

Extending the transition period

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In the current debate, much focus is on the imminent cliff edge: can a consensus be found on the draft Withdrawal Agreement or will the UK leave without such an agreement ('no deal') on 29 March 2019, prompting logistical chaos and legal uncertainty that will make the movement of people, goods, services and capital almost impossible. Given the imminence and severe impact of this possibility, it is not surprising that the focus is on this scenario. However, a second cliff edge is looming at the end of the transition period, and action must be taken now to avoid it.

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THE SECOND CLIFF EDGE

The European Commission's draft Withdrawal Agreement¹ envisages a transition period starting on the day of the entry into force of the Withdrawal Agreement – likely 30 March 2019 – and ending on 31 December 2020. The purpose is to allow time for negotiations on the UK's long-term relationship with the EU to be completed, notwithstanding that the UK will cease to be a member state on 30 March 2019. The transition period is, in effect, a standstill period, during which nearly all substantive provisions of EU law will continue to apply until the end of 2020.

While this provides some breathing space, it also implies that, if no long-term arrangement is agreed, the UK will, at the end of 2020, become in all respects a third state. The Withdrawal Agreement will not prevent this second cliff edge since its provisions merely cover the modalities of leaving, and the accompanying political declaration on the long-term relationship is nothing more than a statement of intent. At the end of the transition period, the UK will already be a non-member state, making any last-minute reprieve much less likely.

Finding a long-term agreement in the 21 months of transition will be extremely challenging, if not impossible. In many ways, the Withdrawal Agreement is the easy part. Complex, comprehensive and ambitious trade deals take much longer to negotiate, and this is arguably the trickiest one the EU has ever had to conclude, while the UK has not negotiated trade deals in decades. Besides, it is not merely a trade negotiation. The future relationship will need to encompass a range of interrelated policy domains, which are politically sensitive, such as security, justice or research and innovation.

Politically, the UK will find it difficult to construct a domestic consensus, given the competing interests that will all be affected by the negotiations and the pervasive cost of market disintegration. Most likely, there will be a time delay on the EU side given the institutional changeover in 2019. The Commission will lead the

negotiations, but there will be no momentum until it is confirmed in post in October 2019, following the upcoming European Parliament elections. Thus, the real negotiations are only likely to start in the autumn of 2019, thereby cutting negotiation time. Time will have to be built in for the member states and the UK to ratify the deal before the transition period ends², so effectively, there might only be around a year to determine the long-term relationship. Even with the best will in the world, and without the inevitable frictions that will arise, this is not enough time.

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FINDING AGREEMENT ON THE LONG-TERM RELATIONSHIP

It is in the interest of both sides to agree on the long-term relationship before the end of the transition period. For the UK, dropping out with no long-term arrangement is less disastrous at that point than the current 'no deal' possibility, given that more preparations and the Withdrawal Agreement will be in place, and some stopgap measures in critical areas could be agreed with the EU. The economic costs for the UK would, nevertheless, be considerable. Such an outcome would also be costly for the EU, albeit to a lesser degree, and, especially from a geopolitical point of view, it would benefit the EU to keep the UK close.

Arguably, the underlying intention of Article 50 is to find agreement if this is at all possible. It demands that "the Union shall negotiate and conclude an agreement with that [exiting] State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The wording envisages that a framework for the future relationship between the UK and the EU will be worked out, the absence of a settled long-term relationship being the default if the negotiations run out of time.

Many, including UK Business Secretary Greg Clark³, have argued that it might be necessary to extend the transition period if it becomes clear during the transition that more time is needed - potentially leading to an indefinite process where the UK could end up in permanent transition, without any long-term relationship being settled definitively. Such a situation would raise tricky questions from an economic and political perspective. Economically, it would imply that the UK could have a special status or access to the Single Market not available to other most favoured nations the EU trades with. Politically, many in the EU27 are unhappy with

the idea of permanent transition, and it is even more difficult to envisage how this could find a majority in the UK. For Brexiteers, it would be equivalent to a status of permanent ‘vassal state’, which they adamantly oppose.

Moreover, the EU is legally constrained. Under EU law, Article 50 TEU is the legal basis for the Withdrawal Agreement (and the transition period specified within it). This provision gives the EU the competence to “negotiate and conclude an agreement [...] setting out the arrangements for [the withdrawing Member State’s] withdrawal”. It, therefore, does not empower the Union to conclude an agreement dealing with the future relationship between the EU and the UK. To provide for an indefinitely renewable transition period would go well beyond the scope of Article 50 since it would have the effect of creating a new form of future relationship rather than an aspect of the withdrawal process.

HOW BEST TO ALLOW FOR AN EXTENSION OF THE TRANSITION PERIOD?

If possible, it would be best to use the Article 50 agreement as the basis for any extension of transition. Unless the Withdrawal Agreement explicitly specifies the possibility of a (limited) extension of the transition, any extension to the transition period will require concluding another international agreement between the EU and the UK. The latter would have to amend the Withdrawal Agreement to the effect that the transition period would run beyond 31 December 2020. Furthermore, in accordance with the principle of conferral, the agreement would need to have an appropriate legal basis in the EU Treaties.

There are serious doubts as to whether such an amendment, introduced during the transition, could be based on Article 50 TEU. The main problem lies in the fact that Article 50 TEU only allows for agreements to be concluded between the EU and a departing member state. Yet, once the Withdrawal Agreement is in force, the UK will have ceased to be a member state, Article 50 TEU would therefore no longer be applicable at that point.⁴ While a counter-view might point out that amendments to EU agreements can be concluded on the same legal basis as the original agreement, there is no authority to confirm this view with regard to Article 50 TEU. There is a risk that the Court of Justice might strike down such an extension of the transition period. Given the legal, economic and political chaos that would result from this, it is not advisable to use Article 50 as the legal basis for an extension of transition unless this possibility is already specified in the Withdrawal Agreement.

WHAT LEGAL BASIS FOR EXTENDING THE TRANSITION?

It would – in theory – be possible to conclude an agreement on a different legal basis. However, this needs to be carefully specified as the Union is governed by the principle of conferral, according to which “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the

objectives set out therein. Competences not conferred upon the Union remain with the Member States”.⁵ The principle of conferral implies two types of constraints for the EU’s external action: substantive and procedural. Substantive constraints relate to the subject-matter. Procedural constraints result from the different procedures prescribed by the Treaties for the Union’s internal ratification of different types of international agreements. For example, to reach internal consensus, Article 50 (2) TEU stipulates that the Withdrawal Agreement requires a qualified majority in the Council and the consent of the European Parliament; by contrast, an association agreement must be concluded unanimously by the Council and with the consent of the European Parliament.

If an agreement is concluded on the wrong basis or by way of the wrong procedure, it is liable to be declared incompatible with the Treaties by the European Court of Justice. This can happen in advance – through the ‘opinion’ procedure according to Article 218 (11) TFEU – or after the agreement has been concluded, e.g. by way of a preliminary reference from a national court. For these reasons, the choice of the correct legal basis is of constitutional importance as it determines the validity of the Union’s action.

On which alternative competences could such an agreement be based? There is no clear-cut answer. The Union’s external competences to conclude international agreements are scattered throughout the Treaties.⁶ In contrast to Article 50 TEU, which gives the EU cross-cutting powers to deal with the arrangements for the withdrawal of a member state, most other provisions providing for the Union’s external competences relate to specific policy areas, such as the common commercial policy or environmental policy. Given the scope of the EU-UK relationship, basing an extension on these competences would require a bundled approach. For instance, the trade aspects of transition would be covered by the Union’s exclusive competence over the common commercial policy; jurisdiction over private law disputes and enforcement of judgments could be based on implied powers;⁷ and so on. However, there is no guarantee that all the EU’s external competences combined would suffice. In fact, some of the political aspects of quasi-EU membership, such as the Common Foreign and Security Policy that is set to continue to apply to the UK throughout the transition, would warrant the conclusion of a mixed agreement.

Mixed agreements are concluded by the EU and the member states on one side and a third country on the other. By bringing the member states as parties into the agreement, the EU-side can plug any competency gaps that might exist under the EU Treaties. The disadvantage of this kind of arrangement is that it is procedurally cumbersome: not only must the EU ratify the agreement – usually by way of unanimity in the Council and consent of the European Parliament – but each of its 27 member states must do the same according to their respective constitutional requirements. This will in most cases involve a vote in the national parliament but may also require more, such as the consent of a regional parliament or even a referendum. In recent years the Parliament of Wallonia voted against CETA, the EU’s free trade agreement with Canada, and the Dutch people rejected an act approving the EU’s

association agreement with Ukraine in a referendum. Using a mixed agreement would thus make the ratification process – for which there may only be a short window in practice – subject to additional uncertainties such as challenges in national constitutional courts.

The inclusion of an explicit clause in the Withdrawal Agreement allowing for a time-limited extension of the transition period based on Article 50 TEU is the best option.

PROVISION FOR AN EXTENSION OF THE TRANSITION

For these reasons, the inclusion of an explicit clause in the Withdrawal Agreement allowing for a time-limited extension of the transition period based on Article 50 TEU is the best option. Based on Article 50 TEU, it would, therefore, avoid the legal difficulties that alternative solutions would imply.

Specifically, paragraphs 2 to 4, below, should be added to Article 121 of the Withdrawal Agreement.

Article 121 Transition Period

- 1 - 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.
- 2 - *The initial transition period in paragraph 1 may be extended once for an additional period of one year at the request of the Union or the United Kingdom. The decision to extend the transition period may be taken by the European Council acting unanimously and in agreement with the United Kingdom. The decision to extend the transition period must be made before the end of the initial transition period and only after the procedure in paragraph 4 is completed.*
- 3 - *During the additional transition period, Articles 122-126 shall apply in the same manner as during the initial transition period. During the additional transition period, the United Kingdom shall contribute to the Union's budgets.*
- 4 - *The request to extend the transition period must be communicated to the other party. Following this request, the European Commission shall produce a proposal containing estimates of the costs for the United Kingdom's participation in Union policies and programmes during the additional transition period. On the basis of this proposal, the Council, after obtaining the consent of the European Parliament, shall adopt a decision determining the United Kingdom's financial contribution to the Union's budgets for the additional transition period.*

EXPLANATION OF THE DRAFT PROVISION

1. LEGAL BASIS

Article 50 TEU is the legal basis for including the option of extending the transition period. As explained above, a strictly time-limited transition period can appropriately be based on Article 50 TEU since a transition period can be considered part of the arrangements for the withdrawal of the UK from the EU. Following the same rationale, Article 50 TEU also provides an appropriate basis for a possibility of extending that period.

The following points should be reiterated, however: Article 50 TEU cannot serve as the legal basis for a future relationship between the EU and the UK. The more specific bases, such as Article 207 TFEU for a free trade agreement, take precedence for two reasons. First, they are more specific in terms of substance. Second, they contain different – and often harder to fulfil – procedural requirements. For instance, a free trade agreement between the EU and the UK that covers trade in all services would require a unanimous decision in the Council.⁸ By contrast, Article 50 TEU only requires a qualified majority.

The limits of Article 50 TEU as a legal basis, therefore, mean that the inclusion of any possibility for an extension of the transition period must not allow for the transition to morph into a permanent relationship. It rules out an unlimited number of extensions as otherwise transition could, in theory, be extended on an annual basis and thereby become a permanent state in practice. For this reason, the proposal is for a **one-off extension**.

The **duration** of the proposed additional transition period is one year. An alternative approach would be to allow both sides to agree on an additional transition of 'up to one year' or something similar. However, this would carry additional budgetary difficulties that would be best avoided by allowing for an extension of one calendar year only, coinciding with the annual EU budget.

While politically a longer additional transition period might be desirable to, for example, ensure that a UK General Election has to take place within the extended transition period, it is legally risky. The same limits to Article 50 TEU mean that the overall transition phase cannot be so long as to practically amount to a permanent settlement of the relationship between the EU and the UK. The current draft provides for 21 months; a possibility to extend this by one year – as proposed here – would bring the total duration to 33 months. Arguably, it is impossible to determine the permissible length of a transition period with exact precision for lack of guidance in the Treaties or from the Court of Justice. In this paper, it is suggested that the main factor in that assessment should be the purpose of the transition period – which is to allow enough time for the EU and the UK to negotiate and ratify one or several agreement(s) concerning their future relationship – on the basis of the political declaration (that constitutes 'the framework for [their] future relationship') as envisaged by Article 50 (2) TEU. If

the framework spells out an ambitious relationship, then this takes longer to negotiate and finalise than a more basic one. Given past practical experience of EU free trade negotiations, a period of five years for the entire process – from its start on 29 March 2017 to finish at the end of 2021 – would seem to be appropriate.

Given that the fundamental political decisions in this regard can be expected to have been made as part of the overall framework by the time the Withdrawal Agreement enters into force – i.e. two years after the notification under Article 50 TEU was sent – an overall maximum transition period of just under three years – as proposed here – should be therefore covered by the purpose of Article 50 TEU. Hence the possibility to extend the 21-month transition period by one year to an overall duration of 33 months can lawfully be based on Article 50 TEU.

2. EXTENSION PROCEDURE

The draft provision envisages a procedure that will require the unanimous consent of the European Council (i.e. the EU27 heads of state or government) and of the UK in order to bring about an extension of the transition period. Neither side can, therefore, be forced into a longer transition. Due to the far-reaching legal implications of an extension for the legal orders of the EU27, it is imperative that each member state be directly involved in the decision-making process resulting in an extension.

Given the obvious parallels to the extension of the Article 50-period, it is appropriate to mirror the procedure for the extension of the two-year period in Article 50 (3) TEU by requiring a unanimous decision by the European Council and the agreement of the withdrawing member state. This way the consent of each member state and the consent of the UK must be secured.⁹

A further question is whether there should be a cut-off point after which an extension request will no longer be possible. There would be the distinct advantage of providing a degree of certainty to the EU institutions, the member states, the UK, and all other stakeholders. Meanwhile, a strict cut-off point – say three months before the end of the transition period – might prove to be too rigid and indeed counter-productive.

That said, the request for an extension cannot be made at the last minute given that an additional transition period has budgetary implications, which would need to be determined by the EU institutions. Paragraph 4 proposes a procedure – explained in more detail below – to determine in advance the financial contribution the UK would need to make during the additional transition period. Paragraph 2 stipulates that the European Council and the UK cannot make its decision before the completion of that procedure. This has the advantage that the UK will know precisely what it commits to financially before agreeing to an extension of the transition period. Therefore, in practice, the parties must allow some time for this procedure to take place, which means that a request for an extension of transition cannot be submitted at the last minute.

3. EFFECTS OF AN EXTENDED TRANSITION

Paragraph 3 of the draft provision makes it clear that during any extension of the transition the same legal rules as the initial transition period would apply. In particular, Union law will remain applicable in the UK with the same effects as in the EU and its member states – with the exceptions noted in Article 122 of the draft Withdrawal Agreement. The UK will remain outside the decision-making processes of the EU (Articles 123 (1) and (6) of the draft Withdrawal Agreement). At the same time, the EU's institutions, bodies, offices and agencies – including the Court of Justice – will retain their enforcement and supervision powers as provided for in the Treaties.

Furthermore, paragraph 3 emphasises that the UK will need to make financial contributions during any additional transition period.

4. BUDGETARY ISSUES

After stating that the request to extend the transition period must be communicated to the other party¹⁰, the fourth paragraph of the draft provision deals with the procedure to determine the UK's contribution.

The end of the initial transition period will coincide with the end of the EU's current Multiannual Financial Framework (MFF – running from 2014-2020), which had been drawn up with the UK as a member state in mind. Article 128 of the Withdrawal Agreement provides that during the original transition period (until 31 December 2020) the UK “shall contribute to and participate in the implementation of the Union's budgets”. Such financial contribution does not require changes to the current MFF since the latter already assumes the UK's participation as a member state.

The next MFF (2021-2027) will no longer assume that the UK is a member state and will, therefore, set the ceilings for EU's spending accordingly. At the same time, an extension of transition on the terms laid down in the Withdrawal Agreement would entail costs for the Union: the UK would continue to participate in EU programmes and policies. These costs will need to be covered by the UK.

Paragraph 3 already sets out the rule that the UK shall contribute to the EU's budgets during the additional transition period. Paragraph 4 foresees the procedure for determining the UK's financial contribution for the year 2021.

This procedure is modelled on Article 314 TFEU and involves the same institutional actors. The Council and the European Parliament would therefore have to approve a proposal made by the Commission. Arguably, it would be appropriate to involve the same actors – and in particular the European Parliament – as they are also responsible for the annual EU budget.

Coupled with paragraph 2, which stipulates that a decision to extend the transition period may only be taken after the UK's financial contribution has been

determined, this procedure ensures that both sides are aware of the financial implications of an additional transition period before the European Council and the UK agree on an extension.

HOW LIKELY IS THE INCLUSION OF SUCH AN EXTENSION CLAUSE?

Many commentators in the EU and the UK have noted the tight negotiation schedule and thus the benefits of a possible extension of transition. There have been numerous press reports speculating that the UK government will ask for the inclusion of such a clause and that the EU27 - and Task Force 50 in particular - are open to the inclusion of such a provision. Formally, however, the UK will have to ask for it at some point during the negotiations. Speculation is that this will happen last minute, given how contentious this is likely to be with Brexiteers in the UK. But there are good defensive lines: the extension is limited in time and will only be used if both sides agree. An extension of transition provides more time to find a solution for Northern Ireland. The Prime Minister can also commit to fully involve the House of Commons in any decision on extending transition. In the end, the Brexiteers will still get their main prize: the UK will leave on 29 March 2019, even if the transition period might then last for 33 months instead of 21.

POLITICAL CONSEQUENCES OF AN EXTENSION OF TRANSITION

Having a possible extension of transition could change the political dynamics in the UK. Not only does an extension make different outcomes feasible, but the political debate around an extension will also take place in a very different environment. In March 2019, Brexit will have happened, so Leavers can claim that the result of the referendum has been honoured. Consequently, the political debate can focus more easily on how the *status quo* can be maintained to avoid the economic costs associated with a limited trade deal, while the payment of additional money to merely stay in transition might highlight the desirability of fully participating in beneficial EU policies and programmes.

An extension of transition does not guarantee a better outcome. It buys some time and can help to change the political environment of the UK domestic debate. However, to have any chance of becoming a reality, the provisions will have to be included in the Withdrawal Agreement.

In the end, an extension of transition does not guarantee a better outcome. It buys some time and can help to

change the political environment of the UK domestic debate. However, to have any chance of becoming a reality, the provisions will have to be included in the Withdrawal Agreement. If they wish to avoid a second cliff edge, both sides should not lose sight of the need to do so, as proposed in this paper.

- ¹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community TF50 (2018) 35.
- ² Since the deal will probably take the form of a 'mixed agreement', it will require, on the EU-side, ratification by the Union plus all 27 member states according to their own constitutions, which may include national and regional parliaments and may even involve challenges in constitutional courts.
- ³ See <https://news.sky.com/story/business-sec-hints-brexit-transition-could-be-extended-past-2020-11422809>.
- ⁴ See Steve Peers (2018), A Bridge to Nowhere? The Brexit transition period: analysis and annotation, <http://eulawanalysis.blogspot.com/2018/03/a-bridge-to-nowhere-brexit-transition.html>.
- ⁵ See Article 5 (2) TEU.
- ⁶ Among them are the Common Commercial Policy, Article 207 TFEU; environmental matters, Article 191 TFEU; development cooperation, Article 209 TFEU; association agreements, Article 217 TFEU; and implied powers, Article 216 TFEU.
- ⁷ See Opinion 1/03 Lugano Convention ECLI:EU:C:2006:81.
- ⁸ It realistically assumes that such an agreement would cover cultural and audio-visual services as well as social, education and health services, see Article 207 (4) TFEU.
- ⁹ An alternative approach would have been to give a central role to the Joint Committee. According to Article 157 (1) of the draft Withdrawal Agreement, the Joint Committee consists of representatives of the EU and the UK. According to Article 159 (3) of the draft Withdrawal Agreement, it adopts its decisions by mutual consent. As the body with overall responsibility for the implementation and application of the Withdrawal Agreement, the Joint Committee could be regarded as the appropriate body to decide on an extension. While this alternative solution would mean that an extension of the transition period could not be effected unilaterally by the EU or the UK, it would not contain hard and fast guarantees that the EU27 member states would be in a position to influence the decision to extend. Of course, the EU could adopt binding internal rules on the delegation of the power to extend the transition period to the EU representative on the Joint Committee. For instance, these internal rules might, if necessary, require a unanimous decision by the European Council before the EU representative on the Joint Committee can agree to a request for an extension. Nevertheless, member states may consider such guarantee as insufficient.
- ¹⁰ A possible alternative would be to specify that the request must be made in the Joint Committee.

MISSION STATEMENT

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