

Brexit Essentials

Phase II update: Towards a Withdrawal Agreement

6 March 2018

Contents:

1. Where are we now?
2. Status of the draft Withdrawal Agreement
3. Scope and operation
4. Citizens' rights
5. Northern Ireland
6. Governance
7. Transition arrangements
 - 7.1 Current status
 - 7.2 Length of transition
 - 7.3 The "vassal state" issue
 - 7.4 Certainty of market access
 - 7.5 Application of international agreements
8. Separation issues
 - 8.1 Part Three of the Withdrawal Agreement
 - 8.2 Jurisdiction and enforcement of judgments
9. Future relationship
 - 9.1 The UK's challenge
 - 9.2 A new economic partnership
 - 9.3 The customs conundrum
 - 9.4 Is the Government's position viable?
10. Outlook

1. Where are we now?

Phase I of the Brexit negotiations concluded in December, with the EU and the UK reaching broad agreement in the form of a "[Joint Report](#)" on the three headline issues: citizens' rights, the UK's financial obligations on exit and the options for managing the Irish border issue. Since then the need for a transition or "implementation" period has also been acknowledged. The next major milestone is agreement on the legal text of a Withdrawal Agreement, which will include the arrangements for transition.

In a speech on Friday at the Mansion House, Mrs May said that the key elements of the Withdrawal Agreement were agreed. The EU's [draft Withdrawal Agreement](#) published on 28 February suggests there is more work to do than Mrs May indicated. The draft Agreement follows the Joint Report, but running to so far, over 100 pages, it fleshes out a number of issues not covered in the Joint Report on the basis of the EU's position as set out in its negotiating guidelines. The draft Agreement is also incomplete in a number of areas, largely those that are dependent on the shape of the parties'

relationship beyond transition - which is yet to be agreed.

The Prime Minister's Mansion House speech suggests that Government policy has evolved in some areas. Mrs May made a number of constructive points and acknowledged various realities. She accepted that the UK cannot "have our cake and eat it" and that regulatory alignment is the quid pro quo for EU market access in certain areas. Outside the EU, the UK will regain its sovereignty in that it will be free to change its laws, but it must accept that if it chooses to diverge from the EU framework, there may be repercussions for market access.

Friday's speech may present a way forward, but the Government's proposal remains light on detail. In particular, the viability of the Government's thoughts on customs arrangements, which are intrinsically linked to the Irish border issue (the most difficult of the outstanding Phase I points between the parties), remains difficult to assess.

The need to come to a conclusion on Ireland suggests that a political declaration or agreement in principle, at least on the customs aspects of

the EU/UK future relationship, will need to be documented within the Withdrawal Agreement. Given the breadth and intricacy of the UK's vision of the future relationship, the concern remains acute that it may not be possible in the time available to articulate it sufficiently so as to provide a foundation for the full scale negotiation during transition. The text of the Withdrawal Agreement must be settled by October to allow sufficient time for ratification by the European Parliament, the Council and the UK prior to 29 March 2019.

It is also clear that from an EU perspective, the UK's proposition is at odds with the existing Norway or Canada "off the shelf" models. It is in essence, an extrapolation of the "three baskets" idea the Prime Minister put forward in Florence last year, which was dismissed by the EU. It therefore remains susceptible to accusations of "cherry-picking", notwithstanding Mrs May's attempts on Friday to re-define the concept.

This remainder of this briefing summarises the status and scope of the draft Withdrawal Agreement and the parties' positions on certain key points of difference. It also assesses the Government's recently articulated position on future EU-UK relations.

2. Status of the draft Withdrawal Agreement

The EU's draft Withdrawal Agreement describes the arrangements for the withdrawal of the UK from the EU. The draft is subject to discussion with the European Council and the Brexit Committee of the European Parliament, following which it will be formally put to the UK as a basis for negotiation. The draft appears compliant with the EU's negotiating guidelines. As it contains few surprises, it is anticipated that it will not change materially before it is passed on to the UK.

There has been no indication that the UK will produce a competing draft or response to the draft once formally put forward. This seems unlikely given the tight timetable, the close adherence

of the EU's draft to the Joint Report and the Prime Minister's view expressed on Friday that the Agreement is almost agreed. The Government published a response to the legal text on the transition aspects of the Withdrawal Agreement (following the EU's position paper that preceded the draft Withdrawal Agreement), suggesting that the UK will proceed on a reactive basis to any other aspects.

3. Scope and operation

The draft comprises six parts and two protocols:

- Part One - Common provisions
- Part Two - Citizens' rights
- Part Three - Separation provisions
- Part Four - Transition
- Part Five - Financial Provisions
- Part Six - Institutional and final provisions
- Protocol on Ireland and Northern Ireland
- Protocol on the Sovereign Base Areas in Cyprus

The Withdrawal Agreement is intended to enter into force on 30 March 2019, the day after the expiry of the Article 50 period and effectively the first day of the transition period. On the basis that during the transition period, the EU acquis will continue to apply, Parts Two and Three and the Protocols are not required and therefore will become operative at the end of the transition period.

4. Citizens' rights

This Part is the most detailed aspect of the draft Agreement as it needs to be capable of reliance and enforcement by EU and UK citizens. It fleshes out the position agreed in the Joint Report with regard to the entitlements of EU citizens resident in the EU and UK citizens in the UK after Brexit,

but in doing so, touches on certain points which were not agreed during Phase I and are the subject of ongoing negotiation. For example, the UK has not agreed that future spouses and civil partners of EU citizens should be entitled to UK residence on the same basis, nor has it agreed that free movement of persons will continue to apply during the transition period.

The draft Withdrawal Agreement does not address the rights of EU nationals during the transition period, because it is assumed that they will be treated in the same way as those that arrive prior to transition. The Government has recently conceded that EU citizens arriving in the UK during the implementation period will in principle have the right to settle permanently, but according to a Home Office factsheet, “there will be key differences between the post-implementation [period] rights of this cohort of EU citizens and those who arrived before March 2019”. Guy Verhofstadt, the European Parliament’s Brexit co-ordinator’s response was that the EU will not accept any discrimination between EU citizens who arrive before or during transition.

5. Northern Ireland

The Protocol on Northern Ireland is the aspect of the Withdrawal Agreement that has prompted the most vociferous reaction in the UK, although on closer inspection, perhaps somewhat unfairly.

While the parties were agreed on the importance of safeguarding the unique circumstances of the island of Ireland, the Joint Report said little about the way forward. The UK’s desire to avoid a “hard border” ie any physical infrastructure or checks, could not be reconciled with the EU’s overarching priority of protecting the integrity of the single market. The Joint Report instead put forward three options to be explored in next Phase of negotiations:

- Option A, the UK’s preference, which is to solve the Irish border issue through the EU and UK’s future relationship.

- Option B, the UK will propose “specific solutions” - a reference to unspecified technological solutions first raised in the Government’s [future partnership paper](#) on customs last August.
- Option C, the backstop option - in the absence of agreed solutions, the UK will maintain “full alignment” with the rules of the Single Market and the EU Customs Union.

The Protocol in the draft Withdrawal Agreement alights on the third of these options (the point that has been seized in the press). It proposes that Northern Ireland should be “fully aligned” with Ireland and therefore the EU, on matters including customs, VAT, energy and product standards. This would involve EU/UK customs controls at ports and airports, widely reported as a hard border in the Irish Sea. Northern Ireland, by virtue of its legal and regulatory alignment with the EU, would be subject to the jurisdiction of the ECJ and the EU institutions.

The Protocol clearly puts forward this proposal on the basis that discussions on the other scenarios might be pursued in parallel, and that the Protocol will fall away if an alternative agreement is reached. Further, even if this option were to be pursued, there is a significant amount of work to be done on the details. As such, the Protocol might be viewed simply as a trigger for further discussions and a fallback (which the UK agreed to in the Joint Report), to apply if an alternative route cannot be agreed by the end of the transition period.

The Commission’s [Q&A document](#), published alongside the draft Withdrawal Agreement states that all three options remain on the table, but the other two can only be made operational in the context of discussions on the UK and EU’s future relationship.

Query whether responses to the Protocol have been coloured by its wording. The Protocol proposes a common regulatory area comprising the EU and the “United Kingdom in respect of Northern Ireland”.

This is along the lines the Government was ready to agree back in December (as a fallback option), but under pressure from the DUP, the Joint Report was amended to refer to **the UK** maintaining regulatory alignment. The Q&A, however, do not suggest any intention to depart from the Joint Report in this regard.

In addition, the Protocol does not reflect the commitment in Article 50 of the Joint Report, which states that the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the UK. Although the EU sees this as a commitment of the UK to Northern Ireland, its absence in the Protocol has been interpreted as undiplomatic.

In response to the Protocol, Mrs May swiftly and firmly rejected any proposal that Northern Ireland should remain in the Customs Union, telling Donald Tusk that no Prime Minister would put her name to a deal that risked “breaking up the UK”, a cross-party red line. Sir Keir Starmer, the shadow Brexit secretary similarly underlined that the solution for Ireland cannot involve a hard border or any other agreement that would undermine the Good Friday Agreement.

Mrs May returned to this point in Friday’s speech, calling the creation of a customs and regulatory border in the Irish Sea, “unacceptable”. However, in terms of a solution to the Irish border problem, she went on to do little more than reiterate the Government’s proposals on customs from last August. Whether the Government’s proposals on customs are viable (and they were described by the Government itself last summer as “blue sky thinking”) is looking increasingly crucial to the successful conclusion of the Withdrawal Agreement. Michel Barnier’s positive reaction to the Labour party’s support for a customs union suggests scepticism in the EU camp. The Government’s and the Labour party’s proposals on customs are discussed in more detail in section 9 below.

6. Governance

The EU draft makes provision for the settlement of most disputes arising under the Withdrawal Agreement by reference to a Joint Committee. The Joint Committee may decide to refer disputes to the ECJ. However, if the Joint Committee is deadlocked and the dispute has not been settled within three months, both parties have a unilateral right to bring proceedings before the ECJ.

The ECJ’s jurisdiction continues to be a redline for the UK and it will no doubt wish to put forward alternative options. It is noted that under the EEA agreement, if the equivalent Joint Committee is deadlocked, there are safeguard mechanisms but the decision to refer the dispute to the ECJ requires unanimous consent. More generally, it is highly unusual in the context of any international agreement for disputes to be resolved by the courts of one party.

The governance and dispute resolution mechanisms in the draft Agreement would therefore appear to require considerably more work.

7. Transition arrangements

7.1 Current status

Both sides have accepted the need for a transition period during which the UK will no longer be an EU member state, but the status quo will be maintained in terms of single market access and legal and regulatory aspects. The stated intention on both sides is that businesses should not need to implement change until the end of the transition period and that there will be only one change.

The EU and the UK exchanged views on the scope and operation of the transition arrangements prior to the publication of the draft Withdrawal Agreement. The UK’s [policy paper](#) of 21 February states the UK’s belief that there is broad alignment between the UK and EU position, “with only a small number of areas requiring discussion”. While there may only be a handful of issues, a number might be considered reasonably material.

Many of the outstanding points will be of concern to businesses. These include how long the period is likely to be, the extent to which continuing access to the Single Market and to the benefits of current EU trade agreements can be relied on and whether the UK will be obliged to adopt new EU acts during the period, which it may have had limited opportunity to shape.

7.2 Length of transition

The parties remain at odds with regard to the length of the transition period (or “implementation” period as the UK Government continues to refer to it):

- According to the EU, and as reflected in the draft Withdrawal Agreement, the transitional period should conclude at the end of 2019, to coincide with the end of the EU’s budget cycle. This has been the EU’s consistent position for some time (although query whether Guy Verhofstadt’s reference to the end of 2020 or the beginning of 2021 in an interview with Andrew Marr on 18 February indicates there is room for movement).
- The UK’s policy paper echoes comments in Teresa May’s [Florence speech](#) last year. The length of the transition period should be determined by how long it will take “to prepare and implement the new processes and systems that will underpin the future partnership...this points to a period of about two years, but [the UK] wishes to discuss with the EU the assessment that supports that end date”. The Prime Minister’s office subsequently insisted that Mrs May still wanted a “strictly time limited period of around two years” and that the paper merely intended to provide some flexibility.

The EU’s position is in part driven by the deal that has been reached on the financial settlement. The current agreement is that the UK will cover its commitments to the end of the EU’s budget cycle. Accordingly, the financial settlement would need to be adjusted (at least from the EU’s point of view)

should the transition period extend beyond the end of 2020.

The view that the currently proposed transition period is too short is widely held in political and business circles. If the UK’s position remains that a two year period is appropriate, some might question whether the Withdrawal Agreement should build in an extension mechanism.

On Monday, however, Philip Hammond appeared to rule that out, saying that there are no plans to provide for an extension and planning for a “no deal” scenario should continue even after transition arrangements are finalised.

7.3 The “vassal state” issue

The EU’s view is that during transition, the UK will be subject to EU laws and regulations, which will be applied and interpreted by the EU’s institutions in the same way as would apply were the UK a member state. The UK has acknowledged that the agreed approach will need to ensure that the UK’s domestic law reflects the EU *acquis* during transition, although it has said that it wishes to discuss how that is to be achieved. This might include the question of whether (as indicated in the draft Withdrawal Agreement), the principles of direct effect and the supremacy of EU law should be maintained. This is contrary to the position currently expressed in the EU Withdrawal Bill. It is however acknowledged that separate UK legislation is needed to implement transition and in effect, suspend the effects of the EU Withdrawal Bill for the transition period.

Both the EU and the UK accept that the UK will not be entitled to participate in EU institutions during transition. The EU’s view is that the UK should have virtually no ability to influence any changes in law or any new laws and regulations brought in during transition. This is an aspect the UK has made clear it wishes to negotiate and it is under some political pressure to do so.

The UK’s recent policy paper indicates that it will look for rights to be involved and to prompt a discussion in relation to EU acts during transition.

These include the right to receive information and to participate in meetings as well as a process for determining whether new acts should fall within the scope of transition terms. The UK is seeking specific rights to be consulted on sensitive issues such as sanctions and fisheries policy.

The UK will no doubt continue to attempt to improve its position here. The consequences of whatever is achieved will need to be assessed in the context of the length of the transition period. In reality the pipeline of EU laws is largely known and is unlikely to be extended in the short term. This debate may therefore assume more importance if the transition period is extended beyond what is currently envisaged.

7.4 Certainty of market access

The EU has moved away from its widely reported proposal to include a “penalty clause” in the Withdrawal Agreement which would enable it to suspend the UK’s market access in certain circumstances should it fail to comply with the terms of the Withdrawal Agreement. The draft Withdrawal Agreement reflects a softened position. If the UK fails to comply with the Agreement, and the outcome of the dispute resolution mechanism is adverse to the UK, the EU may decide to suspend aspects of the Agreement, in a manner which is proportionate to the nature and gravity of the breach.

This topic nonetheless remains contentious from a political perspective, due to the nature of the dispute resolution mechanism. The Withdrawal Agreement provides that the ECJ shall have full jurisdiction over the UK during transition. This is the inevitable result of the continuation of the EU *acquis* during that period.

7.5 Application of international agreements

It is agreed in principle that EU trade policy will apply during transition, but as an ex-member state, it is unclear whether the UK can continue to claim the benefit of the EU’s international agreements.

The Government published a [technical note](#) on 8 February covering the UK’s approach to international agreements during transition. Although there are legal arguments to the effect that these agreements (or some of them) should continue to apply, the UK’s intention is to get the EU’s counterparties to confirm to that effect in writing to provide maximum certainty.

Uncertainty about whether these agreements will be rolled over during transition is a highly precarious aspect of the Government’s position. Obtaining confirmation from all relevant counterparties is a significant undertaking. It is estimated that there are around 750 such agreements to be dealt with.

The Commission has made clear that it is up to the UK to ask third countries to confirm that their agreements with the EU apply to the UK during transition. It is unwilling to participate in the process due to concerns about third countries taking the opportunity to seek concessions.

The other aspect of this issue is the question of whether while the UK remains under the umbrella of the EU’s trade policy during transition, it is able to pursue its own. The Government has been vocal about its intention to pursue and finalise third country trade agreements as soon as possible, even if they cannot actually be signed or become effective until the transition period ends.

The Withdrawal Agreement might be considered to reflect this position. There is a prohibition on the UK becoming bound by trade agreements in transition period unless authorised by the EU to do so.

8. Separation issues

8.1 Part Three of the Withdrawal Agreement

Part Three of the draft Withdrawal Agreement covers an array of grandfathering provisions relating to certain events that straddle the end of the transition period. It deals with:

- goods placed on the market before the end of transition
- ongoing customs procedures, value added tax and excise duty matters in relation to movements commenced before the end of transition and related administrative co-operation
- the continuing protection of intellectual property rights
- ongoing police and judicial cooperation in criminal matters
- ongoing judicial co-operation in civil and commercial matters
- data and information processed or obtained before the end of the transition period or on the basis of the Withdrawal Agreement
- ongoing public procurement and similar procedures
- Euratom-related issues
- the application of EU judicial and administrative procedures
- the application of EU privileges and immunities and other issues relating to the functioning of EU institutions, bodies, offices and agencies.

An analysis of the EU's versus the UK's position on each of these issues is outside the scope of this briefing, but suffice to say, there is scope for improvement from the UK's perspective, in relation to most aspects of this section. The concern here is that the more politically potent issues will continue to monopolise the time of the negotiators. In relation to a number of separation issues, it is possible that the EU's draft may end up being the final text and any uncertainties will be resolved only in the context of the future relationship discussions.

The provisions of Title VI of Part Three relating to the EU's Brussels Recast regime are outlined below by way of example.

8.2 Jurisdiction and enforcement of judgments

The EU's Brussels Recast Regulation ensures that courts across the EU apply common rules to determine which member state's courts have jurisdiction. After the expiry of the transition period, this arrangement will need to be specifically replicated to maintain the precise effects of the current EU regime. That may be agreed (and it is anticipated it will, given the parties' mutual interest in doing so), but pending those discussions, contracting parties will wish to be confident that their chosen dispute resolution mechanism will be protected by Brussels Recast in relation to future disputes and judgments arising before or after the end of the transition period, to the same extent as would be the case if they arose today.

The Withdrawal Agreement would ideally give comfort to parties contracting prior to the end of the transition period, that a) their submission to the English courts will be upheld in accordance with Brussels Recast and b) any judgments of an English court arising out of jurisdiction conferred prior to the end of the transition period will be easily exported and enforced within the EU27 under the protection of the EU regime, even if the dispute arises after transition has ended.

The draft Withdrawal Agreement goes some way towards this end, but does not achieve the desired objective entirely. It confirms that the Brussels regime will continue to apply:

- to all legal proceedings started before the end of the transition period and in the treatment of jurisdiction agreements concluded before the end of the transition period; and
- as regards enforcement, to all judgments handed down before the end of the transition period.

However, the provisions exclude a) judgments handed down after the transition period, but in proceedings started before or during transition; and b) judgments handed down post-transition, in post-transition proceedings, but arising from jurisdiction agreements made before or during transition.

The UK highlighted these issues in its [August future partnership paper](#). That the draft Withdrawal Agreement still reflects the EU's original position suggests that there has been no progress since.

In theory, corrective amendments should be eminently achievable. If pre-exit legal proceedings and jurisdiction agreements are to be grandfathered, why not the judgments which are the logical conclusion (and purpose) of each? The difficulty is that in the scheme of loose ends to be addressed, this may not be at the top of the priority list. This is not least because even in the absence of Brussels Recast, broadly the same results will be achieved under the domestic laws of many of the EU27.

Given more pressing and contentious issues, it may be that this is simply not an aspect that will receive the requisite attention in time.

9. Future relationship

9.1 The UK's challenge

The UK is clamped between the need to conclude the Withdrawal Agreement and provide businesses and citizens with certainty that the status quo will be maintained until the end of the transition, and the desire not to make concessions (in particular with regard to Northern Ireland) that will have a direct impact on the future relationship.

Both parties have accepted that post-Brexit EU-UK trading arrangements are not likely to be finalised prior to the conclusion of the Withdrawal Agreement, given the October deadline. However, it would seem crucial that the Withdrawal Agreement sets out the broad principles on which those discussions will proceed.

Michel Barnier has acknowledged on behalf of the EU that some kind of political declaration may be included in the Withdrawal Agreement. It will be interesting to see whether the EU's new negotiating guidelines, a draft of which is anticipated to emerge later this week, place constraints on the extent of what the EU will agree to during this Phase of negotiations. EU representatives continue to refer to the proposed opening of talks on the EU/UK future relationship as "preliminary discussions" only.

9.2 A new economic partnership

In Friday's speech the Prime Minister reiterated that none of the existing models provide the depth of market access and frictionless trade that the UK envisages. The UK "will not accept the rights of Canada and the obligations of Norway". A "new balance" is required.

Mrs May acknowledged that the EU's structure cannot be sustained if the UK were to enjoy all its benefits without its obligations. The Government intends to seek an economic partnership with the EU that covers more sectors and involves co-operating more fully than any other existing free trade agreement ("FTA") in the world. It appears this will be built on substantial areas of regulatory alignment, an ongoing dialogue and an independent dispute resolution mechanism.

What does all this mean?

The thrust seems to be that as an ex-EU member state, the UK's laws will be aligned with the EU's. Presumably in areas where the agreement with the EU provides for regulatory alignment (or "mutual recognition") as a condition to market access, should the UK choose to change its laws in a manner which achieves a different outcome to the EU equivalent, it would consult with the EU, and if necessary, invoke the dispute resolution mechanism to determine whether this should affect the agreed arrangements.

Mrs May gave some examples of how this would operate. In relation to goods, she noted that

she does not want to see the introduction of tariffs and quotas and a “comprehensive system of mutual recognition” will be needed to avoid border checks. Similarly, the UK wishes to explore associate membership of critical EU agencies such as the European Medicines Agency. To do so, the UK understands that it would have to buy into those agencies’ rules and standards. If it chooses to depart from them, it would do so accepting that there are consequences for the UK’s membership and market access rights.

A concept of mutual recognition is unprecedented on this scale. Mrs May made clear that existing concepts of equivalence are inadequate as the UK wants to achieve an arrangement that can endure and adapt and will not cause the parties to have to come back to the negotiating table in future.

In relation to data protection, for example, which Mrs May cited as one of the five foundations that must underpin any trading relationship, the UK wants to go further than just obtaining an “adequacy decision” from the EU. Rather it would like to retain an ongoing role for the UK’s data regulator, which it states will ensure UK businesses are effectively represented in the EU’s new “one stop shop” mechanism for resolving data protection disputes.

Moving from the current position of alignment, it might be thought (and it has been remarked by Government ministers) that an EU-UK trade agreement should be much swifter to achieve than those where third countries come together for the first time. Mrs May’s proposal still has the potential to be immensely complex and time-consuming. The Government’s vision will involve agreement on the degree of mutual recognition, co-operation and permitted regulatory divergence on a sector by sector basis - as well as an appropriate dispute resolution mechanism. Will measuring the permitted amount of flex be any quicker than assessing the substantive equivalence of divergent regimes?

The new agreement is proposed to extend to areas that have never been covered in an FTA in

any meaningful way before (to quote Mrs May), including broadcasting and financial services. The UK “has some ideas” (which, in relation to financial services, Philip Hammond is due to announce on Friday), but the groundbreaking nature of these proposals is yet another challenge.

In other areas, like digital, Mrs May suggested that current alignment may not continue, despite the EU and UK economies being closely linked. For example, she confirmed that the UK will not be part of the EU’s Digital Single Market, citing the importance of “domestic flexibility” in this fast evolving sector. It will be interesting to see what arrangements the UK is considering in this area, particularly given the wide-ranging and developing nature of the EU’s Digital Single Market Strategy and the importance of data to the digital world generally and EU-UK trading relationship in particular.

The Mansion House speech has been received quite positively in the UK media, although less so in Europe. Notwithstanding Mrs May’s assertion that all trade agreements involve some element of cherry picking, the ideas put forward build, as already noted, on concepts the EU has previously indicated to be unacceptable. In a speech on Monday evening, Stefaan de Rynck, chief adviser to Michel Barnier, responding to Mrs May’s speech, emphasised that the concept of mutual recognition is built not just on common rules, but on an ecosystem of common application, institutions and practice.

9.3 The customs conundrum

The Government’s proposals on customs, which are an integral aspect of the future economic partnership, are high level, and to many observers, deeply confusing. Friday’s speech did not add much to the proposals put forward in the UK’s future partnership paper last August.

According to Mrs May, we need “an agreement on customs” and a “frictionless border” but it is very clear (is it?) that we are leaving “the Customs Union” and we are not entering “a customs union”

along the line of those between the EU and countries such as Turkey.

What is the difference between:

- the Single Market and the EU Customs Union
- a customs unions between the EU and the UK outside the single market and
- the options for an “agreement on customs” that the Government put forward in its 2017 future partnership paper on customs?

The key points are as follows:

- The EU Customs Union comprises a Common External Tariff which is collected at the EU border and then enables goods to move within the EU free of tariffs. Frictionless borders are not, however, achieved by the Customs Union alone. The Single Market requires regulatory alignment or common standards that means goods do not need to be checked for compliance with national standards as they move across borders within the EU.
- A customs union outside the Single Market, such as the arrangement between the EU and Turkey, may enable tariff-free access for goods within its scope, but those goods still need to be checked for compliance with national standards as they move from the EU to Turkey or vice versa.
- A customs union can be full or partial - covering selected goods only as in the case of the EU-Turkey arrangement. In a partial customs union, goods outside the arrangement attract tariffs and inspections.

A customs union is said to be unappealing to the Government because members are committed to the Common External Tariff and are prohibited by its terms from lowering tariffs in agreements with other countries. Thus the UK would be prohibited by EU trade policy (over which it has no influence) from agreeing its own trade deals as regards tariffs.

A particularly unattractive aspect of the Turkish model is its asymmetry. Turkey has access to the EU, but not to other countries with which the EU has trade agreements. Those other countries however, gain access to the EU and Turkish markets.

The Government’s options are an attempt to combine the benefits of the single market while avoiding the downsides of a customs union:

- Option 1 is a customs partnership between the EU and the UK. At the UK border, UK checks would apply the EU’s requirements to goods bound for the EU, so that customs processes will not be required at the UK-EU border and the objective of “frictionless” trade is achieved. The UK acts as the EU’s gatekeeper to ensure its standards are adhered to and tariffs applied when goods enter the UK which might end up in the EU. However, if the goods are intended for the UK market, the UK would apply its own tariffs and trade policy.

This would therefore involve a dual checking system at the UK border which would need to be designed and implemented from scratch. The need to segregate goods which are intended for the UK market adds a further level of complexity.

- Option 2 is a “highly streamlined” customs arrangement. This appears to be broadly based on minimised and automated customs checks - thus potentially involving minimal friction, rather than being entirely frictionless. This option would also include special (more streamlined) measures for Ireland, including exemptions for smaller traders.

Option 2 is a technical solution and the key concern is how long it would take to develop. Some estimates have indicated that a five year lead time is realistic.

9.4 Is the Government's position viable?

There is increasing awareness that a successful deal is dependent on solving the “customs conundrum”, but without details of how the Government's proposals will operate - and an assessment of the timeframes for delivery - it is challenging for businesses to react positively.

The Labour Party's position has the attraction of greater simplicity. Jeremy Corbyn announced on 26 February that Labour will support the UK staying in a customs union with the EU and accepting the Common External Tariff. Some observers say that in an era where tariffs are less important than non-tariff barriers, this is a more acceptable proposition. However, Labour's position is dependent on the UK having some say in the EU's future trade agreements. It is questionable whether this condition could be agreed.

This topic seems likely to be debated further. The Institute of Directors, in its paper “Customising Brexit”, for example, has recently put forward a proposal for a partial customs union with the EU, covering industrial goods and processed agricultural products only.

It is possible that Mrs May's hand will be forced by the vote on the Taxation (Cross-border trade) Bill, which is currently scheduled for April. Tory rebels have tabled an amendment that empowers the Government to enter into a customs union with the EU, which Labour are currently considering whether to support.

10. Outlook

The next weeks will be crucial. The EU has said it is “ready to intensify negotiations [on transition]”. The Prime Minister has announced the UK's intention to “move forward by calm, patient discussion”. For now, the message from both sides is to “keep calm and carry on”.

The transition arrangements are understood to be the focus of the March negotiations. The EU and UK are aiming to reach an agreement on transition at the meeting of the European Council on 22 and 23 March. Although drafts are anticipated shortly, it is also expected that the Commission's negotiating mandate for the next stage of talks will be approved at that meeting.

All being well (or satisfactory at least), the negotiations should move on to the EU and UK's future relationship, with a view to bringing discussions to a close in October.

It is clear that there is much to be done. The unprecedented nature of this situation means that consensus is likely to build only around proposals that are sufficiently substantiated and detailed. This seems to be borne out by the story so far. That is not to say that consensus is not achievable, but the need to develop detail in so many areas adds to the time pressure and adds fuel to the Government's view that the transition period needs to be as long as is required.