

Implementing Brexit

Securing more time



About this report

With time running out for the UK and EU to agree and ratify the terms of their future relationship, and then to prepare for the biggest changes to their trading environment in decades, this paper sets out five options for both sides to secure more time.

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Summary

The Brexit transition period is set to end at 11.00pm GMT on 31 December 2020. Before that happens, the UK and the European Union (EU) need to negotiate – and ratify – their future relationship. Whatever the outcome, governments and businesses will need to be ready for practical changes – from the swathe of new customs procedures to new security arrangements. The UK must also implement the most contentious issue of the Withdrawal Agreement: the Northern Ireland protocol. All of this is taking place in a dramatically different environment from the one envisaged when the deal was signed in January, with coronavirus bringing the greatest health and economic crisis of recent times.

The UK and EU have a lot of work to do and very little time. The Withdrawal Agreement does include the option of extending the transition period by 30 June,¹ but the government has been adamant that it will not contemplate an extension, not least because of the costs the UK could incur in contributions to the EU budget and the fact that the whole of the UK would continue to be bound by EU rules. Yet even if the UK and EU appear unwilling to agree an extension before 30 June, the scale of the Brexit task and the rapidly changing and uncertain environment with coronavirus mean that the two sides could still decide that more time is necessary later in the year – either to wrap up negotiations or to prepare for the new trading relationship.

This paper explores five ways in which the UK and EU could arrange for this between now and the end of the transition period. We find:

- **There is not just one opportunity to secure more time – the two sides could agree more time even after the 30 June deadline.** The deadline in the Withdrawal Agreement is often presented as the only opportunity for the two sides to extend the Brexit timetable. In theory, there are at least four other options available. The two sides could:
 1. **Amend the end date of the transition period in the Withdrawal Agreement.** This could be done at any point after June. But it would almost certainly require a European Court of Justice (ECJ) opinion before it could be done.
 2. **Create a new transition period, which would begin at 11pm on 31 December 2020.** But this would mean striking an entirely new, extremely complex agreement and a lengthy ratification process.
 3. **Include an implementation phase as part of the future relationship treaty** – a period of time between the conclusion of negotiations and the treaty coming into force where the UK and EU would phase in their new trading relationship.

But unlike other trade agreements that include implementation phases, this one would be much more complex and time consuming to agree – it would require a new mandate and would make ratification of the final relationship more complex.

4. **Create an implementation phase to prepare for no agreement** – a period of time to adapt to a no-agreement scenario in the event that UK–EU trade talks break down. This would give governments and businesses time to prepare for new tariffs and trade barriers. But it would require two sides who had just failed to reach agreement on a future relationship to return to the negotiating table to agree an ambitious, unprecedented deal that would only be temporary.
- **Extending the Brexit timetable by 30 June – using the Withdrawal Agreement – offers the government the greatest certainty, flexibility and control over the terms of the extension.** The terms of this extension cannot be imposed on the UK; they will need to be negotiated. The transition period could look different to what it is today: the UK could ask to opt out of some EU programmes and policies, like the common agricultural policy. This could, in turn, reduce the UK’s overall budgetary contribution to the EU. The government could also ask that the additional time be used for practical preparations for the new trading relationship, and not for negotiations. The government should be clear that June represents its best opportunity to adjust the Brexit timetable: any last-minute requests for more time, like the Article 50 extensions, could fail simply through procedure or lack of time.
 - **In practice, relying on any of the other four options is a huge risk – each is politically sensitive, uncertain and/or legally complex.** Some of these options may work in theory, but in practice are likely to be impossible. Both sides would need to show flexibility and goodwill to make the options work. All options would require significant negotiation, a new mandate, a legal basis and – at a minimum – the approval of the UK, member states and the European Parliament.
 - **A last-minute decision to extend the transition period might be an easier political sell but, practically, it would be extremely difficult to agree and could prove less useful to business.** First, securing more time after June will require the EU to do something for which it has no precedent. Any decision of this magnitude would require careful negotiations between the European Commission, member states and the European Parliament – but also wider discussions with national parliaments, industry groups and civil society. Second, any last-minute agreement – at the end of negotiations – would be of limited use to businesses. Businesses need time to adapt their supply chains to trade with the EU under new conditions. Some businesses would also need to stockpile to deal with a no-agreement outcome. Without clarity on the outcome of trade negotiations, businesses will either delay their preparations or make decisions to halt exports/imports (which they would not have taken had they had more time to prepare).

Introduction

“Transition ends on 31 December this year. We will not ask to extend it. If the EU asks, we will say no.” – David Frost, sherpa and EU adviser to prime minister Boris Johnson, 16 April 2020.²

With the Brexit transition period set to last until 11.00pm GMT on 31 December 2020, the UK and EU have less than seven months to negotiate and prepare for their future relationship. The UK and EU are due to take stock of negotiations in June. Michael Gove, who has taken on a key role in the UK’s Brexit preparedness, stated at a recent select committee hearing that he is “confident that [the UK and EU] will be making progress in all sorts of areas” by June.³

But reaching a deal is only part of the challenge. Even if they have a deal by the autumn, the UK and EU will still need more time to ratify and prepare for their new trading regime before the end of the year. EU trade agreements can take anything between six months and several years to ratify. The outbreak of Covid-19 makes this timetable even more difficult: businesses in particular need to plan ahead to ensure they can deal with the consequences of the pandemic and prepare for radical changes to their trading environment at the same time.

Given these challenges, the UK and EU may find that they want to secure more time later in the year. At a recent event at the Institute for Government, Shanker Singham, a trade expert who has advised the government on trade negotiations, suggested that while he opposed extending the transition period for the purpose of negotiations, “a pause in the global economy” may make agreeing extra time to adapt to a new UK–EU trading relationship “more attractive”.⁴ Others⁵ have suggested that the UK and EU will need some form of implementation phase – a period of time to adapt to the new trade relationship – whether negotiations succeed or not.

As things stand, the Withdrawal Agreement includes the option of extending the transition period by 30 June⁶ – but the government has been adamant that it will not contemplate an extension, not least because the UK could incur costs in contributions to the EU budget and would be bound by EU state aid rules. David Frost, the UK’s chief negotiator in charge of Brexit talks with the EU, has said that a longer transition would “create even more uncertainty”.⁷ The UK has also bound itself in domestic law not to extend the transition period beyond the end of the year.⁸ Meanwhile, the EU’s chief Brexit negotiator, Michel Barnier, has suggested the EU would agree to an extension but has fallen short of asking for one. But what if the UK and EU did want to secure more time later in the year?

In this paper, we find that 30 June is not the final opportunity to secure more time. We begin by outlining the reasons why the UK and EU may want to secure more time. We then outline the five options available – in our view – to secure that extra time. For each option, we outline the legal requirements on both sides, steps that need to be taken, as well as some of the political hurdles that would need to be overcome.

Why secure more time?

Negotiations

Time is limited and there is a real possibility that the UK and EU will fail to reach a deal by the end of the year. EU trade negotiations have typically taken between one and a half and five and a half years to conclude, but in this case the UK and EU have very little time left.⁹ The Withdrawal Agreement – the first phase of Brexit negotiations – took two and a half years to fully negotiate. The first Withdrawal Agreement¹⁰ proposed a transition period of 21 months – but after three extensions to Article 50, the time left for transition was only 11 months after the UK left the EU on 31 January 2020. Unlike the Withdrawal Agreement, the future relationship covers a much wider scope, including trade in goods and services but also police co-operation and access to security databases.

In February, the government said that its aim was to have a “broad outline of an agreement” by June’s high-level meeting, which it would aim to “rapidly finalise” by September to leave time to ratify and implement it.¹¹ But three negotiating rounds in and there are stark points of disagreement including over the so-called ‘level playing field’, the governance structure of the agreement and fisheries.¹² To break the deadlock, the UK has suggested that it might be open to dropping its ask for tariff-free/quota-free access to the single market in return for the EU dropping its demands for stringent level-playing-field commitments. But dropping this ask would mean negotiating tariffs and quotas; this would be a very different negotiation and it would take much longer than a couple of months.

The coronavirus pandemic further complicates an already difficult timeline – in effect delaying negotiations for several weeks. The UK and EU were forced to postpone the second round of negotiations from March to April as countries dealt with combating the health crisis.¹³ Both chief negotiators and some at the centre of the UK government, including the prime minister himself, were incapacitated by the virus. Michel Barnier has also said that the basic practicalities of virtual negotiations have posed problems for constructive discussions and hampered progress.¹⁴

Ratification

The reality is that the timetable for negotiations is shorter than seven months – to avoid a cliff edge, the UK and EU would also need to ratify the new trading relationship by the end of the year. The complex process of ratification on the EU side means that the UK and EU cannot take negotiations to the wire on 31 December – they must also set aside time to vote on the agreement.

Ratification would be straightforward in the UK. The Constitutional Reform and Governance Act 2010 (CRAG) allows the government to ratify a treaty 21 days after it has been laid before parliament, provided MPs do not vote against it. The government is under no obligation to schedule a vote on any treaty – and it removed its initial commitment to hold a vote on the final UK–EU treaty from the European Union (Withdrawal Agreement) Act 2020 (‘the WAA’) passed in January. Moreover, CRAG also allows the government to disapply such a measure in “exceptional cases”.¹⁵

The government may, however, need to introduce primary legislation to implement a new UK–EU treaty (or treaties) into UK law, just as the WAA was necessary to implement the Withdrawal Agreement. For example, if the EU’s proposals on state aid make it into the final agreement, the government would need to confer powers on the Competition and Markets Authority to disapply acts of parliament. This legislation would need to pass through both Houses of Parliament and would be open to amendment. But this can be done relatively quickly, especially given the government’s large majority in the House of Commons: the WAA received royal assent only 35 days after it was introduced, including the two-week Christmas recess.

Ratification on the EU side is a lot more complicated. How quickly the EU can approve a UK–EU deal will largely depend on the final content of the deal(s) – and who in the EU is required to vote on it (them).

Whereas the EU is proposing one agreement for the whole of the future relationship, the UK would prefer 10 agreements,¹⁶ from trade, fisheries and transport, to civil aviation and social security co-ordination, each focusing on one specific aspect of the relationship. This will have implications for EU ratification.

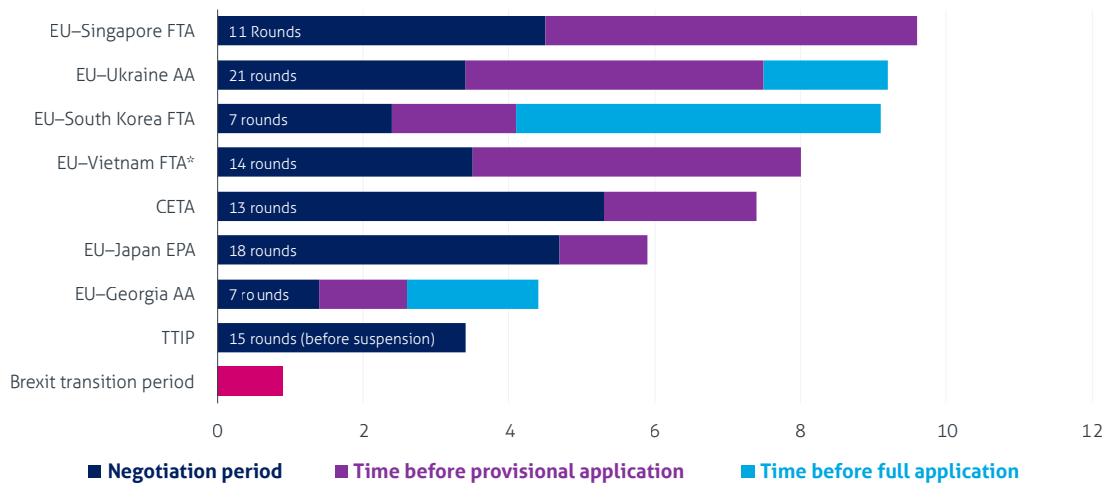
The UK’s draft UK–EU Comprehensive Free Trade Agreement (FTA) suggests the UK would prefer an ‘EU-only deal’, that is, a deal for which the content focuses exclusively on areas of EU law.¹⁷ This kind of deal would only require agreement at the EU level, so in the Council of the EU (the grouping of the 27 member states) and the European Parliament, before the end of the year. There are examples of ‘EU-only deals’ being ratified relatively quickly: the 2019 Japan–EU trade agreement (Economic Partnership Agreement or ‘EPA’) took less than five months. Given the time pressure for the UK–EU deal, the process could move much more quickly. Ideally, the EU parliament would need to vote by mid-December as this is when its last plenary of the year is taking place.*

But if the deal covers policies for which the EU and member states have law-making power, like transport or aviation, then it will be considered a ‘mixed agreement’. Whenever the EU and member states are party to an EU agreement, EU ratification takes much longer as 27 national and seven regional parliaments¹⁸ are also required to ratify the deal.**

* It would be possible for the EU parliament to organise an extraordinary sitting after the last plenary in December to vote on the UK–EU deal – but it would require members of the European Parliament (MEPs) to be on board.

** If the UK–EU deal covers areas where the EU has no competence at all, like social security co-ordination, then national and regional parliaments are obliged to vote.

Figure 1 **Time taken for the EU to complete recent free trade agreements (FTAs), compared with length of transition period (years)**



*The EU–Vietnam FTA has not yet entered into force

Notes: AA = Association Agreement, CETA = Comprehensive Economic and Trade Agreement, EPA = Economic Partnership Agreement, FTA = Free Trade Agreement and TTIP = Transatlantic Trade and Investment Partnership.

Source: Institute for Government analysis of European Commission, directorate-general trade data. Data taken up to 1 June 2020.

But there are ways the EU could avoid a ‘ratification cliff edge’ at the end of the year.

First, the EU council might be able to limit ratification of a mixed agreement to the EU level. The 2019 Japan–EU EPA was ratified as an ‘EU-only agreement’, although it included provisions of shared competence.¹⁹ But the reverse has also been true: member states have previously asked that an EU trade deal be considered a mixed agreement even though the EU commission did not think it was legally necessary.²⁰ This was the case for the EU–Canada deal, for example. The question of which international agreements must be ratified by member states is currently an unsettled one (the only exception being when an agreement covers areas for which the EU has no competence at all, such as health).²¹ Either way, it would be risky for the EU to pursue an EU-only approach unless there was consensus among all the bodies that could potentially bring a legal challenge to it – all 27 member states, the EU commission and the EU parliament – that this was the best way forward.

Second, the EU and UK could provisionally apply the agreement pending full ratification. But this too is not a straightforward decision and would require negotiation with the UK and within the EU. The UK and EU would first need to agree which areas of the agreement to provisionally apply – and for the EU, provisional application can only work in areas of exclusive EU competence. It could not be extended to cover aviation for example. The EU–Canada deal was provisionally applied in 2016 and some national legislatures are yet to ratify the deal almost four years after it was concluded. Provisional application is not a permanent state either: either party still reserves the right to unilaterally withdraw provisional application.

The challenges with the ratification process are not, however, just a question of timing. The UK–EU deal could still fall at the point of ratification: one of Belgium’s regional legislatures, the parliament of Wallonia, nearly brought down the EU–Canada trade deal even though it had already been provisionally applied.²² If ratification failed, with the two sides unable to address issues raised by member states, provisional application would be suspended. Failed ratification in this case would pose serious challenges: unlike other trade negotiations, the UK and EU would be forced to trade under World Trade Organization (WTO) terms as there would be no facilitated trade arrangement to fall back on as the transition period will have already ended.

Implementation

The government and business will need time to prepare before the end of the transition period – whether negotiations succeed or not.

A new relationship with the EU will see demands at the UK’s border change overnight. Before then, the government will need to set up new institutions to control areas it has not had competence for in almost half a century. For example, the UK will need a new customs system, requiring 50,000 new customs agents, and it will need to introduce a wide-ranging change to the current migration regime.²³

These changes will need to happen even if negotiations with the EU break down. But they will be different from some of the changes prepared for in case of no deal in October 2019. For example, the UK government has said it would no longer wave through EU goods at its border without checks, but instead plans to have full border checks in place and operational by the end of the transition period.²⁴

The government and the EU must implement the Withdrawal Agreement, including securing the rights of EU citizens in the UK, and vice versa, and implement the contentious Northern Ireland protocol.²⁵ To avoid any checks and controls on the island of Ireland, more processes will be required for goods entering Northern Ireland from Great Britain to protect the integrity of the EU single market – a key concern for member states. A failure to effectively implement the Northern Ireland protocol in time could have legal and reputational consequences for the UK, as well as economic and political consequences for Northern Ireland.²⁶ And it is not just the UK that has work to do: Michael Gove, chancellor of the Duchy of Lancaster and minister for the Cabinet Office, recently criticised the EU and member states for not doing enough to guarantee that British citizens living and working in the EU will be able to continue to enjoy the same level of rights and freedoms after the transition period.²⁷

Most importantly, it is not just government that faces major changes. **Between 150,000 and 250,000 businesses will have to make customs declarations for the first time²⁸ and adapt their supply chains and they will face increased administrative costs – whether trade negotiations succeed or not.** Businesses will need to hire staff to comply with new customs procedures and ensure that their cash flow is adequate to cover new customs duties. UK lawyers and accountants will have much more restricted access to EU markets, varying from member state to member state. Those that sell goods and services to EU governments will find their access to EU public procurement markets sharply limited, especially in the case of no agreement.

But a last-minute deal will not give businesses enough time to adapt. Many small businesses did not prepare for no deal in the Withdrawal Agreement phase simply because they did not have the money or capacity to invest.²⁹ Others did not prepare because they wanted certainty – if they take the same approach for the future relationship, it could leave them with just weeks to prepare for changes, given the short time window for the future relationship to come into effect. In July 2019, after two Brexit extensions and shortly before the 31 October deadline, the government had to register 88,700 businesses that had not previously signed up for an EORI number³⁰ – but HMRC will not be able to contact or enrol those small businesses that are not VAT registered.³¹

A major change for businesses will be the end of freedom of movement and a new immigration system. Companies seeking to hire European nationals will face additional hurdles to do so under the new immigration system in the UK. Many smaller businesses that have never had to sponsor a non-EU national or conduct right-to-work checks will need to prepare to do so for EU nationals they want to employ. Service suppliers who travel between the UK and EU (when this restarts after the coronavirus travel restrictions are lifted) will also need to carefully check whether the activities that they intend to pursue will be possible as a business visitor or whether they will need a travel visa.

The introduction of most favoured nation (MFN) tariffs in a no-agreement scenario raises long-term questions for the viability of some businesses.** The tariffs that would be imposed are significant for some parts of the private sector. The EU's WTO MFN tariffs average 2.3% on industrial goods but can be more than 60% for certain agricultural products.³² This could make some businesses fundamentally unviable and require the serious restructuring and reorientation of other firms.

As some experts have pointed out, the outbreak of Covid-19 could make it harder to put everything in place by the end of the year.³³ The attention of EU and UK leaders is, rightly, focused on responding to the pandemic. In March, many UK civil servants negotiating the future relationship and preparing for practical challenges were redeployed to work on the coronavirus pandemic. Businesses also face acute capacity issues; Nicole Sykes, the Confederation of British Industry's (CBI's) head of EU negotiations, recently expressed concerns over the twin effects of the coronavirus and Brexit: "If you're in new levels of debt as a result of coronavirus, you cannot afford to deal with Brexit. And you've just lost two months in which to get ready for Brexit."³⁴

* An EORI (Economic Operators Registration and Identification) number is a unique ID issued to businesses by an EU member state's customs authority. Businesses need this number to complete customs declarations. Until the end of the transition period, customs declarations are not required for goods moving between the UK and the EU. After the transition period ends, any UK business importing from or exporting to the EU will need an EORI number from HMRC.

** 'MFN tariffs' are the tariffs that a country applies to imports from all other WTO members with which it does not have a trade agreement, in line with the WTO's MFN principle.

The pandemic also complicates stockpiling. In an interview for Radio 4's *World at One*, Alistair Hughes, managing director of Savoir Beds, said that his business would need to start stockpiling raw materials as early as July 2020 to deal with a no-agreement outcome – but that the outbreak of Covid-19 meant that it is much harder to identify what demand there might be over the next six months to a year.³⁵ Many businesses will prefer to wait to see what happens in trade negotiations, rather than begin stockpiling.

For now, the government says it will stick to the plan to leave the transition period on 31 December. The rest of this paper sets out what the government could do if it changed its mind as a result of the pressures we have outlined above, or other unforeseen circumstances.

Five options for securing more time

The remainder of this paper sets out five ways the UK and EU could secure more time. Some of the options would allow time for negotiations and implementation; others focus exclusively on implementation. Each involves trade-offs and legal or political difficulties. They would all need to be negotiated and approved this year.

Using the Withdrawal Agreement to extend the transition period by 30 June. The Withdrawal Agreement allows for a single extension of up to two years, but the exact terms of this extension are up for negotiation. The parties would need to decide how to use this extra time – be that for negotiations, ratification and/or implementation – by 30 June.

Amending the end date of the transition period in the Withdrawal Agreement, so that the transition period continues beyond 2020. This extension would allow time for further negotiation, ratification and/or implementation. It could also be agreed after 30 June.

Creating a new standalone transition period, which would begin at 11pm on 31 December 2020 – a transition period in all but name – to secure more time for negotiations and implementation.

Including an implementation phase as part of the future relationship treaty. This option applies in a scenario where the UK and EU have reached and ratified a deal, but need time to prepare for the new arrangement. The UK and EU could include an implementation phase as part of the final agreement.

Creating an implementation phase to prepare for no agreement. This could be used if the UK and EU fail to reach a deal, but still need time to prepare for a no-agreement outcome. This implementation phase, in the form of a new agreement, would be used to phase out the current UK–EU relationship and prepare for a new trading relationship under WTO terms.

Using the provision in the Withdrawal Agreement to extend the transition period is the only watertight way of securing more time – although the government has set its face against using it. All the other options rely on much more complex workarounds, which could be as time consuming and uncertain as finalising the trade negotiation itself.

Table 1 **How the UK and EU could secure more time**

How an extension could be used	Option 1: Use the Withdrawal Agreement to extend the transition period by 30 June	Option 2: Amend the end date of the transition period in the Withdrawal Agreement	Option 3: Create a new standalone transition period	Option 4: Include an implementation phase as part of the future relationship treaty	Option 5: Create an implementation phase to prepare for no agreement
To negotiate	●	●	●		
To ratify	●	●	●		
To implement a deal	●	●	●	●	
To implement no deal	●	●	●		●

Option 1: Using the Withdrawal Agreement to extend the transition period by 30 June

Purpose	Negotiation, ratification or implementation
Coverage	Negotiable in parts
Deadline for decision	30 June 2020
Length	Up to two years (although the decision could include a break-off clause or provision to extend further)
EU legal basis	Article 132 of the Withdrawal Agreement

This option would see the UK and EU use the existing provision in the Withdrawal Agreement to prolong the current transition period to negotiate, ratify and implement the future relationship for up to two years. It could also focus solely on implementation.

Legal basis and coverage

Article 132 of the Withdrawal Agreement allows for a single extension to the transition period of up to two years. It does not specify that this additional time must be used for negotiations – the UK and EU could decide to use it for ratification and/or implementation too. The decision would need to be made by 30 June 2020.

The UK and EU could also draft the legal decision to extend the transition period so that it includes:

- specific guidelines to determine how this extra time should be used – this would avoid the extension being swallowed up entirely for negotiations, leaving implementation questions unanswered
- a break-off clause to end the transition period as soon as a new agreement is in place and/or once implementation is completed – although this could complicate negotiations around the UK's payments to the EU
- the possibility for another extension should both sides decide more time is necessary.*

* It may be the case that neither the UK nor the EU would want to include the possibility of a further extension later – especially since the Withdrawal Agreement talks of a single extension of up to two years.

The EU and UK would need to jointly agree the exact terms of the extension. The expectation is that the extension would cover broadly the same issues as the current transition period – meaning the UK would stay in the single market and customs union and continue to take part in EU security structures. Like the current transition period, the UK would be subject to EU rules but without a voice or vote in the EU institutions. But the UK could try to negotiate some opt-outs. For example, it may decide it no longer wants to take part in EU programmes like Horizon Europe, the EU’s new research programme, which is due to begin on 1 January 2021 at the same time as the new seven-year EU budget.

Deciding the terms

Article 132 of the Withdrawal Agreement says that the co-chairs of the EU–UK Joint Committee³⁶ – the forum responsible for overseeing the application of the Withdrawal Agreement – have until 30 June to decide whether to extend the transition period. They will need to have agreed the length of the extension and the UK’s contributions to the EU budget for the extra time. The two chairs are Michael Gove³⁷ and Maroš Šefčovič, the Slovakian vice-president of the European Commission for Interinstitutional Relations and Foresight.³⁸ The UK would also need to re-authorise the use of written procedure to make a joint committee decision as the WAA ruled out the use of written procedure for any joint committee decisions.³⁹

Extending the transition period is not a simple yes or no question. The terms and conditions will need to be hammered out and this could take more than one sitting of the joint committee. For example, should the UK’s contribution be smaller than it is today – especially if it is no longer planning to take part in EU research programmes like Horizon Europe or the EU’s common agricultural policy, which will start on 1 January 2021, at the same time as the EU’s new multi-annual budget? Should the extension focus solely on implementation as Raoul Ruparel, special adviser on Europe to Theresa May, recently proposed?⁴⁰ Both sides would need to agree on these matters. The joint committee needs to be open to meeting more than once in the run-up to 30 June deadline to discuss these issues. Currently, it is only due to meet at the beginning of June.

Securing agreement

In the UK, the decision to extend the transition period is likely to require primary legislation before the decision is adopted in the joint committee.⁴¹ The WAA made it illegal for the government to agree to a joint committee decision extending the transition beyond 2020. Some say that the WAA contains within it the legal framework for ministers to pass secondary legislation to agree an extension,⁴² but such a decision is controversial and runs the risk of being subject to challenge in the courts. For this reason, we believe new primary legislation would be necessary. This legislation – which could be extremely short, along the lines of the European Union (Notification of Withdrawal) Act 2017 – would need to be approved by both Houses of Parliament.

Passing primary legislation to facilitate an extension should not be a problem: the government has a comfortable majority in the House of Commons and opposition parties are unlikely to vote down an extension, although the question of transition could highlight political fissures in the government's own backbenches.

Any primary legislation would also need to go through the House of Lords, which has different virtual proceedings to the House of Commons and notably has not currently made provisions for virtual voting. While it can discuss any non-substantial government work virtually, it must sit to pass any primary legislation. But in any case, given the political make-up of the House of Lords, peers are unlikely to prevent the passage of such a bill – particularly if the House of Commons has approved it. In this scenario they could agree to pass the legislation without a division or possibly look to use the technology that the House of Commons is developing.

The EU sign-off could happen relatively quickly. Before the EU commission agrees to an extension in the joint committee, it would need to secure the approval of the EU council – the grouping of the 27 EU heads of governments – in the form of a legal decision. As usual with EU legal acts, the decision would need to be translated into all official languages and published in the Official Journal of the European Union, but this can be done in a few days at most.

Potential obstacles

The real obstacle in the UK to such an extension is political. The government has been adamant that it does not intend to use the provision in the Withdrawal Agreement to extend the transition period. A sudden U-turn would be politically awkward for the government and would need to be managed carefully. While the EU has said that it would be open to an extension, it has not called for one directly.

Conclusion

Using the provision in the Withdrawal Agreement to agree an extension would be far more straightforward than any of the other options. The UK and EU know what processes and discussions are needed to get to an agreement. The extra time could be used for negotiations, but also for implementation. It could be drafted in a way to include an early break-off clause or further prolongation if necessary. But both sides could only begin discussing the terms if the government changes the position it has firmly set out: that it will not use the extension mechanism.

Option 2: Amending the end date of the transition period in the Withdrawal Agreement

Purpose	Negotiation, ratification or implementation
Coverage	Negotiable in parts
Deadline for decision	Ideally the autumn
Length	Negotiable
EU legal basis	Unclear

According to the terms of the Withdrawal Agreement, the transition period can only be extended if a decision is taken by 30 June.⁴³ But some have suggested that it might be possible to extend it after 30 June. To do so, the UK and EU would need to amend the completion date of the transition period in the Withdrawal Agreement.

Like the first option, this extension would allow time for further negotiation, ratification and/or implementation. It would give both sides the chance to see how far they get with negotiations; if, by the autumn, they realise they need more time, they could decide to extend then.

But this option is far from straightforward. Unlike the UK, it is not clear that the EU has the legal authority – which is derived from the EU treaties – to amend the Withdrawal Agreement in this way. Without clarity, it would be a big gamble to rely on this option as a route for securing additional time.

Legal basis and coverage

The Withdrawal Agreement states that the transition period can only be extended if a decision is taken in the joint committee by 30 June.⁴⁴ While the joint committee does have the power to make amendments to the Withdrawal Agreement for up to four years after the end of the transition period, it can only do so to “correct errors, address omissions or other deficiencies”.⁴⁵ The Withdrawal Agreement is also clear that the joint committee cannot amend Parts One, Four or Six of the agreement – which include the provision on the length of the transition period.⁴⁶

To agree an extension of the transition period after 30 June, then, the UK and EU would need to find a way to amend the completion date of the transition period in the Withdrawal Agreement. If they succeeded in doing so, the extension would last for as long as the UK and EU deemed it necessary to conclude the future deal(s) and/or allow time for implementation. It could also include a break-off clause.

Deciding the terms

Assuming it were possible to amend the Withdrawal Agreement, the UK and EU would still need to negotiate and agree the terms of this extension. The EU is likely to ask that it covers broadly the same issues as the current transition period – meaning the UK would stay in the single market and customs union and continue to take part in EU security structures. Like in option 1, there might be some wiggle room: the UK could ask not to take part in Horizon Europe or to be excluded from other EU policies like the common agricultural policy or the common fisheries policy. The EU and UK could also amend the requirement that says that they can only extend once and for up to two years.

Securing agreement

Under international law, parties to a treaty have the right to amend it.⁴⁷

The UK can easily extend the transition period after 30 June as the government has the powers to make and unmake treaties.⁴⁸ The government would need to introduce new primary legislation – which, like in option 1, could be a short bill to change the completion date of the implementation phase in the WAA and allow the UK to continue to pay into the EU budget beyond March 2021.⁴⁹ Then, the government would need to either lay the amending treaty before parliament for 21 sitting days in line with CRAG, or exempt the amending treaty from this requirement (as the WAA did for the Withdrawal Agreement).^{*} Since the UK has a firm principle that it does not ratify treaties before the implementing legislation has received royal assent, this would need to happen before the agreement amending the Withdrawal Agreement was ratified (or otherwise took legal effect).

For the EU, it would be much more complicated. The EU would need to find a legal basis in the EU treaties to amend the Withdrawal Agreement – but it is not clear there is one. Unlike the UK, the EU is not a state or a sovereign entity; instead, it derives its powers from the EU treaties, which member states negotiate and sign. This means that it can only act where the EU treaty explicitly says it can.⁵⁰ For this reason, the EU institutions will always cite a specific article of the treaty that gives them the legal competence to act in the field in question. This includes modifying international agreements the EU has made.

To amend international agreements, the EU adopts a new legal act – usually a ‘Council Decision’, made by the EU council with the EU parliament’s agreement – to consent to the amendment. These Decisions will cite as their legal base the same article that was used for the original agreement. For example, the Decisions to amend the EU–Swiss agreements cited as their legal base Article 207 of the Treaty on the Functioning of the European Union (TFEU). But in the case of the Withdrawal Agreement, the EU cited Article 50 of the Treaty on European Union (TEU) to approve the original Withdrawal Agreement – but Article 50 only gives the EU the authority to negotiate and conclude an ‘exit’ agreement with an outgoing member state. It is silent on whether the EU can still use this article once the member state has already left.

^{*} Section 22 of CRAG allows the government to ratify an international agreement without giving parliament 21 sitting days in “exceptional cases”, provided a minister lays a statement before parliament explaining why it has done so. The government could use this provision, but it is likely to be unnecessary.

As we said above, the joint committee does have powers to amend certain parts of the Withdrawal Agreement so as to correct errors or address omissions and other deficiencies. The EU commission has recently proposed to use those powers to make technical corrections to parts of the Withdrawal Agreement that were drafted based on the UK leaving the EU in March 2019 rather than January 2020. The commission's proposal cites Article 50 as its legal base.⁵¹ But the terms of the Withdrawal Agreement make clear that the joint committee cannot amend the part of the agreement that covers the transition period. This means that the EU could not necessarily use Article 50 to amend the completion date of the transition period.

Lawyers are split on the question. Some have argued that Article 50 in effect 'expired' as the basis for any new agreements with the UK – including agreements to amend the Withdrawal Agreement – when the UK formally left the EU on 31 January.⁵² Others point out that, if Article 50 cannot be used, then it would be impossible to ever amend the Withdrawal Agreement, which would be incompatible with general principles of international law. On that basis, the courts should therefore interpret Article 50 as giving the EU a legal base to do so.⁵³ While this argument is not without force, it would be a risky strategy to pursue, as we show below.

And it does not seem that any other article of the EU treaty could be used either: even the 'catch-all' Article 352 of the EU treaty is unlikely to supply a valid legal base. This article allows the EU council to adopt decisions "when action by the Union should prove necessary... to attain one of the objectives set out in the Treaties". But the EU later clarified that this article could not be used as a basis to amend the EU's international treaties.⁵⁴

Potential obstacles

Given the risks involved with using Article 50 as a treaty base, EU negotiators would want to make sure they secured the approval of member states and the European Court of Justice (ECJ) before recommending a Decision to amend the Withdrawal Agreement citing Article 50 as its legal base.

This is because the Decision to amend the Withdrawal Agreement could be challenged in a national court or in the ECJ. Any EU member state could bring an action to annul the Decision in the ECJ, even if it had previously supported the extension.⁵⁵ Any UK or EU citizen or business could also bring such a challenge in a national court, provided they complied with the standing rules of their jurisdiction. That court would then be required under Article 267 of the TFEU to refer the question to the ECJ. For example, an EU business with UK competitors could argue that the extension infringed its interests because it gave those UK competitors better market access than they would otherwise have had.*

The ECJ could also conclude that Article 50 does not provide a valid legal base.⁵⁶ From a legal standpoint, it would be as if the transition period had never been extended – from one day to the next, the UK and EU could find themselves in a very different

* They might not succeed. But the serious risk the EU would incur if they were successful could still deter the EU institutions from the attempt.

trading relationship, with no guarantee that they have the necessary measures in place to trade under new terms (thinking the extension would give them more time to prepare). Given this risk, it is very unlikely the EU commission would recommend using Article 50 without securing an advisory opinion from the ECJ first.^{*57} Previous cases requesting an opinion on the legality of a treaty have taken years to conclude, although the ECJ could speed up the opinion if need be.**

Conclusion

This option has the advantage of delaying any commitment to an extension until later in the year – but the legal and political risks suggest that neither side should bank on this being an option after the expiry of the June deadline. Further, without a clear legal base on which to base the Decision, it would be impossible for the EU to amend the completion date of the transition period in the Withdrawal Agreement.

* As, for example, it did on the EU's proposed FTA with Singapore.

** See, for example, Opinion 2/15 on the EU's proposed FTA with Singapore, delivered on 16 May 2017 after a request from the EU commission on 10 July 2015. See Opinion 2/15 of the Court, 16 May 2017, retrieved 27 May 2020, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>

Option 3: Creating a new standalone transition period

Purpose	Negotiation, ratification or implementation
Coverage	Negotiable
Deadline for decision	Ideally by 14 December 2020 (which is the last plenary of the EU parliament in 2020)
Length	Negotiable
EU legal basis	Article 207 or Article 217 and Article 218 of the Treaty on the Functioning of the European Union (TFEU)

Another option would be to negotiate a new separate treaty, establishing a new transition period that would pick up where the previous one left off – at 11.00pm GMT on 31 December 2020. Like in option 2, the extension would last for as long as the UK and EU deemed it necessary to conclude the future deal(s) and/or allow time for implementation. It could also include a break-off clause.

But here too there are risks. Negotiators would need to agree the content and ratify the new agreement before the end of the year. Negotiators would almost certainly need to pause future relationship talks to focus on securing this agreement, without the guarantee that it could be settled and ratified in time.

Legal basis and coverage

To reach an agreement in time, the new transition period would likely need to be substantially similar to the current transition period: the UK would need to continue to pay into the EU budget and abide by EU rules to remain part of the EU single market, customs union and security structures. So if, for example, the UK wanted to reserve the right to implement new trade agreements or deviate from EU rules in certain areas during the extra time, it would make the negotiations much more complicated and time consuming.

For the EU, the EU council would need to authorise the opening of new negotiations with the UK, in the form of a legal decision. It would have a choice of legal base: it could use either Article 207 (the article used for FTAs) or Article 217 (the article used for deeper and more comprehensive association agreements) in conjunction with Article 218 (the procedural article). Which would be more appropriate is open to question: the scope of the transition period goes well beyond what is generally covered by trade agreements negotiated under Article 207; meanwhile, the notion of 'association' under Article 218 implies a degree of permanency with which a transition period is inconsistent.⁵⁸

Deciding the terms

The UK and EU would first need to agree the terms and conditions of this new transition period before the current transition period expires. These would include the length and coverage of the period and the UK's ongoing contributions to the EU budget. The EU would almost certainly ask that the UK continues to adhere to EU rules and regulations (including new ones that come into force) and accept the oversight of the EU commission and the jurisdiction of the ECJ. As we said above, any changes to the content of the agreement could involve lengthy discussions with the UK, but also inside the EU – as EU negotiators would need to secure the approval of the EU council and parliament, and, pending ratification requirements, national and regional parliaments too.

Securing agreement

In the UK, the government would need to ratify the new agreement using CRAG. An act of parliament would also be needed to implement a transition period beyond 2020.

For the EU, the EU council and parliament would need to approve any final deal before the end of the year. And if the UK and EU were to transpose the provisions from the Withdrawal Agreement into a new arrangement, that means it would cover areas of exclusive EU competence but also policy areas that are shared between the EU and member states, for example road transport and aviation. As we made clear in the introduction to this paper, this could have implications for ratification: a 'mixed' agreement could require ratification by the legislatures of the individual member states. Excluding areas of shared competence from the new transition period could speed up ratification, but it is hard to envisage the period excluding core areas such as haulage and air services.

Potential obstacles

In addition to the challenges listed above, the UK and EU would also run the risk of challenge in the WTO – although the risk would be small. The rules defining what constitutes an FTA and a customs union are laid down in Article XXIV of the General Agreement on Tariffs and Trade. This agreement, were it to happen, could be construed as an agreement establishing a customs union and so be compatible with Article XXIV, but WTO members might still seek to challenge it as incompatible with the MFN (most favoured nation) principle, which says WTO members cannot grant special favour to one trading partner without offering the same favour to all its other trading partners.

Such a challenge would have limited chances of success though. It would take months or even years to work its way through the dispute settlement mechanism before reaching the final stage, the appellate body, which is currently non-functional. Even if they were by some chance to succeed, the UK and EU would simply be ordered to bring the transition period to an end within a 'reasonable period of time' – usually several months.

It is more the optics that matter. It is not clear whether the UK and EU would want to be seen to circumvent WTO rules precisely at a time when both have pledged to uphold and strengthen the international trade system.⁵⁹

Conclusion

This option has the advantage of delaying any commitment to an extension until later in the year – and unlike option 2, the EU would have no problem in identifying which legal basis to use to open and conclude negotiations.

But this option also carries significant political and legal risks. It could also force negotiators to pause future relationship talks to focus on an extension, without the guarantee that extra time would be secured. This would mean less time for negotiations, but also for implementation. It also assumes the UK and EU can agree the content, time and conditions of the new agreement – and that it can be ratified in time. If the two sides are concerned about having time to negotiate a future relationship by the deadline, it would make little sense to then negotiate and ratify an entirely new, separate agreement on top of the future relationship.

Option 4: Including an implementation phase as part of the future relationship treaty

Purpose	Implementation
Coverage	Negotiable
Deadline for decision	Before the close of negotiations on the future relationship treaty
Length	Negotiable
EU legal basis	The legal basis used for the UK–EU future relationship treaty

When countries sign FTAs, they often agree a period of transition during which the provisions of the FTA are progressively brought into force. For example, some of the tariff reductions in the Canada–EU FTA (the Comprehensive Economic and Trade Agreement or 'CETA') are being phased in over seven years, while the EU–Japan Economic Partnership Agreement provides for a 20-year phase-in period for certain highly sensitive goods. These phase-in periods allow businesses in the partner countries to make gradual adjustments to new trading conditions, scaling up or down their operations as changes in the competitive environment dictate.

But in this case the UK and EU are attempting something historically unprecedented: not bringing two trading partners closer together but pushing them further apart. There is therefore no precedent for phasing in such a change over time; plus, some of the changes that the UK–EU trading relationship will undergo are binary and would not allow for a gradual phasing in. Given this lack of precedent, the length and terms of such an implementation phase would need to be negotiated.

Legal basis and coverage

The implementation phase would be part of the future relationship agreement and, ideally, it would share its legal base. There are two basic ways in which an implementation phase could be constructed:

- 1. The EU and UK attempt to construct an implementation phase that looks very much like the current transition period.** All existing EU law would continue to have effect in the UK during the transition period – the ECJ would also continue to have oversight. It would be necessary to provide in law for the continued direct effect of EU law in the UK and the continued jurisdiction of the EU institutions during the implementation phase. This option would give the two sides a block of time to prepare for the changes agreed in the future relationship.

2. The UK and the EU construct a new, bespoke implementation period. This would look similar to the situation in Northern Ireland as long as the Northern Ireland protocol applies. Under this model, the UK would remain in a customs union with the EU, continue to apply EU product standards, and apply EU state aid rules. But it would not be required to take part in the common agricultural policy, provided it paid farmers no more subsidy than it would do as an EU member state. It could also refrain from participating in the common fisheries policy, instead applying whatever new fisheries agreement it reaches with the EU. And, as will be the case in Northern Ireland under the protocol, it would not take part in the EU single market for services. Free movement of people would also end.

The EU would need to make sure that the legal base provided of the Council Decision authorising the conclusion of the wider future relationship agreement was adequate to cover an implementation phase as well. Most conventional EU FTAs along the lines the UK is seeking – such as those with Canada and Japan – use Article 207 of the TFEU as their legal base. But an implementation phase along the lines of the first example above would be much broader. This could require a different legal base – probably Article 217 of the TFEU, used for association agreements – which would then be the legal base of the whole agreement.

Deciding the terms

There is always going to be a 'cliff edge' as the UK moves from a relationship with the EU founded on its membership of the customs union and the single market to one based on an FTA. The aim of this implementation period would be for it to work like a 'down ramp', with a progressive phasing out of obligations over time. This is based on the model conventionally used for FTAs, where tariff cuts are phased in over a number of years.

Given the EU and UK have said they want a zero-tariff arrangement, most of the changes that will occur in the EU–UK trading relationship are likely to be binary in nature. Customs declarations either have to be submitted or they don't; goods traders must either prove that their goods are compliant with rules of origin or not; animal products either need to be checked at a border inspection post or not. This will happen whether negotiations succeed or not.

But some changes would not need to be binary. If the UK and EU were to agree a customs union, UK service providers would need to adjust to their new market access immediately but goods traders would have longer to prepare to submit customs declarations. But this would require the UK and EU to agree an implementation phase to bring different requirements and prohibitions into effect at different times.

Securing agreement

The final UK–EU agreement – including the implementation phase – would need to be ratified by both sides. Whether or not primary legislation is required to implement the final UK–EU relationship, the UK would certainly need to make primary legislation to give effect to the implementation phase. If it followed the Article 50 model, it would need to make provision for EU law to continue to have effect in the UK. Even if a bespoke implementation phase were agreed, it would need primary legislation to allow the UK to, for instance, take part in a customs union with the EU.*

The EU would approve the conclusion of the agreement through an EU council Decision. Voting in the council – that is, whether it can be done by majority voting or requires unanimity – will depend on the final shape of the UK–EU agreement. If the agreement is an association agreement, this would require the approval of the EU parliament⁶⁰ and the unanimous support of member states in the council.⁶¹ If it were a pure trade agreement – even including a customs union – it could be made with the support only of a qualified majority in the council, provided it did not encroach on any areas where the EU did not have competence.

Potential obstacles

The major risks in such a scenario are political.

Even if the UK and EU opt for an ‘off the peg’ implementation phase based on the Withdrawal Agreement transition period, negotiations would still be complex.

The two sides would, for example, have to agree whether the UK would take part in EU programmes and how its contribution to the EU budget would be calculated. It would also see the UK continuing to be subject to the full panoply of EU law and the jurisdiction of the EU institutions. Recently, Michael Gove told the House of Commons Future Relationship with the EU Committee that the government was not considering an implementation phase as “staying within the purview of the EU would mean additional costs for the UK taxpayer and being subject to additional EU laws”.⁶² While the UK government could still use this scenario to make good on its commitment not to formally extend the transition period, it is likely to face opposition from MPs who would see this as all but the same thing.

Negotiations would be even more complex for more limited implementation. The UK and EU would need to negotiate exactly which areas of the final agreement the implementation phase should cover and on what terms. The original Northern Ireland protocol – which this proposal resembles – took many months to negotiate and was almost 175 pages long, including its 10 annexes.⁶³ Even if the UK and EU were willing to take it as their basis, there are some areas in which either side might wish to make changes: some member states, for example, may ask the UK to maintain EU social and environmental standards during the implementation phase.

* The government has already taken powers under section 31 of the Taxation (Cross-border Trade) Act 2018 to implement customs union agreements in general, but section 31(5) of the Act prohibits these powers from being used to implement a customs union with the EU without a further act of parliament.

The scale of work would be considerable. Both the UK and EU may be reluctant to undertake such substantial work for an implementation phase lasting only a very short period of time. In effect, they would reach the finish line of their wider negotiation only to begin work on an almost equally complex agreement.

Even the second option of a more limited implementation phase would impose severe restrictions on the UK. A customs union would necessarily preclude the UK from bringing into force any new trade agreements it negotiates in the course of 2020, including with the US – although this may be less of an issue if coronavirus delays those talks as well. Some contribution to the EU budget – even if at a lower rate than under the Article 50 transition period – would likely be required. And the EU would certainly demand guarantees of a level playing field. For example, if the EU is to exempt the UK from its requirement to send all exports of animal products through a border inspection post (as third countries are required to do), the UK would have to continue to apply the full range of EU animal health and food safety legislation. Such provisions would prevent the UK from amending its domestic regulatory standards or subsidising its industries in ways incompatible with EU law. It seems unlikely that the current government would wish to undertake such obligations.

To be beneficial, an implementation phase would need to be agreed well before the end of the transition period. If it is tacked on to the end of negotiations, it will not be of use to businesses that have already started their preparations either for a new deal or for a no-deal outcome, as best they can.

Conclusion

The nature of the future relationship the UK government is seeking will change the way British businesses trade with the EU overnight. This makes an implementation phase more necessary. The gap between the status quo and the envisaged future is considerable and will require enormous efforts on the part of both government and industry to implement.

The government has already publicly stated this intention to diverge substantially from the status quo.⁶⁴ It has also urged its own agencies and businesses to prepare either for an agreement or for a no-agreement outcome in December.⁶⁵ But as stated in Chapter 1, the outbreak of Covid-19 means many companies do not have the headspace or financial means to prepare for a changed trading environment and respond to the pandemic at the same time.

Even though the government is not considering one now, an implementation phase could look more desirable if the UK and EU do succeed in negotiating a future relationship agreement.

Option 5: Creating an implementation phase to prepare for no agreement

Purpose	Implementation
Coverage	Negotiable
Deadline for agreement	31 December 2020
Length	Negotiable
Legal basis	Article 207 and Article 218 of the Treaty on the Functioning of the European Union (TFEU)

In previous chapters of this paper, we discussed possibilities for securing more time either for negotiations or for implementation once negotiations have concluded. But this is not the only possible outcome: the negotiations could fail entirely. Trade talks often do: the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US dragged on for more than three years before collapsing.

When trade talks fail, the parties simply continue with the status quo. But as we wrote in the introduction to this paper, in the case of UK–EU negotiations, there will be no status quo to fall back on. The day after the transition period ends, the UK will become a standard ‘third country’ with regard to the EU: it will no longer be part of the EU’s single market or customs union or be able to trade with the EU’s trading partners the way it has done. Even more serious disruption could result if the UK and EU are unable to negotiate any agreements in the areas, such as air services and road transport, that are not covered by multilateral rules.

As we also mentioned, the gap between the status quo and the new environment would be even greater than that which option 4 would produce. Some exporters, particularly in the agriculture sector, would face high tariffs in a no-agreement outcome that they would be unlikely to face if there is a deal. This may force businesses to reconsider their business models, to look for new markets, or to change the structure of their operations so as to comply with new regulation. They will need time to do so – time that they will not have if negotiations go up to the wire.

This final option looks at the possibility of a ‘standstill’ period – a sort of ‘down ramp’ leading to a more distant trading relationship. The UK and EU would use this period to prepare to trade on WTO terms and to negotiate agreements on issues such as aviation or civil nuclear co-operation that are independent of the wider trading relationship. The length and terms of such an implementation phase would need to be negotiated.

This would be an entirely new international agreement between the UK and the EU. The transition period would end at 10.59pm GMT on 31 December 2020. At 11.00pm, a new implementation phase would start.

Legal basis and coverage

As in option 4, such a period could take a variety of forms: an implementation phase that looks very much like the current transition period or a new bespoke implementation period, under which certain aspects of the current trading relationship would continue – the customs union for instance.

The EU would need to find an adequate legal base for such an agreement. As in option 4, the legal base of an association agreement (Article 217 of the TFEU) would likely be the most secure for it to use, but it could also consider using a common commercial policy legal base (Article 207 of the TFEU) if the transition period were restricted to pure trade issues. But this would require the exclusion of some issues closely related to trade, such as road transport, which would not be desirable if one of the purposes of the agreement was to allow time to negotiate bilateral agreements in such areas. If the EU and UK wanted to avoid disruption, they would need to adopt unilateral measures along the lines proposed for a no-deal outcome in 2019⁶⁶ – for example, recognising UK-issued hauliers' licences.

Deciding the terms

The UK could negotiate such an agreement and ratify it, subject to the obligations imposed by CRAG. It would also need to bring forward primary legislation to implement the agreement in UK domestic law. This legislation would look similar to that described in option 4.

The EU ratification process would look similar to that for a full-scale agreement between the UK and the EU. An association agreement, which commands the most secure legal base from the EU's point of view, would need to be approved by the EU parliament and then by all member states in the EU council.

Securing agreement

Such an agreement – like many aspects of the relationship between the UK and the EU – would have little precedent besides the transition period established under the Withdrawal Agreement. The EU's lawyers would want to consider carefully whether such an unprecedented extension of the rights and obligations of EU membership to a non-member state is compatible with the EU treaties.

This type of standstill agreement would be technically and legally complex, and would require some time to negotiate. But it seems implausible that such negotiations would start before the UK and EU had accepted that their wider negotiations had irretrievably failed. This would likely be very close to the end of the transition period provided for under the Withdrawal Agreement, leaving almost no time to negotiate this new standstill agreement.

Member states would need to give the EU's chief Brexit negotiator, Michel Barnier, a new mandate authorising him to negotiate such a 'standstill' agreement with the UK. Similarly, the UK government might wish to explain the nature of the new agreement it was seeking to parliament and the public.

Potential obstacles

Such a complex negotiation would require goodwill on both sides and looks politically impossible. If UK–EU talks break down, it is likely that the goodwill will be in short supply – especially to undertake a complex and difficult transition arrangement for only a limited period of time. On the EU side, there may well be voices advocating for a 'short sharp shock' in order to show to both sides the mistake that no deal constitutes. This was the basis on which it rejected the idea of a 'managed no deal' in 2019. Conversely, the UK government might well take the view that having full sovereign autonomy would be a more useful mitigation tool than a standstill period that would see the UK continue to be bound by certain EU rules. For example, this would allow it to bring into force new trade agreements as soon as they are negotiated rather than wait until the end of the implementation phase.

Like option 3, the UK and EU run the risk of challenge in the WTO – although the risk of challenge is small. An agreement to create a new standalone transition period could be construed as an agreement establishing a customs union and so be compatible with Article XXIV of the General Agreement on Tariffs and Trade, but WTO members might still seek to challenge it. That said, the limited duration of the agreement and the current gridlock of the WTO dispute settlement mechanism means that it is unlikely that any third party, even if frustrated at the preferential access the UK and EU would have to each other's markets, could do much to challenge such an agreement.

Conclusion

The one thing businesses have repeated throughout the Brexit process is their need for certainty. Telling businesses to prepare for the worst just in case will not cut the mustard: if a business implements costly preparations for no agreement, it risks losing out to less conscientious competitors if an agreement is reached at the last minute. Allocating a specific period of time during which government and businesses could focus exclusively on preparing for a no-agreement scenario could reduce the chances of this happening.

Unfortunately, the politics of the situation would make this difficult. It is hard to see the UK and EU admitting that negotiations have irretrievably broken down before the autumn. And if they do, that will hardly be the most propitious time to embark on a new and technically complex negotiation on an implementation phase. To deliver the biggest benefits, such an implementation phase would need to be announced to business and the public well before the end of the transition period – perhaps six months before. But if the politics permit this, it is hard to see why they would not also permit a conventional extension of the transition period as in option 1 – which would be both simpler and more comprehensive.

Conclusion

Despite the difficulties of negotiating, ratifying and implementing a future relationship – or a no-agreement outcome – in such a short time, the UK government has stuck firmly to its position that it will not countenance any extension to the transition period. If anything, coronavirus, while prompting the Scottish⁶⁷ and Welsh⁶⁸ governments to call for an extension, has in fact confirmed the UK government's resolve to leave the EU fully at the end of 2020.

This paper has set out ways in which the government could seek to secure more time if it changed its mind. From the perspective of the UK's own legal order, there is considerable flexibility. In all five of the options we have discussed, the government would need to pass new primary legislation through parliament. But with a large majority in the House of Commons and a House of Lords that is likely to support extending the transition period, this is not a difficult obstacle to surmount. The chief obstacle for the government will be the need to find a way of explaining its change of heart to parliament and the public, given the emphasis it has placed on delivering the benefits of Brexit as soon as possible. Parliament, particularly committees, should be ready to scrutinise the details of any attempt to secure more time.

Extending after June would be much trickier for the EU. The EU is a creature of law: it cannot act without an adequate legal base. The transition period – in effect, granting a third country all of the rights and obligations of a member state – is legally unprecedented. Extending it would be doubly so. While the EU might, if pressed, be able to find some flexibility to extend after June, it would find it enormously easier to make use of the flexibility in the existing Withdrawal Agreement under Article 50. The other possible mechanisms we have outlined in this paper present a varying degree of legal risk for the EU.

What is more, they would entail considerable practical and political difficulties. The original transition period provided in the Withdrawal Agreement is conceptually quite simple: the UK is treated exactly like a member state for the duration of the transition period, though it no longer has any representation in the EU institutions. Designing a new transition period from scratch could be enormously more complicated, especially if the UK and EU cannot agree on an existing model, such as the Withdrawal Agreement transition period or the whole-UK backstop proposed in Theresa May's version of the Northern Ireland protocol.⁶⁹ The idea that the UK and EU will be able to manage this while simultaneously concluding negotiations on a future relationship is ambitious.

What businesses value above all is certainty: they can cope with most outcomes provided they have reasonable notice. The great challenge they faced in March and October 2019 was that the UK government's attempts to ratify the Withdrawal Agreement continued up until the very last moment when it was possible to do so. This meant that businesses had to prepare in parallel for two radically divergent outcomes.

While the situation at the end of 2020 is rendered less problematic by the fact that the UK government's proposed deal looks rather closer to no agreement than it does to the status quo, this problem remains. The UK and EU should give serious thought to how they will allow businesses time to prepare for whatever outcome they succeed in negotiating – especially given the additional pressures that the coronavirus pandemic has created.

It would be rash for the UK and EU to rely on a workaround being available at some point later in 2020. If an extension is agreed before 30 June, it can be made extremely flexible. It could provide for break-off clauses, allowing for the transition period to be brought to an early end if the two sides successfully negotiated an agreement – or if they reached the conclusion that no agreement would be possible. Specific guidelines could be established to prevent the extension being used merely to delay decision making and to provide for a fixed period of time to be made available for implementation. It could even allow the parties to extend the transition period once again. If the UK government considers it at all possible that it will at some future date want an extension, it should start discussing it now.

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Acknowledgements

We would like to thank all those in the UK and the EU who helped us with our research; without them this paper would not have been possible. We would also like to thank the various reviewers who have helped in the shaping of the paper.

Special thanks are due to our colleagues at the Institute for Government – Joseph Owen, Jill Rutter, Maddy Thimont Jack, Jess Sargeant, Alex Stojanovic, Bronwen Maddox, Emma Norris and Hannah White – for their advice and comments. We are also grateful to Rowena Mayhew for her excellent edit, and Sam Macrory, Will Driscoll and Melissa Ittoo from the communications team at the Institute for Government for their help in turning this paper around so quickly.

This paper is the product of team effort – and lots of delving into EU treaties and parliamentary procedure. Any errors or omissions in the paper are the responsibility of the authors alone.

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The Institute for Government is a registered charity in England and Wales (No.1123926) with cross-party governance. Our main funder is the Gatsby Charitable Foundation, one of the Sainsbury Family Charitable Trusts.