the UK's position on transitional arrangements. It is comprehensive in scope and would mean that there is minimal change to existing relationships and structures of cooperation following withdrawal. Crucially, current levels of market access would be maintained. By calling for an implementation period which maintains existing frameworks of cooperation and is based on EU rules and regulations, Theresa May effectively ruled out highly bespoke transitional arrangements.

What would be the duration of the transitional arrangements?

From a legal perspective, there is no reason why transitional arrangements need to be time-limited. Although counterintuitive, post-withdrawal transitional arrangements could be indefinite. In some respects, there is precedent for this. The EU's customs union agreement with Turkey was initially intended to be a transitory framework which laid the foundations for further integration and eventually Turkish accession to the EU.¹⁴ Although this agreement was implemented in 1996 it is still in force, and Turkish accession looks further away than ever. In theory, the UK's withdrawal could be just as protracted.

There are good reasons for an indefinite transitional period. If the purpose of a transitional period is to buy time in which to conduct negotiations and to implement new systems, then a time-limited transition could result in the same problems further down the line. If at the end of the transitional period the UK and the EU were still far from finalising a comprehensive agreement on the future relationship, another cliff-edge would present itself. In this sense, the transitional period would not resolve the fundamental problem which necessitates its existence. A simple and desirable solution would be to ensure that it is easy to extend the transitional arrangement, not least because two or three years may well fall short of the time needed to negotiate a free trade agreement and implement new systems and processes.

The prospect of an indefinite transitional period is slim, with both sides ruling it out thus far. On the EU side, a shorter transitional period may be desirable. In the same way that the two-year Article 50 timeframe favours the EU, another deadline could force the UK into making concessions during trade negotiations. Paradoxically, a shorter period would also be preferred by the UK government, to show that they are delivering Brexit and not trying to delay the process. A transitional period of more than three years would extend uncertainty beyond the UK's 2022 general election. The European Parliament have also said that the transitional period must not exceed three years.¹⁵

Although David Davis has repeatedly stated that he does not want trade negotiations to continue during the transitional period, it is difficult to see how they would not, both due to the time constraint and the fact that the EU cannot conclude a trade agreement with the UK until after its withdrawal. Interestingly, the extent to which there would be any obligation for either party to engage in and conduct trade negotiations following the UK's withdrawal is open to interpretation. As the process would no longer be governed by Article 50, and the UK would no longer be a member state, presumably the EU (or the UK) would only be *obliged* to engage in trade talks with the other party if

10 HM Government, 'The United Kingdom's exit from and new partnership with the European Union' (2017), p. 65.

11 Prime Minister's Office, 10 Downing Street, 'PM's Florence speech: a new era of cooperation and partnership between the UK and the EU' (2017).

12 House of Commons, Select Committee on Exiting the European Union, *David Davis oral evidence on the progress of the UK's negotiations on EU withdrawal* (25/10/2017), Answers to Q21 and Q30.

13 Daniel Boffey, 'Brexit: UK likely to end up with Canadian-style deal, warns Barnier', (24/10/2017), *The Guardian*.

14 Ceren Zeynep Pirim, 'The EU-Turkey Customs Union: From a Transitional to a Definitive Framework?' (2015) 42(1) *Legal Issues of Economic Integration*, p. 33.

15 European Parliament, 'European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union' (2017/2593(RSP)), para. 28.

this was a specific requirement stipulated in the withdrawal agreement. (Indeed, the EU would no longer be bound by the principle of loyal cooperation towards the UK). Even if this was a stipulation, enforcing it would be difficult. Furthermore, an obligation to negotiate would not equal an obligation to reach an agreement.

As such, although unlikely, an indefinite transitional period could lead to a situation where one or both sides simply stop engaging in negotiations on the future relationship, and the transitional arrangements become the status quo. (One side could stop engaging in negotiations under a time-limited transitional arrangement too, but the pressure to reach a deal would be immense). This appears to be a concern of some Brexiteers, including David Davis, who fears that transitional arrangements represent unnecessary dithering designed to undermine Brexit or could result in continual extension to allow more time for negotiations.¹⁶ Having said that, Article 8 TEU stipulates that the EU must develop 'special relationships' and 'peacefully cooperate' with its neighbours, so the EU refusing to engage in trade negotiations is unlikely and would require considered justification to be compliant with the EU's constitutional objectives.¹⁷

Section II: The Options for Transitional Arrangements

This section outlines and assesses the different options for post-Brexit transitional arrangements. It presents five options, and argues that it is difficult to envisage transitional arrangements which diverge significantly from one of these scenarios. The options for the post-Brexit transition are:

- 1. Extension of the EU *acquis communautaire*, without membership**
- 2. An extension of the Article 50 withdrawal negotiations**
- 3. Remaining in the internal market via the EEA Agreement**
- 4. Remaining in the internal market by negotiating a new agreement modelled on the EEA Agreement**
- 5. Entering into a customs union agreement with the EU customs union**

The first and second option, extension of the EU *acquis*, without membership, and extension of the Article 50 withdrawal negotiations, are the most desirable options, due to their relative simplicity and comprehensiveness in scope. From a political perspective, the first option is probably more feasible, as it is broadly consistent with the EU and UK positions.

Importantly, options three or four could be pursued in conjunction with option five, or any of these three could be pursued in isolation. In other words, the UK could both remain in the internal market and form a new customs union agreement with the EU, or opt for one of these options and not the other.

This section now analyses each option in detail, comparing them with one another. For each option, three things are considered:

- How would this arrangement be implemented or work in practice?*
- What are the salient legal, political, and policy issues and implications?*
- On both the EU and UK side, is the option politically feasible?*

1. Extension of the EU *acquis communautaire*, without membership

How would this work in practice?

Thus far, the UK Government has indicated that the desired transition will seek to continue the *status quo*. One way of achieving this would be for the *acquis*

¹⁶ 'Nigel Farage: We did not vote for transitional arrangement' (15/08/2017), *The Telegraph*; House of Commons, Select Committee on Exiting the European Union, [David Davis oral evidence on the progress of the UK's negotiations on EU withdrawal](#) (25/10/2017), Answer to Q30.

¹⁷ [Article 8](#) of the Treaty on European Union.

communautaire – the whole body of EU law – to continue to apply in the UK during a time-limited transition, but without the UK continuing to be a Member State. The withdrawal agreement could provide for what would effectively be an extension of the UK's current rights and obligations. However, the UK would no longer be represented in the EU institutions. As the withdrawal agreement would be the legal basis for such an arrangement – assuming it is successfully negotiated – its implementation would require a qualified majority vote in the European Council and the consent of the European Parliament.

The extension could cover all of the *acquis communautaire*, or it could be limited to a defined set of policies and the corresponding rights and obligations – although such a bespoke arrangement would be harder to negotiate. In the Florence Speech Theresa May mentioned “access to one another's markets” and “existing security measures”, leaving open the possibility that other policy areas may not be covered. Michael Gove, for example, has stated that fisheries policy should not be part of a transition.¹⁸

What are some of the legal issues?

There is little doubt that an extension of the EU *acquis* could be arranged by the withdrawal agreement, concluded on the basis of Article 50. It is plausible to read that provision as conferring competence on the EU to provide for such an extension, as part of an orderly transition between withdrawal from the EU and the entry into force of a new relationship. However, questions do arise as regards the continued effect of EU law in UK law; the role of the ECJ; the scope for limiting the transition to defined areas of EU law; and the inclusion in such a transition of the international agreements to which the EU is a party.

First, the direct effect and primacy of EU law constitute core EU law principles, which the EU would undoubtedly wish to see safeguarded by the withdrawal agreement. At present, the European Communities Act (ECA) guarantees direct effect and primacy, as defined by the ECJ case law. The UK would need to adopt legislation with identical effect for the transition period (for example as part of the Withdrawal Bill, currently before Parliament). The EU's likely insistence on direct effect and primacy is not just a matter of EU “theology”. These twin principles are, in essence, an indispensable guarantee for ensuring that EU law is complied with. All Member States are subject to them, and the EU27 will want to see this legal guarantee that the UK continues to comply with whatever rules and provisions of EU law are part of the transition.

Second, the EU may insist on the continued jurisdiction of the ECJ, in one form or other. Again, this is connected with ensuring that the UK complies with the relevant EU law obligations which are part of the transition. Direct

effect and primacy are intimately connected with the jurisdiction of the ECJ to deliver preliminary rulings on questions of EU law. This is effectively the main mechanism through which the enforcement of EU law is ensured. It means that direct effect and primacy are not just abstract principles, whose application is left to the courts and tribunals of the member states. Instead, those courts and tribunals cooperate with the ECJ, which has ultimate authority to interpret EU law. It would not be unprecedented for the ECJ to have such preliminary rulings jurisdiction also for questions raised by courts of a non-member state, which is not represented on the ECJ.¹⁹ What would be unprecedented would be the broad scope of this jurisdiction, given the likely breadth of the transition *acquis*. On the other hand, UK courts and tribunals have been referring questions of EU law to the ECJ for more than 40 years.

Are there alternative methods of dispute settlement for such a transition? The option of a new, joint UK-EU court of some kind is unlikely to be on the table. It would be inconsistent with ECJ case law on what it calls the autonomy of EU law. To put it succinctly, where an international agreement (such as the withdrawal agreement) concluded by the EU copies large parts of EU law, the ECJ does not accept that a rival international court would, effectively, interpret EU law, and bind the EU to its interpretations and rulings.²⁰ Such interpretations would also bind the ECJ, and that is inconsistent with its ultimate – and for certain types of cases exclusive – authority to interpret EU law. At most, the ECJ may allow for a parallel system of dispute settlement, such as in the case of the EEA Agreement: the EFTA Court has jurisdiction over the non-EU parties to the EEA Agreement; it needs to be guided by the ECJ case law; and the ECJ interprets the EEA Agreement as applied in the EU member states. However, it is difficult to see how an analogous UK transition court could be set up: as the UK is the sole non-EU party to this agreement, it would need to set up an international court with jurisdiction limited to the UK itself. That is hardly sensible, and would not be seen to offer guarantees of effective enforcement.

What we are left with is the possibility to “borrow” the EFTA Court, for the transition. That Court could be given jurisdiction to interpret the withdrawal agreement, in particular in so far as it governs the transition. However, this would require the cooperation of the EEA states.

Third, the extension of the EU *acquis* in the transition agreement becomes more problematic if it is to be limited to certain parts of that *acquis*. The reason is that EU law is an integrated system, with all kinds of connections between its parts. Those connections are of a structural legal kind, and are also linked to the relationships and overlaps between different policy areas. Let us take the example of EU fisheries policy, and let us assume that this policy is excluded from the transition, but that EU environmental policy is not. Clearly, fisheries policy has an environmental protection dimension, and there will then be a need to identify, specifically, which instruments of EU law

¹⁸ Oliver Wright and Francis Elliott, ‘Gove demands immediate end to EU fishing deal’ (09/10/2017), *The Times*.

¹⁹ See the *European Common Aviation Area Agreement*, OJ L 285, 16.10.2006.

²⁰ See in particular *Opinion 2/13 re ECHR Accession* EU:C:2014:2454.

are included and excluded. There will be legislative cross-references which no longer work, and this will require detailed scrutiny. It will offer opportunities for political disagreements which will need to be resolved. Fourth, it is not clear how such a transition could extend to the international agreements which the EU has concluded, in the absence of agreement by the relevant non-EU parties. Take the example of the EU-South Korea FTA. Once the UK is no longer a member state, that FTA cannot continue to apply to UK-South Korea trade relations without some kind of negotiation and update. The reason is that the FTA is defined as applying, on the EU side, in the territories of the EU member states. Nor can the withdrawal agreement fix this, as South Korea is not a party to it.

However, all of these problems could be overcome if the withdrawal agreement were to set a future date for actual UK withdrawal from the EU. Such a transition would mean that the UK remains a full EU member state (minus any special arrangements) up to this future date (e.g. 2020 or 2021).²¹ The special arrangements could include a permission for the UK to negotiate trade agreements with non-EU countries and in the WTO; financial arrangements; exceptions to the continuation of the status quo; and certain institutional arrangements.

Is it politically feasible?

Although there are legal issues associated with extending the EU *acquis* as a transitional arrangement, they are not insurmountable. If the UK accepts the jurisdiction of the ECJ for the transition, and does not attempt to forge a bespoke arrangement whereby specific policy areas and sectors are not included, then it should be possible to reach an agreement. Furthermore, given that the legal basis for such an arrangement would be the withdrawal agreement, and complex ratification procedures involving member states would thus not be required, putting such an arrangement in place could be relatively straightforward.

As argued above, the positions of both the UK and the EU on the transition are broadly consistent with the notion of extending the EU *acquis*. The UK government has been clear that it wants existing arrangements and structures of cooperation to remain as similar as possible during the transition, so that ‘businesses and citizens only need to adjust to one set of changes’.²² It has even stated that the framework for this would be the ‘existing structure of EU rules and regulations’. Also – and perhaps more importantly – the government has indicated that it would be willing to accept some of the more politically sensitive aspects of this arrangement, such as the continued jurisdiction of the ECJ,²³ contributions to the EU budget and free movement of people, all without representation in the EU institutions.

One stumbling block concerns whether the UK will seek sectoral carve-outs, as Michael Gove has suggested. Another issue is the extent to which the UK would be able to pursue an independent trade policy in this scenario. Being able to negotiate free trade agreements with third countries is a key red-line for the UK in the transition. The EU may accept this, as the UK, as a third country, would legally be allowed to conduct trade negotiations. However, its room for manoeuvre would be severely restricted, as it would continue to adopt the EU’s common external tariff and follow its commercial legislation.

This transitional arrangement, provided it did not undermine the integrity of the EU legal order, would most likely be deemed acceptable by the EU. The notion of a ‘prolongation of the *acquis*’ is in the European Council negotiating guidelines and the European Parliament Brexit resolution; it has also been referred to by Michel Barnier on several occasions. Indeed, the EU has been consistent in stating that such an arrangement ‘*would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply*’. If the UK accepted all the obligations which EU membership entails, whilst simultaneously giving up its representation in the EU institutions and therefore its decision-making rights, the option of prolonging the *acquis* in order to minimise disruption for the post-Brexit transition period could more than likely be agreed.

As this option is comprehensive in scope, relatively straightforward to ratify from a legal perspective, and ostensibly politically acceptable for both the UK and the EU, it is the most desirable option and the transitional arrangement which both parties should pursue in the second phase of the negotiations.

2. An extension of the Article 50 withdrawal negotiations

Various analysts have pointed out that the simplest option for dealing with the lack of time which the Article 50 process allows for withdrawal negotiations is to extend those negotiations.²⁴ Instituting complex transitional arrangements, such as a new customs union agreement, an EEA-style agreement, or even a prolongation of the *acquis*, will require time, negotiation and political capital. Instead, would it not be easier to extend the negotiations, to give both parties sufficient time in which to negotiate a withdrawal agreement *and* an agreement on the future relationship?

How would this work in practice and what would the implications be?

The practical steps which need to be taken for this to happen are quite simple. According to Article 50,

²¹ Federico Ortino and Holger Hestermeyer, ‘Article 50 does allow Britain to negotiate a transitional period’ (14/11/2017), *LSE Brexit Blog*.

²² Prime Minister’s Office, 10 Downing Street, ‘PM’s Florence speech: a new era of cooperation and partnership between the UK and the EU’ (2017).

²³ Theresa May comments in the House of Commons (09/10/2017), *House of Commons Hansard*.

²⁴ Allie Renison, ‘Bridging the Brexit Gap: Options for transition’ (2017), *IoD Policy Paper*, p. 6; Kenneth Armstrong, ‘Implementing Transition: Legal and Political Limits’ (2017), *CELS University of Cambridge*, pp. 7-8.

if the European Council unanimously agrees that the talks should be extended, then they can be extended, provided the UK also agrees.²⁵ The implications of this are both simple and complicated: the UK remains a full, participating EU member state, as it is now, until the Article 50 negotiations are officially over. However, this raises some thorny questions. Would UK MEPs stand in the 2019 European Parliamentary elections? Would the UK play a role in the appointment of the new European Commission? These considerations bring us onto the main issue with this option: political feasibility.

Is this politically feasible?

Many, such as former EU chief lawyer Jean-Claude Piris, think that the prospect of the EU unanimously agreeing to extend the talks is unlikely.²⁶ This is for two reasons. First, the legal and political practicalities of the UK remaining a member state whilst conducting lengthy withdrawal negotiations might be considered too disruptive. Although this is the current state of affairs, it is confined to a relatively short period, and after a new set of MEPs are elected and a new Commission is appointed in 2019, this will be seen as the perfect opportunity for the EU to 'move on' from Brexit. Second, the two-year time frame puts the EU at an advantage over the UK. The fact that talks must be completed by a certain date puts pressure on the UK, and could lead to a situation where the UK makes concessions on key points at the eleventh hour, to get a deal. The EU would be loath to give up this advantage, especially if some countries were particularly dissatisfied with how the negotiations had gone.

It is more plausible to imagine talks being extended for a short period of time, if both parties were content with their progress, to allow time for conclusion and ratification procedures. However, it is difficult to see a major extension of the talks (i.e. for more than a year) as a transitional arrangement. Requesting or agreeing to such an extension would also be politically problematic on the UK side. Theresa May has made it clear that the UK will be leaving the EU in March 2019 and that there will be no delay. The UK remaining an EU Member State post March 2019 would cause domestic political problems for the government, both internally in the Conservative Party and potentially with the wider electorate. Compromising on principles such as free movement or ECJ jurisdiction for a post-Brexit transition will be hard enough, so the UK remaining a full member for an extended period post-2019 is difficult to imagine.

However, although it is easy to envisage the political difficulties with this option, it is also important to stress that it is incomparably easier to maintain the status quo through a simple extension of the negotiations than through any of the other arrangements. Furthermore, it is equally plausible to imagine a situation towards the end of the withdrawal negotiations in which there is a major impasse or crisis and the risk of 'no deal' looms large.

Such a time may come where the issues become so pressing that the political downsides of extending the talks are put to one side.

In sum, from a legal perspective, this is the simplest form of transitional arrangement. Although there are political obstacles, given the volatility of the withdrawal process and the potential for major crisis, it cannot – and should not – be ruled out as a viable option.

3. Remaining in the internal market via the EEA agreement

One of the biggest economic risks of Brexit is that the UK could go from being a member of the EU's internal market to having significantly reduced access to it overnight, which is what would happen if the UK left the EU without a free trade agreement or substantive transitional arrangements. To mitigate this risk, the UK could remain a member of the EU's internal market via the European Economic Area (EEA) Agreement.

How would this work in practice?

The EEA Agreement extends membership of the EU internal market to three European Free Trade Association (EFTA) states: Iceland, Liechtenstein, and Norway. Signed in 1992 and entered into force in 1994, the EEA agreement has thirty-two contracting parties: the EU, the twenty-eight EU member states, and three EFTA states. The EEA Agreement is a two-pillar system, meaning that only EFTA states or EU states can participate.²⁷ Therefore, if the UK wanted to join the EEA post-Brexit, it would have to first join EFTA. EFTA is an intergovernmental organisation with four members: Iceland, Liechtenstein, Norway, and Switzerland, which exists to promote free trade between its members. To join, the UK would need to apply to the EFTA Council and negotiate accession with the

Would the UK automatically remain party to the EEA Agreement?

There is somewhat of a debate as to whether the UK needs to join EFTA to re-join the EEA. Some highlight the possibility that the UK would remain a contracting party to the EEA Agreement unless it formally triggers Article 126 of that agreement (Gavin Barrett, 07/01/2017, [LSE Brexit Blog](#)), whereas others argue that by virtue of the two pillar system of the EEA agreement outlined in Article 127, the UK will automatically cease to be a contracting party by virtue of its withdrawal from the EU. This is the position of the UK government and the EFTA states. A logical implication of the UK's position on this is that the government concedes that all bilateral free-trade agreements which the EU has cannot be expected to endure for the UK. Their set-up is very much like that of the EEA (i.e. effectively bilateral between the EU and its member states on the one hand, and the other parties on the other).

²⁵ Concerns have been expressed regarding limits to the Council's competence to manage the withdrawal and the transitional period solely on the basis of Article 50 – see Kenneth Armstrong, *Ibid.*, p. 5.

²⁶ Comments made in a podcast with Paul Adamson, 'In search of a Brexit transitional deal' (January 2017).

²⁷ Article 128 (1) of the Agreement on the European Economic Area, OJ L 1, 3.1.1994.

EFTA states. Following the negotiations, if the EFTA states unanimously agreed that the UK could join, it could become a member.²⁸ This would require a formal process of treaty ratification, involving the national parliaments of each EFTA state and the UK.

Alternatively, the conditions of participation in the EEA Agreement could be altered through a protocol. From a legal perspective, there are probably no insurmountable obstacles to such a course of action (although not all legal scholars agree on this point).²⁹ Politically, the reasoning would be (a) that the UK always participated in the EEA Agreement, through its EU membership; and (b) that the arrangement is transitional and time-limited.

The UK's continued participation in the EEA would at any rate require negotiations and would necessitate amendments to the main text of the EEA Agreement (through a protocol or otherwise), something which has never been done since it was signed in 1992. Again, this would require agreement by all contracting parties to the EEA Agreement, and would entail a formal process of treaty amendment, involving all the national parliaments (and potentially some regional parliaments). In this sense, the process is much more onerous than the mere use of Article 50 TEU: the withdrawal agreement does not require approval by the member states in their individual capacity, and can be concluded with a super qualified majority in the Council. However, the withdrawal agreement is incapable of amending the EEA Agreement, or adding a protocol to it, as this would not comply with the international law requirement of consent by all the parties.

A key question is whether all of this can be done in time. Indeed, for transitional arrangements to be useful, this would all have to be achieved by the time the Brexit withdrawal negotiations end in March 2019. Some legal experts argue that this cannot be done within two years.³⁰

What would the implications of this arrangement be?

Iceland, Liechtenstein and Norway are full participating members of the internal market via the EEA agreement. This means that all EU law relevant to the internal market and the four freedoms, such as rules on state aid, competition and mutual recognition of standards, must be applied in these states. The EFTA states do not have a role in EU decision-making processes, meaning they must apply laws and regulations over which they have little say. Although the EFTA Surveillance Authority, which monitors compliance with the EEA Agreement, and the EFTA Court, which provides judicial oversight and interprets EEA law, are formally independent, in practice they are both very closely aligned with the European Commission and the European Court of Justice (ECJ) respectively. Under the EEA Agreement there is homogeneity of EEA and EU

law, and homogeneous interpretation by the EFTA Court and the ECJ. According to legal scholars Fredriksen and Franklin, 'the EFTA Court has consistently let the objective of a homogeneous EEA prevail over any temptation to exercise its formal independence from the ECJ'.³¹

It is argued that the EFTA states have accepted 'life under the hegemony of the EU' because of the economic benefits of internal market membership.³² If the UK joined the EEA as an EFTA state post-Brexit, it would have to continue accepting freedom of movement, it would continue making payments (albeit smaller ones) to the EU budget, and it would have to abide by laws and regulations over which it has little say. On these points, it is interesting to note that there are examples of EFTA states using delaying tactics, whereby politically controversial EU laws have not been adopted domestically until a few years after they were passed at EU level.³³ Also, and more importantly, the EEA is only a free trade agreement and it is not a customs union. There is also no 'ever closer union' principle. Under this transitional arrangement, the UK could still 'take back control' in a range of policy areas, such as agriculture, fisheries, foreign policy, customs, and international trade. Crucially, the EFTA states are free to pursue free trade agreements with other nations, both individually and collectively.

This would therefore not be a full 'status quo' transition. The benefits of the customs union would be lost, and the UK could face difficulties with continued access to the preferential trade arrangements incorporated in the trade agreements concluded by the EU. Those trade preferences are predicated on full membership.

Is this option politically feasible?

On the UK side, it is easy to see the obstacles. Staying in the internal market has been ruled out by the government as a long-term option, largely because it would prevent the UK from restricting EU migration and would require the UK to continue abiding by EU laws. Crucially, David Davis has also ruled out the possibility of the UK becoming a signatory to the EEA Agreement via EFTA, even as a transitional arrangement.³⁴ From a purely presentational perspective, there is some room for manoeuvre with the EEA option. For example, the principles of direct effect and primacy do not apply under EEA law, and national courts are not obliged to refer cases to the EFTA Court, which, as previously noted, is formally independent from the ECJ.

There is, of course, no guarantee that the EFTA states or the EU would agree to this option, even if the UK chose to pursue it. The EFTA states might consider it too disruptive for the UK to join their organisation for a time-limited period, purely so that it could remain in the internal market as a post-Brexit transition. It would also have significant implications for the balance of power within

28 David Pinnemore and Cenni Najy, 'The Option of Association: The United Kingdom post-Brexit and the European Free Trade Association' (2017), *forus Policy Brief*, pp. 11-12.

29 Jean-Claude Piris, 'Why the UK will not become an EEA member after Brexit' (09/2017), *ElSharp*.

30 Pavlos Eleftheriadis, 'How Brexit will fail' (2016), *Oxford Business Law Blog*.

31 Halvard H. Fredriksen and Christian N.K. Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on' (2015) 52(3) *Common Market Law Review*, p. 673.

32 *Ibid.*, p. 633.

33 *Ibid.*, pp. 657-658.

34 Adam Becket, 'David Davis rules out EEA or EFTA membership for UK after Brexit' (07/09/2017), *Business Insider*.

EFTA. Nonetheless, the 2017 EFTA Ministerial Meeting communique struck a positive tone towards the UK: *'The UK is a major trading partner of all EFTA States, and Ministers emphasised the importance of continuing close economic and trade relations, which have existed to the benefit of all parties for decades [...] Ministers stressed the need to provide stability and predictability in the transition to any new legal framework for economic relations with the UK.'*³⁵

It is perhaps less likely that this arrangement would be rejected by the EU than the EFTA states. Indeed, the EU would favour the economic stability and legal certainty that this arrangement would bring. Also, overall, the EU is relatively happy with the functioning of the EEA Agreement and its relationship with the participating EFTA states. EU law professor Christophe Hillion argues that such a transitional arrangement would probably be desirable for the EU, as it would be consistent with the EU's negotiating guidelines and would preserve the integrity of the EU's legal and constitutional order.³⁶ Similarly, Norwegian political expert Ulf Sverdrup thinks that the EU would be happy with this option, noting that 'the EEA is the most preferred model of association for third countries'.³⁷ Finally, Michel Barnier himself also suggested that this option was still on the table.³⁸

4. Remaining in the internal market by negotiating a new agreement modelled on the EEA agreement

Legally, it would be possible for an entirely new agreement to be crafted, which extends membership of the internal market to the UK in the same way that the EEA Agreement does for the three EFTA states. Indeed, Open Europe's Stephen Booth argues that 'it is unlikely that the UK would join the EEA formally, a more likely arrangement is one that mirrors the EEA in almost every aspect'. This is, he believes, because it would be less disruptive for the EFTA states. Characterising this potential arrangement, he states, 'it would be a temporary agreement between the UK and the EU which mirrors the EEA in almost every aspect, but with a specific sunset clause to demonstrate that it is transitional.'³⁹

How would this work in practice?

In principle, it would be straightforward enough to draft a transitional agreement which copies the EEA Agreement, and thereby ensures that the UK continues to participate in the internal market in a way which is near-identical to the terms of the EEA Agreement. Article 50 TEU could be used as the legal basis for such an agreement, since

the agreement would clearly seek to achieve an orderly transition from member state to third country status. That would facilitate the conclusion and ratification of the agreement, as it would not require the consent of each member state. There are nonetheless a number of difficulties with this option.

First, such a transitional arrangement would not extend to the EEA contracting parties on the EFTA side. Their participation would require a further agreement. It is difficult to see how that agreement could be based on Article 50, as it would include non-member states and there is nothing in Article 50 to suggest that such states are entitled to participate in the withdrawal negotiations. If the EEA copy were to apply only to the UK and the EU, there would no longer be free trade between the UK and the EEA contracting parties on the EFTA side.

Second, the *institutional mechanisms* of the EEA Agreement are harder to copy into a UK-EU transition agreement, particularly as regards surveillance, enforcement and dispute settlement. It is important to be aware that, effectively, the EEA Agreement carves up those mechanisms between the EU and the EFTA side. On the EU side, the Commission ensures surveillance and enforcement, and the ECJ interprets and applies the agreement where there are disputes. This of course includes the myriad of legal questions which may arise in litigation throughout the EU, before member state courts and tribunals. The latter refer questions of EU law – and of EEA law – to the ECJ. On the EFTA side the EFTA Surveillance Authority performs the surveillance and enforcement role, and the EFTA Court is the dispute settlement organ. This works because the EFTA side of the EEA is itself *multilateral* (even if two of the three members are small countries). However, in a UK-EU arrangement the UK would have to set up a surveillance authority and a court with itself, so to speak. As discussed above, it is difficult to see how that would work, not least because it entails an international court overseeing the UK's compliance with the transitional agreement which consists of UK-appointed judges only.

To the non-expert, the solution may seem simple: set up a joint UK-EU surveillance authority and court. Alas, the case law of the ECJ, namely, the well-established principle of the autonomy of EU law, does not accept such an arrangement. The ECJ does not want a non-EU court or tribunal to be given authority to interpret and apply provisions of EU law; and this extends to agreements, such as the EEA Agreement, which effectively copy EU law and extend it to non-member states.

A potential solution would be to involve the EFTA Surveillance Authority and the EFTA Court in the EEA copy. That would of course require amendments to the EEA Agreements,⁴⁰ thereby necessitating the agreement of all EFTA States.

35 EFTA Ministerial meeting – Communiqué (26/06/2017).

36 Based on comments made at the European Parliament AFCC Committee meeting (20/06/2017).

37 Ulf Sverdrup oral evidence to the House of Lords Select Committee on the European Union (15/09/2016).

38 Kris Van Haver, 'L'Union européenne se prépare aussi à un 'no deal' avec les Britanniques – Barnier' (24/10/2017), *L'Echo*.

39 Stephen Booth, 'As the UK searches for a post-Brexit plan, is the EEA a viable option?' (2016), *Open Europe briefing*.

40 Agreement on the European Economic Area, OJ L1, 3.1.1994. Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice, OJ L344, 31.1.1994.

What are the implications and is it politically feasible?

Unless the UK could negotiate substantially different terms to the EEA Agreement, which is highly unlikely given the time constraint, the implications of this arrangement are very similar to joining the EEA via EFTA. Although the issues relating to sovereignty and migration would be the same, perhaps it would be an 'easier sell' for the UK government as it is, technically, a bespoke UK-EU agreement. However, taken alone, it still does not represent the comprehensive '*status quo*' transition which Theresa May outlined in her Florence speech. Again, like the EEA option outlined above, such an arrangement would probably be acceptable on the EU side and potentially even more desirable for the EFTA states. It does, however, raise similar questions about whether there is the time and political capacity to put such an arrangement in place by March 2019, and the issues related to dispute settlement and enforcement cannot be overlooked. Again, extending the talks or prolonging the *acquis* are both far more simple and comprehensive.

5. Entering into a customs union agreement with the EU customs union

The UK government has been clear that it wishes to enter into a customs union agreement with the EU customs union, which replicates existing customs arrangements, for an interim period following withdrawal. If the transitional arrangement *only* involved re-joining or copying the EEA, this would not entail a customs union agreement. However, prolongation of the *acquis* or an extension of the talks would of course cover customs. It is possible, though unlikely, that a customs union agreement could be sought in isolation as a transitional arrangement. This section explores that option.

If the UK did not have a customs agreement with the EU following withdrawal, significant barriers to trade in goods would arise, such as costly tariffs and rules of origin checks, as well as a full customs border in Ireland.⁴¹ Although membership of the EU Customs Union is not possible without EU membership, the EU does have separate customs union agreements with Andorra, San Marino and Turkey. The EU-Turkey Customs Union Agreement⁴² serves as a useful starting point when considering what a UK-EU (customs) transitional arrangement could look like.

Turkey is the only major country with a customs union agreement with the EU. This agreement came into force in 1996, and was designed to lay the foundations for full integration of Turkey into the European Community. The key features of the EU-Turkey Customs Union agreement are:

- Tariff-free trade in goods across a range of sectors, excluding agriculture (but including some processed agricultural goods).
- Reduction in non-tariff barriers to trade through legislative and regulatory alignment.
- A common external tariff with respect to imports from third countries.

Although many think that the arrangement has benefited the Turkish economy, some scholars note that the political costs (i.e. the loss of sovereignty and policy-making autonomy) have been too high.⁴³ There are two main points here. Firstly, Turkey must adopt EU laws and regulations across a range of customs and commercial policy related areas. However, Turkey has no participatory or decision-making rights in the EU legislative process. It therefore must adopt and abide by laws over which it has no say. Secondly, Turkey is unable to pursue a fully independent international trade policy. This is partly because it has no say in the EU's common external tariff. It is also because it plays no part in EU trade negotiations, even though the EU's free trade agreements give third countries access to Turkey's market, without granting Turkey reciprocal access to theirs.

41 Piet Eeckhout, 'The Consequences of Brexit for the Customs Union and the Internal Market Acquis for Goods' (2017), *European Parliament Internal Market and Consumer Protection Briefing*, p. 6.

42 Decision No 1/95 of the EC-Turkey Association Council.

43 Ceren Zeynep Pirim, 'The EU-Turkey Customs Union: From a Transitional to a Definitive Framework?' (2015) 42(1) *Legal Issues of Economic Integration*, pp. 42-43.

How would this work in practice?

The process by which the UK could forge a transitional customs union agreement with the EU, as proposed in the UK's position paper, need not be as complex or challenging as the process for joining the EEA. Such an agreement would be negotiated with the European Commission as part of the withdrawal negotiations. It would most likely form part of the withdrawal agreement. However, even if it came under a separate agreement, member state approval (and the complex ratification processes this entails) would not be necessary. A pure customs union in goods can be concluded and ratified by the EU alone, and must be approved by a qualified majority of the Council.⁴⁴

What would the implications of this arrangement be?

Although an UK-EU customs union agreement would not be the same as the Turkish agreement, there would be some similarities. For example, the UK would have to adopt the EU's common external tariff, which in turn would severely restrict – but not inhibit – its ability to negotiate and strike trade deals with other countries. The EU would also expect the UK to continue abiding by and applying relevant EU customs and commercial legislation, to ensure that standards and regulations are harmonised across the customs union. Of course, the UK would also continue to benefit from tariff-free trade in goods, and there would be no burdensome customs checks and procedures at its customs borders with the EU. However, the negative implications for sovereignty are clear. Like Turkey, the UK would be adopting and following policies over which it has no formal say. However, Turkey is not under the jurisdiction of the ECJ. Instead, political mechanisms are used to resolve disputes related to the EU-Turkey agreement.

Is this option politically feasible?

Whether such an arrangement would be politically feasible for the UK largely relates to one key factor: whether the UK would be able to negotiate and conclude free trade agreements with other countries immediately following withdrawal. Again, much of this is about presentation. Even if the UK adopts the EU's common external tariff – which it has indicated it would be willing to do for a time-limited period – it would still be able to negotiate trade deals with other countries. However, it would not be able to conclude and sign those deals. The EU would most likely demand that the UK (like Turkey) mimic the EU's trade agreements, to maintain the principle of 'goods in free circulation'. For example, the EU would not accept that the UK conclude a free-trade agreement with the US, while the UK is part of the customs union. The EU does not have such an agreement with the US, and the principle of 'goods in free circulation' would simply allow US exporters to get tariff-free access to the EU internal market through the UK. This could only be avoided by

introducing rules of origin, but the checks which such rules trigger would interfere with free circulation, and cancel the benefits of the customs union.

Nonetheless, the symbolism of being able to commence trade negotiations with major nations could be helpful for the government (even though it would not be able to pursue a truly independent trade policy). Moreover, the UK could probably negotiate a better deal than Turkey's, not least because of the shared starting point (i.e. hitherto harmonised product standards). One which covers all (goods-related) sectors and continues the free flow of goods between the EU and the UK is achievable, if the UK accepts the inevitable sovereignty-related compromises. On the EU side, it is reasonable to argue that such an arrangement would be deemed acceptable.

Taken alone, a customs union agreement based on the Turkish model is insufficient as a transitional arrangement, and it falls well short of what May outlined in her Florence speech. This is because it only covers trade in goods, and the services industry makes up eighty percent⁴⁵ of the UK economy, as well a significant proportion of UK-EU trade. Indeed, the EU's customs union is only one pillar – albeit a fundamental one – of the internal market. The internal market is mainly about reducing and eliminating barriers to trade via regulatory harmonisation, and the customs union does not cover that at all. In this sense, remaining in the internal market via the EEA is more comprehensive. Even though the EFTA states are not in the EU customs union, it is possible that the UK could pursue both options simultaneously, for a transitional period.

⁴⁴ Article 207 of the Treaty on European Union.

⁴⁵ Office for National Statistics, 'UK index of services: June 2017'.

Section III: Further Remarks

Judicial oversight of transitional arrangements

Judicial oversight refers to the interpretation of the withdrawal agreement and any other agreements, as well as dispute settlement and enforcement mechanisms. The nature of the post-Brexit judicial oversight framework will depend on the nature of the transitional arrangements. However, one thing is clear: under any comprehensive set of arrangements in which the UK and the EU continue to cooperate closely, escaping the jurisdiction and influence of the ECJ will not be easy.

If the transitional arrangement consists of an extension of the EU *acquis* to the UK, without membership, then the EU will insist on full jurisdiction of the ECJ. (Everything would continue unchanged, as normal, if the Article 50 talks were extended). If the UK joins the EFTA pillar of the EEA Agreement, it would come under the jurisdiction of the EFTA Court, which is legally obliged to interpret EEA law in homogeneity with the ECJ. The UK government's position paper on the topic indicated that the UK might be open to this possibility, citing the EFTA court as an example of an existing arrangement, compatible with EU law, in which the ECJ does not have direct jurisdiction.⁴⁶ If the UK entered into a customs union agreement with the EU, it is likely the EU would insist on the ECJ being the ultimate arbiter of that agreement, not least because the UK would be applying and implementing EU laws. Perhaps the EU could compromise and accept a different mechanism, like in its agreement with Turkey.

The UK government's position is that the '*direct jurisdiction*' of the ECJ must come to an end following withdrawal,⁴⁷ and ending the jurisdiction of the ECJ has been a centrepiece of Theresa May's Brexit strategy. However, if the UK wants to continue cooperating in EU programmes, initiatives and regulatory frameworks post-Brexit, as the government suggests it does, it might have to accept the continued jurisdiction of the ECJ in some areas. Cooperative arrangements such as the European Arrest Warrant and the internal market in aviation, as well as regulatory frameworks in fields such as medicines, food standards, and aviation safety, are all embedded in EU law, with the ECJ as the ultimate legal authority.⁴⁸ It is presumed that the UK will want to continue cooperating in many such programmes and frameworks for a transitional period, not least because the UK does not seem to have the time, capacity or desire to set up similar agencies or develop new regulatory systems by March 2019.

Most of the difficulties in this area relate to the principle of the autonomy of EU law. This principle, heavily emphasised in recent ECJ case law, establishes that the EU is an autonomous legal order, with the ECJ as the ultimate legal authority. As a result, the ECJ does not permit other legal bodies to have ultimate legal authority on the interpretation of EU law. If post-Brexit transitional

arrangements were based on EU laws, the ECJ would expect its jurisdiction to continue. It is important to remember that the ECJ is also the ultimate authority on the legality of the withdrawal agreement, and any member state could refer the withdrawal agreement to the ECJ for an opinion on its compatibility with EU law. Such opinions are binding.

Transitional arrangements in other areas

This paper has predominantly focused on the necessity and options for transitional arrangements in the realm of UK-EU trade and economic relations. This is because the future economic relationship is arguably the most complex and wide-ranging issue which needs to be resolved in the Brexit negotiations, and there is not enough time to fully resolve it by March 2019.

Nonetheless, UK-EU relations, and the EU in general, amount to much more than trade and economic integration. There is deep and wide-ranging EU integration and cooperation in almost every policy area. Particularly important domains include security and policing, defence and foreign policy, civil justice cooperation, environment and research and innovation. Many of these areas of cooperation are not politically controversial in the UK, and it appears that, in many instances, the UK wants cooperation to continue in a similar fashion post-Brexit. As a result, it is possible that there may be multiple transitional agreements, or multiple provisions in the withdrawal agreement, covering transitional arrangements in a range of policy areas. At this stage, it is impossible to say which issues can be resolved in the Article 50 process, and which issues will require more time. Such a broad analysis is beyond the scope of this paper. However, it is certain that transitional arrangements will need to cover much more than just trade.

⁴⁶ HM Government, 'Enforcement and dispute resolution: A future partnership paper' (2017), p. 5.

⁴⁷ *Ibid.*, p. 2.

⁴⁸ Piet Eeckhout, 'Brexit and the ECJ red line' (2017), *London-Brussels blog*.

Conclusion

This paper has argued that some transitional arrangements will be necessary following the UK's withdrawal from the EU, due to the lack of time both parties have in which to conduct the withdrawal negotiations and implement new systems and processes, as well as the need to avoid a cliff-edge scenario. The time constraint also means that it will be very difficult for the UK to negotiate transitional arrangements of a bespoke nature. Instead, the only transitional arrangements which will be on offer from the EU are likely to either prolong, replicate or be modelled upon existing arrangements. The most desirable and simplest options are an extension of the EU *acquis*, without membership, or even an extension of the Article 50 withdrawal negotiations. However, other viable options include the UK joining the EEA via EFTA, closely mirroring the EEA with a new agreement, or entering into a customs union agreement with the EU customs union. This customs union option could be pursued in conjunction with either EEA option, or any of these could be pursued in isolation.

Each one of these options will require a great deal of complex negotiation, compromise and political capital to implement. They will also have key implications for the economy and sovereignty of the UK, as well as the integrity and functioning of the EU's legal and political order. In terms of political feasibility, it is fair to say that, on the UK side, the way in which any transitional arrangements are presented and perceived domestically will be a principal consideration, whereas the EU's primary concern will be to maintain the integrity of the existing legal and constitutional order.

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