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Ceasefire: Managing divergence in Post-Brexit Europe

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Credit: Justin Tallis/AFP

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DISCLAIMER

THE BREXIT REVOLUTION

Most informed people, the world over, think it is a curious form of madness for the United Kingdom to have left the European Union. Brexit may indeed be a deranged policy, but the Brexiteers who have taken over the UK's ruling party see liberation from Brussels as their justification by faith alone. According to Brexit ideology, a 'world-beating' 'Global Britain' emerges after decades of subjugation to continental rulemaking. Britain's national sovereignty, suffocated in the years of European interdependence, is now reborn. Brexiteers believe Britain's destiny can never be European. They regard the last 60 years since the UK launched its first membership bid to the European Community as a historical aberration. The natural balance of power is at last restored: from now on the UK and EU will be treating each other as independent sovereign equals.[1]

The European side in this strange negotiation is having difficulty getting used to the fact that Britain has changed. The government formed by Prime Minister Boris Johnson after his election victory in December 2019 is not just another manifestation of traditional British euroscepticism but a right-wing nationalist takeover. The new government is not urbane. It is not pragmatic. It has no precedent. It may not last very long. But for the moment it is decidedly in charge of the British state. As its bungling over the COVID-19 pandemic has displayed, few of the government's leading lights are particularly competent. Unsurprisingly in these circumstances, Britain's diplomacy is demoralised and overstretched – "not what it was", as they say in Brussels.

The EU side, said Frost, had to come to terms with this new "relationship of equals".

On 17 February, David Frost, Britain's chief negotiator, gave what he called an academic lecture to a Brussels audience.[2] He confirmed that Brexit "was surely above all a revolt against a system – against, as it were, an 'authorised version' of European politics". He explained that, in his view, Britain had never really been committed to the EU's goals. With national sovereignty regained, the UK would be able to set its own goals and rules. It would then be "perfectly possible to have high standards, and indeed similar or better standards to those prevailing in the EU, without our laws and regulations necessarily doing exactly the same thing". He continued:

> "It is central to our vision that we must have the ability to set laws that suit us […] So to think that we might accept EU supervision on so-called level playing field issues simply fails to see the point of what we are doing. That isn't a simple negotiating position which might move under pressure – it is the point of the whole project".

The EU side, said Frost, had to come to terms with this new "relationship of equals".

Besides Frost, the UK negotiating team is made up of hardline Brexiteers, Dominic Raab, Michael Gove and Dominic Cummings. They say they want a comprehensive free trade agreement (FTA) with the EU, but their predilection for vaunting national sovereignty may put such an agreement beyond reach. In justification of Brexit, the quartet wishes to break Britain's regulatory alignment with the EU *acquis*. While paying lip service to the principle of non-regression from the status quo, the UK's negotiators want to base cooperation with the EU on international law precepts and conventions, not Union law. Accordingly, they shun the Commission's proposals for binding ties to the *acquis* ex-ante, by implication preferring ex-post remedies in the event of major disruption to trade.

Frost's lecture set the scene for the start of the FTA negotiations. He has been conducting the negotiations as if he were still fighting the Brexit referendum campaign. No wonder Michel Barnier, Frost's EU counterpart, is moved to emphasise that his mandate is to protect the EU's internal market from British buccaneering and assorted cherry-picking.

The spread of the coronavirus pandemic in March heightens the sense of alarm pervading the Brexit talks. Not only has it been virtually impossible to conduct serious negotiations at a social distance, but both London and Brussels have been inevitably distracted from the business of concluding Brexit before the transition period closes at the end of this year.

After a videoconference summit on 15 June between Johnson and the Presidents of the European Commission and European Council, it was agreed to intensify the talks in search of the "most conducive conditions for concluding and ratifying a deal before the end of 2020. This should include, if possible, finding an early understanding on the principles underlying any agreement".[3] It speaks volumes about the Brexit project that, a full four years on from the referendum and over five years since David Cameron sought in vain to renegotiate the terms of Britain's membership of the Union, there are still such basic misunderstandings between Britain and Europe.

FREE TRADE AND GOOD GOVERNANCE

Of the numerous issues yet to be resolved in the current negotiations, two stand out: how to ensure the terms of trade and how to govern the future relationship.

Although the British often miss the point, it is the Union which holds the stronger hand because of its size, wealth, legal coherence and political unity. Initially, after the 2016 referendum the Union's leaders were anxious to prove to any other potential secessionists that it would be a mistake to copy the British and leave. That immediacy has now passed. Unity among the EU 27 is impressive. The Commission is proving itself to be a staunch defender of EU interests. It insists that if the UK is to get its comprehensive trade agreement, it must be a free and fair one: that is, in return for zero tariffs and zero quotas, which makes trade free, Britain must respect the level playing field, which makes trade fair.

Of the numerous issues yet to be resolved in the current negotiations, two stand out: how to ensure the terms of trade and how to govern the future relationship.

The EU's practice hitherto has been to cooperate closely with its third-country trading partners. It has sought ambitious association agreements with its European neighbours that go well beyond deep and comprehensive free trade to something akin to a neo-colonial relationship. A plethora of partnership agreements with Eastern and Southern European countries are dedicated to spreading the EU's values, promoting its interests, achieving convergence on EU norms, even to preparing the associated states for future membership bids.

True, not everybody in the neighbourhood is intent on dynamic association with the EU. Norway and Iceland have changed their mind about accession and are stuck in a rather static (and therefore unsatisfactory) association agreement with Brussels, gaining privileged access to the EU's internal market in return for paying hefty dues and accepting second-hand EU laws. The Swiss balked at joining the European Economic Area (EEA) and now enjoy a costly, fractious and litigious relationship with the EU, including interruptions to trade. Switzerland has many separate bilateral agreements with the EU without institutional oversight.

The UK, in its Brexity wisdom, like Switzerland has rejected the EEA option. It also dismisses the template of the Ukraine Association Agreement of 2014 as being grounded on the presumption of convergence. (For Johnson, too, the Ukrainian model smacks too much of Theresa May's Chequers deal of July 2018 which caused his resignation from her government.) For Brussels, the rejection by the UK of the EU's favoured type of a neat, modern association agreement is galling. Meanwhile, hardened by experience, the EU is determined not to replicate the Swiss model for the sake of the British.

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The UK is certainly asking for more – and giving less – than other non-associated partners of the EU. It wants special dispensation with respect to freedom of movement for service providers. It presses for full mutual recognition of professional qualifications, and for the right of co-decision on the withdrawal of equivalences in financial services. It seems to expect a clutch of privileges in the dimension of justice and home affairs (while refusing to legislate to guarantee the European Convention on Human Rights).

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The British evince pained surprise that their word is not taken on trust. That is precisely why the second outstanding post-Brexit issue, of governance, is so important for the European side. The EU wants a single, comprehensive system of joint governance of the future agreement that will ensure coherence and consistency despite the UK's expressed intention to diverge from the *acquis*. Such an outcome rests on persuading the UK, even as an ex-member state, to continue to respect the autonomy of Union law and institutions.

THE POLITICAL FRAMEWORK

Michel Barnier often draws attention to the Political Declaration on the framework for the future relationship which was agreed by Boris Johnson on 17 October last year and has since been accepted by both the European and British parliaments.[4] In fact, he sees his job as translating that politically binding document into a legally binding treaty. (That's how the EU works.)

It is true that Johnson's version of the Political Declaration commits the UK to less regulatory alignment than the original version agreed by his predecessor, Theresa May, in November 2018. Being narrower in scope, the new Political Declaration is also less favourably disposed to a wide spectrum of outcomes. But it does not rule out voluntary regulatory cooperation.

In trade in services, the Declaration aspires to "ambitious, comprehensive and balanced arrangements".[5] As far as goods are concerned, "while preserving regulatory autonomy, the Parties will put in place provisions to promote regulatory approaches that are transparent, efficient, promote avoidance of unnecessary barriers to trade in goods and are compatible to the extent possible".[6]

Specifically, the level playing field will be maintained to "uphold the common high standards" in state aid, competition, social and employment policy, environment, climate change and relevant tax matters. Both sides "should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement".[7]

Brexiteers have a phobia about the EU's Court of Justice, suspecting it of being packed with foreign federalist schemers, probably of a socialist bent.

When it comes to governance, "in order to ensure the proper functioning of the future relationship, the Parties commit to engage in regular dialogue and to establish robust, efficient and effective arrangements for its management, supervision, implementation, review and development over time, and for the resolution of disputes and enforcement, in full respect of the autonomy of their legal orders".[8]

It is proposed to set up a Joint Committee at ministerial and Commission level, taking decisions consensually, to oversee the implementation of the new treaty and to resolve problems that may arise. Should difficulties defy political or administrative solutions in the Joint Committee, a "flexible mediation mechanism" will be tried.[9] An independent arbitration panel will have binding powers to settle disputes. Initially, the panel was given some latitude to decide whether to refer questions concerning the interpretation of EU law to the European Court of Justice (ECJ) "as the sole arbiter of Union law".[10] But the Commission's draft text of the new partnership agreement, published on 18 March, seems to reduce the panel's autonomy from that currently enjoyed under the terms of the Withdrawal Agreement.[11]

Brexiteers have a phobia about the EU's Court of Justice, suspecting it of being packed with foreign federalist schemers, probably of a socialist bent. Even mainstream UK politicians misread the European Court of Justice, seemingly unaware of its pathfinding work in consolidating the internal market, its diligent policing of the boundaries of EU treaty-based competence, its landmark cases in trade policy, and, latterly, in advancing the concept of EU citizenship. The seminal contribution of many English and Scottish lawyers to the development of the Luxembourg Court and the evolution of EU law has been recognised too seldom.

In February 2020 the UK published a White Paper on its approach to the negotiations. It accepts a role for the Joint Committee "to support the smooth functioning of the Agreement, and provide mechanisms for dialogue, and, if necessary, dispute resolution." But it continues:

> "The arrangements will reflect the regulatory and judicial autonomy of the UK and accordingly there will be no role for the Court of Justice of the European Union in the dispute resolution mechanism. This is consistent with previous Free Trade Agreements concluded by the EU."[12]

The British contributed their own draft text of the agreement, published on 19 May 2020.[13] It makes no reference at all to the ECJ, or indeed, to Union law. By contrast, the Commission draft text provides that "[c]oncepts of Union law contained in this Agreement [...] shall in their application and implementation be interpreted in accordance with the methods and general principles of Union law and in conformity with the case-law of the Court of Justice of the European Union."[14]

David Frost wrote a blunt and intemperate letter to Michel Barnier on 19 May:

> "Your text contains novel and unbalanced proposals which would bind this country to EU law or standards, and would prescribe the institutions which we would need to establish to deliver on these provisions. To take a particularly egregious example, your text would require the UK simply to accept EU state aid rules; would enable the EU, and only the EU, to put tariffs on trade with the UK if we breached those rules; and would require us to accept an enforcement mechanism which gives a specific role to the

> European Court of Justice. You must see that this is simply not a provision any democratic country could sign, since it would mean that the British people could not decide our own rules to support our own industries in our own Parliament."[15]

The tireless Barnier replied the next day. The UK cannot expect "high-quality access" to the single market unless it is prepared to respect the level playing field and ensure that competition "remains open and fair". He explained:

> "This means upholding the common high standards applicable in the EU and in the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters. It also requires appropriate mechanisms for the effective implementation of these standards domestically, as well as for enforcement and dispute settlement. This does not mean that the UK would be bound by EU law after the end of the transition period in these areas; the UK will remain entirely free to set its own higher standards. But we need to give ourselves concrete, mutual and reciprocal guarantees for this to happen."[16]

KEEPING A SENSE OF PROPORTION

The British government's reaction, notably through Michael Gove, its representative on the Joint Committee, has been to talk of retaliation by way of raising tariffs against certain unspecified EU imports. Brussels regards such talk as anachronistic and insists that it still wants a zero-tariff FTA. It also points out that even were tariffs imposed, the EU would still apply the rules of the level playing field to British imports. British entrepreneurs will have to conform to EU business and industrial standards if they wish to continue to export across the Channel. Few major UK companies supported Brexit, but nonetheless now face significant customs, trade, regulatory and potential tariff barriers in order for the UK government to be able to claim the right to diverge from EU norms.

The more that has been revealed about British demands, the more complex the settlement promises to be. The UK wants to ensure that whatever dispute mechanism system is agreed, it will not apply to the environment, tax, labour, state aid or competition policy provisions of the FTA. On financial services the UK expects from the EU "treatment no less favourable than it accords to its own" operators.[17] It is seeking separate governance arrangements for fisheries, aviation and air safety, as well as for any UK participation in EU programmes such as Horizon Europe. It envisages a standalone nuclear cooperation agreement with Euratom, and another for data protection.

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In the field of judicial cooperation in civil and criminal matters, the UK wants to operate alongside the EU under the terms of international agreements while explicitly excluding jurisdiction for the ECJ. It wants closer engagement than has been attained by any other third country with the EU's Passenger Name Recognition, European Criminal Records Information System, Prüm Convention, European Arrest Warrant and second-generation Schengen Information System. Simultaneously, the UK appears to want to piggyback on the work of Europol and Eurojust while avoiding the responsibilities of membership. No British objectives will be agreed by the EU in this area unless the UK accepts to maintain the EU's high standards of data protection, including data exchange.

Clearly, then, the UK will not get all it wants. It will not get anything without compromise.

Clearly, then, the UK will not get all it wants. It will not get anything without compromise. Failure to compromise will provoke hostile reaction among its erstwhile partners. Britain has already been evicted from the Galileo global navigation satellite programme, largely to the benefit of French and German industry, because the Commission feared security leaks once the UK was released from its obligations as a member state. In the event of there being no deal on the FTA, Britain's aerospace and automotive industries will come under great pressure to relocate to the European mainland. British science and education will also suffer badly if the UK refuses to conform to Union rules, including judicial oversight, which would readmit the UK to participate as a third country in EU programmes.

The UK is, of course, entitled and right to pitch for more than Canada, South Korea or Japan. But it is unwise

to pretend that it is not doing so for fear of Brexiteer reaction back home. The UK would do well to openly admit that the legacy of EU membership, the size and shape of the British economy and the proximity of Dover to Calais are material factors which must determine the nature of the future partnership.

Some of the UK's demands for special treatment have more going for them than others.[18] None of the EU's current FTAs makes a perfect fit for the special British situation. The EU's rigid rules of origin will be tough to verify in the case of the large volume of cross-cumulation trade in manufactured goods. Both sides would benefit from a more liberal approach if tariffs and queues at ports are to be avoided. In some ways – for example, on mutual recognition of professional qualifications – the British have an approach which, if adopted by the EU, could enhance the operation of the internal market without jeopardising its integrity.

Nonetheless, it is difficult to see how the UK can avoid making a legal commitment to more dynamic alignment in this field if it is to enjoy the privileged access to the single market that it believes it has a right to expect.

Classical non-regression clauses in the FTA should suffice for labour and environmental standards, backed up by on-going British commitments to observe the terms of the International Labour Organisation and the Paris Climate Conference. Taxation policy is more complicated because it is an active field of both European integration and international politics.

Protection against abuse of state aid rules is a cardinal feature of the EU's internal market. It is true that, as a member state, the UK has been much more compliant with EU state aid policy than, say, Germany, France or Italy. Moreover, the necessary relaxation of the EU's state aid rules during the pandemic crisis in any case changes the context in which future state aid policy will be considered. Nonetheless, it is difficult to see how the UK can avoid making a legal commitment to more dynamic alignment in this field if it is to enjoy the privileged access to the single market that it believes it has a right to expect.

It would be helpful, however, if both sides stopped exaggerating the likelihood of endless trade disputes. Belligerent Brexiteers spoiling for a fight with French fishermen should be roundly castigated by UK ministers and not pandered to. In practice, few commercial differences end up in international courts – and this is not just because the appellate procedures of the World Trade Organisation (WTO) are complex, costly and long. Perhaps too much attention is being paid to the make-up and powers of the proposed independent tribunal and too little to the need for pragmatic solutions. As trade expert David Henig warns:

> "Entering dispute settlement every time such a problem arises would soon render the agreement unworkable. […] Therefore, the UK and EU must find ways to build a working relationship without having to resort to such mechanisms."[19]

THE ARCHITECTURE FOR A DEAL

Chastened not least by its unfortunate experience with the Swiss, the EU wants a unique governance procedure for its British trade agreement. What does this mean? The Political Declaration talks enticingly of "an overarching institutional framework covering chapters and linked agreements relating to specific areas of cooperation".[20] Under this architecture, specific governance arrangements could be established sector by sector, but legally linked. The Declaration adds that there could be an agreement sitting outside the overarching framework, presumably to cater for foreign, security and defence policy. Enticingly, the Declaration even notes "that the overarching institutional framework could take the form of an Association Agreement".[21]

The British, especially since the new government was formed in December, have since taken fright at the idea of the EU penalising the UK in one area – say, financial services – for playing hardball in another – say, fisheries. The existence of single institutions governing the whole treaty is thought likely to facilitate and even encourage such cross-retaliation. That explains why the UK, instead, wants a suite of separate agreements.

There is ample room for compromise on the architecture. A single set of joint institutions can readily allow variable forms and degrees of oversight according to the sector involved.

There is ample room for compromise on the architecture. A single set of joint institutions can readily allow variable forms and degrees of oversight according to the sector involved. Clearly, one type of governance does not fit all: the level and force of harmonisation for the nuclear industry, for example, must be very different from the rules governing public procurement or air transport. But the EU needs a coherent structure of joint governance for the future partnership not least so that the Commission can maintain internal cohesion among the 27 member states. The robust joint governance arrangements foreseen in the Political Declaration and articulated in the Commission's draft treaty (and predicated in the Withdrawal Agreement) give the UK the equal status it craves. Decision making by consensus – and not by qualified majority vote – is what the British like best.

Anything less overarching risks incoherence and legal uncertainty – and is sure to discourage investors.

Likewise, there can be a coming together about the role of the European Court of Justice. Concepts of EU law will be prevalent throughout the comprehensive free trade agreement, but that does not give the ECJ jurisdiction over the UK. Because the UK has left the single market and customs union, the EU is not demanding that the UK adopts EU laws. Rather, the EU wants that concrete, mutual and reciprocal guarantees are put in place to prevent distortions of trade and the taking of unfair competitive advantage by lowering standards. This is what the EU means by maintaining a level playing field – terrain which is "not for sale", as Barnier says.

PROCEDURES FOR MANAGING DIVERGENCE

As we have noted, the Commission's draft treaty proposes an institutional model of joint governance which is similar to that established by the Withdrawal Agreement – although the ministerial level Joint Committee is optimistically redubbed the Partnership Council.[22] At least 16 specialised committees are suggested to work beneath the Partnership Council, along with numerous working parties.[23] All these bodies will be co-chaired by Commission and British officials, and will be consultative of stakeholders and academic experts.

The purpose of this joint governance apparatus is to implement and apply the terms of the treaty and supplement and adapt the treaty provisions where desirable – all by mutual agreement between London and Brussels. The Commission's draft text leaves open the precise duties of the specialised committees. In fact, these committees need well-defined delegated powers to enable them to monitor equivalence between UK and EU norms, to manage the consequences of any serious divergence that may threaten to impede free and fair trade, and to propose remedies.

The purpose of this joint governance apparatus is to implement and apply the terms of the treaty and supplement and adapt the treaty provisions where desirable – all by mutual agreement between London and Brussels.

Early warning of any impending changes to EU or UK legislation would be given to the appropriate specialised committee. The committees could hear requests to recognise technical equivalence. Where regulatory equivalence is not agreed nor sought, the more limited system of mutual recognition of conformity assessment could be verified at the level of the specialised committee. Relevant market participants would be consulted as to the likely impact of any notable divergence. Alerts would be drawn to potential customs' bottlenecks or interruptions to industrial supply chains. The committees would also serve to identify shared interests and expertise, not least in new technology.

The specialised committees must have powers of surveillance over the implementation of the FTA and be competent to take action to rectify infringement of its terms. Disputes and allegations of a breach of obligation by one party or the other would be flagged up early in the specialised committees and, if necessary, passed upwards to the Partnership Council for political resolution.[24] Only where that body fails to resolve the dispute would the parties eventually have recourse to the independent arbitration panel.

The recent breakdown of the appellate procedures of the WTO has led the Commission to propose the establishment of its own Chief Trade Enforcement Officer whose job it will be to react when the WTO cannot deliver a final ruling because another WTO member blocks the dispute procedure by launching spurious appeals. The new mechanism will also apply to the dispute settlement provisions included in regional or bilateral trade agreements to which the EU is party, including the new partnership with the UK. The EU trade enforcer will be empowered to monitor the operation of the social and environment clauses in any FTA and to initiate appropriate action, including adjusting tariffs, in cases of non-compliance. In the interests of reciprocity and to facilitate communication, the UK should consider appointing a high official with comparable powers.

The UK still must reinforce its own regulatory framework to compensate for the loss of EU oversight of the

acquis across a range of sectors, from financial services to environmental protection. Its newly empowered agencies must be independent of ministerial direction and open to dialogue with stakeholders and citizens. As all these bodies will have to pay regard to the level playing field conditions inscribed in the new partnership agreement, the appointment of a British version of an EU trade enforcement officer, operating out of the Cabinet Office, may be highly appropriate.[25] The pair of trade enforcement officers would be useful correspondents and could work together to aid the work of the Partnership Council and its numerous committees.

THE DEAL

Slowly, the outline of a possible deal is starting to become clear. And time pressure increases.

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Everyone now acknowledges that the FTA in force in 2021 will be fairly basic. The UK will not make blanket, binding or indefinite commitments to align ex-ante with EU single market rules. But it should agree not to retreat from current shared standards, and it will continue to respect the level playing field in the first instance. It can claim the right to diverge but should agree not to exercise that right at this point (or, possibly, ever). Given its stated preference for an outcome-based approach, the UK must accept that if it should in the future undermine EU state aids policy it will face the likelihood of retaliation measures ex-post. British divergence in product standards will bear a price for the UK in terms of EU recognition of type approval and conformity assessment. Decisions on regulatory equivalence will never be farmed out to the UK.

The EU, for its part, will agree to continue to grant the UK preferential market access with zero tariffs and zero quotas unless and until the UK decides to trigger regulatory divergence. Barnier will be able justifiably to claim that he has mechanisms in place to protect the level playing field from incoherence. The EU will still be in control of the gateway to its internal market.

When the FTA inscribes this deal into law it should be careful to leave open an equal possibility not only of future divergence (as the UK claims to want) but also of future convergence (which is the EU's *raison d'être*). Such balance, reflecting the Political Declaration, will allow for all eventualities – including those that might arise as and when a new British government has cause to review the country's European policies.

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What is needed immediately is the design of the trustworthy systematic methodology to manage potential flux in the regulatory arrangements. The EU's main criterion for agreeing to any such device is that the UK accepts joint governance with single institutions as broadly proposed by the Commission.

RECOMMENDATIONS

There are certain preconditions for reaching such a settlement:[26]

- Both sides should make more of an effort to address each other's concerns, and the British, especially, should adopt a more modest tone.
- Neither party should deny that the UK is a special case because it is an ex-member state, large and nearby.
- Where the UK makes a good case to be treated exceptionally, it should be so treated.
- The EU should accept a limited number of separate but linked agreements.
- In return the UK should accept the overall institutional architecture.

- The mandate of the specialised committees should target the management of regulatory divergence, including remedial action.
- The British should drop their curious obsession with the European Court of Justice.
- In return, the EU should permit the arbitral tribunal genuine autonomy.
- The UK should honour in full the commitments it made in the Political Declaration.
- The UK should rapidly complete the strengthening of its domestic regulatory framework.
- As a confidence-building measure, the UK should be encouraged back into the Galileo project.
- A commitment should be made to deepen cooperation on foreign, security and defence policy in 2021.

This deal amounts to a respectable ceasefire between Britain and Europe.

This deal amounts to a respectable ceasefire between Britain and Europe. Given the known constraints, the alternative to this deal would seem to be no deal. That would be much worse.

[1] See Duff, Andrew (2020), "Brexit: Getting it done", Brussels: European Policy Centre.

[2] Frost, David, "David Frost lecture: Reflections on the revolutions in Europe", Université Libre de Bruxelles, 17 February 2020a.

[3] European Commission, EU-UK Statement following the High Level Meeting on 15 June, STATEMENT/20/1067, 15 June 2020, Brussels.

[4] Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, TF50 (2019) 65, European Commission, para.27.

[5] *Ibid*., para. 27. The UK's surplus in trade in services with the EU was £23.0 bn in 2019.

[6] *Ibid*., para. 23. The UK's deficit in trade in goods with the EU was £94.9 bn in 2019.

[7] *Ibid*., para. 77.

[8] *Ibid*., para. 122.

[9] *Ibid*., para. 129.

[10] *Ibid*., para. 131.

[11] Compare Article 174(2) of the Withdrawal Agreement with Article INST.16(2), Draft text of the Agreement on the New Partnership between the EU and the UK.

[12] UK Government (2020a), "The Future Relationship with the EU: The UK's Approach to Negotiations", London, para.83.

[13] Task Force for Relations with the United Kingdom (2020), Draft text of the Agreement on the New Partnership with the United Kingdom, UKTF (2020) 14, European Commission, Art.INST.16(2). Emphasis added.

[14] *Op. cit.*, Article COMPROV. 16.

[15] Frost, David, "UK draft legal texts: Letter from David Frost to Michel Barnier", 19 May 2020b, p.3.

[16] Barnier, Michel, "Letter from Michel Barnier to David Frost", UKTF (2020) 3060790, 20 May 2020, Brussels, p.2.

[17] Article 17(3)(1) Draft UK Negotiating Document, *op. cit.*

[18] See Lowe, Sam (2020), "EU-UK negotiations: No need to panic (yet)", Centre for European Reform.

[19] Aktoudianakis, Andreas; Przemysław Biskup; Benjamin Bodson; Andreas Eisl; Elvire Fabry; Agata Gostyńska-Jakubowska; David Henig; Kirsty Hughes; Juha Jokela; Carsten Jung; Rem Korteweg; Alexander Mattelaer; Anand Menon; Jonathan Portes; Nicolai von Ondarza; Jannike Wachowiak; Alan Wager and Fabian Zuleeg (2020), Towards an ambitious, broad, deep and flexible EU-UK partnership?, Brussels: European Policy Centre, p.80.

[20] Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), op.cit., para.118.

[21] *Ibid*., para. 120.

[22] Task Force for Relations with the United Kingdom (2020), op.cit., Art.INST.1. See also Council Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019), op.cit., Art.164.

[23] Task Force for Relations with the United Kingdom (2020), op.cit., Art.INST.2.

[24] *Ibid*., Art. INST.13.

[25] For a good discussion of how the level playing field should be monitored inside the UK, see Baldock, David; Larissa Brunner; Pablo Ibáñez; Emily Lydgate; Marley Morris; Martin Nesbit; Jacques Pelkmans; Vincent Verouden and Fabian Zuleeg (2019), *Ensuring a post-Brexit level playing field*, Brussels: European Policy Centre.

[26] An agreement on fisheries is also required - thankfully outside the scope of this paper.

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