

Transition Time: 3 Options for Extending the Transition Period

Working Paper

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Executive Summary

The United Kingdom (UK) and the European Union (EU) are seeking to agree the terms of a Withdrawal Agreement to provide for an orderly exit of the UK from the EU. An important element of that agreement is the 'transition' or 'implementation' period that will span the period from the UK's departure from the EU and the entry into force of a new economic and security partnership agreement.

The draft Withdrawal Agreement published this year envisaged that core aspects of EU law would continue to apply to the UK during a transition period: a legal 'stand-still' ending on 31 December 2020. During this period the new economic and security partnership would also be agreed. The intention was to provide certainty for companies and individuals following withdrawal and to ensure that as far as possible, only one set of changes in the law would be experienced.

It is becoming clear that the fixed end-point of 31 December 2020 is unrealistic as a date for entry into force of the new UK-EU partnership arrangement. This is also significant because the UK considers that it is through a new economic relationship that the imposition of customs and regulatory controls on the island of Ireland will be avoided. In order to guarantee that no new frontier controls are introduced, the EU has insisted that a 'backstop' arrangement is written into a Withdrawal Agreement. The difficulties in defining this backstop risk jeopardising the conclusion of Article 50 negotiations, leading to a potential 'No Deal' Brexit in which customs and regulatory controls in Ireland could be necessary.

This working paper argues that a different approach to the transition period is needed and sets out three possibilities:

- An optional extension
- An open or rolling transition with an exit mechanism
- A transition and implementation facility

An optional extension to the transition period would entail creating a mechanism that the parties could in the future trigger to extend the transition period. The downside is that it may not give sufficient time to negotiate a future UK-EU partnership and so would not achieve the certainty that firms and citizens might want. It would still entail the need to define a 'backstop' to manage border issues in Ireland.

An open or rolling extension would facilitate a smooth transition from the status quo to new arrangements while avoiding the need to define a further

backstop. But it would be politically and legally risky without a clear mechanism to bring transition to an end which might heighten demands for a backstop.

The third model would be to create an extended transition and implementation facility for a fixed period during which transition ends as soon as new UK-EU agreements enter into force. This would be a refinement of the model already contained in the draft Withdrawal Agreement and would still require the commitments on Ireland contained in the Joint Report to be honoured in any future agreements.

Transition

In her speech in Florence on 22 September 2017, the UK Prime Minister Theresa May stated that the UK Government would seek an interim framework within the terms of Article 50. The Prime Minister stated:

The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations.

In its Article 50 Guidelines to the Union's negotiator, the European Council cautiously accepted the possibility of the negotiation of a transitional arrangement as a bridge towards a future relationship provided it was 'clearly defined and precisely limited in time.' In January 2018 a negotiating mandate for the Commission was agreed by the Council to provide for a 'time-limited prolongation of the Union *acquis*'; effectively a legal stand-still during which time the UK would remain bound by EU rules even though it had ceased to be a Member State. Paragraph 22 of the mandate states:

The transitional period should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020.

When the UK and the EU agreed in March 2018 to include a transition period in the draft Withdrawal Agreement it was welcomed as a decisive step in progress in the Brexit talks and appreciated by businesses that feared that economic relations otherwise risked falling off a 'cliff-edge' once the UK left the EU on 29 March 2019. The UK had originally sought a two-year transition period in which it accepted that EU law would continue to govern relations between the UK and the EU. The EU was happy to accept this 'stand-still' provided it ended before the start of the new 'multi-annual financial framework' that guides the EU budgetary process. And so, 31 December 2020 became the deadline for the transition period to end.

During the transition period, the UK will remain bound by the laws of the Single Market, and will continue to apply EU customs rules to goods other than those originating in the EU or the UK. For the purposes of customs and regulatory controls on the island of Ireland, things will be as they have been during the UK's EU membership and no frontier controls will be required. As long as the UK remains in this arrangement, the issue of border controls in Ireland does not arise.

Once transition ends, if there is no new trade relationship between the UK and the EU which provides equivalent guarantees to avoid a 'hard border', then frontier controls become an issue. This is why the December 2017 Joint Report stated that if neither the future economic partnership deal nor a bespoke agreement resolved the issue, then a 'backstop' had to be written into the Withdrawal Agreement to address the problem. It is the failure to come to an agreement on the design of this backstop which is jeopardising the conclusion of the Article 50 negotiations. Failure of those negotiations would produce a disorderly withdrawal of the UK from the EU, including the need for customs and regulatory controls on North-South trade on the island of Ireland.

What's Wrong with the 31 December 2020 Transition Deadline?

In evidence before the House of Commons Select Committee on Exiting the EU on 25th October 2017, the then Secretary of State, David Davis identified three main reasons for seeking what the UK government insists on terming the 'implementing' period but which is legally the 'transition' period under the draft Withdrawal Agreement:

- To give the UK government more time to put in place arrangements for life outside the EU;
- To give other EU states time to make any consequential adjustments; and
- To give business clarity about what they might need to do to prepare for the UK's withdrawal rather than simply having to prepare for a worst-case scenario.

Absent from this list is that a transition period would create a time period for the negotiation and ratification of a new agreement between the UK and the EU to govern their future relationship. This no doubt reflected a view in some government circles that an agreement on withdrawal and an agreement on a new trade relationship between the UK and the EU could be negotiated in parallel. However, the EU has been clear that discussions on withdrawal logically, and legally, precede negotiations on a future trade arrangement.

The problem with specifying a fixed deadline of 31 December 2020 is that described by Lock and Zuleeg,¹ namely that it creates a second 'cliff-edge' at the end of 2020. If there is nothing in place to substitute for transitional arrangements, businesses would still need to be prepared for a 'worst-case scenario' of trade on World Trade Organization (WTO) terms from 2021. Even if this was short-lived and a new UK-EU trade agreement reached, it would hinder planning and mean that businesses had to operate under three sequential regimes – EU, WTO and a new UK-EU trade agreement.

The other problem with a further 'cliff-edge' is that without any new UK-EU trade and customs agreements following the end of the transition period, there is a risk of the imposition of customs and regulatory controls along the Ireland/Northern Ireland border. It is to guard against this risk that the December 2017 Joint Report specified that in the absence of alternative arrangement the UK should maintain 'full alignment' with the rules of the EU Internal Market and the Customs Union: the so-called 'backstop'. The EU's vision of this backstop – keeping Northern Ireland in a regulatory area and customs arrangement with the EU – has been rejected by the UK Government that has sought an all-UK solution.

To meet both of these problems, the idea of an extended transition period is being discussed. However, the mechanism by which transition could be extended is open to debate. In the rest of this paper, three different mechanisms are explored. Each mechanism is evaluated against the following criteria?

- Does it create sufficient time to negotiate and conclude a new UK-EU economic relationship?
- Does it offer certainty allow firms and individuals to plan for the future?
- Does it meet commitments to avoid a hard border on the island of Ireland?
- Is the mechanism compatible with Article 50 and other legal requirements?
- Is transition time-limited?

An 'Optional' Extension to the Transition Period

Following the European Council meeting in October 2018, the UK Prime Minister noted that an idea being discussed was to create an option to extend the transition period for a matter of months. Extending transition by a matter of months seems unrealistic in giving both sides sufficient time to agree a future economic partnership, let alone one that can also resolve the issues over the customs and regulatory controls on the island of Ireland. But what would an optional transitional mechanism look like?

In their thoughtful and detailed proposal, Tobias Lock and Fabian Zuleeg suggest amending the provisions on transition in the draft Withdrawal Agreement to allow either the UK or the EU to request an extension of the 'initial transition period' for an additional period of one year. The unanimous consent of the members of the European Council and the agreement of the UK would be needed. The option would need to be exercised before 31 December 2020. The UK would also need to agree to make further budgetary contributions for the period of the extended transition.

Is this sufficient time?

If exercised this option could extend transition to the end of December 2021. This may be sufficient time to agree a new future relationship but the pace of negotiations on the Withdrawal Agreement suggest this may still be optimistic. The extension is also inflexible. For Lock and Zuleeg this is deliberate as an alternative proposal of an extension of 'up to one year' might make it difficult to reconcile with annual budgetary planning.

Does it offer certainty?

Clearly this would offer a somewhat longer time horizon for firms and individuals but not in a way that would necessarily be significant. There would still be a risk of a second cliff-edge but just a year later than is currently envisaged.

Does it avoid a hard border?

If the extension of transition enabled agreement of a new UK-EU economic partnership that met the commitment to

avoid a hard border on the island of Ireland then this test would be met. However, this option does not de-risk the failure of those negotiations and would still require a backstop to be negotiated within the Withdrawal Agreement. Failure to agree the backstop would risk a 'No Deal' Brexit and the imposition of frontier controls.

Compatible with EU Law?

The strength of the proposal is that it takes seriously the limits of what is possible under Article 50 TEU. The option would be contained in the Withdrawal Agreement itself and so would not require a separate legal agreement to create the mechanism. This would be a one-off extension that would not leave the UK lost in a permanent transition that would be incompatible with EU law.

Is it time-limited?

Yes. Transition would end on either 31 December 2020 or 31 December 2021.

An Open or Rolling Transition with an Exit Mechanism

An alternative approach to a fixed one-year extension would be to allow transition to run on an open or rolling basis. The legal ‘stand-still’ would last unless and until a new agreement entered into force or the parties triggered an exit mechanism to bring it to an end.

An open or automatically recurring transition would give UK and EU negotiators the flexibility to negotiate, conclude and ratify a treaty establishing a new relationship between the UK and EU. However, in the absence of a replacement treaty and to avoid transition becoming a de facto permanent post-membership legal arrangement, there would need to be a mechanism for bringing it to an end. If transition proceeded on an automatic renewal basis – for an annual period ending on 31 December – it could be ended by the parties giving notice. Transitional arrangements would then cease on 31 December of the calendar year following the year of notification. The same exit mechanism could be triggered if transition was simply open.

Is this sufficient time?

This option could extend transition for as long as it took to negotiate a new future partnership treaty without an artificial end to transition on either 31 December 2020 or 2021. Transition would simply end when a new treaty entered into force, giving negotiators more time to come up with a future relationship deal.

de-risk the failure of those negotiations as it would have a mechanism to bring transition to an end even without a deal. What is different, however, is that a No Deal Brexit would be a clear political choice. It is a choice that the EU27 would be unlikely to make. If made by the UK, then it would be clearly its decision for which it would have to take responsibility.

Does it offer certainty?

This option would give more certainty than a simple one-year extension. On an optimistic scenario in which a new partnership treaty is agreed, businesses and individuals would only have to transition once from the status quo to the new arrangements. On a pessimistic scenario in which transition ends without a replacement arrangement, there would be at least a year to plan for a worst case No Deal situation.

Compatible with EU Law?

A transition without a time limit would risk creating a permanent post-membership legal framework for UK-EU relations. Although some aspects of the Withdrawal Agreement are intended to have enduring qualities – the provisions governing citizens’ rights – Article 50 only gives the EU power to agree a ‘framework’ for future cooperation. A permanent new relationship has to be based on other treaty provisions. The exit mechanism is legally necessary.

Does it avoid a hard border?

If this more flexible transition period enabled agreement of a new UK-EU economic partnership that also met the commitment to avoid a hard border on the island of Ireland then this test would be met. This option does not completely

Is it time-limited?

Yes. Transition would end either on the entry into force of a new UK-EU partnership treaty or on 31 December of the calendar year following notification under the exit mechanism.

An Extended Transition and Implementation Facility

Instead of creating an option to extend transition on a one-off basis for a year, or leave transition open subject to an exit mechanism, the parties could agree now to a fixed date by which transition would end. This looks similar to the approach that is currently being taken in the draft Withdrawal Agreement but with a different end date. However, a key difference would be to create a ‘transition and implementation facility’ which would allow transition to end earlier – in whole or in part – once new agreements were in place covering areas that would otherwise be governed by existing EU law during the transitional period.

The idea that transition ends when new arrangements are agreed is already present in the draft Withdrawal Agreement which allows for a future Foreign Policy, Security and Defence treaty to replace provisions of EU law applied to the UK under the transitional provisions of the Withdrawal Agreement. This permits a new treaty to become a replacement source of rights and obligation *before* transition ends on 31 December 2020. This proposal would generalise that model. Creating an extended facility for transitional arrangements for a longer fixed period of time would allow EU rules on the Single Market and Customs Union to end once a new economic partnership agreement came into force. Indicative wording for how this could look in a Withdrawal Agreement is suggested in the Appendix.

Choosing a date for the expiry of the facility would be tricky. Extending the facility to 31 December 2022, for example, could take transition beyond the next scheduled General Election on 5 May 2022. This might give added urgency to finalise negotiations and end transition before an election. It would give some additional time after an election to reflect any changes in the UK’s position.

Is this sufficient time?

It would certainly give negotiators longer than a one-year extension to transition.

given to try and avoid that risk materialising. Any new relationship would still have to respect the commitment to avoid customs and regulatory controls.

Does it offer certainty?

This option would offer more certainty than a simple one-year extension. If negotiations went well and resulted in an agreement, then there would be clarity as to what the future entailed. Nonetheless, there would still be a risk that negotiations would fail. If there was an intervening General Election, a new government might seek a very different future relationship from that for which businesses and individuals had planned.

Compatible with EU Law?

This would not be an open-ended transition. However, extending it too long risks keeping the UK bound to EU rules without mechanisms of democratic voice. It would be difficult to contemplate a transition facility that lasted an entire EP electoral cycle.

Does it avoid a hard border?

This option also carries a risk of a second cliff-edge albeit with more time being

Is it time-limited?

Yes. Transition would end either on the entry into force of a new UK-EU partnership treaty or on the date specified for the facility to cease.

Conclusions

Extending transition is clearly difficult for the UK Government. For some, a clean Brexit is preferable to any transition period let alone an extended period.

However, it is evident that there is growing interest on all sides in the idea of an extended transition. Although this is typically conceived as a means of securing a deal on a Withdrawal Agreement, given the political difficulties in defining the UK's vision of its future relationship with the EU, allowing more time for negotiations could be beneficial if used to build a domestic consensus and to increase the zone of 'win-win' outcomes on both sides. This might also avoid rejection of a new partnership treaty when it is presented for ratification.

The idea of a one-year extension has been suggested, although the Prime Minister has indicated that the option to extend might only be for a matter of months. The key problem with this option is that it still threatens a second cliff-edge at the end of 2021 if no agreement is in place.

The need for transition to have an endpoint means that no option can completely de-risk the potential for Brexit to fail to resolve border issues in Ireland. The option of a rolling or open transition with an exit mechanism, nonetheless, offers certain advantages compared to the other options explored here.

In an ideal scenario, an open or rolling transition would simply end once the new partnership entered into force.

Although it cannot avoid the risk of a No Deal Brexit, an open transition does avoid

hard cliff-edges. The end of transition would be subject to a process which would give at least a year for preparations to be put in place.

If negotiations failed and the process to end transition triggered, it would be clear which party had responsibility for instigating the end of the stand-still. A No Deal Brexit would be a choice rather than an event caused by an expired deadline.

Nonetheless, it is impossible to conceive that an open or rolling transition – even with an exit mechanism – would prove to be politically acceptable. In which case, the option of a transition and implementation facility has some similar benefits – transition should end when new agreements are reached – and offers clarity as to when it ends. The essence of a facility is that the parties have incentives to minimise how much of the facility is used. If the UK were to continue to make budget contributions it would have a strong incentive to seek early deals.

An extended transition and implementation facility would be legally possible within the scope of Article 50. It would be a refinement of the approach already adopted in the draft Withdrawal Agreement. The downside would be that budgetary planning would be more difficult than a simple one-off one-year extension.

The limitations of any extension of transition are obvious in respect of cross-border trade in Ireland. The Withdrawal Agreement must enshrine the commitments made in the Joint Report and commit all sides to finding solutions.

Appendix

Indicative wording of revisions to the draft Withdrawal Agreement to establish a transition and implementation facility.

Article 121 Transition Period

A transition and implementation facility is hereby established for a period beginning on the date of entry into force of this Agreement and ending on 31 December 2022.

Article 122 Scope of the Transition

1 ...

2 (a) Should the United Kingdom and the European Union reach an agreement covering any matter falling within the scope of the transition period as defined in paragraph 1 and which becomes applicable during the transition period, the relevant provisions of the treaties and the acts adopted on the basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement.

For the purposes of this paragraph an agreement becomes applicable from the date of its entry into force or its provisional application where applicable.

(b) An agreement referred to in this paragraph includes, but is not limited to an agreement governing a future relationship in the areas of:

- I. trade and customs
- II. the Common Foreign and Security Policy
- III. the Common Security and Defence Policy.
- IV. any other matter within the scope of the transition period as defined in paragraph 1.

(c) Any reference in this Agreement to the transition period shall not apply to a matter falling within the scope of this Article to the extent that the matter is governed by an agreement referred to in this paragraph.

3 ...

The Author



Kenneth Armstrong is Professor of European law at the University of Cambridge and a fellow of Sidney Sussex College. His book, [*Brexit Time: Leaving the EU – Why, How and When?*](#) was published by Cambridge University Press in 2017.

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Reference

¹ Tobias Lock and Fabian Zuleeg, *Extending the Transition Period* (European Policy Centre, 28 September 2018)
http://www.epc.eu/documents/uploads/pub_8761_extendingtransition.pdf?doc_id=2052