



# Getting the UK ready for the next phase of Brexit negotiations

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## Foreword

Raoul Ruparel was special adviser on Europe to Prime Minister Theresa May between July 2018 and July 2019, having previously held the same role at the Department for Exiting the European Union (DExEU) between October 2016 and July 2018. This paper sets out his conclusions on the lessons learnt from the first round of Brexit negotiations, and his advice to the prime minister as the UK prepares for the next phase.

The Institute for Government publishes occasional pieces from guest contributors that we believe will make an important contribution to public knowledge and debate. Raoul Ruparel's arguments echo many of the recommendations the Institute has made in the past three years, and the work draws on our own reports. The views expressed in this paper are his alone.

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## Summary

There has been much talk over the past few years about getting the UK ready for leaving the EU without a deal. However, fundamentally, the government and civil service have a lot of work to do if they are to prepare to leave *with* a deal – especially given Boris Johnson’s deadline of the end of 2020. As it stands, the UK does not yet appear ‘match-fit’ for the next phase of negotiations.

Along with policy and procedural decisions still to be made, the focus of the first two sections of this paper, there are four broad steps which need to take place from now to get a deal brought into force. These relate to the government’s mandate for entering the new negotiations; the way it approaches these; ratification; and implementation. I shall address all four in this paper.

Contrary to popular belief, I believe negotiations in 2020 can return a clear outcome by the end of the year – subject to a few caveats. Of these, time may prove most pertinent, and may constrain the ambition with which any free-trade agreement (FTA) is produced.

Before looking ahead to the second phase, it is important also to learn from the first. Based on my experience, there are five key lessons for the prime minister and his team to consider as they begin the process:

- 1. Have a clear view on the structure of the negotiations:** in the first phase, the UK failed to put forward its view of how the negotiations should work, and this ended up favouring the EU.
- 2. Get on the front foot:** EU negotiators were able to take charge of the first phase, and a lot of time had to be spent in moving them off their opening position – rather than proactively arguing the UK’s case.
- 3. Have a better communications operation and a clear public narrative:** too often the negotiations were separated from the communications operation, meaning the UK failed to win the debate with the public.
- 4. Bring the UK Parliament, external stakeholders and the public on side:** failure to bring Parliament and external stakeholders along on the journey of the negotiations made it harder to pass the final deal. It is also important to ensure any agreement is long-lasting.
- 5. Make better use of diplomatic channels:** certain EU states were far more effective at leveraging their diplomatic channels to influence the negotiations. The Irish, for example, were much more proactive on the issue of the border.

The EU made mistakes as well, and doubtless there are similar introspections going on on the continent, as member states, too, look to 2020. This is to be expected, and fair: a lack of preparation on both sides risks the next phase of negotiations repeating the mistakes of the first.

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The government's Brexit deal still leaves a huge number of unanswered questions on the detail of the UK's preferred future relationship with the EU. While we know it will be based on an FTA approach, this could still mean many different things – the negotiated 'political declaration' (PD) is both far from complete and not legally binding.

There has been a lot of work done within various government departments, but much of this was done under Theresa May's government and often without any central co-ordination or direction. This means much of it may not in the end have much bearing on reality, or may actually conflict with the work other parts of government have done. There urgently needs to be central political direction and decisions on the detail of the future relationship and the overarching strategy for the next phase – this should all then be turned into legal text as soon as possible (to help the UK get on the front foot).

So far, the focus has been on the FTA itself, particularly from media. But the future relationship goes far beyond that, and includes important issues such as: internal and external security co-operation; data protection and sharing; aviation; road haulage; energy; science and innovation; and mobility. How this all fits together will be an important decision that will have an impact not only on the strategy for the next phase but also on the time it might take to negotiate – and the UK should decide its preferred approach by the end of January.

The crucial issue here is whether the UK seeks a 'mixed' agreement (requiring ratification by all EU member states) or one that only engages EU 'exclusive competence' (which could be approved by just the EU Council and European Parliament). It is nearly impossible to see a mixed agreement being in force by the end of 2020, given the government's position so far; an agreement focused on the EU's exclusive competence seems more likely. This would, though, limit the scope of any agreement, resulting in what might be termed a 'shallow and narrow' future relationship.

Another important decision related to this will be how the UK decides to structure the future relationship. Is it a single overarching agreement, or does it seek a series of separate agreements to be negotiated in parallel? There is no clear-cut answer here, but the approach will have a big impact on the strategy in the negotiations.

The structure and process of the negotiations themselves are also key. As it stands, Whitehall is not yet set up to run such a wide-ranging and complex negotiation, nor implement the outcome on the ground. There will need to be changes to the so-called machinery of government. Due mainly to the difficulty of having one department manage others, it is likely that DExEU will need to be wound down.

There are three options for replacing DExEU and running the next phase:

- 1. Create a narrow central unit:** run out of No.10 or the Cabinet Office but with most of the detailed negotiation and implementation left to departments.
- 2. Create a broad central unit:** a larger unit in the Cabinet Office with sufficient policy expertise to challenge departments and run larger chunks of the operation directly.

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**3. Revamp the Department for International Trade (DIT):** a combination of DExEU and DIT that would cover all trade negotiations, including with the EU. This would likely need to be combined with a version of Option 1 to deliver central direction and oversight, especially of parts of the negotiation beyond the FTA.

Whichever option is chosen – though I tend to favour Option 2 – a key decision will be how involved the prime minister is going to be: will he be involved on a daily basis or delegate the running of the negotiations to a senior minister. Further, there needs to be a revamped decision-making structure sitting on top of it, where the same group of ministers take decisions on trade with the EU and with the rest of the world in concert, as the choices on one will directly impact the other.

Given how far along the UK is in determining its approach on policy and process (or not as the case may be), as well as the short timeframe, a key challenge will be the need to negotiate and implement the agreement at the same time. This means that both government and business – as well as other external parties – will have to make their preparations without knowing the shape of the future relationship. They will likely prepare for the worst. This in turn could reduce the value of the final deal.

The government should consider moving to a phased implementation approach – allowing different agreements to be put into place at different times and allowing more time for implementation where needed. This would surely be less politically contentious than simply seeking more time to negotiate, which is not in itself guaranteed to deliver a better outcome given both sides' red lines.

One option under consideration is likely to be to strike an initial agreement in 2020, and then seek to build on this over time to create a more ambitious and comprehensive relationship. But this has an important drawback. Businesses are likely only to make one major change to their operating models and supply chains. This will be based on the initial agreement. Even if the future relationship is improved over time, it is unlikely to be significantly utilised by businesses as they will have already adjusted to the new status quo. The value of the future relationship with the EU for business is the extent it manages to limit change, rather than what it can add after the change has been made.

Finally, there will be some difficult decisions facing the government next year that could yet derail the negotiations, despite its large majority.

Most crucial will likely be whether the probable narrow and shallow future relationship, once it is agreed, delivers sufficient benefits to the UK given the concessions that may well be required to secure it. This will also be a consideration for Brussels – overreach with its initial ask and the choice becomes less palatable for the UK.

No one can be sure now which way that choice will go. But its mere existence, and the complicated politics it involves, means the risk of the UK leaving the EU at the end of the transition period without an agreement is still very real – and too little recognised.

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## Lessons from phase one of the negotiations

As we think about the next phase of negotiations over the UK's withdrawal from the EU, it is useful to start with a review of the first phase. I don't believe anyone – in London or Brussels – thinks the negotiations to date have gone perfectly, but I will focus on the lessons for the UK side.

### Lesson 1: have a clear view on the structure of the negotiations

One of the biggest mis-steps in the first phase came early on, with the acceptance of the EU's approach of sequencing the negotiations and delaying any substantive negotiation on the future relationship until the second phase. Furthermore, seeking to find a practical and legally viable solution to the unique circumstances surrounding the border between Northern Ireland and the Republic of Ireland in the first phase also put a huge amount of political pressure on that phase of the negotiations.

These were political choices by the EU, not legal ones. Article 50 does not prescribe any particular approach to negotiations over the two-year period it allows for. The EU set up the sequencing approach with a view to generating points of leverage – for example, its approach to 'sufficient progress' in December 2017 – and with a view to securing some of its key aims in the negotiations, notably on the financial settlement and citizens' rights.

While it may not have been possible to avoid the EU's sequencing once it had internally agreed on it, the real error was that the UK never properly considered what approach and structure would suit its own goals best, or put forward an alternative.<sup>1</sup> Looking to the next phase, the UK must avoid doing this again.

The current government has some clear goals, not least to reach agreement on the FTA in short order. It must carefully consider how the negotiations are structured. For example, questions must be resolved quickly on what is negotiated when, which aspects are run in parallel negotiations, how often the teams will meet, and what will be needed to support the negotiating team. These may sound like mundane procedural issues, but they will have a real impact on the progress of negotiations and considerations of when trade-offs need to be made. The first phase reinforced the mantra, 'control the process, control the outcome'.

### Lesson 2: get on the front foot

For much of the first phase the UK was on the back foot. This has been a result of several related failures – principally the delays in taking key decisions, and a lack of political agreement and clarity on the desired outcome. The EU was continuously first to set out its policy positions, particularly in legal text. This meant that the default in the negotiations was to use EU legal text as a base for discussions; this clearly favoured the EU side.

But more importantly, a lot of time and effort had to be expended in trying to dig the EU out of positions it had settled into. The prime example is the original Northern Ireland-specific backstop, which May's government spent the best part of nine months

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trying to shift the EU away from. The failure of the UK to swiftly follow up the December 2017 Joint Report with its own legal text setting out its interpretation of the report contributed to this problem.<sup>2</sup>

Similarly, the delay and lack of clarity regarding what type of future relationship the UK wanted to see ended up allowing the EU to dictate the narrative. I believe this served to limit the ambition somewhat. Therefore, in the next phase it is imperative that the UK gets on the front foot by setting out its positions early on, ideally with legal text where possible. This also means taking key policy decisions in advance of the negotiations starting in earnest and having a clear strategy (including decisions on trade-offs) ahead of time.

This latter point is important. During the first phase the UK was too often 'salami sliced' towards an EU position – at any given stage it might have seemed an obvious compromise to make but at the end the outcome turned out to be some way from where it had been originally envisaged at the outset.

A clarity of purpose, strategy and desired outcome can help to avoid this problem.

### **Lesson 3: have a better communications operation and a clear public narrative**

During the first phase of negotiations, particularly under the previous government, the public narrative was often an afterthought to negotiations. Those in control of determining the communications strategy were often kept at arm's length from the detailed negotiations. This lack of integration made it hard to make public arguments for UK areas of concern.

Conversely, the EU did a good job of briefing and communicating its key issues to the press, or tactically leaking parts of the negotiations, to suit its own ends. The result was that the UK often struggled to win the public debate regarding its negotiating position, while the EU could use the public narrative to help exert pressure on the UK.

This did change somewhat towards the end of the first phase, with the UK setting out its stall on the need for a democratic consent mechanism as part of the Northern Ireland Protocol. By taking the lead on this issue and generating support for it in the public debate, the UK was able to negotiate from a stronger position.

### **Lesson 4: bring the UK Parliament, external stakeholders and the public on side**

There was a clear failure to secure support in Parliament and with the wider stakeholders for the government's position ahead of time in the first phase. This made it harder to pass the deal when the time came. Given any deal in the next phase will also need to be approved by Parliament in some form – even if just through the standard ratification procedure for international treaties – it is important that there is a more structured process through which to engage with Parliament and stakeholders.

The current draft of the Withdrawal Agreement Bill (WAB) provides for a role for Parliament to some extent through the requirement to get a mandate approved by the House of Commons. (Of course, with a larger majority, this may be less relevant.)

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Though the government should be cautious about side-lining Parliament for short-term benefit, as any future relationship needs to be durable and stable for the long term – the government must look to the next few decades, not just the next five years.

Engagement with stakeholders will be particularly important in the next phase given the multitude of policy decisions that need to be taken and which will have an important impact on the UK economy. Given the UK has not conducted such a trade negotiation in recent history, it does not have an established system for this throughout such a negotiation – which will include initial policy decisions through to trade-offs made in the negotiations. Establishing a framework for ensuring sufficient transparency in the next phase of negotiations will be key, and must be done quickly.

### **Lesson 5: make better use of diplomatic channels**

The UK diplomatic service is often revered around the world – and rightly so – but the UK government failed to make proper use of it during the first phase of the negotiations. This is not a criticism of the diplomatic service or any one part of government, but simply an observation that there has been a lack of communication and integration over the past three years.

This led to a failure to properly distribute messages and arguments via the UK's diplomatic network and, while information was collected, it was not properly utilised in a clear and strategic manner. There are a couple of examples where EU member states proved far more successful at doing this. The first is the Irish government, which ran a concerted diplomatic campaign to explain its position on the backstop. Not only did this involve regular engagement with other EU member states but extended to bringing representatives from other states, the media, expert groups and other stakeholders to the border to explain their viewpoints. The second is Spain, which in the run-up to the original European Council guidelines in March 2017 mounted a concerted diplomatic effort to add a reference to Gibraltar to the guidelines.

### **The EU also made mistakes over the past three years**

I also believe there were several decisions made on the side of the EU that served to make the negotiations more acrimonious and testing than they needed to be. The rush to publish the legal text of the Northern Ireland-specific backstop in February 2018 is a prime example, though as noted above this was a failure on both sides in different ways. Similarly, the EU's refusal to make amendments to the Northern Ireland Protocol, particularly on democratic consent, for the May government but agreeing to it in October this year – for a government desiring a more distant relationship – has contributed to a harder break between the UK and the EU.

But it is not for me to analyse the EU's failings in detail. I hope there will be some similar introspection on the EU's side ahead of the next phase, though I fear the prevailing view is that it acted the only way it could and therefore all the decisions which were taken were the correct ones.

There certainly remains a risk that, if there is complacency on both sides, the lessons from the first phase are not properly learnt and are therefore repeated going forward.

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## Policy development ahead of phase two

Ahead of the beginning of the next phase, there are countless policy decisions that must be taken. While the political declaration (PD) provides a framework for the future relationship, we should not forget that it remains a very high-level document and can be seen to produce a wide range of outcomes.

Similarly, while we now know that the government will be seeking an FTA with the EU, that, too, can mean a huge number of things.

### **The UK government must decide, soon, how ambitious it will be on areas like services**

The government still needs to make several decisions about how ambitious it wants the future relationship to be in key areas. These will have a significant impact on the scale and scope of the negotiations, not to mention the likely time they will take to complete.

The first big question is on the UK's approach to services. Given the UK is no longer seeking frictionless trade in goods, there is a question as to whether it should seek a more ambitious deal on services – not least as the UK request on services was previously made less ambitious to prioritise goods trade.

But bigger demands for services would push the FTA into territory rarely, if ever, covered by FTAs (whether negotiated by the EU or others), likely making for a lengthy negotiation. This also points to the eventual FTA taking the form of a 'mixed agreement' (more on this later).

As it stands, the PD text implies a very limited relationship on trade in services, based largely around existing EU equivalence regimes. But even here there are questions. For example, is the UK prepared to accept the modest market access offered for financial services through the existing equivalence route if the price is continued alignment with EU rules – in practice – in the necessary areas? This is just one example of a hugely important sector to the UK economy where there is a clear need for a collective political decision on the direction which the UK wants to go in the future relationship.

More broadly, the initial assumption seems to be that, with a large majority, the government will no longer be reliant on support from harder-line backbenchers and so can move to a 'softer' Brexit position. However, when you consider the choices involved in this, it looks unlikely. The Conservative Party has been clear on its desire to leave the single market and customs union for some time; the election will be seen as a validation of this approach and a mandate to deliver it.

If that is ruled out, the next 'soft' Brexit approach would be to pursue some form of alignment with the EU similar to the 'Chequers' proposals put forward by Theresa May. But this has long been opposed by the current prime minister, as well as by many in his party, both on substantive and negotiability grounds.

It seems unlikely the government will want to commit to long-term dynamic alignment with the EU in any areas – especially those that would be needed here, such as on the

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entire suite of goods or services regulation and on level-playing-field provisions like state aid and environment regulation. As such, the framework in which these decisions will be taken will likely still be that of a more standard FTA, rather than the softer approach some might hope for.

### **The UK may need to take key decisions without all the necessary information**

There are also some areas where the government will need to take quick decisions on which it lacks data and information. A good example of this is rules of origin (RoOs), often one of the trickiest and most controversial parts of a trade negotiation. RoOs determine whether goods can utilise preferential tariff rates by setting the necessary threshold for them to classify as 'locally produced content'.

Data on where value is added along an international supply chain and the true levels of 'local content', is not particularly detailed or well understood. This is particularly true for the complex manufacturing supply chains that cross between the UK and the EU (often multiple times) and have developed without the need for any RoO requirements or documentation.

This is not just a problem within government – some businesses will struggle (at least initially) to determine exactly where all the inputs into their supply chains are produced. Without a clear picture of what content is produced locally and elsewhere in each sector, it will be difficult for the UK's negotiators to know exactly what to seek from negotiations, which in turn could limit the utility of the deal to key sectors.<sup>3</sup>

If the UK wants to avoid negotiating in this uncertainty, it may need to delay detailed talks on RoOs until it has built up a clearer picture.

## **The UK should use draft legal texts to get on the front foot**

These key policy decisions and the associated policy development need to be taken quickly with the aim of informing the UK's opening positions and allowing the UK to get on the front foot in the negotiations. Ideally, the UK should draft up legal text on key policy areas with an aim of tabling it early in the negotiations, to avoid some of the mistakes of the first phase.

Here it is worth noting that the UK is not starting from scratch; there has been much work done over the past three years. In particular, DExEU has at previous points worked up draft versions of an FTA between the UK and the EU, based largely on existing precedents.<sup>4</sup> Most of the work was done for the May government, but the detailed options remain the same.

While this may not be in full legal text, there is a significant body of policy work in hand and this should be utilised to avoid duplication and speed up the process. There has also been much detailed policy work done in departments that have a significant stake in the future relationship, in particular the Department for Business, Energy and Industrial Strategy (BEIS) and the Department for Environment, Food and Rural Affairs (Defra).

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\* This has previously been confirmed by former Brexit secretary David Davis on the floor of the House of Commons.

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However, much of this work has been done without any clear central political guidance. It has also been done without reference to the work other departments are doing.\* A lot of work was also done in building the July 2018 'Chequers' white paper on the future relationship with the EU – but it is not clear how much of this can be utilised now.

The government can still use and re-purpose large amounts of the work done across Whitehall, but there will need to be a centralised process to bring this all together. The government must rationalise the information and use it to inform decisions around key policies for the next phase and the trade-offs between departments.

### **The UK needs a detailed negotiating strategy – setting out trade-offs, concessions and possible fall-backs**

Beyond just taking the policy decisions, working up the detail of each policy and drafting legal text, a proper negotiating strategy should be set out. The government needs to consider its opening pitch, the various trade-offs that could be made and the fall-back positions to be pursued if required. This may take longer to develop at the outset and require complex and contentious political discussions in Cabinet – it inevitably means agreeing where some sectors (and so departments) could lose out. But it will enable swifter decision making down the line, allowing for the negotiations to move faster, and will ensure that the UK government has a clear and consistent end point in mind.

### **The UK should not see this as simply a trade negotiation – it requires decisions on a much wider set of issues**

Of course, this issue stretches far beyond just the FTA. There are many subjects that are not traditionally part of an FTA that need to be negotiated in the next phase, in particular: internal and external security co-operation; data protection and sharing; aviation; energy; science and innovation; and mobility. Of these, there are a few decisions of particular importance.

First, as mentioned above, the level of policy ambition. A key example is on aviation. There is a long history of negotiating on aviation (air transport agreements) both in the EU and globally. If the UK simply wanted to secure an agreement to allow flights from the UK to the EU and vice versa, including a stop-off in more than one EU state, the agreement would likely be relatively simple and quick to negotiate. However, if the UK sought to allow UK airlines to operate flights from one EU country to another, without any stop-off in the UK, it will become a far more complex negotiation.

There will also be difficult, and related, questions over the UK's future involvement (or not) in the European Aviation Safety Authority (EASA) and the regulation and oversight of the UK's aviation industry. Part of the logic behind the Chequers approach of a 'common rule book' – that is, alignment with EU rules in certain areas – was to secure unprecedented participation in agencies such as EASA.

Without that, there will need to be a tricky negotiation about the relationship with such agencies, though the default is a minimal one. The same applies to the choice to rule out a role for the European Court of Justice (ECJ).<sup>5</sup>

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\* For more on this see Institute for Government, [Negotiating Brexit: Preparing for the UK's future relationship with the EU](#)

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## The UK's level of ambition will have implications for the length of ratification

The UK and EU will need to decide whether areas beyond basic trade, like aviation, will be included in the FTA. This raises the question of whether the UK should seek a 'mixed agreement' or one that relies solely on the 'exclusive competence' of the EU.

The latter would allow for a quicker ratification – with approval only being needed from the EU Council and European Parliament – and could also be provisionally applied as soon as the Council and Parliament give their approval. However, any agreement that strayed into mixed competence, i.e. involving both EU and member state competences, would need to be ratified by all EU member states in accordance with their own constitutional requirements. This may require approval from a number of regional Parliaments and so has implications for the length of the ratification process.

For this reason, it is hard to see how a mixed agreement could be in force by the end of 2020. It is possible that the parts of the agreement that fall under 'exclusive competence' could be provisionally applied, but this still leaves a question as to what happens to those sectors or issues not covered by this provisional application: would they default to World Trade Organization (WTO) rules in the interim, for example?

There are of course potentially creative solutions to this problem, but these would require willingness on both sides – from the UK in seeking to essentially continue the transition period for certain sectors, and from the EU in coming up with a novel legal approach that allows for this differentiated model. It is not clear that either of those conditions will be fulfilled, let alone both.

It is also worth considering that, given the importance and potential controversial nature of any future relationship between the UK and the EU, member states may seek to impose the process for a mixed agreement onto the relationship regardless of its depth and scope. In such a scenario, provisional application could be useful, allowing the FTA to be applied in practice while the ratification process for a mixed agreement is completed (even though all aspects of the FTA may fall under exclusive competence of the EU).

It is not always clear where the line between exclusive competence and a mixed agreement is drawn. It has evolved over time, not least due to ECJ rulings.<sup>6</sup> The key issues that are likely to push the agreement into mixed territory include:

- mobility (beyond so-called 'Mode IV', including mutual recognition of professional qualifications)
- intellectual property
- energy
- institutional process and administrative provisions (note for example the previous disputes around investor–state dispute resolution mechanisms)
- non-direct investment

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- road haulage
  - civil judicial co-operation.

### **The UK and EU could decide to split up the agreement to help minimise lengthy ratification procedures**

The UK and EU will need to agree – quickly – on the exact structure of the agreements they want to reach. While this may again sound like a mundane technical point, it has a fundamental impact on the strategy going into the next phase – as well as on ratification – and therefore the timeline by which these agreements can be reached and put into place. The EU has begun deliberately splitting negotiations into different agreements based on areas that are exclusive EU competence and those parts of the deal where the competence is shared between the EU and member states.<sup>7</sup> This was the approach taken to agreements with Japan and Singapore, but it is not yet clear if it will take a similar approach with the UK.

There are various options for the UK. The most expansive would be to try to combine most, or even all, of the agreements into a single Association Agreement. This approach is mentioned in the PD and has long been advocated by the European Parliament.<sup>8</sup> However, lumping it all into a single agreement may make for a more complex negotiation.

Running a series of smaller negotiations in parallel for a series of separate agreements could prove more efficient, although this would require a significant amount of negotiating capacity on both sides. It would also require a highly effective oversight structure to keep control of the different negotiations, and to take the right decisions at the right time, given the various moving parts.

These separate agreements would still need to be a single package and have some overarching governance framework to make clear the UK is not seeking to copy the Swiss structure – a patchwork of separate agreements – which the EU has made clear it does not want to see replicated.

### **The UK must decide whether it wants to negotiate a single agreement or a range of smaller ones**

If the EU is able to provisionally apply part of the agreement – or agreements – subject to ratification, there is not much to choose between a comprehensive approach and a more disaggregated approach, from a ratification perspective. The choice becomes one of strategy and speed of negotiation. Is it more advantageous for the UK to seek to keep all issues linked in a single package or attempt to disaggregate them? There are pros and cons for each.

The key advantage for the UK from keeping all issues linked under a single agreement is that it allows for leverage to be utilised across the board (though this is as true for the EU as it will be for the UK). An Association Agreement would also present a familiar and recognisable form to the EU, which could help speed up the process of both negotiation and ratification.

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The key downside of seeking a single overarching agreement is that it may well play into the EU's hands in terms of its demands for ambitious commitments on areas like state aid and workers' rights (the so-called 'level playing field'). The EU could say these are required due to the wider ambition of the single agreement, rather than the specific market access provided for by the FTA. The UK has consistently been clear that the level playing field requirements should only be proportionate to the level of market access.

As for negotiating on a series of agreements, the key advantage here would be that it may help prevent linkages between the various sectors. The deal struck for each agreement could be judged on the merit of that agreement alone, not the wider negotiation (though there is no guarantee this would be the reality). A further advantage is that this approach would allow for all stages – negotiation, ratification and implementation – to move at different speeds for different agreements, staggering a complicated process out into more manageable tasks.

This, though, also highlights the key downside for working with numerous agreements at once – which is that it may lead to a more complex process overall.

#### **Box 1: How to approach Northern Ireland in phase two**

This is an important question, and one on which the UK and EU may have very different views. From an EU perspective, issues around NI are largely settled: the two sides have negotiated a permanent relationship that applies to Northern Ireland (NI) regardless of the future relationship between the UK and EU in the NI Protocol. There are plenty of details to be thrashed out and the complexity of this should not be underestimated, but that is a matter for the Joint Committee rather than the future relationship negotiations – the process itself will be far from straightforward and will be contentious.

Of course, there are aspects of the future relationship that will need to be considered for the practical application of the NI Protocol (such as the level of tariffs) but they are different negotiations. That said, it is very possible the EU will seek to link progress on the NI Protocol to progress in the wider future relationship negotiations. This is exactly the sort of linkage and leverage points it sought to create in the first phase of talks.

Meanwhile, the UK government has sent mixed signals on this point. When originally presenting the updated NI Protocol to Parliament, it was suggested that it could still be replaced by the future relationship. It is, in theory, possible to replace the NI Protocol with a subsequent agreement in the future (see Article 13(8) of the NI Protocol) though this would require the agreement of both sides, with the EU looking unlikely to be forthcoming for any approach which doesn't achieve exactly the same aims as the NI Protocol.

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Therefore, seeking to include NI in the future relationship negotiations would likely lead to the negotiations running into the same difficult territory as the first phase did, with few obvious alternative outcomes given that this is well-trodden ground.

However, this doesn't necessarily mean that the UK should accept that the two issues are entirely separate. In fact, as noted above, the EU is unlikely to do so itself.

Therefore, the UK must think carefully about how the progress in each negotiation could interact with the other. It should make clear at the outset that implementing the NI Protocol by the end of 2020 is a shared endeavour. It is clearly the responsibility of both sides to find a mechanism which can realistically and practically be implemented on the ground with as little disruption as possible – particularly given the significant opposition to the NI Protocol in the unionist community. This should lead to the consideration of, for example, supplementing the current text with a veterinary agreement to reduce checks on agrifood products between GB and NI.\*

### **The UK cannot decide on policy decisions without considering delivery**

Finally, in all areas, the UK's policy decisions should be informed by the delivery planning the government has undertaken. These were kept entirely separate in the first phase – one obvious example being the hugely complex agreement over the Northern Ireland Protocol and extremely tight delivery timetable. This is not sustainable for the second phase.

Clarity on the strategy and the desired (or acceptable) end point in each policy area should help focus the government on what it will ultimately need to deliver. In areas like trade in goods, where businesses and government will need to adapt existing systems and processes, this will be crucial. Given the tight timetable for both negotiation and implementation, the latter cannot be left until after the former has been completed; both must seek to run concurrently as much as possible.

## **Structures for the second phase**

As well as developing policy, the government needs to urgently put in place the structures capable of negotiating and delivering these agreement(s). As it stands, Whitehall is not set up to run such a wide-ranging and complex negotiation, nor implement the outcome. There will need to be changes to the 'machinery of government', early in the new Parliament.

The UK needs a coherent structure in Whitehall to cover all the key strands of the agreement, and a mirroring function to engage with the EU on negotiating legal text.

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\* Under the current NI Protocol the default is 100% documentary checks on any agrifood products moving from GB to NI and up to 50% physical checks. Given the level of trade in this area and the complexity of that trade – supermarkets regularly move lorry-loads of varied foodstuffs from GB to NI – such checks will be complicated and costly for business. Even a veterinary agreement similar to that between New Zealand and the EU, which does not require alignment of regulations, would see checks reduced to about 10% documentary checks and 1% physical checks.

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Departments have, in the absence of a clear central direction, been staffing themselves to negotiate a deal in a variety of ways, but the efficiency of these will depend on the structure the government finally chooses.

That decision must also recognise that the UK will have an entirely separate structure for negotiating FTAs with the rest of the world, so thought should be given as to how best to integrate the two. There is a strong case to rationalise and integrate many of these structures, to avoid duplication and maximise some of the limited resources at play (particularly in terms of policy and legal expertise).

Sitting on top of these structures, there needs to be a much more effective decision making and governance framework than currently exists. This will help co-ordinate the many facets of the process, and should consult with external stakeholders and Parliament to ensure the process is as streamlined as possible. There are several options for what this might look like.

### **What are the options for structuring Whitehall for the next phase?**

#### ***DExEU should be wound down***

The first question when looking ahead to phase two is what to do with DExEU. Since its inception, the department has suffered from a poorly defined role. Often there has been duplication of the work done in DExEU, either in the Cabinet Office or in other departments.<sup>9</sup> There is of course a pool of policy expertise, in terms of both delivery and negotiations, in DExEU, and this will still be of use – indeed, some of this has already begun to move into the Cabinet Office.

From a political perspective, there also needs to be political oversight from a secretary of state given the significant amount of work left to do as the UK leaves the EU.

However, the biggest problem facing the department has been the fact that other departments have proved themselves unwilling to be given directions by another line department – such direction typically coming from No.10 or the Cabinet Office.

Fundamentally, DExEU has struggled with some of these inherent flaws since it was created (as a temporary addition to Whitehall) in 2016, and, on balance, it would be better to wind the department down.

#### ***The government must decide which department will run the next phase of talks***

This leaves three broad options for the structure for the next phase, all of which would need to incorporate the expertise and personnel that DExEU has built up:

- 1. A narrow central unit:** this would see a small core team led by a chief negotiator, probably reporting directly to the prime minister, which could be based in No.10 or the Cabinet Office. This central unit would seek to co-ordinate policy and delivery of the next phase of negotiations across Whitehall and act as the secretariat to the decision making functions. However, most of the policy expertise would remain in departments – where most of the policy development, and implementation, would happen.

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This central unit would form the core of the negotiating team, but the necessary expertise would need to be brought in from various departments depending on the issues at hand. Fundamentally, this structure would require a strong centre, where No.10 is able to exert control and dictate policy without a huge amount of human resources investment – in other words, it would likely fit best with a prime minister with a strong majority and a strong personal position.

- 2. A broad central unit:** this would look similar to Option 1 but with a much larger team. It would bring in much greater policy and implementation expertise, and would be able to match departments' expertise on these fronts. While departments would still do a lot of the work on delivering on the ground, this larger central team would do more of the negotiation, could have greater control and give more direction given its size and expertise. This would result in a central unit similar to the one that existed before the referendum (the European and Global Issues Secretariat), and could report directly to the prime minister or to a senior Cabinet minister in the Cabinet Office (more on this below). It would need to include all the lead negotiators for each section and chapter of the future agreement, and could also be expanded to handle non-EU trade negotiations as well if desired (making it more akin to the office of the US Trade Representative).

One concern with departments having a greater role, as in Option 1, would be that there is potentially a tension between orders given from the centre and those from the relevant secretary of state. While this should be dealt with through an effective decision-making structure, having a larger central unit would help bolster control and the centre and counter this problem as well.

- 3. A revamped Department for International Trade (DIT):** a final option would see DIT absorbing the remnants of DExEU to create a single organisation capable of handling all trade negotiations. However, given the future relationship will cover more than just trade issues, and some of the expertise on those issues will remain in other departments, there will still need to be some form of co-ordinating function to bring this all together somewhere in government. While the new DIT could try to perform this itself, it risks facing the same problem DExEU had – that is, it could struggle to adequately command other departments' activities.

In my view, Option 2 would be the best way to provide the government with the necessary central control, direction and strategy it needs to conduct phase two with confidence, though all options can be made to work.

### ***The government must also decide who will formally lead the negotiations***

A key question in deciding which approach is taken will be who leads the negotiations, where they are based, and to whom they report. What must be avoided is the dual reporting lines seen at the outset of DExEU that saw a permanent secretary/'sherpa' reporting directly to the prime minister despite technically working for a secretary of state. This is particularly problematic when a lead negotiator and a senior Cabinet

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minister are both seen to be leading the negotiations and both reporting directly (and separately) to the prime minister.

The defining choice here will be how involved the prime minister wants to be in the next phase on a day-to-day basis. The first phase was predominantly led by the prime minister; in the next phase, he may wish to focus on other matters. However, if he wishes to continue to lead the negotiations, it would make sense to have a lead negotiator housed within the Cabinet Office reporting directly to him. It would also make sense to have an official at the level of a permanent secretary working in parallel with the lead negotiator to oversee the management of Cabinet Office official working on Brexit, and particularly delivery. This would suggest either Option 1 or 2 above.

Under such an approach, there would still need to be a ministerial team in the Cabinet Office dedicated to handling the parliamentary demands related to Brexit, but they could be more junior.

If the prime minister wishes to delegate more of these negotiations, he will need a senior Cabinet minister leading on the negotiations. They would lead a wider ministerial team and be opposite number to Michel Barnier – the EU’s chief negotiator. In this scenario, it would be best to have the lead technical negotiator reporting to this minister rather than the prime minister directly, to avoid dual reporting lines.

Finally, there is a choice as to whether this Cabinet minister, if based in the Cabinet Office, also fulfils the chancellor of the Duchy of Lancaster role. It will likely be necessary to have two Cabinet ministers in the Cabinet Office in this scenario, but the exact split and seniority of each is more of a political choice. One would have to focus on Brexit while the other handled the traditional domestic issues out of the Cabinet Office. Such a scenario would suggest Option 2 above.

***The UK needs a structure that supports political decision making and drives co-ordination across government***

Whichever approach is taken, it is likely that a three-tiered structure will be created:

- 1. A clear structure for political decision making and oversight:** this should provide central guidance combining negotiations and delivery. It does not have to be limited to a single grouping and could make use of some of the more effective fora used up to now, such as the Inter-Ministerial Group, but should avoid the split previously seen where different committees with different members address related issues. Ideally, the same group of ministers would take the key decisions regarding the negotiations with the EU as well as those with other countries around the world. The decisions taken on one will have a clear impact on the other.
- 2. A centralised negotiating and delivery department/unit:** likely to be in the Cabinet Office (or DIT as above), leading and co-ordinating policy and delivery planning across Whitehall. This would involve combining all existing policy and secretariat structures on Brexit into one place so that there is a single ‘controlling mind’, with clear reporting lines.

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- 3. On-the-ground delivery led by relevant departments:** taking the lead from the centralised structures and passing issues back up the chain where relevant. The actual technical implementation of high-priority plans would be probably overseen by the Cabinet Office.

Setting up these structures will take some time, though machinery of government changes have been done quickly in the past (see the aftermath of the referendum).

## Timeline for the next phase of negotiations

Even if the government moves swiftly to try and manage the challenges set out above, the big question remains whether this can be done by the end of 2020. I believe it is possible to agree a deal in the time available, but it is likely to be relatively shallow and narrow, with anything substantive on services or internal security requiring more time. The rushed timeline will also have big implications for operational readiness; both business and government are likely to put more effort into preparing for no deal if the outcomes of the negotiations are uncertain for so much of next year.

### Step 1: Mandates

#### ***The EU's negotiating mandate may not be agreed until March***

There will be a need for the EU and potentially the UK to secure a mandate for the negotiations. On the EU side, this will be decided by the European Council based on a recommendation from the European Commission, and will set out the guidelines and the framework for the next phase of negotiations with the UK. This, far more than the political declaration, will determine the potential outline of how the deal could look and what the constraints the EU side is putting in place are.

The European Council conclusions from 13 December 2019 set out that it expects the Commission to submit a draft mandate for the next phase of negotiations immediately after the UK leaves the EU at the end of January 2020 (suggesting work on the mandate is already well advanced). This will then be signed off by the General Affairs Council. However, the European Council may also wish to issue a similar set of guidelines for the negotiations as it did in the first phase. At this stage, the March European Council (26 and 27 March 2020) looks to be the obvious moment for all of this to be brought together.

#### ***The UK will probably need its mandate agreed by Parliament***

On the UK side, the current draft of the WAB sets out that a minister of the Crown may not engage in negotiations with the EU on the future relationship until "a statement on objectives for the future relationship with the EU has been approved by the House of Commons on a motion". This means, under current plans, the UK government would need to set out a clear statement for objectives for the next phase to Parliament, and allow time for that to be debated and discussed, and then approved in a Commons vote. It is not yet clear whether the government will continue with the same approach following the election.

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Indeed, given the majority for the Conservative Party, it could decide to do away with these parliamentary hurdles altogether. Even if they are kept, passing the motion will likely prove easy and, as such, the level of detail required and the time spent may well become an afterthought and less of a constraint than it originally seemed.

Finally, it is worth noting that, during this period, both sides could – and should – engage in scoping discussions regarding the structure of the negotiations and agreements to ensure the negotiations can hit the ground running when they begin properly. Indeed, these negotiations could begin before the UK formally leaves the EU as provided for in the PD.

## **Step 2: Negotiations**

### ***It is possible to negotiate an FTA by December 2020 – but time will constrain the breadth and depth of the agreement***

Once both sides have their mandates in place, and ideally once the UK has taken the proper policy decisions and put in place the necessary structures, the two sides can begin negotiating in earnest. Given Step 1, this looks unlikely to begin before the end of March 2020, leaving only nine months for the negotiations and remaining steps.

This should be possible – though with some important caveats. Focusing first on the FTA, it could be possible to get a relatively narrow and shallow agreement, that is not 'mixed', in place in the time available, using existing precedents.

Such an FTA would cover a few basic things:

- zero tariffs on goods
- zero quotas or quantitative restrictions on trade in goods
- standard rules of origin (RoOs), most likely based on the existing Pan Euro Med Cumulation framework and allowing for bilateral cumulation between the UK and EU
- basic Mode IV provisions to allow the movement of people to provide services via streamlined visa processes
- direct investment
- some basic reduction in technical barriers to trade using existing precedents in the EU's Mutual Recognition Agreements and Veterinary Agreements (relating to sanitary and phytosanitary requirements)\*
- 'level playing field' provisions (competition and state aid though environment and climate change could fall into shared competence)

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\* Ideally this would include some mutual recognition of conformity assessments or at least recognise the ability of UK authorities to undertake EU conformity assessments. However, this could quickly become too tricky to negotiate as it easily strays into territory around the alignment of rules and how the UK's regulation will develop overtime, something which the government has so far suggested is off-limits and shows no sign of changing. In terms of precedents, Canada has a Mutual Recognition Agreement with the EU covering products including electrical equipment, machinery and construction products and the EU–Japan agreement allows for mutual recognition in the automotive sector.

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- an overarching enforcement framework similar to that in the Withdrawal Agreement (i.e. based around an arbitration panel)
  - an agreement on fisheries (though this may be a separate agreement).

This would be in line with the existing FTAs the EU has negotiated and would not push any boundaries into new areas. Of course, as far as EU FTAs with other third countries go, this agreement would probably be seen as comprehensive – it is how the EU–Canada Comprehensive Economic and Trade Agreement (CETA) is described, for example. But relative to EU membership, and even relative to some other negotiating approaches that have been considered – such as ‘Chequers’ – it will be noticeably narrower and shallower, and is unlikely to be particularly novel.

***A basic FTA is unlikely to agree anything substantial on areas like data and services***

Alongside such an FTA it might also be feasible to secure a few other basic agreements. The FTA would be unlikely to include anything substantive on services. This is partly due to the fact it is largely a shared competence but also due to the fact that there are few, if any, precedents for including market access for services in existing EU FTAs – indeed, there are few FTAs anywhere in the world that cover services in a deep and

comprehensive way. As such, services access would likely rely on the existing EU equivalence regimes rather than any specific bilateral deal between the two sides.

The story is similar on data. There would not be sufficient time to do anything novel here but there would likely be scope to reach a standard data adequacy agreement provided the UK continued to align and enforce rules similar to the EU’s General Data Protection Regulation (GDPR). There might also be scope to get a standard Air Services Agreement in place, covering up to the ‘fifth freedom’ of the air. Some agreements for UK participation in certain EU programmes as part of the next Multiannual Financial Framework (MFF) could also be agreed during the course of 2020, indeed they would need to come into place when the new MFF begins. These would probably not need specific member state approval, beyond their approval for the MFF.

In some cases, these could take the form of interim agreements, or the UK could seek to build on them over time (more on this below).

***There will be some areas where it may not be possible to reach a deal in the time available – like internal security***

However, there would also be a number of other areas (beyond professional services) which it would not be possible to include in the FTA either due to the unprecedented and complex nature of the negotiation (meaning time is too short) or due to the fact it would make the agreement a ‘mixed agreement’ one. Other examples include: energy; digital; audio-visual/broadcasting; mutual recognition of professional qualifications; nuclear; and road haulage. It may be possible to achieve some basic agreements in some of these areas in short order (such as on road haulage) but their scope might be limited.

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The focus should not just be on the FTA. While this covers part of the UK's future relationship with the EU, it does not cover the whole (and possibly not even the majority of it depending on the scope). Beyond the areas mentioned above, the key one is security. This is often split into internal and external security. Given the largely intergovernmental nature of external security co-operation, it is feasible that some agreements (possibly via memorandums of understanding) could be in place by the end of 2020.

However, internal security will likely prove much more complicated. It is again an area of mixed competence, meaning ratification will take much longer. But there are also limited precedents for third-country participation in the types of tools and programmes which the UK is likely to want access to. Furthermore, the UK's existing 'red lines' on alignment of rules and, more importantly, ending the oversight of the ECJ in the UK are likely to constrain the level of co-operation in this area somewhat.

This is not a judgement on whether those red lines are correct or not, but simply to highlight that more time alone would not ensure an agreement is reached. Therefore, it is likely that issues beyond a narrow and shallow FTA will be more challenging to have in place by the end of 2020.

This therefore suggests that there may need to be differentiated timelines for different issues, and possibly a return to a 'phased implementation' considered early on in this process.\*

***The tight timelines mean the risk of no deal in December 2020 is higher than many think***

The short timeline will also have an impact on negotiation strategy and the trade-offs that need to be made. The EU is likely to make ambitious requests on several areas, in particular: the level playing field, fisheries and geographic indicators.

In a longer negotiation, the UK might seek to resist these asks and negotiate the EU down from its opening position. However, in this negotiation there will be a trade-off between concluding an agreement swiftly and the time spent seeking to move the EU off its key opening asks. At some point, the UK government will need to decide whether it wants to conclude an agreement by the end of 2020 or seek to continue negotiating beyond that with the aim of securing improved terms. The price of securing a swift deal could become acquiescence to the EU on certain areas.

There is also a linked but larger question that the UK will face at some point next year. This is whether such a price – acceding to EU requests on the level playing field, fisheries and geographic indicators – is worth paying for what will ultimately be a relatively narrow and shallow FTA: will the economic benefits outweigh any potential political costs (and possibly economic costs) of accepting EU positions? It is impossible to know at this stage which way this calculation will go. While the large majority secured in the general election helps take some of the pressure off this decision, it does not remove it entirely.

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\* As was originally set out in the UK government's 2017 white paper.

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The simple presence of this likely trade-off and decision points means that the chance of the UK leaving the transition period without an agreement in place – i.e. a no-deal Brexit – is higher than some believe. It is also an important consideration for the EU side. If the EU sets its asks on the level playing field, fisheries and geographic indicators too high, the risk of no deal rises significantly. The opening position will need to be carefully calibrated.

### **Step 3: Ratification**

#### ***The speed, and ease, of ratification will depend on the structure of the agreement***

If a way through is found in the negotiations, the next step will be to ratify the agreement(s) that have been reached. The exact process will depend on the nature of the agreement. As noted above, the expectation at this stage should be that the UK is aiming for an agreement that largely falls under the EU's exclusive competence, allowing for a relatively quick ratification, on the EU side at least. The EU Council and European Parliament could even ratify the agreement in a few weeks, as we saw in the first phase.

However, the ratification process on the EU side also includes legal scrubbing and translation of the legal text into all EU languages. These processes can take some time and the EU side will likely want to leave a month or two at least to make sure these are done properly.

On the UK side, as we have seen in the past few months, processes in Parliament allow for a flexible approach to approving a deal with the EU. Given the majority the UK government now has, ratification in the Commons should prove less troublesome than in the 2017–19 session, and will be able to be done in whatever timeline is needed ahead of the end of 2020.

But the UK is likely to need some primary legislation to implement the deal, which – as also seen in phase one – could prove contentious.

### **Step 4: Implementation**

#### ***Business may be forced again to prepare for no deal, as the details of any agreement will come late in the day***

The final step will be to implement the agreement on the ground. Again, the aim seems to be to have the agreement in operation from the day the UK exits the transition period at the end of 2020. As such, businesses on both sides will face the tricky task of preparing to implement an agreement before it has been properly negotiated.

The lead-in times for business to prepare for the change in terms of trade vary from sector to sector but it is worth remembering that, when originally agreed, the aim was to have a transition period of at least 21 months to allow for negotiation and implementation. Furthermore, the original approach envisaged a lot of the detail being nailed down in the PD, which clearly did not prove to be the case.

Businesses in both the UK and the EU will therefore face a difficult choice. Either they wait until the key points of the deal become clearer before making changes to their business (and in some cases hope that the transition period may be extended), or they

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push ahead and make any changes based on a worst-case outcome. At this stage, the latter approach looks to be more likely, particularly for large businesses. There are two reasons for this.

The first is that it is in keeping with the approach many adopted during the first phase of negotiations when it came to planning for no deal. This is particularly true for sectors such as financial services, which are largely prepared for no deal and will likely continue to ensure the relevant plans are in place and in some cases may begin activating those plans (indeed some already have).

***A 'shallow' FTA means the preparations for deal and no deal may be similar – for both government and business***

The second reason is that many of the changes are likely to be necessary whether an agreement is struck or not, given the likely outline of a deal as set out above. For example, manufacturing firms can be almost certain they will have to deal with new administrative requirements relating to customs checks and controls and rules of origin. As such they will likely start adjusting their supply chains based on these new administration requirements.

If the deal allows for zero tariffs on UK–EU trade, then it will prove beneficial to them on the margin, but their preparations will still have proved necessary as the checks and controls will still apply. The result therefore will potentially be to reduce the value of any eventual deal, given that many businesses will have already put in place the arrangements for a worst-case approach. These preparations for no deal are more likely in the next phase when there is no longer a prospect of revoking Article 50 and remaining in the EU – though, of course, this is better than the alternative outcome of businesses not being prepared for exit at all.

What is true for business is also true for government. The government will face the same trade-off and will need to decide early on whether it is putting in place all the necessary infrastructure and preparations regardless of the outcome it is seeking in each area of the negotiations. In some areas, the level of confidence in securing a certain outcome could allow for the preparations to be targeted at a negotiated outcome rather than the default outcome without an agreement.

Attempts to run a dual-track preparation – preparing for deal and no deal – would prove as challenging as it did in the first phase. It would mean both businesses and government would have to split resources and duplicate work.

***An extended transition period might not make much difference for negotiations, but could for implementation – if it is agreed early***

There will be a push from many quarters to extend the transition period. The key consideration here will be what the UK gains from having more time. This question applies to both Step 2 (negotiations) and Steps 3 and 4 (ratification and implementation) – indeed, it may well apply differently. Seeking more time for the negotiations is not guaranteed to deliver a better outcome. While in theory this could avoid strategic

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choices over whether to accept certain EU requests to get a deal over the line, in practice this might always end up being the price of achieving an agreement, whatever the time allowed.

But, given the red lines of both sides, there are no guarantees more time would lead to a much deeper and broader FTA (though it would, as explained above, provide for more time to negotiate the multitude of issues outside the FTA itself).

Another consideration is the political angle: given the position of Johnson's government so far, requesting more time for the negotiations could prove contentious.

However, seeking more time to ratify and implement an agreement that is already reached may be less contentious. It would also likely have a material impact on businesses and their preparations, but only if this were determined up front. Any extension at the last minute is unlikely to make a huge difference in terms of implementation, given both business and government will have already had to make a choice on overall approach early on in the next phase.

#### **Box 2: Is July a hard deadline for extending the transition period?**

Article 132 of the Withdrawal Agreement sets out that the UK will have to decide by 1 July 2020 whether it wishes to seek an extension to the transition period of up to one or two years. Given the negotiations are unlikely to have started in earnest until the end of March 2020, this leaves at most three months before the decision has to be taken, at least in theory. In practice, the reality may be quite different. If the UK sought an extension to the transition period later in 2020, it is hard to imagine the EU refusing – not least because its approach is likely to be once again focused on avoiding a 'blame game'.

The main obstacle would be needing to agree any UK financial contributions during an extended transition period. However, if there was willing and desire on both sides, this could likely be a relatively quick negotiation, especially given the existing framework in the Withdrawal Agreement. Similarly, while the legal text of the Withdrawal Agreement sets a hard deadline of 1 July 2020, if the EU and UK wish to find a way to extend the transition period after this date (and EU member states agree) it is likely a legal workaround could be found.

In the end, this is an international agreement in force between both sides. As such, if both sides wanted to amend it, it would surely be possible.

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### ***Could the UK look to build on the future relationship over time?***

One approach that could be adopted if the UK were to pursue a narrow and shallow FTA initially is to build on it over time. There is nothing to stop the UK seeking an ongoing negotiation to improve the terms of the initial FTA.

Indeed, it could seek to include a review clause in the FTA that looks to further liberalise the terms of trade between the UK and the EU in the future. There are already examples of such review clauses in EU trade agreements with Mexico (in relation to the investment provisions) and Canada (in several areas including sanitary and phytosanitary measures and the movement of people to provide services). However, such clauses are traditionally little more than commitments to consider future discussions, rather than legally binding commitments to negotiate, let alone to agree to, anything.

As such, while the UK may want to expand on the agreement in the future, the first hurdle will be the requirement of a willing and engaged EU.

### ***If the UK tries to build on the agreement in the long term, it could have little benefit to business***

However, there is a bigger challenge to such an approach, which significantly limits its practical value. This relates to the approach of businesses to the implementation of any agreement. As set out above, businesses are likely to be required to prepare for more or less a scenario where the UK leaves without any agreement.

Even if they are able to prepare for the narrow and shallow initial agreement, they are very unlikely to make continuous changes to their business lines as the relationship evolves over the coming years.

Most businesses will seek to make a 'single step' to their new operating procedures. They will hold off doing so for as long as possible. But once the changes are made – be they to the nature of their supply chains or to the location of their personnel – they are unlikely to be undone by a marginal improvement in the future relationship. This is because the cost of making a second significant overhaul of their business operations is likely to outweigh any benefit to be gained from a slightly improved level of market access or a slight reduction in the level of trade frictions between the UK and EU.

Therefore, the future improvements in the future relationship are unlikely to generate much benefit for businesses because they are unlikely to be utilised. The value of the future relationship for business is the extent to which it limits the changes they need to make to operations, not the value it may add over time after those changes are made.\*

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\* There are a few approaches which maintain something close to the status quo, financial services equivalence and data adequacy being the best examples – though equivalence in financial services is partial as it only applies to certain regulation. Nevertheless, achieving these as a starting point and then looking to build on them over time is a viable option, though it would require something close to continued alignment with the relevant EU rules while the next steps were considered.

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## Conclusion

There is much work to be done to get the UK ready for the next phase of negotiations. The new government has a big task on its hands, and it must move quickly. One of the first steps will be making sure it learns from its experiences of the last phase. A big part of this will be taking clear policy decisions early on, defining a strategy and carrying this into public legal text.

But process matters almost as much as policy in these talks. The UK needs to have a clear idea about how it wants the negotiations to run, and get Whitehall ready to deliver its plan. This probably means some big changes in a short space of time. Even if the UK does everything in its power, there are still no guarantees a deal *can* be done, particularly by the end of 2020. Getting a deal over the line in this timeframe will involve some tough choices from both the UK and EU early on in this process.

The decisions the two sides take in the coming months could well determine the state of the relationship between the UK and the EU for many years to come.

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