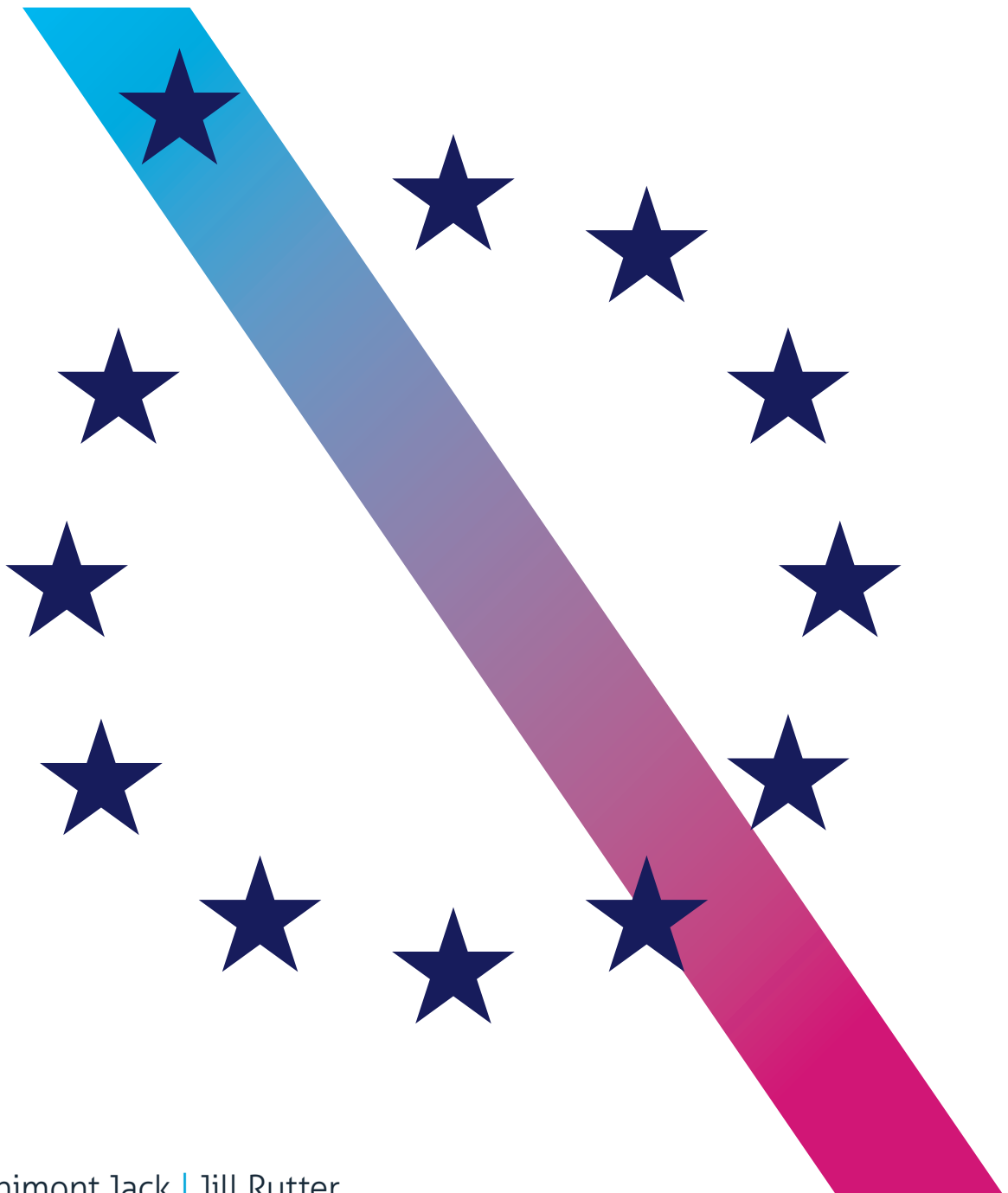


Managing the UK's relationship with the European Union



About this report

Now the UK has left the EU, the government needs to work out how it will organise itself to manage its relationship with its largest trading partner. This paper sets out the framework provided by the agreements with the EU, looks at key domestic legislation, and assesses how the government appears to be approaching these in the first months of 2021 – and what more it needs to address now and in the future.

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Summary

After the 2016 referendum, the UK government had to decide how it would manage the task of extricating the UK from the European Union after 47 years of membership. Now the UK has left, and the transition period ended, the government needs to work out how it will organise itself to manage its relationship with its largest trading partner.

This paper first sets out the framework provided by the agreements with the EU – the Trade and Cooperation Agreement signed on Christmas Eve last year, and the Withdrawal Agreement. It also looks at key domestic legislation, namely the UK Internal Market Act. We assess how the government appears to be approaching these in the first months of 2021 – and what more it needs to address now and in the future.

Introduction

In July 2016 the incoming prime minister, Theresa May, set up the Department for Exiting the European Union (DExEU) to manage all aspects of the Brexit process, along with the Department for International Trade (DIT), which was tasked with making a reality of the UK's new independent trade policy. Those structures were not fit for purpose, were a recipe for conflict and, in September 2017, the responsibility for negotiating with the EU moved into the Cabinet Office, leaving DExEU with the tasks of shepherding withdrawal legislation through parliament and co-ordinating Brexit preparations.

Boris Johnson, having replaced May in July 2019, abolished DExEU when the UK formally left the EU on 31 January 2020,* bringing the negotiating effort into No.10. This was led by a special adviser, Lord Frost, reporting directly to the PM. Johnson also put the Cabinet Office, under the chancellor of the Duchy of Lancaster, Michael Gove, in charge of co-ordinating the transition to new trading and security arrangements with the EU. Two cabinet committees, set up in the summer of 2019, continued to set strategy for the negotiations and oversee implementation.

The parameters of the new economic and internal security co-operation between the UK and EU are now defined by three key documents: the Trade and Cooperation Agreement (TCA – the 'deal' signed on Christmas Eve 2020); the Withdrawal Agreement (WA), which lays out the future relationship for trade in goods between Northern Ireland, Great Britain and the EU; and the UK Internal Market Act, supplemented by 'common frameworks', which set out how the UK proposes to maintain internal coherence between the four nations of the UK after the loss of the EU framework within which devolution was originally conceived.

Below, we set out the tasks and relationships that the UK will need to manage in the coming months and years, and then look at how the government needs to approach the future management of the relationship with the EU.

The speed of the TCA negotiations left many issues unsettled and the UK may, in the future, want to use provisions to improve the deal. The form of the deal left much uncertain – not least how far the scope for independent action while maintaining the zero tariff/zero quota deal (the TCA's big achievement) is restricted by the yet-to-be-tested level playing field (LPF) provisions. Moreover, the Northern Ireland protocol means GB policy in the areas listed in the protocol must always take account of the implications for the 'depth' of the border the government has erected in the Irish Sea.

The government appears inclined at every turn to downplay the significance of the UK's relationship with the EU – and to have a preference for dealing bilaterally with individual member states rather than with the EU institutions. It may also fear that creating an over-elaborate bureaucracy to manage the EU relationship would produce a mindset where the EU looms larger in internal thinking than it needs to.

* Although the UK left the EU at 11pm on 31 January 2020, the Withdrawal Agreement contained provisions for a transition period where the UK remained part of the single market and customs union, as well as part of the law enforcement arrangements and relevant EU programmes, until the end of 2020.

Its recent decision, therefore, to establish a new unit in No.10, again under Lord Frost, starts to answer the questions about how the UK plans to manage that relationship. It is clear the unit will have a strategic role, both on the approach to Europe and the EU as well as wider international policy. But as this paper makes clear it will also need to join up the different interlocking strands of the UK's relationship with the EU – including relations with the devolved governments, management of the Northern Ireland protocol, and how these affect both domestic regulation and trade policy.

The government wanted a Canada-style agreement with the EU but, as we argue below, Brussels will never regard the UK as simply Toronto on Thames – and if the UK fails to manage the relationship well, it may find it ends up with more conflicts with the EU than if it had spent more time thinking in advance about the issue.

The new framework for UK–EU relations

The UK may have negotiated a more distant relationship with the EU than some of the models first proposed – with new non-tariff barriers the price for greater control over the future direction of UK laws. But the new agreement includes complex structures that will need to be managed, as well as key moments when further negotiation, or reviews, will be required. The Northern Ireland protocol of the Withdrawal Agreement also ensures that at least part of the UK will continue to dynamically align with some EU rules.

The TCA establishes a complex governance structure

The EU's consistent negotiating position throughout the Brexit talks was that the future relationship with the UK should be governed by a single treaty, with one overarching governance structure. It was keen to avoid the 'Swiss model', where the free trade agreement (FTA) is supplemented by multiple sectoral agreements, each with separate governance and dispute structures. On this point, the EU was successful.

At the top political level, the TCA will be overseen by a new Partnership Council. Not dissimilar to the Joint Committee established in the Withdrawal Agreement, it will be co-chaired by a representative from the European Commission (recently confirmed to be Maroš Šefčovič, also co-chair of the Joint Committee) and a minister from the UK government (yet to be announced). Its role includes:

- **Oversight:** The Partnership Council will be responsible for overseeing the application and implementation of the TCA. As part of this responsibility, it will be able to set up or disband specialised committees, delegating powers where necessary.
- **Amendment:** For the next four years, the Partnership Council will be able to amend the TCA, or supplement agreements, to correct errors or address omissions. But the power goes beyond just a tidying up function and has the potential to be quite wide-ranging. For example, the Partnership Council will be able to decide to amend some parts of the agreement by mutual agreement, including parts of the chapters and annexes on rules of origin, customs and energy.
- **Dispute settlement:** For most parts of the TCA, the first step in the dispute resolution process is for the two sides to enter into 'consultations', which can take place either in one of the specialised committees (mentioned below) or the Partnership Council.* If a dispute cannot be resolved through consultation at the political level, the complaining party will have the option of requesting an arbitration tribunal and go through the resolution process.

* This process will not apply to all parts of the TCA. There are separate dispute arrangements in areas such as law enforcement and judicial co-operation, fisheries, and parts of the level playing field, including subsidies, labour and social standards, and environment and climate standards. Other parts do not have a formal dispute arrangement, including competition, tax, SMEs and cultural property.

The TCA also establishes the Trade Partnership Committee to oversee the trade part of the agreement, with 10 trade-specialised committees, which will oversee specific aspects of the trading provisions, including on sanitary and phytosanitary (SPS), regulatory co-operation, and the LPF. There will be a further eight specialised committees to oversee other aspects of the TCA, including on social security co-ordination and law enforcement, and judicial co-operation. Together, these amount to nearly double the number of committees included in the EU–Canada Comprehensive Economic and Trade Agreement (CETA). Figure 1, overleaf, provides a full list of specialised TCA committees.

The remit of these committees is to oversee and review the implementation of specific parts of the TCA, reporting to the Trade Partnership Committee or Partnership Council. They will also be required to conduct technical work where necessary and, in some cases, take decisions. The Specialised Committee on Law Enforcement and Judicial Cooperation, for example, will be the first stage in any disputes raised about that part of the agreement.

Four working groups have also been established in the TCA to support the work of specific specialised committees. These are on organic products, motor vehicles and parts, medicinal products (supervised by the trade specialised committee on technical barriers to trade) and social security co-ordination (supervised by the Specialised Committee on Social Security Coordination). These groups have been set up where it is already clear that greater co-ordination or discussion will be needed.

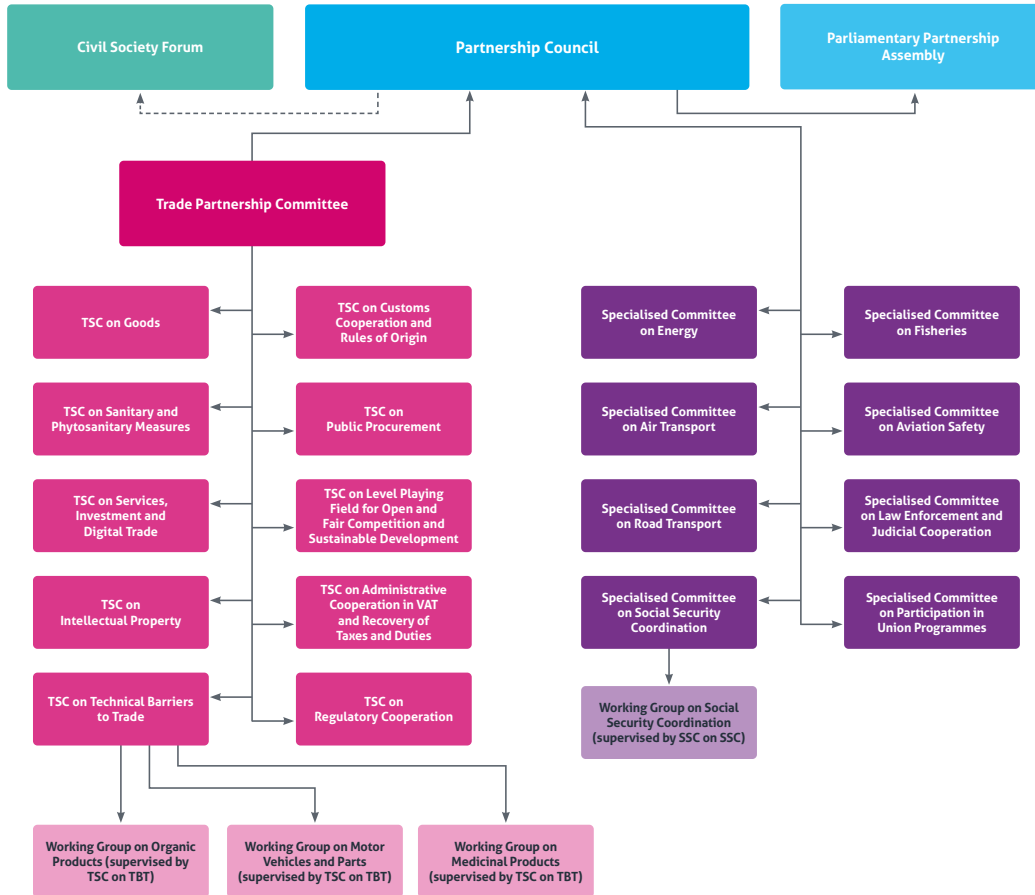
This structure is not fixed. The Trade Partnership Committee and eight specialised committees can establish and dissolve working groups where they agree it is necessary to support the functioning of the agreement.

The TCA also allows the EU and UK parliaments to set up a new 'parliamentary partnership assembly' to exchange and request information on the implementation of the agreement from the Partnership Council as well as to make recommendations. The two sides will also establish a civil society forum and are expected to set up domestic advisory groups.

Officials in Whitehall and the UK Mission in Brussels (UKMis) will have to work out how they propose to staff these committees going up to the top-level Partnership Council. In most cases the subject matter will make the lead department obvious, but in some there will be issues that cut across the interests of a number of individual departments. There will also need to be arrangements for allowing devolved governments and external stakeholders to feed into the UK approach.

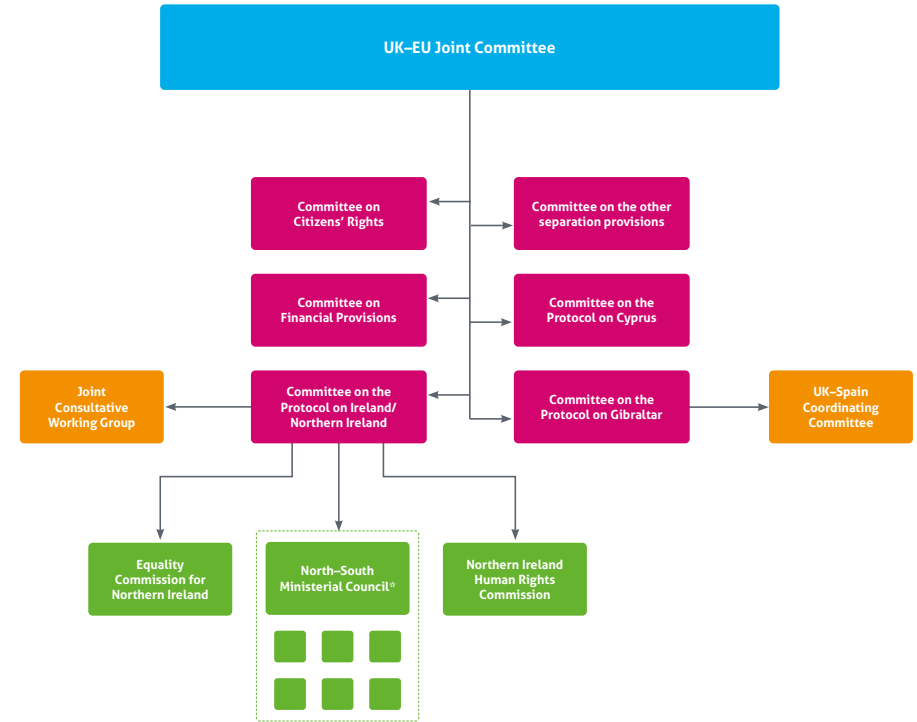
Figure 1 Governance structures: TCA and Withdrawal Agreement

Governance structure of the UK-EU Trade and Cooperation Agreement



The Partnership Council, Trade Partnership Committee, trade specialised committees and specialised committees will all meet at least once a year.

Governance structure of the UK-EU Withdrawal Agreement



* North-South implementation bodies work under the policy direction of the North-South Ministerial Council but can make recommendations directly to the Northern Ireland sub-committee. These bodies include Waterways Ireland; Food Safety Promotion Board; Intertrade Ireland; Special European Union Programme Body; The Language Body; Foyle, Carlingford and Irish Lights Commission.

The Joint Committee and committees will all meet at least once a year.

Source: Institute for Government analysis of TCA and Withdrawal Agreement.

The TCA sets out a series of upcoming decisions and deadlines

The TCA's hasty conclusion led negotiators to agree to a long list of issues that require further resolution by the new committees (see Figure 2, overleaf). The 11 months available to negotiate and finalise a detailed new FTA, during the transition period, were always going to be tight even before both sides had to grapple with dealing with the coronavirus pandemic. Concluding any agreement in that time, let alone one so comprehensive in scope, is a significant achievement. But there are consequences.

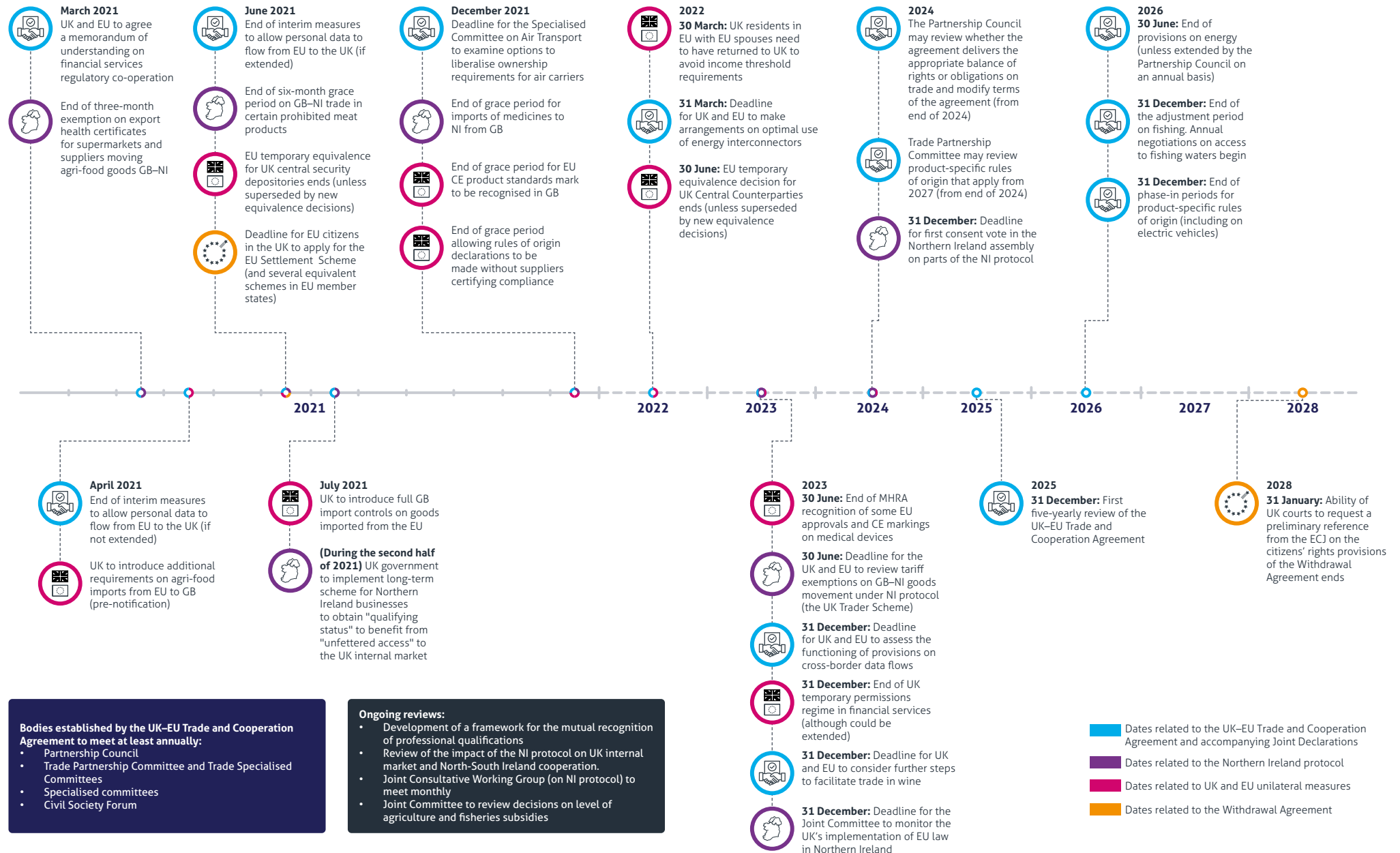
The first item on the Partnership Council's agenda may be agreeing an extension to the provisional application of the treaty currently set as the end of February. This sets a clear deadline for the UK to confirm its co-chair. It would be used not just to give the committees of the European parliament more time to scrutinise the TCA but, more fundamentally, to allow time for it to be translated into all 24 official EU languages.¹

There is also still detail to be filled in. For example, Annex TBT-XX, the annex on facilitating the exchange of information between the relevant databases on market surveillance and product safety, is due to be agreed by the Partnership Council by June 2021. There is also an aspiration to agree a new memorandum of understanding on regulatory co-operation on financial services by the end of March. While some hope it may unlock an EU decision on financial services equivalence, this is by no means guaranteed.²

There are also parts of the agreement that need development to be able to be put into practical use. For example, the Trade Specialised Committee on Administrative Cooperation in VAT and Recovery of Taxes and Duties needs to decide what kind of information relating to VAT should be exchanged automatically. There is outstanding detail on exactly how the mutual recognition of each side's authorised economic operator (AEO) schemes will work (to facilitate some of the customs processes).

Beyond these 2021 deadlines, there are other review points baked into the agreement. For example, in 2023 the UK and EU will need to assess the functioning of the provisions on cross-border data flows. In June 2026, the adjustment period for fisheries will end – as will the energy provisions (unless an extension is negotiated). Under the rebalancing measures in the LPF, each side can request a review of the trade part (or other parts if both sides agree) of the agreement to ensure an "appropriate balance" of the commitments made. The overall functioning of the agreement is also due to be reviewed by the Partnership Council every five years.

Figure 2 Key UK–EU relationship deadlines



Source: Institute for Government analysis.

The TCA also sets out options to build on what has been agreed so far. The clearest is on the mutual recognition of professional qualifications, where there is a pathway to add more professions to the recognition of home title for lawyers already agreed. Since much more extensive mutual recognition was a key negotiating demand in the original UK mandate, and is very important to the UK's business services sector, this might be expected to be a priority area for the government to seek to enhance the agreement. There may be other areas where unanticipated consequences emerge for either side that they may want to look to see if there is scope to agree changes.

All of this will mean an ongoing dialogue between the two sides for as long as the agreement is in force. Once the agreement beds down, initial issues have been resolved and gaps filled and implementation is running relatively smoothly, the level of necessary interaction may decline – but if either side seeks to build on and expand the terms of the TCA, it could increase.

The Joint Committee and its sub-committees will continue to meet

It is not just the governance of the TCA that the government will need to manage. The Withdrawal Agreement (WA), including the Northern Ireland protocol, continues to apply. The WA contains commitments for the UK to comply with the financial obligations it signed up to while an EU member state; protection for the rights of EU citizens who were living in the UK and UK citizens living in the EU before the end of the transition period; and arrangements governing trade in goods between Northern Ireland and the EU, and Northern Ireland and Great Britain, to avoid a hard border on the island of Ireland.

This agreement is overseen by the UK–EU Joint Committee, supported by six specialised committees (see Figure 1). Currently, the Joint Committee is co-chaired by Maroš Šefčovič and Michael Gove. The body is responsible for overseeing the implementation of the WA and can amend it for up to four years after it came into effect “to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when [the] Agreement was signed”.³ Consultations in the Joint Committee are the first step in any dispute raised in relation to the treaty, and it can also establish or dissolve specialised committees and assign them tasks.

The Joint Committee will continue to be an important forum. First, the deadline is coming up, in June 2021, for guaranteeing the rights of UK citizens in the EU, and EU citizens in the UK, who were living there before the end of the transition period. Any concerns about the respective processes can be raised in the Joint Committee.

Second, the Joint Committee will continue to be responsible for ongoing oversight of the application of the Northern Ireland protocol. It has already taken some of the key decisions it was delegated, including the question of which goods are considered not ‘at risk’ of moving from Great Britain to Northern Ireland and subsequently into the EU, therefore subject to EU customs duties. But the Joint Committee is required to continue to review the impact of the protocol on the UK internal market and north–south co-operation, as well as whether new EU laws in areas covered by the protocol need to be added. A joint consultative working group is set to meet monthly.

To address concerns raised by supermarkets about the issues they face moving agri-food from GB into NI, there is currently a three-month 'grace period' for checks and paperwork and a similar six-month period to allow restricted products such as chilled meats to continue to be traded. Recent concerns over the implementation of the protocol has already led to Gove writing to Šefčovič to seek an extension to both these grace periods, as well as resolve issues around parcels, medicines and pet travel.⁴ There has not been any indication so far that the EU is willing to negotiate further.

Putting the new framework into practice

The UK government is keen to make the most of the opportunities and greater freedoms it will have to regulate in a way it feels reflects the needs of the UK (or in some cases, GB or English) market. But it will have to do so in a context where EU rules and regulations remain important – where Northern Ireland has to abide by those rules and/or where action by the UK or one of the devolved governments risks triggering the dispute mechanisms in the TCA. UK businesses will continue to trade across both the GB–EU and GB–NI borders, and the government will also need to keep in mind the consequences for them of significant changes to domestic policy.

The UK government will also need to manage the consequences of the loss of the EU framework for the UK internal market, which formed the backdrop to the original Scottish and Welsh devolution settlements. The UK government intends to avoid the emergence of new barriers to trade between the four parts of the UK through the highly contested and as yet untried UK Internal Market Act 2020, which seeks to guarantee market access for UK businesses in all parts of the UK, and common frameworks agreed by the four governments in specific policy areas.

It is still unclear how restrictive the provisions in the TCA will be

Above, we have set out the councils and committees overseeing the functioning of the TCA. As discussed, these bodies play an important role in the dispute resolution mechanisms.

Much of the agreement is covered by the overarching dispute procedure, where a dispute will first be discussed – and potentially resolved – by specialised committees or the Partnership Council. If that were to fail, it will be referred to an arbitration tribunal, made up of relevant experts in law and international trade. If the offending party fails to comply with a ruling from the arbitration tribunal, the other party will be free to suspend parts of the agreement (including in areas not involved in the dispute).

Other parts of the TCA have their own specific dispute procedures, including fisheries, law enforcement and the provisions covering the LPF. The latter was a key sticking point in negotiations, with the EU concerned that, without explicit commitments from the UK and a robust dispute resolution mechanism, the UK would be able to undercut the competitiveness of the EU single market in the future – in particular, through deregulation.

The compromise in the TCA is a commitment to non-regression in key LPF areas, including social and labour protections, and the environment and climate, and a rebalancing mechanism.⁵ This mechanism would, if future divergence is perceived to have a 'material' impact on trade and investment, allow either party to impose temporary tariffs to counteract it. The question of whether there was an LPF breach could be referred to an arbitration panel if disputed.

The notable feature of dispute resolution mechanisms in conventional FTAs is how rarely they are used. If the EU were genuinely to treat the UK as it does Canada – a large but distant market – then we might expect very little resort to these mechanisms. But this is unlikely to be its approach to the UK, until last year one of its largest member economies and a country on the EU's doorstep. Tight LPF protections were a major negotiating objective for many influential member states, who see a potentially significant emerging competitive threat from the UK – and it is likely that, in the early days at least, they will want to keep alive the potential that those mechanisms will be used. The danger for the UK is that it finds itself with a list of disputes at different stages of the resolution process – much as the Swiss complain about being in constant negotiation. It also reduces the value of the agreement in providing a stable basis for businesses to conduct trade with the EU.

So there is a question mark over how intrusive this mechanism will be. It will depend on actions by both sides: how far the UK pushes divergence and how quick the EU is to raise potential disputes, and, ultimately, where the arbitration tribunal (if the disputes end up there) decide the bar is set.

The EU will be closely watching anything that may be construed as undermining the obligations the UK has signed up to – especially with trust already so recently undermined by the inflammatory inclusion of clauses to undermine the Northern Ireland protocol in the UK Internal Market Bill in autumn 2020 (since removed). And the UK will also need to be alert to any future policy development in the EU that could have a 'material impact' on the UK.

Even if the rebalancing measures aren't triggered, either side could look to take advantage of the relatively limited trade remedies provisions to retaliate on any perceived unfair practices.

The EU's market will remain important for UK exporters

Although the level of trade between the UK and the EU may have been slowly reducing in recent years, in 2019 trade with the EU still accounted for almost half (48%) of total UK trade.⁶ This may change over time both as supply chains adjust to the complexity of the new processes and paperwork associated with trade with the EU, and also as the UK government strikes trade deals with the rest of the world. Talks are ongoing with New Zealand, Australia and the US, and the UK has just formally applied to join the multinational Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

However big a shift these generate, it would have to be well in excess of estimates by government officials even to make a noticeable difference,⁷ let alone a wider economic or cultural change. EU trade will continue to matter, a lot, to many UK businesses for the foreseeable future.

The TCA reflects the fact that in the negotiations, the UK prioritised 'sovereignty' – having the freedom to diverge from EU rules – over market access. The two sides agreed, for instance, neither simplified checks for goods of animal and plant origin moving across the border or to allow one set of regulators to certify goods as compliant with the other's standards.*

There is already debate about whether these are areas the UK government may want to try to build on in the future. Currently, it appears there is little political interest – on both sides – in reopening negotiations. But even if the TCA, once details are finalised, remains relatively static for the near future, UK goods will still need to meet EU standards to be traded within the single market and the development of EU standards will continue to matter. The UK will therefore be under pressure from UK businesses to keep abreast of and try to influence the development of those standards, for example, those relevant to the auto industry. It will need to accept that there are three regulatory superpowers: the US, China and the EU, and that of these the EU is likely to have the most influence on UK trade flows. The UK may in future try to influence the development of regulatory standards on new areas, for instance, new technologies, where it can move more swiftly, by persuading the EU to follow UK precedent.

Even beyond the areas covered by the TCA, the direction of travel in the EU on regulation of personal data will have implications for whether, if a data adequacy decision is granted to the UK in the first place, this remains in place or is rescinded at a later date. Similarly, if the EU grants the UK equivalence in some areas of financial services, but the UK then changes its regulatory regime, this could give the EU grounds to terminate that decision. And in areas covered by the level playing field, the development of new EU rules could trigger the rebalancing mechanism.

EU rules will continue to apply in Northern Ireland

The terms of the Northern Ireland protocol mean that certain parts of the EU *acquis* still apply in part of the UK; more than 300 EU regulations and directives are listed in the annex of the protocol as still applying in Northern Ireland. These include areas such as product requirements, customs and agriculture. To ensure compliance with these rules, new processes have been introduced to regulate the movement of goods between GB and NI.

Any update to the EU regulations and directives listed in the protocol will automatically apply to Northern Ireland. And where such rules emerge, the Joint Committee will need to decide whether they should also apply in Northern Ireland. This will have implications domestically in terms of how regulation is applied in Northern Ireland, but also for the UK internal market and the functioning of the Irish Sea border.

* The UK government is unilaterally recognising the EU's 'CE' product standards marking on most products placed on the GB market until the end of 2021, but afterwards goods must carry the new UKCA marking. Under the terms of the Northern Ireland protocol, goods placed on the NI market must continue to comply with EU product standards and carry the CE marking, although NI goods tested to EU standards by a UK testing house must show both the CE marking and the new UKNI marking. 'Qualifying' NI goods with either the CE or CE plus UKNI markings can be placed on the GB market.

As the Institute for Government has previously argued, the UK government and Northern Ireland executive will need to put in place mechanisms to identify relevant EU proposals, and understand the implications for Northern Ireland and, where possible, influence EU policy making.⁸ The Northern Ireland assembly and UK parliament will also need to consider how to effectively scrutinise this process, with the House of Lords recently setting up a new Protocol on Ireland/Northern Ireland sub-committee under the Lords European Affairs Select Committee.⁹

The UK should not only consider decisions made in the EU. As the UK government looks to make the most of opportunities outside the EU single market and customs union, departments will need to be aware of what implications divergence in key areas will have for trade in goods between GB and NI. As many of the areas listed in the protocol are devolved this will also apply to the Welsh and Scottish governments.

The UK will need to consider how to manage its internal market

The return of powers from Brussels to the UK means that, where policy areas are devolved, powers have also returned to Belfast, Cardiff and Edinburgh. There were concerns this could allow divergence in a number of key policy areas, including the environment, agriculture and fisheries, all of which could well create barriers to trade. The UK government has taken two approaches to managing this: the UK Internal Market Act 2020 and the 'common frameworks' process initiated in October 2017.

The UK Internal Market Act 2020, which proved highly controversial with the devolved governments, has been designed to ensure UK businesses retain market access across Great Britain and – in areas not covered by the protocol, in Northern Ireland – when selling goods or services, regardless of local laws. Northern Ireland businesses will retain 'unfettered' access to GB – ensuring no unnecessary checks or paperwork – placing a commitment the UK government made when it signed the Withdrawal Agreement in statute. The passage of the Act has not stopped ongoing work on common frameworks – a collaborative process for managing regulatory divergence between the four governments in specific policy areas.

Divergence within the UK internal market is likely to be driven by changes at the EU level. Not only will Northern Ireland be bound by EU law in some areas, in January, Holyrood passed the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to give Scottish ministers the powers to continue to align with EU rules. While the Scottish government will need to decide how to manage this process and use these powers, it is a firm indication that Scotland plans to continue to follow EU rules in certain areas (although without the institutional oversight of the EU). Common frameworks will therefore need to be a forum to consider future changes to EU law.

The UK government will also need to consider how to involve the devolved governments in the structures set up under the TCA. Trade policy is reserved, but the devolved governments felt that their views were ignored as the negotiations on the TCA proceeded. The UK government needs to make sure that they understand the evolving framework of trade relations with the EU and offer them appropriate opportunities to influence UK approaches.

Beyond the formal framework

The TCA is wide-ranging – covering areas from trade to internal security to fisheries and road haulage – but it is not exhaustive. The UK specifically excluded foreign, development and defence policy co-operation from the formal structure of the new relationship and the UK will have other interests where it will want to co-operate either with the EU as an institution or with important member states.

France, Germany and Italy are key players in the G7, of which the UK is also a member and holds the presidency this year. The UK wants to make global responses to health crises a key theme for its presidency, but the extent to which the EU should co-operate on health policy, rather than keeping it a member state competence, is becoming an important debate within the EU. The UK will be unable to ignore this for long. The EU will also be one of the key players in the UN COP26 Climate Change Conference, which the UK will chair in Glasgow later this year. And, across the Atlantic, where the Trump administration wanted to bypass the EU, Joe Biden seems much more favourably inclined to deal with it as a bloc.

That all means that the UK will need to have a strategic approach to how it deals with the EU, as well as individual member states. Its early decision to deny diplomatic status to the EU's representation in London, in contradiction of well-established international precedent, has potential repercussions well beyond the superficial.¹⁰ Current rows over vaccines also have the potential to damage the relationship, as was evident from the EU's over-hasty threat to invoke Article 16 of the Northern Ireland protocol to safeguard EU vaccine supplies against a hypothetical threat that NI might become a route undermining an EU export ban to the UK.¹¹ These all need careful handling.

The forthcoming integrated review of foreign and defence policy should set out the UK's strategic approach to Europe. But this will need then to be put into effect throughout Whitehall and the wider overseas network to inform the UK's future dealings with the EU.

Oversight of the future relationship

There are a lot of moving parts for government to manage – and scope for action in one area to have unintended consequences in another. That means co-ordination across the UK government will be important. It also suggests a degree of continuity from the structures now in operation will be desirable, not least the Task Force Europe model at the centre with its links into departmental subject leads and UKMis expertise. It is especially important that as the agreement beds down the UK government can continue to draw on the experience of those who were in the detailed negotiations.

The UK does seem to be providing a welcome degree of continuity. Three of the principal negotiators will be in key positions going forward: Lindsay Croisdale-Appleby, the deputy chief negotiator, is moving to be the new UK ambassador to the EU; Sir Tim Barrow is political director at the new Foreign, Commonwealth and Development Office (FCDO), with Europe in his portfolio; and Lord Frost, the former chief negotiator, is in a new role as the prime minister's Brexit and international policy representative.¹²

The European Commission is also setting itself up to manage the TCA. Michel Barnier, Frost's counterpart in the negotiations, is now a special adviser to Commission president Ursula von der Leyen to advise on 'finalising' the agreement, but responsibility for the long-term operation of the TCA will sit with Šefčovič. He will be supported by two teams in the Commission: one on the operation of the WA and one on the TCA. One of the Commission's biggest challenges will be balancing the competing interests of individual member states who may have different concerns about the functioning of the agreement.

The UK government had three broad options to manage the future relationship:

1. **Business as usual.** This would mean treating relations with the EU on a par with relations with any other third country or international organisation. Implications for the devolved governments would be dealt with through the existing or enhanced intergovernmental relations mechanisms.
2. **Lead department model.** This would give oversight of the future relationship to the department best placed to own it. That would point either to the FCDO, the Department for International Trade or, possibly, the Treasury.
3. **Central unit.** This would create a central unit – along the lines of the old Europe unit – to manage the TCA and the WA.

In any of these arrangements, UKMis will play a big role in managing the relationship day-to-day. As we have argued before, it will need to have the capacity and resources to perform the, in many ways, more challenging process of keeping track of developments within the EU from the outside.¹³

On 29 January 2021, the government announced that Lord Frost had been appointed the prime minister's representative for Brexit and international policy, and head of a new International Policy Unit based in No.10.¹⁴ He will lead on the UK's strategic relationship with the EU as well as other international trade and economic issues. This suggests that, for the time being at least, the government has opted for the third option of establishing a **central unit**, following the Task Force Europe model that led the negotiations. Task Force Europe appears to have established very effective co-operation with both UK Ministers and departments and will form the nucleus of the team managing the new relationship. A new central unit reduces the risks in managing a complex and poorly understood relationship.

Of the other two approaches, a **'business as usual'** model would have marked a more distinctive break with the old relationship with the EU. This might indeed be something to aspire to in the longer term, but it would fail to recognise either the importance or the fragility of the new relationship negotiated in the TCA. It could have made critical linkages between the Northern Ireland protocol, the devolved governments, and domestic policy developments much harder to manage – and risk inadvertent transgressions of the UK commitments under the TCA.

The alternative model of giving oversight of the future relationship to a **lead department** would have raised the spectre of repeating the mistakes made with creation of DExEU straight after the referendum. There was also no obvious candidate: the FCDO does not have the capacity to grip the detailed minutiae of the UK–EU relationship and lacks the other relationships – moreover its core business of foreign and security policy was explicitly excluded from the formal structure of the TCA.

Although the TCA covers the management of trade relations, DIT was not involved in negotiating the TCA and is very much focused on trade beyond the EU. It would have struggled to be seen as an honest broker between departments and would lack the institutional clout to hammer out compromises.

The only other department that could have plausibly played a co-ordinating role was the Treasury. It would have the benefit of a Whitehall-wide view and clout, but co-ordinating the future relationship with the EU would be a big accretion of power by the Treasury and a stretch for the chancellor.

The government is right to opt for a central unit, but there are questions remaining about how it works

Central co-ordination under Michael Gove seems to have worked relatively well for managing the transition. The Transition Task Force supervised activity across Whitehall and established more effective relationships with officials in the devolved governments than in some other areas. As noted, Task Force Europe already has good relationships with both UKMis and other departments.

Before the referendum, EU relations were managed by an axis of UKrep in Brussels* and the Cabinet Office's Europe and Global Issues Secretariat (EGIS); official advice to the PM on EU issues came from the twin axis of the PM's EU adviser/sherpa, who headed EGIS, and the permanent representative in Brussels. Together they co-ordinated Whitehall input into EU discussions. That arrangement was disrupted by the creation of DExEU.

Something rather different will be required to co-ordinate the oversight and management of the TCA. The new unit will need to quadrangulate between UKMis in Brussels, the Constitution Group in the Cabinet Office and the devolved governments, and the rest of Whitehall. It will also need to spot emerging policies that might risk triggering the LPF provisions in the TCA – that would require liaison with the Economic and Domestic Secretariat in the Cabinet Office to ensure that it is alive to the potential of proposals that come forward either for regulatory divergence or significant intervention packages. It will need to manage the read-across between the TCA provisions and other trade agreements the UK may be hoping to conclude, including its membership of the CPTPP and that will mean a link to the Trade Secretariat in the Cabinet Office, which will support future trade negotiations.

It will also need to support the functioning of the Partnership Council and broader governance arrangements overseeing the TCA. Although individual departments will likely be responsible for chairing subject-specific specialised committees, any escalation will go to this unit to decide how to deal with it – it will also need to broker disagreements between departments. The unit will also need to handle any possible disputes between the UK and the EU that arise under the agreement.

The creation of the new unit allows the relatively seamless transfer of some of the members of Task Force Europe into the new team. But it is not yet clear whether the team working on the Northern Ireland protocol will join the new unit or stay in the Cabinet Office. It would make sense to join the two units together. That would mean that the new unit would be charged with oversight of the whole of the new UK–EU relationship and reflect the way in which the EU appears to be bringing together oversight of the TCA and the protocol under Šefčovič. The new unit could also, over time, absorb any remaining central functions from the Transition Task Force, which has been overseeing government and business preparations for the end of transition, once the day-to-day business has been fully transferred back to departments and the Border and Protocol Delivery Group.

* When it was a member state, the UK had a permanent representation to the EU (UKRep), led by a permanent representative. This became a 'mission' (UKMis), led by an ambassador, when the UK left the EU in January 2020.

There are still outstanding issues on ministerial oversight and decision making

Lord Frost remains a special adviser. Johnson could have made him a minister with his seat in the House of Lords, or he could have been reinstated as a permanent civil servant. But the arrangement worked for No.10 before and it has decided to continue it.

But that means there are issues that need to be resolved with ministerial oversight. The most immediate is on the UK co-chair of the Partnership Council. Since the EU co-chair is a commissioner, not the Commission president, it will not be Johnson. The TCA stipulates that it should be a minister, which means it cannot be Lord Frost. The UK could decide to follow the EU's logic and appoint Gove, as chancellor of the Duchy of Lancaster in the Cabinet Office, as the established UK chair of the Joint Committee. That would also seem to follow from the need for the UK co-chair to be a senior minister with a pan-government view, and many of the reasons why a lead department does not make sense to manage the future relationship would also apply to making a departmental secretary of state the chair.

This would, nonetheless, create an awkward reporting line between Frost, Johnson and Gove, but that is probably an unavoidable consequence of the decision to base the new unit in No.10. If Frost concentrates more on the wider elements of the new brief, and leaves the detailed management of the agreement to a civil service deputy, that person could have a direct reporting line into the Partnership Council chair.

A new cabinet committee structure is needed as well

So far we have looked at the civil service structures designed to manage the TCA – but these will need ministerial involvement and oversight. At the moment there are two cabinet committees that have overseen EU policy. There is a small strategic committee that oversaw the EU negotiations as well as wider trade policy, known as XS, consisting of the chancellor, international trade, foreign and home secretaries, the chancellor for the Duchy of Lancaster, and chaired by the prime minister. This is paired with a bigger operational committee, XO, focused on implementation and chaired by Gove.¹⁵ Neither looks as though it has the right membership to oversee the management of the TCA.

The prime minister may want to make big strategic calls on the management of the relationship with the EU, but he is unlikely to want to engage as regularly as management of the TCA might require. The PM, the foreign secretary and Lord Frost will certainly need to agree on an overarching approach to Europe and the EU if this does not emerge clearly from the imminent integrated review of defence, foreign and security policy. But once that framework is agreed and endorsed by cabinet, the PM should feel able to hand over the chairmanship of the TCA committee. That would logically fall to the minister who represents the UK at the Partnership Council.

The membership of the cabinet committee needs to reflect the departments that have the most issues at stake in the TCA. That points to membership for the secretaries of state for environment, food and rural affairs and the business department. The Treasury has a big interest in customs issues – this might fall to either the chancellor or a more junior Treasury minister – and the importance of the agreement for law

enforcement and security co-operation, as well as the borders, suggests the home secretary's involvement. There is also a strong case for including the Northern Ireland secretary to ensure that Northern Ireland's concerns are properly reflected. It would make sense for the UK ambassador to the EU to attend in his own right to give ministers a temperature check on how the relationship was evolving.

The lead minister on the TCA will also have to meet regularly with ministers in the devolved governments in whatever arrangements emerge from the review of intergovernmental relations.

The government also needs to work out how it will interact with parliament on TCA issues

The government will also need to decide how it is going to keep parliament informed of developments under the TCA, including who will make statements and submit to questioning by select committees. Parliament is already concerned about the opacity of the workings of the Joint Committee,¹⁶ and will want to make sure that it has advance notice of important decisions coming up in the various committees established in the TCA.

While officials can submit documents and give evidence to committees, a minister needs to lead in both Houses. Again, this should be part of the responsibilities of the minister who chairs the Partnership Council – but it also suggests that there needs to be a strong parliamentary liaison function in the co-ordinating unit to ensure a proper flow of documents into parliament.

These arrangements need not be set in stone, but will be needed until the first review, in five years' time

At the moment it is far from clear how the TCA will play out. There looks to be a lot of unfinished business to be resolved in the coming months, and it is as yet unclear how vigilant the EU will be for signs of emerging UK competitive advantage, nor what the results of any disputes might be if the independent dispute resolution processes are triggered. Ministers will need to make decisions on whether they want to use any of those provisions if they think the EU or member states are unfairly disadvantaging UK businesses. Nor is it clear whether there will be much appetite for using the potential to improve the deal.

But the deal itself sets out a timetable for review in five years' time of how it is working. Annual negotiations on fishing at the end of the agreed adjustment period (in June 2026) cannot just be left to the Department for Environment, Food and Rural Affairs as they could potentially trigger changes in market access on other parts of the agreement. The UK government will need to start preparing for those negotiations, and for the review of the agreement, and decide whether it is in its interests to continue to apply the TCA. It will also have a huge interest in the four-yearly votes in the Northern Ireland assembly under the consent mechanism, the first of which is due in 2024.

This all points to the need to retain dedicated structures to manage the relationship at least until after the completion of the first review. It may be that, after that, ministers will feel that the agreement is functioning well, and is sufficiently understood that it can be left to UKMIs and departments to manage without bespoke structures. But that is not the position now.

The row over the triggering of Article 16 as a by-product of the EU's export restrictions on vaccines exposed what can happen when inadequate forethought is given to consequences of any action for the fragile network of agreements. That debacle has damaged the reputation of the Commission. But the UK does not want to blunder in the same way. So it needs to put resources and effort into ensuring that the new relationship is managed effectively from the off.

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