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Brexit: The Transition Agreement

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Introduction

On 19 March 2018 the EU and the UK announced that they had reached political agreement on a draft transition agreement covering the period from the 30 March 2019 to the 31 December 2020.¹ This agreement would enable the UK to continue to participate in EU policies and programmes for the whole of the transition period, but without being part of the EU's political structures. The purpose of the transition is to enable both the UK and the remaining 27 EU Member States to adjust to the UK's departure from the EU and prepare for a new relationship between the UK and the EU from the 1 January 2021. Agreeing on a period of transition, and on the rules that would operate during that time, was essential to providing businesses in the UK and the remaining EU Member States with the degree of confidence they need to plan for the consequences of Brexit.

The transition agreement forms part of the broader Withdrawal Treaty to be signed by the UK and the EU. The draft of the Treaty was published at the same time as details of the transition agreement as the latter is incorporated within it.² Significant parts of the Withdrawal Treaty have not yet been agreed between the parties.

This briefing looks at the transition agreement, noting those issues that have been resolved and those that have yet to be resolved. Where necessary, it explains the linkage between the transition agreement and the Withdrawal Treaty.

The transition agreement in outline

The text of the transition agreement is in Part 4 of the draft Withdrawal Treaty (that is, Articles 121 to 126) between the UK and the EU.

The main elements of the transition agreement are:

- period, definitions and territorial scope;
- institutional arrangements;
- EU external action policy;
- fishing;
- supervision and enforcement.

¹ See European Commission, *Press statement by Michel Barnier following the latest round of Article 50 negotiations*, STATEMENT/18/2161, 19 March 2018

² European Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, TF50 (2018) 35, 19 March 2018

Each of these is considered in turn below. It is important to note that there is no reference to citizens' rights in the transition agreement. This is because existing EU law will continue to apply in the UK during the transition period, including in respect of citizens' rights (exceptions are noted below). Changes in citizenship rules agreed in the Withdrawal Treaty will only apply after the end of the transition period.

Period, scope and definitions

The first part of the agreement gives the period to which it will apply, 30 March 2019 (assuming the UK's exit from the EU is not delayed) until 31 December 2020, defines some terms used and explains its territorial scope. Article 122 explains that it applies to the United Kingdom, Gibraltar (whose inclusion however, will depend on formal agreement on this text and discussion between the Spanish and British Governments), and to the extent to which EU law applies to them now, the Channel Islands, the Isle of Man and the UK's Sovereign Base Areas on Cyprus.

Broadly, the transition agreement provides for a period of standstill, in which things will largely remain the same for citizens and businesses. The full body of EU law and policies, known as the *acquis*, will continue to apply to the UK during the transition with some specific exceptions. These include:

- certain justice and home affairs measures that the UK would already be entitled to opt out of under the Treaties;
- UK citizens will no longer be able to stand or vote in European Parliament elections;³
- the UK will not participate in new enhanced co-operation measures;
- UK citizens will no longer be eligible to apply for posts in the EU institutions; this will not affect those already in such posts.

Institutional arrangements

This part of the transition agreement removes the United Kingdom after 29 March 2019 from any participation in the institutions of the EU. This means that the UK will, while still subject to EU law and the jurisdiction of the Court of Justice, have no representatives in the European Parliament, in the Council of Ministers, the European Commission, the European Court of Justice or in the network of committees staffed by the permanent representations of the Member States which deal with much of the day-to-day work of the EU. Article 123 of the agreement spells this out in detail.

Although the UK will have no entitlement to attend and vote in such meetings, the agreement does however make provision for British representatives to attend where that is necessary or desirable from an EU perspective. The UK's representatives will be restricted to contributing to the specific agenda items that concern the UK.

The agreement also makes provision for the UK to be consulted where draft EU legislation refers to national authorities, their procedures or documents. The UK would be allowed to

³ This is contained in Article 6 of the Withdrawal Treaty but specifically applied to the transition period by virtue of Article 123.

comment on drafts of this legislation but the other Member States are not required to take account of the UK's views when finalising the legislation.

External action

External action policy covers the EU's relationships with third countries. During the period of transition, the UK will continue to be bound by those treaties and agreements that the EU had reached with third countries prior to the UK's exit from the EU.⁴ This means that the UK must continue to apply the EU's free trade agreements with third countries, for example that with South Korea. But in practice, the EU cannot require third countries to offer the same terms of trade to the UK after Brexit (such as tariff-free access to their markets) that they had before the UK left. However, the EU will notify those countries that it considers that they should treat the United Kingdom as if it were still a member of the EU for the purposes of these agreements for the duration of the transition period.⁵

This part of the agreement precludes the United Kingdom from participating in any bodies and organisations in connection with the EU's third country agreements, unless the UK is a member of such a body or organisation in its own right. The agreement provides, however, for UK representatives to serve as part of an EU delegation at the invitation of the EU.

The UK has undertaken in the transition agreement to refrain from taking any action or position in international organisations and conferences which would be "prejudicial to the Union's interests". The agreement specifically provides for the UK to be able to negotiate, sign and ratify international agreements that relate to policies normally within the exclusive competence of the EU (but not for them to enter into force until 1 January 2021). This means that the UK can negotiate trade agreements with third countries during the transition period but they will not be able to be implemented until after that period. The value of this concession is reduced by the fact that third countries are likely to want to know the terms of the UK's trade with the EU after Brexit before they agree to a trade agreement with the UK.

During the transition period, the United Kingdom will not be bound by foreign policy statements adopted by the EU should it lodge an objection, but it has agreed to refrain from actions that would undermine the EU's policy. The United Kingdom will not be able to command civilian or military missions or operations under the EU's common foreign and security policy or its defence and security policy.⁶ This will mean ending the UK's role as the provider of the command centre for the anti-piracy mission in the Indian Ocean.

Fisheries

The UK government had indicated that it wished the UK to cease to participate in the Common Fisheries Policy (CFP) as soon as the UK left the EU. The agreement does not provide for that. However, it does make provision for the UK to be consulted about fisheries quotas and other matters relating to the operation of the CFP during the transition period though it will have no vote on the decisions. This particular part of the agreement has been criticised both in Parliament and by fisheries industry leaders. But it reflects the reality that the UK cannot revert in any case to its national fishing policies before it joined the European

⁴ European Commission, *supra* n. 2, p. 77, Article 124

⁵ European Commission, *supra* n. 2, p. 77, footnote

⁶ But there is no apparent obstacle to the UK continuing to participate in such missions if the EU agrees.

Communities in 1973 as the international legal framework governing territorial rights has changed substantially since then.

The UK is in the awkward position that it imports roughly 80 per cent of the fish it consumes and exports the same proportion of the fish it catches, much of that to other EU Member States (EU tariff rates on such exports would vary between two and 20 per cent). The UK must therefore balance its desire to have greater control of fishing in its own waters after Brexit with the need to secure continuing access to EU markets for its fish exports. This dilemma will be at the centre of the UK-EU negotiations on the future partnership if the UK or the EU wish to include fishing in that agreement.⁷

Supervision and enforcement

This short section says that the institutions of the EU shall continue to have the powers conferred on them in the Treaties in the respect of the UK, its citizens, businesses and other entities during the transition period. This means that the European Commission retains its powers to ensure that EU law is complied with in the UK. This article of the agreement also states that the jurisdiction of the Court of Justice of the European Union will continue to apply to the UK during the transition period.

Supervision and enforcement are part of dispute resolution, one of the most contentious areas in the UK-EU negotiations. Those parts of the Withdrawal Treaty relating to dispute resolution have, except as concerning the transition period, not yet been agreed between the parties. Agreement was reached in respect of the transition because the UK eventually accepted the continuing jurisdiction of the Court and the supervision role of the Commission although it had not wanted to do so.

Other issues

Data

One of the unresolved areas in the Withdrawal Treaty is how data or information received from people and institutions outside the UK before the end of the transition period should be handled. Articles 66 to 70 therefore seek to protect data and information obtained by the UK before Brexit and to ensure that personal data that concerns people outside the UK is covered by EU law on data protection. The draft Withdrawal Treaty does not give any time limit on this proposed extension of EU law to cover personal data belonging to people outside the UK.

Parliament is in the process of bringing into UK law the EU's recent General Data Protection Regulation which enters into force on 25 May 2018 and the Government has stated that this will be the basis of the UK's data protection regulation after Brexit.⁸ But there are concerns inside the EU that the UK's data standards might, over time, diverge from those of the EU because they feel that the UK is less concerned about the protection of personal data. Data protection concerns have led to previous problems with third countries, including the

⁷ See Senior European Experts, *Fisheries: The Transition Agreement and Future Arrangements*, April 2018

⁸ The GDPR was enacted as Regulation 2016/679 on 27 April 2016: see *Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, 2016 OJ L 119/1

rejection by the Court of Justice of an agreement with the USA and by the European Parliament of a proposed agreement with the US concerning banking data.⁹

UK financial contribution to the EU during the transition

The UK will continue to contribute to the EU budget as if it was a member during the transition period. The transition period is entirely within the current budget period, known as the multi-annual financial framework, which expires on the last day of the transition, 31 December 2020. Should the transition period be extended, the UK will have to negotiate a financial contribution with the EU which, unlike the period up until 31 December 2020, would not necessarily be covered by the rebate formula that currently applies to UK budget contributions. This means that any UK contribution to the EU budget after the transition is likely to be proportionately more than the UK's current contribution.

Extension of the transition period

There is no provision in the Withdrawal Treaty for the transition period to be extended beyond 31 December 2020. This is important because, whilst agreeing the transition postpones the cliff-edge moment when the UK leaves the EU it does not avoid it. If agreement is not reached on a future partnership by the end of 2020, business would be faced with sudden change; on 1 January 2021 the UK would start trading with the EU under World Trade Organisation rules, which would require customs inspections, the levying of duties and a number of regulatory complications.¹⁰ There would then be another moment of change when the UK and the EU adopted their new relationship. This approach would be both costly and disruptive.

In other areas of the UK-EU relationship, such as co-operation against crime, terrorism and people-trafficking, the cliff-edge could be even more precipitous with the UK losing the ability (for example), without access to the European Arrest Warrant, to extradite suspects easily and British citizens wanted in EU Member States facing legal uncertainty.

For all these reasons it may become necessary to extend the transition period. Although the possibility of such an extension has been discussed informally it would not necessarily be straightforward to agree such an extension. On the EU side the question would be what legal base in the Treaties should be used. For the UK, the difficulty would be that its leverage would have been reduced by leaving the EU and it would find itself with limited negotiating room and a lack of time.

Assessment

At the beginning of the negotiations the UK set out to restrict the ability of the EU to apply new laws in the UK during transition, to require EU citizens entering the UK during that period to register with the Home Office and to exclude fisheries from the agreement.¹¹ By the end of the negotiations it conceded on all these questions, with free movement of

⁹ For details of the SWIFT Regulation on banking data and its rejection, see European Parliament, 'SWIFT: European Parliament votes down agreement with the US', 11 February 2010 and European Parliament, 'Civil Liberties Committee rejects EU Passenger Name Record proposal', 24 April 2013

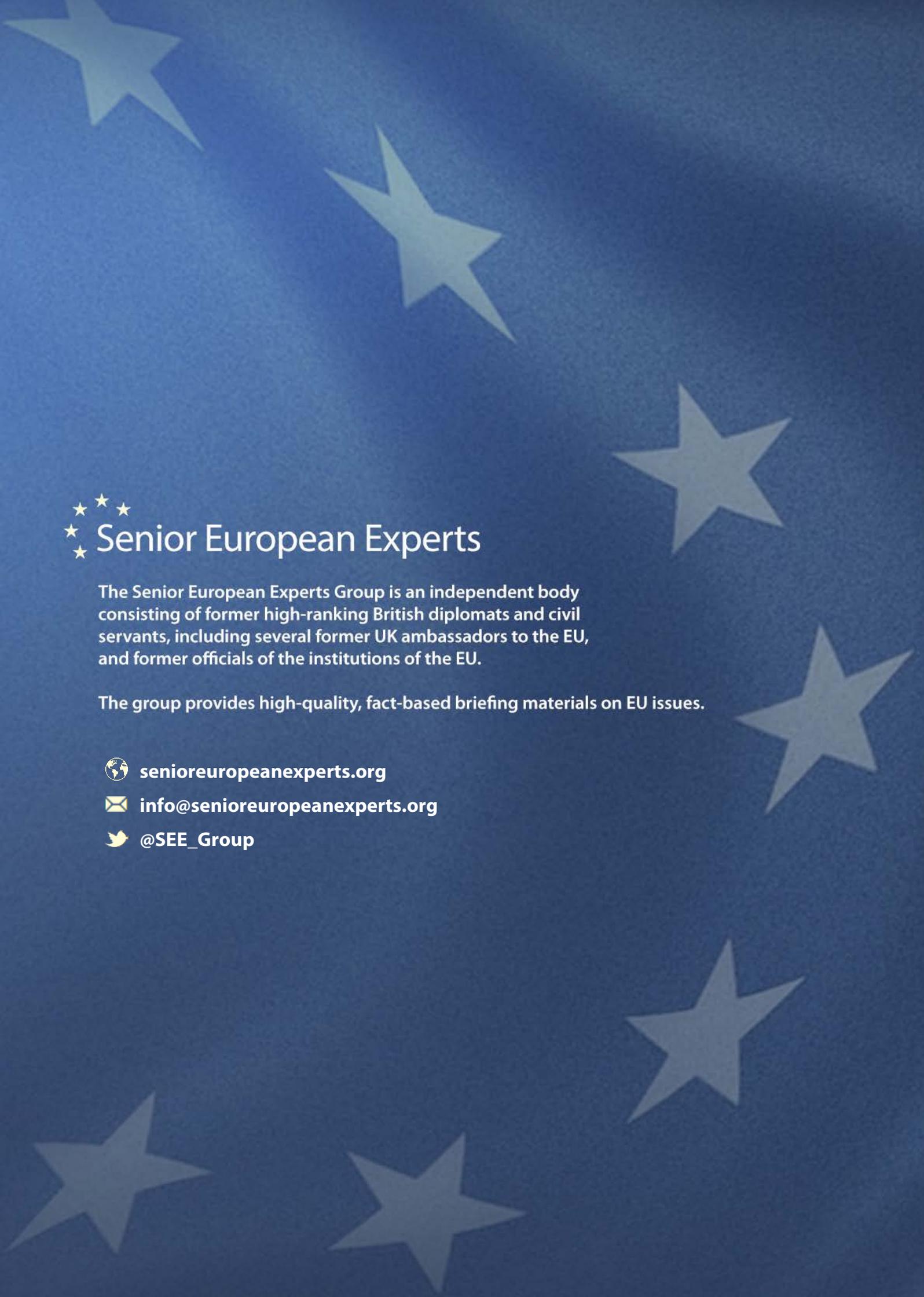
¹⁰ For example, aviation; these issues are considered further in Senior European Experts, *Brexit and the EU Regulatory Agencies*, September 2017

¹¹ See HM Government, 'David Davis' Teesport Speech: Implementation Period – A bridge to the future partnership between the UK & EU', 26 January 2018; and 'FAQ: Behind the Brexit fisheries transition deal', Kait Bolongaro, *Politico*, 21 March 2018

persons continuing as now, the Court and Commission also continuing in their current roles and with fisheries included in the transition, with the UK no longer present when quotas and other Common Fisheries Policy rules are set. The EU did agree that the UK could negotiate and sign trade agreements with third countries but they cannot come into force until the end of the transition period.

Finally, it is important to note that the transitional arrangements are subject to the principle that nothing is agreed until everything is agreed, which applies to the whole Withdrawal Treaty. There is therefore a possibility, at least in theory, that no transitional arrangements will be in force after 29 March 2019.

April 2018



Senior European Experts

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