

Brexit

An update ... and what's next?



10 November 2017

Jeff Twentyman

SLAUGHTER AND MAY

Agenda

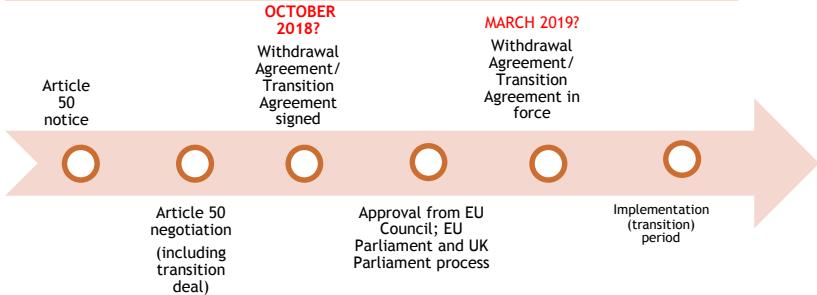
- 1. What is happening in Brussels?
 - Are we at cross purposes (and did Florence help)?
 - What has been agreed?
 - What's still to be done?
- 2. Sufficient progress?
 - Cliff edge deferred?
 - Key elements of a transitional agreement
 - EU-UK FTA
- 3. What is happening in Whitehall?
 - European Union (Withdrawal) Bill
 - On-shoring the EU “acquis”
- 4. Execution risk
- 5. Where are we now?

Miles to go before we sleep

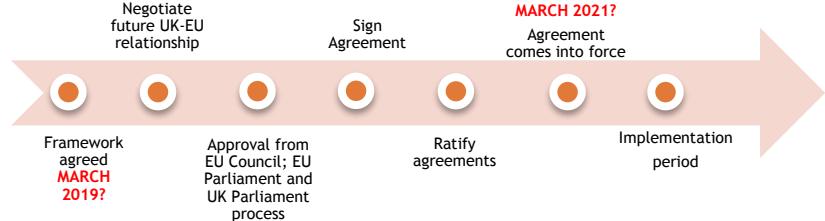
1. Legislate for Brexit



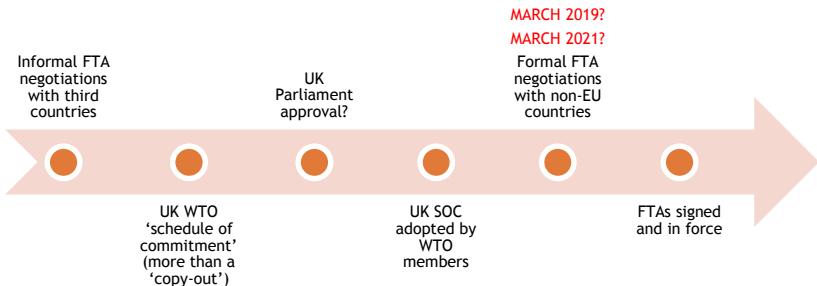
2. Withdrawal Agreement (and transition deal)



3. EU-UK Trade Agreement



4. Third country FTAs



Withdrawal Agreement

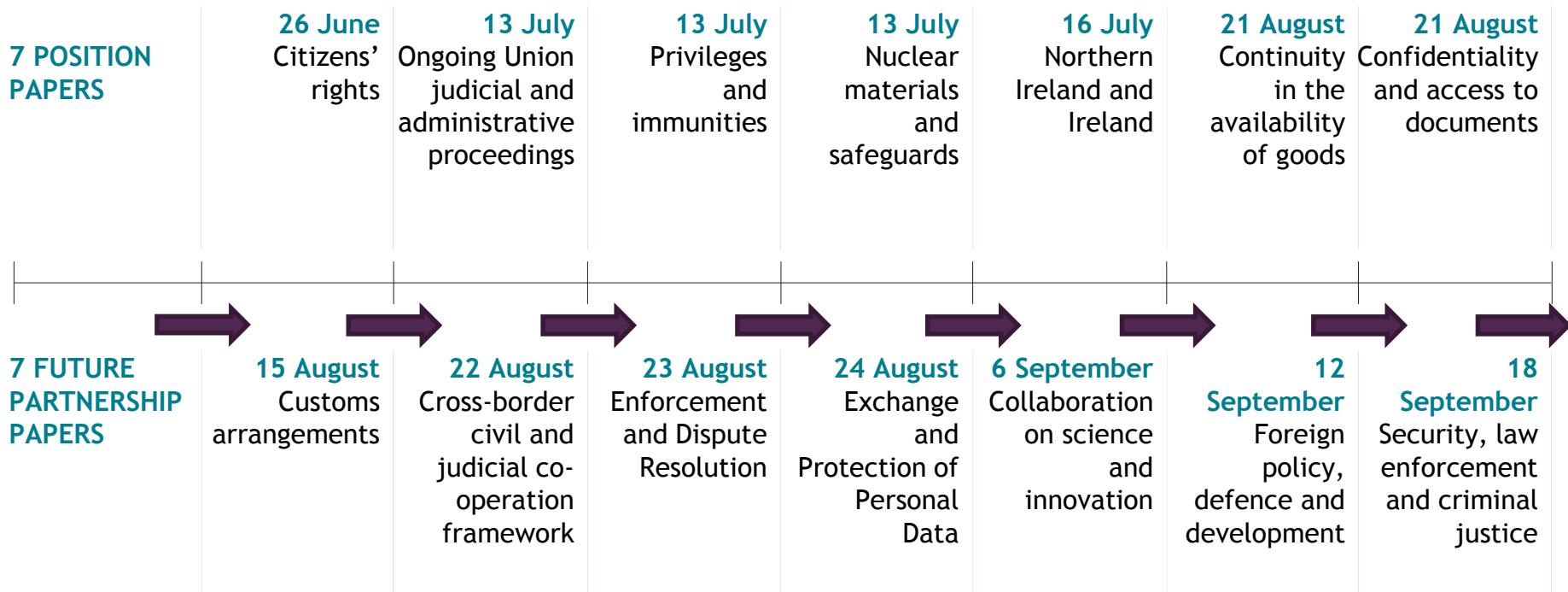


*Qualified majority

- at least 72% of Member States (i.e. a minimum of 20 out of 27 Member States) vote in favour of the agreement; and
- they represent at least 65% of the EU population

What is the UK trying to achieve?

14 policy statements so far: continuity, replication and mitigation



Policy statements

"The UK is clear that it is in the interests of both the UK and the EU for **cooperation in this field to continue** as part of our future partnership." (FPP on Civil and judicial cooperation)

"It is the UK's ambition to build on its uniquely close relationship with the EU, so that collaboration on science and innovation is not only maintained, but strengthened." (FPP on Collaboration on Science and Innovation)

"A highly streamlined customs arrangement between the UK and the EU, streamlining and simplifying requirements, leaving as few additional requirements on EU trade as possible...." (FPP on Customs arrangements)

"a future relationship that is deeper than any current third party partnership . . having as its starting point our shared interests and the degree of engagement that has evolved through our membership of the EU." (FPP on Foreign policy, defence and development)

"The UK proposes...the current substantive position [the Good Friday Agreement] is **not changed**...and that both parties recognise that it will remain unchanged.." (Policy paper on Ireland and Northern Ireland)

A UK-EU model for exchanging and protecting personal data...could productively build on the existing **adequacy model**. (FPP on Exchange and protection of personal data)

The road to Florence

2 September

News emerges of Mrs May's plans for a keynote speech

21 September

Barnier's speech on the progress of negotiations (Rome)

22 September

Mrs May's speech (Florence)

22 September

Barnier's statement (Brussels)

EU 21 September - Rome

- **Citizens' rights:** EU citizens must have “same rights and safeguards” as before
- **Financial settlement:** “All that is necessary.. is that everyone honours the commitments they have made to each other”
- **Ireland:** “We must act responsibly to respect the Good Friday Agreement..and the integrity of the single market”
- **Transition:** “..without a withdrawal agreement, there is no transition...”
- **Trade:**
 - EU’s 60 third country FTAs respect EU social, environmental, DP and food safety standards
 - EU-UK FTA - “less about building convergence and more about controlling future divergence”
 - Not possible to have same benefits (Norway) but limited obligations (Canada)
 - EU-UK FTA to go beyond trade (external, security and defence angle)

UK 22 September - Florence

- **Citizens' rights:**
 - Incorporate agreement fully into UK law
 - UK courts to be able to take into account judgments of ECJ
 - “Same rights as enjoyed at the moment” - a breakthrough?
- **Financial settlement:** “No one to pay more or receive less” over the remainder of the current budget plan as a result of the UK’s decision to leave. The UK will “honour the commitments it has made”
- **Ireland:** All are “committed” to protect the Belfast Agreement and the CTA and have “stated explicitly that we will not accept any physical infrastructure at the border”

UK 22 September - Florence (2)

- Transition
 - UK will no longer be a member of the EU from March 2019
 - People and businesses will only have to plan for one set of changes; access will continue on current terms
 - Existing EU rules and regulations will provide the framework (and ECJ?)
 - Current expectation (“as of today”) is 2 year duration but should last as long as it takes to put arrangements in place eg for new immigration system
 - Could end transitional arrangements in particular areas if arrangements in place earlier (eg for dispute resolution)
 - “Double lock”: guarantee of continuity and guarantee that period will be time limited

UK 22 September - Florence (3)

- **Trade**
 - Norway model would “not work” for the British people
 - Canada-style FTA a “severe restriction” on mutual market access compared to current position
 - “No need to impose tariffs where we have none now”
 - Commitment to high regulatory and product standards
 - New ways of managing our independence and our differences
 - We will find a strong dispute resolution mechanism (not ECJ)
 - We will continue to take part in specific policies and programmes of joint advantage, such as science, education, culture and security (for which contribute to costs)

EU 22 September - Brussels

- **Citizens' Rights:**
 - EU27 citizen must have the same rights as British citizens today in the EU
 - PM's speech must be translated into precise negotiating position
- **Financial settlement:** “[EU] stand[s] ready to discuss” PM’s pledge to honour budget contributions (“and whether this assurance covers all commitments” [made by UK while part of EU])
- **Ireland:**
 - no clarity on how the UK intends to address
 - our objective is to preserve the GFA and the integrity of the Single Market and CU

EU 22 September - Brussels

- **Transition**
 - “a time limited prolongation of Union acquis...would require existing Union ... instruments and structures to apply”
 - The sooner we reach an agreement on the principles of the orderly withdrawal ... and on the conditions of a possible transition period ... the sooner we will be ready to engage ... on our future relationship”
- **Trade:** The EU shares the UK’s goal of an ambitious partnership but will continue to insist on sufficient progress in key areas before looking at future relationship

Sufficient progress?

- **Citizens' rights:**
 - extent of rights unresolved
 - role of ECJ unclear; “direct effect” conundrum
 - **Financial settlement:** to be negotiated
 - **Ireland:** no further obvious progress
 - **Transition:** cliff edge deferred? A number of important questions to be considered and negotiated. Is talk enough?
 - **EU-UK FTA:** will progress be made prior to transition period?
- 
- EU parliament resolution 3
October - no sufficient
progress
EU Council 19/20 October -
no sufficient progress

Labour position: flexible

"Subject, of course to negotiations, remaining in a form of customs union with the EU is a possible end destination for Labour. We are also flexible as to whether the benefits of the Single Market are best retained by negotiating a new Single Market relationship or by working up from a bespoke trade deal. "

[Conference speech, 25 September 2017]



Keir Starmer

Shadow Brexit secretary

SLAUGHTER AND MAY / Brexit - an update...and what's next?

"That is why Labour has made clear that Britain should stay within the basic terms of the single market and a customs union for a limited transition period. It is welcome at least that Theresa May has belatedly accepted that."

"... a Labour Brexit that puts jobs first, a Brexit for the many, one that guarantees unimpeded access to the single market and establishes a new co-operative relationship with the EU."

[Conference speech, 27 September 2017]



Jeremy Corbyn

Leader of the Labour Party

"The best Brexit plan now is staying put. Fortunately, this is what our party agreed at the conference last year, when a motion, carried overwhelmingly, said this couldn't be ruled out. Our new coalition [in defence of freedom of movement] will build the narrative and lead Labour to a credible, and inevitable, stay-put plan."

[The Guardian, 27 September 2017]



Manuel Cortes

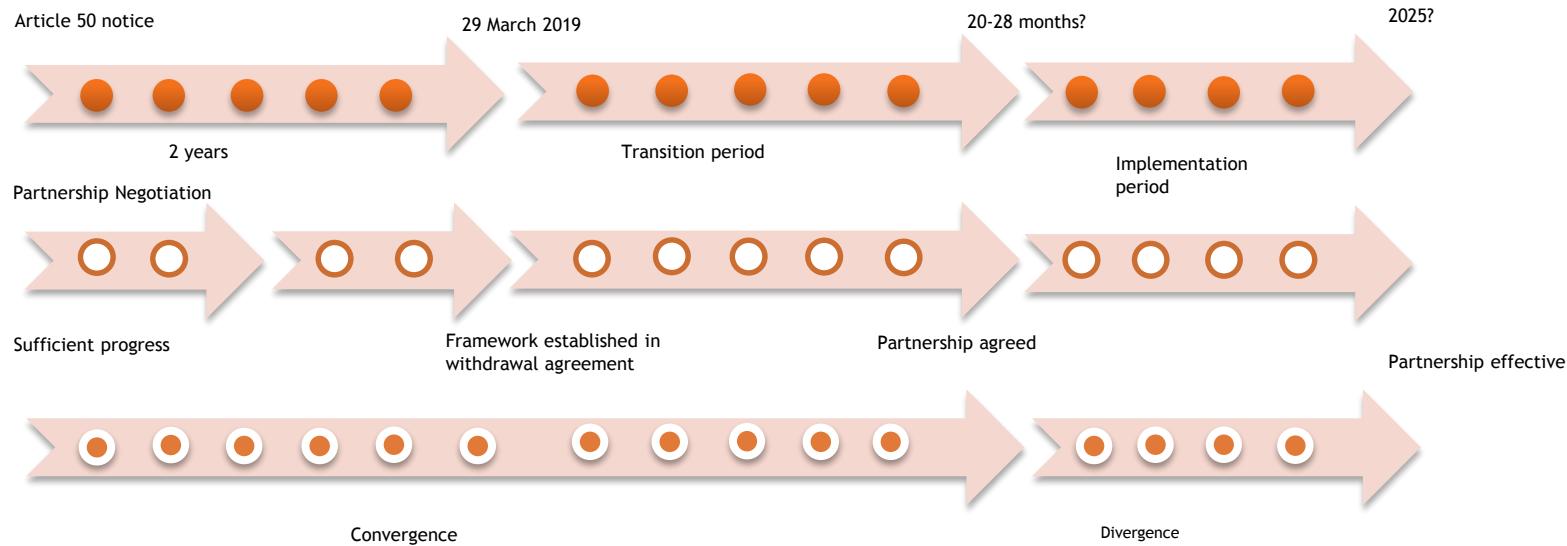
General secretary of the Transport Salaried Staffs' Association union

Transitional agreement

Key elements and issues to consider

Assumptions	Issues to consider
<ul style="list-style-type: none">• Need to plan for only one change• EU structures and rules will apply• Continuing supervision/applicability of ECJ and its decisions• UK to pay its share (beyond current budget)• No participation in EU institutions and no influence or veto• Duration around two years	<ul style="list-style-type: none">• Will any existing rules not apply?• What about the CCP?• Which new rules/regulations?• What if 2 years is insufficient?• “A” customs union for period?• Do we leave EU/SM/CM to rejoin?• Why not an extension to Article 50?• What is impact on EU(WB)?• How do we legislate for transition?• A bespoke transition: anyone for EEA?

Transition period or implementation?



Sources: Centre for European Reform
The Leave Alliance
Rt. Hon P. Hammond

Why is Ireland important?

- Importance of North/South trade and co-operation; dual citizenship challenge
- EU polices its outer border, which becomes NI border
- Onus on UK to devise mechanism so that EU need not police border
- If UK chooses regulatory divergence the border is compromised
- Agreement to maintain/match regulatory standards and have means of consultative or managed divergence
- System needed where our trade deals do not jeopardise integrity of single market
- Test case for future relationship

“ . . .solutions must respect the proper functioning of the internal market and of the Customs Union as well as the integrity and effectiveness of the Union legal order”

“ The UK has made a political commitment to upholding the GFA to ensure that nothing agreed as part of the UK’s exit in any way undermines the Agreement”

EU paper 20 September

DExEU statement

“ . . . we will leave the European Union in 2019 as one United Kingdom

. . . we recognise the need to address the unique circumstances

. . . that the GFA is upheld. . . that the CTA is maintained . . that the right of citizens and relations North-South are preserved, that the border for people, goods and services between NI and Ireland remains as seamless and frictionless as possible with no physical infrastructure at the border.

and of course. . . that there is no border between GB and NI or anything that fractures the internal market of the UK, which benefits NI hugely.”

James Brokenshire
Secretary of State for NI
Conference Speech 1 October 2017

Ireland: An “all-island” solution?

“We will leave the EU in 2019 as one United Kingdom”

J. Brokenshire, Brussels
6th November 2017

“It . . . seems essential for the UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the customs union . . .”

EU briefing paper
8th November 2017

This document “crystallises our position. If the UK wants to move on to phase two of negotiations then the question of a hard boarder needs to be addressed.”

Simon Coveney
Irish Foreign Minister
10th November 2017

Vision for EU-UK FTA

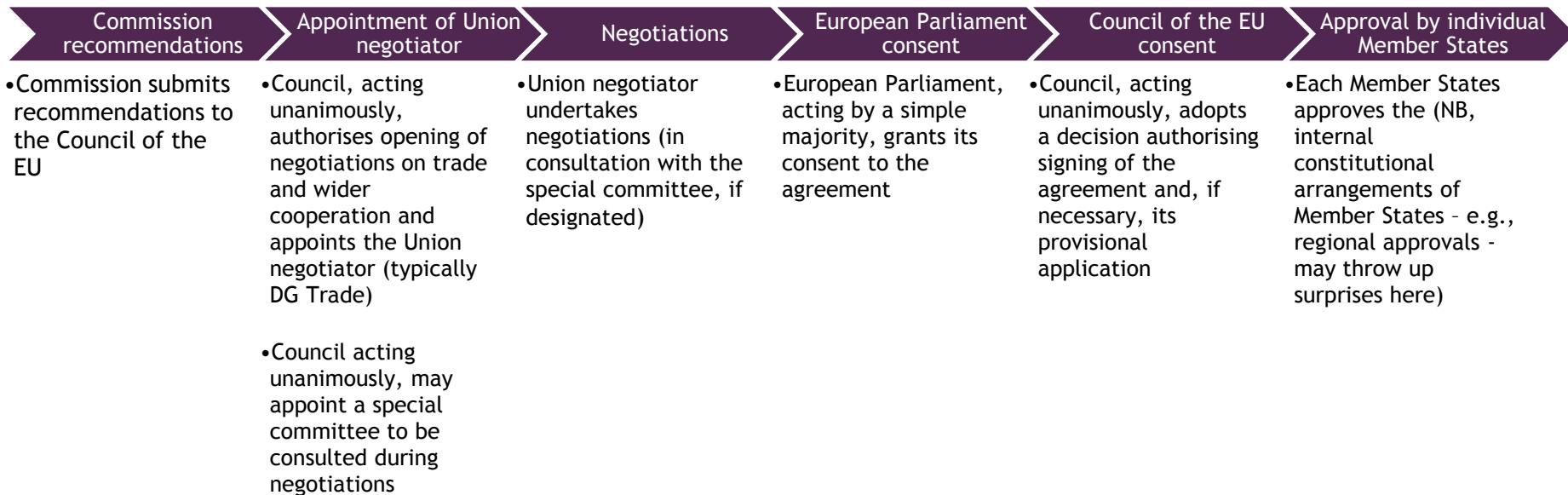
- “Deep economic partnership”
- Security relationship and defence co-operation (unconditional) based on existing models
- Managed migration:
 - “best and brightest” regime
 - unskilled workers to meet needs for foreseeable future
 - registration scheme
 - time limits (Home office paper)
- Continuing co-operation in science, research, education, culture and nuclear fields
- Data protection: GDPR equivalent and continuing adequacy
- State aid rules; public procurement
- Parallel competition supervision

Vision for EU-UK FTA (2)

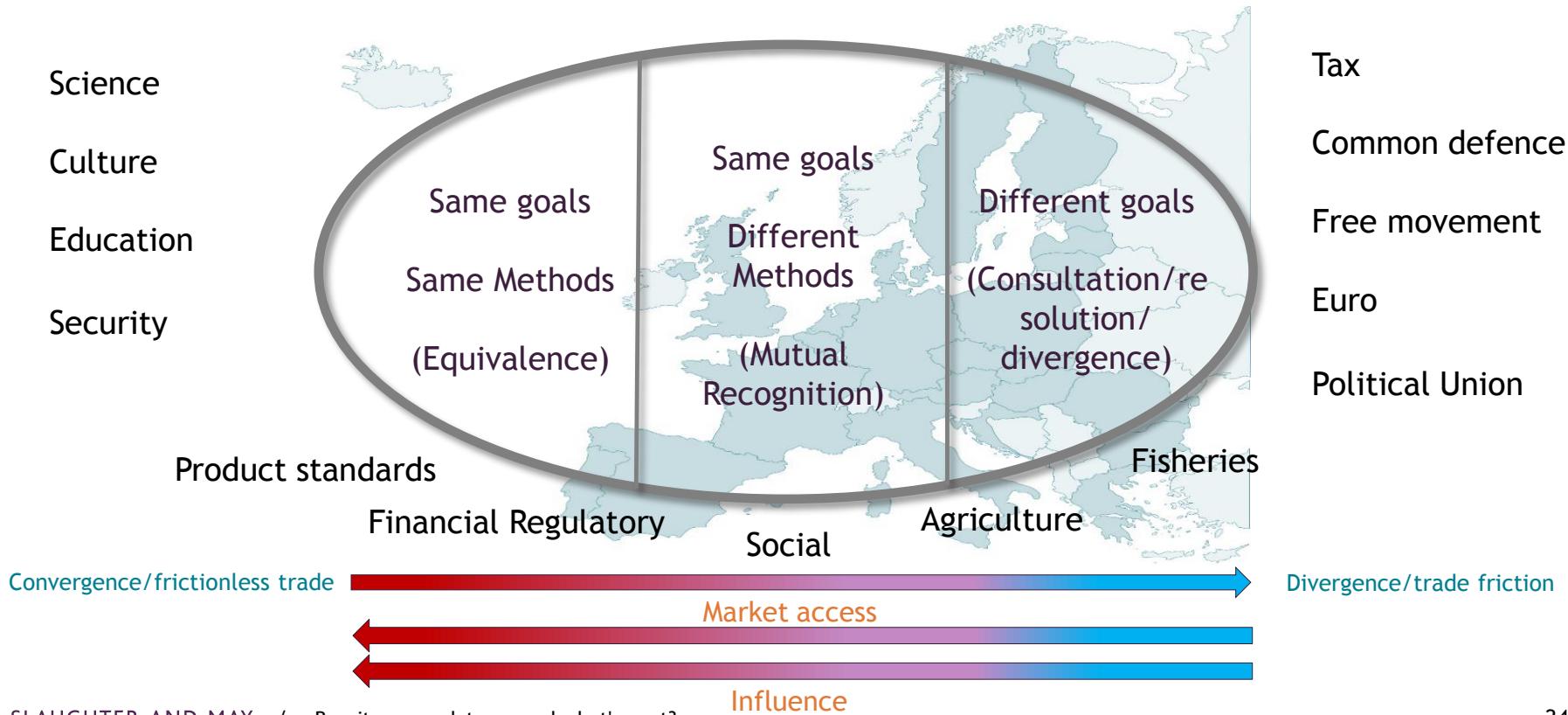
- Commitment to maintain high product and regulatory standards (becoming a standard-taker? Tension with FTAs elsewhere - particularly Anglosphere?)
- Managed/consultative divergence mechanism
- Outside customs union (but trade as “frictionless” as possible?)
- DR mechanism (Not UK or ECJ) - ISDS? Arbitration? Court?
- Mutual recognition of judgments and enforcement regime
- Continuing payments for areas of co-operation

Towards a EU-UK FTA

Article 218 TFEU - the EU takes control



EU - UK Sphere of Interdependence



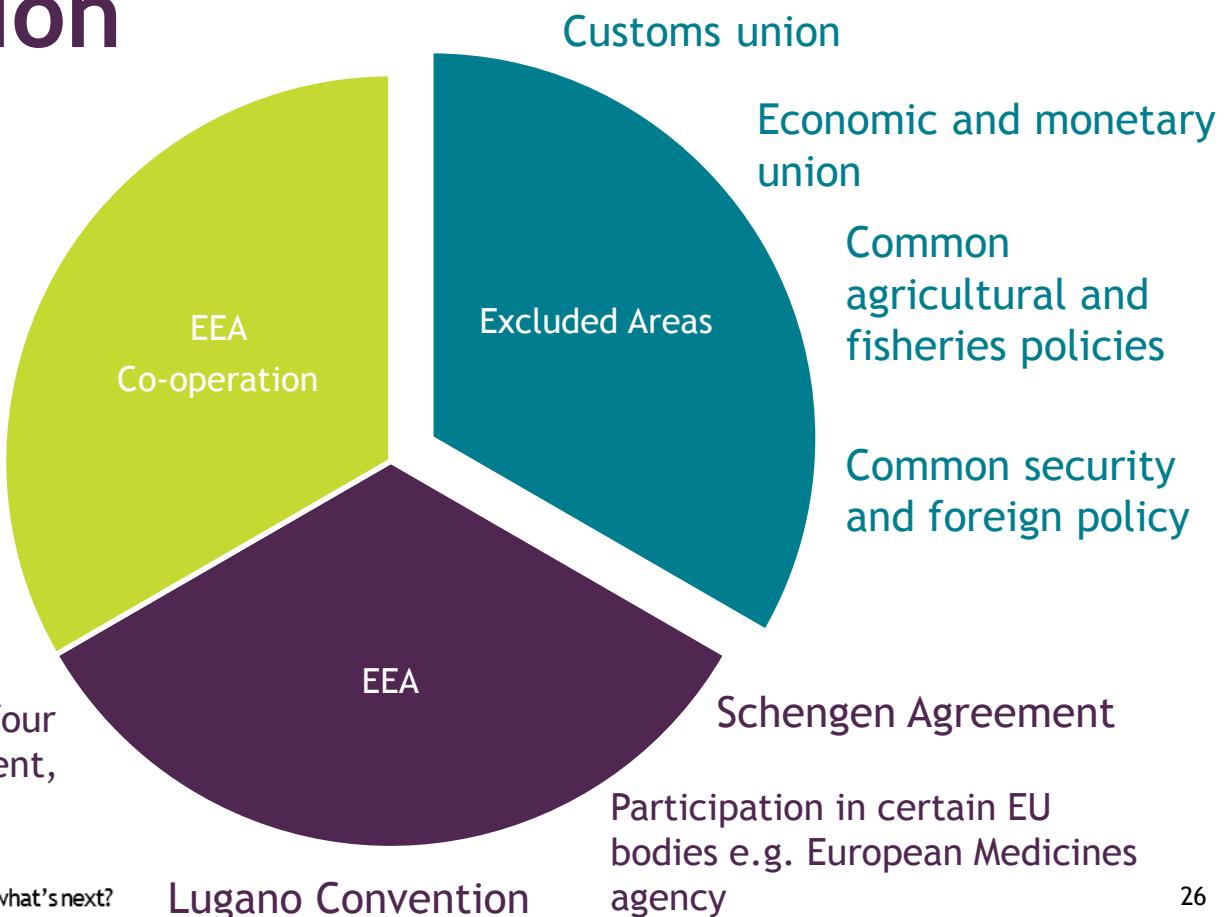
UK/US Relationship

- “Our relationship can be even stronger. We want more trade and more investment. We want to be your number one trading partner worldwide.”
- “It is ... important that an eventual Brexit agreement takes into account our commercial interests, and does not hinder development of a closer post-Brexit US-UK relationship by continuing divergent standards and regulations and other protectionist measures”
- “...address with the UK some concerns we have that they may be tempted to include (provisions) in their agreement with the European Commission (EC) that could be problems for a subsequent FTA (Free Trade Agreement) with the US”
- “Key hindrances” to transatlantic trade cited by Mr Ross included the US’s limited or non-existent access to the EU’s standard-setting process; a lack of transparency and a lack of ability to participate in the EU’s regulatory process; potential barriers to trade and investment “in the digital space” and, finally, the “limited role of science in assessing risk especially in sanitary and phytosanitary matters”.
- “The EU talks free trade but actually is highly protectionist”.

Wilbur Ross
6th November 2017

The EEA Option

No co-operation in defence matters and justice and home affairs but EEA states participate in Europol and Eurojust. Norway and Iceland participate in European Arrest Warrant



What is happening in Whitehall?

- White Paper (March 2017): “Legislating for the UK’s withdrawal from the EU”
- European Union (Withdrawal Bill): first reading on 13 July 2017; Second reading on 11 September 2017 (government majority of 36)
- “Onshoring” project: review of EU-derived legislation for deficiencies
- Objectives
 - certainty and stability
 - avoidance of “cliff edge”

The European Union (Withdrawal) Bill

- First reading on 13 July 2017; Second reading on 11 September 2017 (government majority of 36); “Committee” stage commences 14 November
- Repeals European Communities Act 1972 (ECA) and “onshores” EU related law on “exit day”:
 - EU-derived UK legislation continues to have effect (notwithstanding repeal of ECA (section 2(2))
 - Directly applicable EU legislation part of UK domestic law
- Ends the supremacy of EU law
- Empowers Ministers to make corrective/adaptive changes

What is “onshored” by the EU(W)B?

- Three categories of legislation are “on-shored”:
 - “EU-derived domestic legislation” (section 2)
 - “direct EU legislation” so far as operative immediately before exit day (section 3)
 - certain rights derived from EU treaties (section 4)
- Is this on-shored legislation primary legislation, secondary legislation or something else?
- EU(W)B requires that retained EU law be considered primary legislation for the purposes of the Human Rights Act 1998 but not otherwise

Interpretation of “retained EU law”

- General principles of EU law, ECJ caselaw and domestic caselaw as it exists on “exit day” to be taken into account by UK courts to extent relevant to validity, meaning or effect of any “retained EU law” (sections 6(3) and 6(6))
- Supreme Court and Scots equivalent not bound by retained EU case law in same way they can depart from their own caselaw (sections 6(4) and 6(5))
- “Retained EU law” means *“anything which, on or after exit day, continues to be or forms part of, domestic law by virtue of section 2, 3 or 4 or [6(3) or 6(6)] (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)”* (section 6(7))
- Clause 13 and Schedule 5 (Publication of Retained Direct EU legislation etc. will not assist)

EU(W)B - delegated powers

Multiple - including:

- Section 7 - deficiencies arising from withdrawal
- Section 8 - complying with international obligations
- Section 9 - implementing the Withdrawal Agreement
- Sections 10 and 11 - devolved issues
- Section 14 - power to specify “exit day”
- Section 17 - consequential and transitional provisions

EU(W)B delegated powers - key concerns

- Delegated powers are broader than is necessary to fix the plumbing in particular to the extent they confer powers to amend primary legislation and EU(W)B itself (Henry VIII clauses)
- Whether SIs are passed via the affirmative or negative resolution procedure is left largely to Ministers to determine

The legislative process for SIs

Negative procedure

- regulations are made by the Minister without prior debate and can be annulled by a vote of either House

“Draft affirmatives”

- regulations are laid before Parliament and do not become law until debated and approved by both Houses

“Made affirmatives”

- regulations are made and come into force but cannot remain in force unless debated and approved by Parliament within a month

HL Select Committees

- Delegated Powers and Regulatory Reform Committee Report 28.9.17:

“It is no answer for the Government to say they would never use a statutory instrument for these purposes...We judge powers not on how the Government say that they will use them but on how any Government might use them...Parliament is capable of passing urgent Bills with extraordinary expedition.”

Other issues

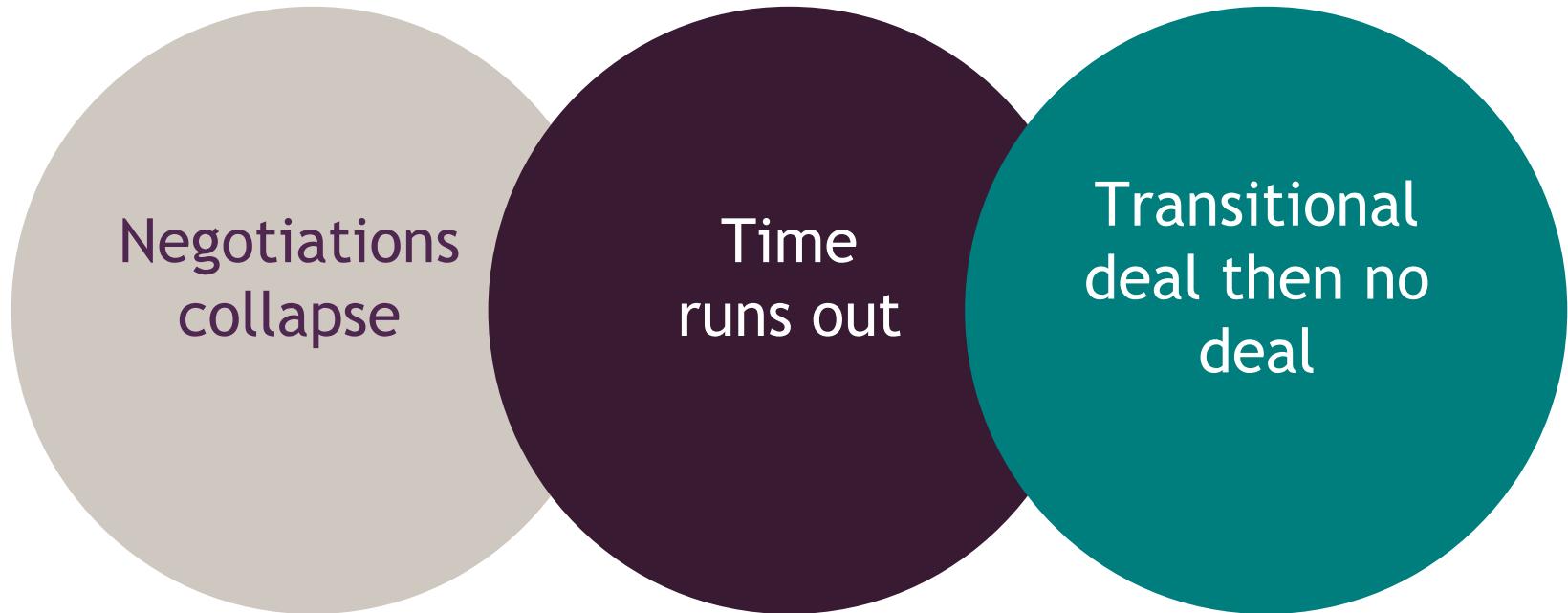
- “Sunset” provisions only apply to powers under sections 7, 8 (both 2 years from exit day) and 9 (exit day) and potentially capable of manipulation by designation of multiple “exit days” or use of tertiary legislation (or via EU(W)B delegated powers?)
- “Guillotine” approach to domestication raises questions about status of subsequent EU law/guidance intended to supplement existing law
- Domestication only a partial fix in many areas - e.g. enforcement/dispute resolution/data protection
- Views and concerns of the devolved administrations
- How will the Bill address a transitional agreement with the EU?

Some real uncertainties to be worked through - uncertainty may be enduring

Scale of “onshoring” project

Directly applicable EU legislation	UK SIs implementing EU law
Over 12,000 EU Regulations	7,900 UK statutory instruments (SIs) implement EU legislation
UK Acts affected	Adaptation
Of 1,302 UK Acts passed between 1980 and 2009, 186 Acts relevant (c.15% EU influence/content)	Deficiencies in EU related law to be dealt with by SI
Review process	Financial services
All government departments are reviewing ‘their’ EU legislation for deficiencies	Review project led by HM Treasury

Execution risk - three scenarios



What happens?

- Trading under WTO rules - UK needs to establish its own WTO relationship
- Customs clearances - UK needs to establish own trade/customs regime
- Market access blocked for certain industries eg airlines can't fly
- Multiple issues to be resolved in the financial services sector
- Asymmetric application of domesticated EU laws based on mutual recognition principles
- “Onshoring” process underway: Customs and Trade Bills to domesticate EU customs regime and change VAT/excise duty regime now published

Where are we now?



EU (WB) Committee Stage



Phase 2?



December 2017



**"We've got 50, nearly
60 sector analyses
already done."**

*David Davis,
The Andrew Marr Show,
25 June 2017*

**"It is not the case that
58 sectoral impact
assessments exist."**

*Department for Exiting the EU written
statement to Parliament,
7 November 2017*

OPEN BRITAIN

Rome Speech M. Barnier 9 November

- First, we must agree on the orderly withdrawal of the United Kingdom before entering into a discussion about our future relationship and a possible transition period
- When the moment arrives for the separation that the British have chosen, we must guarantee the rights of European citizens in the UK and the British citizens in the EU. We must fulfil our duty to our taxpayers. And we must find a way of maintaining stability and dialogue in Ireland. Trust between the British and the Union depends on it. And trust is absolutely essential.
- Secondly and to lay a proper basis for our future relationship, we must all understand and explain objectively what it means to leave the European Union, the single market and the customs union. These choices have consequences.
 - **It is not possible to be half in and half out of the single market.**
 - **It is not possible to end the free movement of persons, while retaining the free movement of goods, services or capital by means of a generalised system of equivalences**
 - **It is not possible to leave the single market and continue to set the rules**
 - **It is not possible to leave the customs union but expect to enjoy frictionless trade with the EU**

Rome Speech M. Barnier 9 November cont. .

- Thirdly, there will be **no future partnership without common rules**. There will be no close trade links without a level playing field.
- Establishing the rules will not be so easy, because for the first time in negotiations with a non-member country it will be more a matter of **managing regulatory divergence** than of encouraging convergence.
- And when I hear the US Commerce Secretary Wilbur Ross, in London, call on the British to move from Europe in order to move closer towards others - towards less environmental, health and food regulation, and no doubt financial, tax and social regulation too - I have my doubts.
- The United Kingdom has chosen to leave the European Union. **Will it also want to distance itself from the European model?** That is another matter.
- Of course, the UK will still be a European country. **But it is for the British to tell us if they are going to adhere to the European Model.** Their reply is important because it will shape the discussion on our future partnership and the conditions for ratification of the partnership.

Round 6 Brussels 10 November

- UK must make progress and proposals on financial settlement within 2 weeks in order to allow time to conclude that significant progress has been made at European Council 14/15 December
- The UK would not let Northern Ireland stay in the Customs Union or the Single Market
- Half way point!

No Brexit?

“My conclusions are simple

The national debate about Brexit should take account of the facts that:

- our Article 50 letter could be withdrawn without cost or difficulty, legal or political;
- a standstill agreement is no panacea;
- once out, there is no easy way back in, and there would be a price to pay; but
- whilst still in, the option of stopping the clock, in order to consult the people again is available.

All four facts will still be relevant when Parliament next autumn gets the chance, as it must, to assess the outcome of the negotiations.”

Lord Kerr
(draftsman of Article 50 TFEU)
10th November 2017

Government paralysis risks a Brexit disaster

We have a **minority government** whose central and defining policy is to change fundamentally Britain's economy and foreign policy in ways which will damage, and are already damaging, both; and this on the basis of the **most extreme interpretation of a very narrow referendum result**, itself conceivably influenced by a foreign power, an interpretation which is not supported by the majority of MPs, nor by half the cabinet, nor by the majority of the electorate and which the Prime Minister herself probably does not think is in the best interests of the country.

Brexit blogger
Professor Chris Grey
9th November 2017

Brexit: a utopian dream

“ . . . half lamentation, half lampoon . . half an echo of the past, half menace of the future; at times, by its bitter, witty and incisive criticism, striking the bourgeoisie to the very heart’s core; but always ludicrous in its effect, through total incapacity to comprehend the march of modern history”

K. Marx

The Communist Manifesto

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