

# The Brexit transition extension 2.0

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*Credit: Olivier HOSLET / POOL / AFP*

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# Executive summary

The deadline for securing an extension to the ongoing Brexit transition is nearing fast. If the UK government refuses to request an extension now, what are the options to secure more time after the end of June deadline under the Withdrawal Agreement has elapsed? Looking at the different scenarios, which all involve huge uncertainties, this paper argues that the most legally sound option appears to be the conclusion of a mixed treaty; yet, this route is uncertain and contains significant political risks.

While there is an urgent need for extending the Brexit transition period, the UK government is adamantly refusing to either ask for or accept an extension. It is highly unlikely that the government will change its mind before 1 July, the deadline stipulated by the Withdrawal Agreement to agree an extension of up to one or two years.

However, the question of how to secure more time might resurface later this year. At the moment, Boris Johnson believes the immense time pressure to agree on a deal by the end of the year will concentrate minds and result in last-minute concessions from the EU. Once he realises that the EU is not willing to compromise the integrity of the Single Market to grant him the deal he wants, the question about how to secure more time might be back on the agenda.

While concluding a mixed agreement is legally speaking the soundest option, a lot of obstacles remain. It involves a lengthy ratification process and the likely return of vested interests and political disagreements that might rise to the surface within the UK and the EU. Overall, it is highly uncertain whether a late extension request can still be accommodated. By letting the deadline under the Withdrawal Agreement pass, the UK government increases the chances for a no deal outcome.

## Introduction

In the current Brexit debate, much focus is on the impact of the COVID-19 crisis on the negotiations on the future relationship and the urgent need to extend the transition period. Once again, the clock is ticking: under the Withdrawal Agreement, an extension must be agreed before 1 July 2020. If the British government decides to let the deadline pass without such a request, as it is adamantly indicating, the likelihood of no (trade) deal being concluded increases yet again.

There is, of course, a chance that Boris Johnson will change his mind later this year and request more time at the very last minute. However, this form of brinkmanship might well backfire, and the British government should be aware of the various legal and political pitfalls of opting for a late extension request.

## 1. The case for an extension in light of COVID-19

The timetable to negotiate the new EU-UK relationship was already tight before the COVID-19 outbreak struck Europe. With the ongoing battle to save lives and livelihoods demanding full political attention, there is an overwhelming case to allow for more time.

### **A LACK OF BANDWIDTH TO FOCUS ON BREXIT**

Despite not formally suspending the negotiations, the fallout of the COVID-19 pandemic has caused the talks to fall behind schedule. The first negotiation round in March was the only face-to-face meeting between the two delegations. When the full extent of the health crisis became apparent, talks were temporarily disrupted until the two sides finally decided to continue the negotiations virtually.

In the meantime, the two chief negotiators, Michel Barnier and David Frost, had to self-isolate after showing COVID-19 symptoms. The British prime minister was temporarily taken into intensive care. Some UK civil servants working on the negotiations were redeployed to work on the government's response to the pandemic. The capacities of both sides have been put under severe strain.

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**Virtual meetings cannot replace the personal rapport and multiple exchanges needed to make these kinds of detailed and sensitive negotiations work.**

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In any case, virtual meetings cannot replace the personal rapport and multiple exchanges needed to make these kinds of detailed and sensitive negotiations work. While it might be possible to continue talks on a technical level, it is much more difficult to recreate the elements of the political give-and-take that are needed to broker a final deal. In addition, COVID-19 is taking all political bandwidth away from Brexit, severely limiting the room of manoeuvre to reach political compromises, not only between the negotiating partners but also within the EU27 and UK.

## **NO TIME TO PREPARE**

With so many lives and livelihoods at risk, both sides are unable to pay sufficient attention to Brexit. This is true of politicians and governments, as well as institutions, businesses and citizens. The latter two are especially unable to react and adapt to the immediate COVID-19 crisis and simultaneously prepare for the looming changes that will result from Brexit at the end of the year – new migration rules, border controls and further disruptions to supply chains.

## **A DOUBLE WHAMMY FOR THE ECONOMY**

In addition to the lack of political bandwidth, there is an overwhelming economic rationale for allowing for more time. The economic shock caused by COVID-19 will affect global growth, unemployment rates and living standards dramatically. The International Monetary Fund (IMF) has predicted a crisis on a greater scale than the global financial crisis of 2008-09.<sup>1</sup> With a view to the UK, the Bank of England foresees a crisis that will push the British economy into its worst recession in three centuries.<sup>2</sup> Adding the economic shock of Brexit to that equation – no matter its eventual scale – seems reckless and unnecessary.<sup>3</sup> To make matters worse, the economic shocks caused by COVID-19 and Brexit might be mutually reinforcing, as businesses could decide not to restart their activities in the UK due to the prevailing uncertainty about market access to the EU.

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**Extending the transition is not about stopping Brexit, but about preventing even larger damage for both the British and European economies.**

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Unlike with previous extension requests, Brexit has already happened. The UK is no longer a member of the EU. Extending the transition is not about stopping Brexit, but about preventing even larger damage for both the British and European economies. In addition to losing access to the Single Market and Customs Union at the end of the year, the UK will also be excluded from EU programmes (e.g. on research cooperation), creating further uncertainty. An extension would create stability for all.

## **JOHNSON'S BRINKMANSHIP: DEAL OR NO DEAL?**

The UK government has repeatedly said that it will neither ask for an extension nor accept a request from the EU. While there is an increasing number of voices in the UK making a case for an extension – including ex-senior civil servants, opposition politicians and the devolved administrations –, the government's strategy seems to be to dismiss these warnings as stalling tactics from Remainers and Remain-leaning organisations. Unlike his predecessor, Boris Johnson has a huge government majority and has shown little desire to accommodate opposing opinions, even from within his own party.

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**There is no reason to believe the EU will fold at the last minute.**

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Besides, the British government seems to approach the negotiations based on the assumption that deadlines concentrate minds, and therefore an extension would remove the incentive to come to an agreement. This is a form of brinkmanship that, if correct, makes agreeing to an extension now politically nonsensical.

However, the EU has shown repeatedly that its highest priority lies in protecting the integrity of the Single Market. There is no reason to believe the EU will fold at the last minute. Although the EU does wish to conclude a deal, it will not do so at any price.

Furthermore, the UK government claims that the legislative and economic flexibility which Britain will gain by leaving the EU will be crucial to manage the ongoing economic crisis successfully. It is unclear which areas of the British crisis response would be constrained by an extended transition period, especially considering that the EU has temporarily eased its state aid rules in light of the crisis. On the contrary, having unfettered access to the European Single Market and being able to tap into joint procurement and research efforts (even if reluctantly) will benefit the UK's response to the crisis.

In any case, the benefits and deals that the UK expects to materialise from Brexit – a new migration system, a global Britain that trades with the entire world and especially the US – will either be on hold or might be called into question due to the long-term impact of COVID-19. Negotiations with the US might have started, but it is unlikely that a deal will be concluded any time soon, with governments and administrations focused on the immediate economic fallout.<sup>4</sup> With regard to migration, the crisis raises important questions about key workers, the post-Brexit labour supply and the kind of migration needed for a functioning society.

The COVID-19 crisis will have a long-term impact on our economies, and an extended transition period is needed

to avoid a further hit at the height of an unprecedented economic crisis.

## 2. The predicament: Why the UK might temporarily or permanently block an extension under the Withdrawal Agreement

Taking into account British domestic politics, it is far from certain that the British side will change its mind within the next few weeks. But time is of the essence. Under the terms of the Withdrawal Agreement, an extension must be agreed before 1 July 2020.<sup>5</sup>

Article 132(1) of the Withdrawal Agreement provides for the possibility of an extension of the transition period:

“Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years.”<sup>6</sup>

The wording “up to 1 or 2 years” suggests that an extension can be for either one or two years, but nothing in between.<sup>7</sup> Proposals of a “month-by-month” extension, which have been floated by the British press,<sup>8</sup> are therefore legally unfeasible as there can only be “a single decision” to extend (i.e. only one extension).

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### The UK has tied its own hands and is currently unable to agree to an extension without having to amend domestic legislation.

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It follows that the transition period can only be extended once, and either until 31 December 2021 or until 31 December 2022. Several short extensions would also be politically undesirable. An extension of less than a year defies the purpose; that is, among other things, to create legal and planning certainty for businesses and citizens. Besides, a shorter extension – especially if it is decided on a monthly basis – would complicate determining the UK’s financial obligations.

The Joint Committee must make the decision to extend. Set up by the Withdrawal Agreement, it consists of EU and UK representatives and decides by mutual consent.<sup>9</sup> Both the EU and UK must, therefore, agree to an extension decision under Article 132.

However, extending under Article 132(1) faces four practical and legal problems, likely making a search for

alternative avenues to extend the transition period or preserve its effects necessary.

First, the UK has tied its own hands and is currently unable to agree to an extension without having to amend domestic legislation. Section 33 of the European Union (Withdrawal Agreement) Act 2020 – the legislation ratifying and implementing the Withdrawal Agreement – expressly prohibits a UK minister from “agree[ing] in the Joint Committee to an extension of the implementation period.”<sup>10</sup> Should a minister ignore this prohibition, the UK government is likely to face judicial review proceedings, which it would most probably lose. Hence for the UK to lawfully agree to an extension of the transition period as provided for by Article 132 (1), the UK would need to amend the European Union (Withdrawal Agreement) Act 2020. This is currently an unlikely prospect.

Second, and closely related to the first problem, is the unrealistically early deadline for agreeing on an extension. Experience with the three extensions of the negotiating period under Article 50 TEU suggests that extension decisions tend to be taken at the last minute,<sup>11</sup> when the political pressure is at its peak. This is particularly so when the process of granting an extension will have to face a parliamentary – and thus very public – process. It is unlikely that this will be the case before 1 July 2020, with the end of the transition period a seemingly comfortable six months away.

Third, even if an extension were agreed, there is a chance that the transition period would only be extended by a year. And as long as no sufficient progress has been made in the negotiation, both parties would find themselves in a similar predicament one or two years later. Given that Article 132 of the Withdrawal Agreement only allows for a one-off extension, it would be impossible to extend the transition period further.

Fourth, the extension deadline concurs with the set date for agreeing on fisheries. This might make it politically more difficult to agree on an extension if no tangible progress regarding this politically sensitive area has been made by then. In addition, the high-level conference to take stock of the negotiations is scheduled for June – just before the deadline to extend transition. If at this point the EU is under the impression that the UK is not engaging with key issues seriously, or no progress has been made regarding the implementation of the legally binding Withdrawal

Agreement, some member states might want to impose further conditions before agreeing to an extension. In

which case, coming to an agreement would become even more difficult.

### 3. What to do if the extension request comes too late?

There are three basic options which might allow for an extension of the transition or the extension of the effects of transition if the route envisaged by Article 132 of the Withdrawal Agreement is no longer open:

1. Extend the transition phase under the legal authority of the exit process (i.e. Article 50 TEU).
2. Extend the transition phase with a new mixed treaty.
3. Extend the transition phase partially, with a bridging period incorporated in the future relationship agreement.

Under all these scenarios, a late request for extension will pose considerable legal and political challenges. Legally, it raises the question about the appropriate legal basis in the EU Treaties once the time limit set in Article 132 has elapsed.

Under international law, treaties are generally open to amendments provided that the parties agree.<sup>12</sup> Unless the treaty itself provides for a specific procedure, a treaty amendment is effected by concluding another treaty. The EU is constrained by the principle of conferred powers, which means that it can only conclude treaties if member states have given it the competence to do so. The EU must, therefore, possess the requisite competence that covers the amendment in substantive terms if it is to amend the Withdrawal Agreement.

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In most cases of historic treaty amendments – typically by way of a protocol to the original treaty<sup>13</sup> – this requirement did not pose a problem. After all, the Union had the competence to conclude the original treaty, say on trade in goods. Amendments usually concern the same subject matter so that the same external competence can be used.

#### 3.1 OPTION 1: AN EXTENSION BASED ON ARTICLE 50 TEU?

The Withdrawal Agreement was concluded on the basis of Article 50 TEU. One can doubt, however, whether the article can also be used as the legal basis for amending it, due to the wording of Article 50(2):

“A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.”<sup>14</sup>

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**Can Article 50 only be used until either the entry into force of the Withdrawal Agreement or the withdrawing member state’s exit without an agreement by lapse of time?**

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The question is whether this means that Article 50 is no longer available as a legal basis once the UK is no longer a formal member state. In other words, can Article 50 only be used until either the entry into force of the Withdrawal Agreement or the withdrawing member state’s exit without an agreement by lapse of time?

One can think of arguments in favour of a broad understanding of Article 50: the provision’s overall purpose is to facilitate an orderly withdrawal from the European Union. While it acknowledges the possibility of a disorderly exit without an agreement, the preference for an orderly withdrawal is clear from the wording of Article 50 (3) (‘failing that’) and its drafting history.<sup>15</sup> The question is whether this overall purpose can be read as the competence which amends the Withdrawal Agreement after its entry into force.

A counterargument would be that although Article 50 itself shows that an orderly withdrawal is desirable, the member states were not willing to give the EU the competence to deal with all the consequences of withdrawal comprehensively. It is clear from Article 50

that the EU's standard – and limited – competences must be used in two scenarios. First, if a member state leaves without an agreement by lapse of time, any mitigation measures agreed between the former member state and the EU cannot be based on Article 50. Secondly, Article 50 TEU is clear that the future relationship agreement cannot be based on it.

As such, based on a strict reading, Article 50 would not cover an amendment to the Withdrawal Agreement. In the absence of authority from the European Court of Justice (ECJ), going down that route would, therefore, be risky. After all, the EU's conclusion (or amendment) of an international agreement on the wrong legal basis could lead to its invalidation by the ECJ. The risk of a judicial review questioning the validity of the amendment would be high. It could be questioned as part of any legal dispute concerning the transition period, referred to the ECJ via the preliminary reference procedure.

The alternative to basing an amendment on Article 50 would be to look for alternative legal bases in the Treaties. During the transition period, EU law continues to apply to and in the UK. While there are exceptions (i.e. the representation of the UK and its citizens), the UK is treated almost like a member state. The Withdrawal Agreement governs, therefore, the entirety of substantive EU law. This includes politically sensitive areas of cooperation, such as the Common Foreign and Security Policy.<sup>16</sup>

In EU treaty practice, treaties envisaging political cooperation – such as most association agreements<sup>17</sup> – are concluded as mixed agreements. This practice exists despite the fact that the ECJ's case law suggests that Article 217 TFEU, the legal basis for association agreements, “must necessarily empower the [Union] to guarantee commitments towards non-member countries in all the fields covered by the Treaty.”<sup>18</sup>

That said, the Brexit transition period goes a lot further than any association agreement in terms of cooperation. Moreover, it is doubtful that Article 217 TFEU could itself be used as a competence base for an extension of the transition period, given the temporary character of any such extension. Associations are intended to be durable, whereas the transition period is meant to expire. Taken together, this strongly suggests that, if it is not based on Article 50 TEU, an amendment to the Withdrawal Agreement must be concluded as a mixed agreement.

### 3.2 OPTION 2: AN EXTENSION WITH A NEW MIXED TREATY

Concluding as a mixed agreement would make the ratification of any such agreement complex for the EU. Not only would there be a process under EU law – a unanimous decision in the Council plus the agreement of the European Parliament<sup>19</sup> – but also under the laws of each EU member state. Furthermore, the latter may entail a requirement for not only national parliamentary approval but also regional.

On the UK side, there would be no special requirements for the ratification of such an amendment.<sup>20</sup> The prohibition on extending the transition period resulting from the EU (Withdrawal Agreement) Act 2020 would continue in principle. Whether the prohibition would ‘bite’ would depend on whether the extension decision would still be left to the Joint Committee, in which case it would; or whether the extension decision would be made by way of the amendment itself, in which case it would not.

There would also be no need to amend the EU (Withdrawal Agreement) Act 2020 by way of the usual parliamentary process. While the Act defines the end of the implementation period (i.e. ‘IP completion day’) as 31 December 2020 at 11.00 PM,<sup>21</sup> this date can be changed by regulations – a Minister of the Crown, i.e. the government can effect this change without going through the process of amending the Act. However, this change can be annulled by the resolution of either of the Houses of Parliament.<sup>22</sup> This means that if either the House of Commons or House of Lords voted for a motion of annulment, the implementing legislation would not change and EU law could not take the effects intended by the amended Withdrawal Agreement.

Extending with a mixed treaty would imply the same procedural requirements as extending under Article 132 of the Withdrawal Agreement: the length of the extension and the UK's financial contribution would need to be negotiated first. In addition, it may well be the case that political expectations come into play, with member states imposing further conditions (e.g. progress on the fisheries issue, which is supposed to be agreed upon by 1 July 2020 and which the EU would like to settle on early). Regarding the UK's rights and obligations, the same terms and conditions as during the current transition phase would apply; the UK would remain a member of the Single Market and Customs Union, but not carry any voting rights.

### 3.3 OPTION 3: A BRIDGING PERIOD AS PART OF A FUTURE RELATIONSHIP AGREEMENT

The alternative to an amendment to the Withdrawal Agreement would be to include provisions in a basic future relationship agreement. This would result in the extension of certain aspects of the EU *acquis* for a limited period. Agreeing on a partial extension thus presupposes the conclusion of some sort of basic trade deal before the end of the year.

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## Why might this be needed?

Without an extension of the transition period, negotiators will in all likelihood not have the time to negotiate all aspects of the future relationship agreement. At best, they will achieve an elementary agreement on governance and a basic free trade agreement (FTA) which mainly covers goods. Important areas of economic cooperation (e.g. trade in financial services, aviation, access to the Digital Single Market), as well as security cooperation (i.e. in the fields of criminal law and procedure), will either be omitted completely or only dealt with in a most basic fashion. Add to that the fact that citizens, market operators and the parties to the agreement may simply not be ready to implement the agreement from day one, it may become necessary to continue the status quo – either completely or partially – for longer.

Come the end of the transition period, this would lead to a drastic deterioration in cooperation, even if both parties wish for a closer relationship.

The parties may thus want to agree on an implementation phase<sup>23</sup> in which parts of the EU *acquis* continue to apply to and in the UK. The term ‘implementation period’ is, of course, already in use by the UK to refer to the transition period. For this reason, an implementation phase would need to be christened something different, for instance ‘bridging phase’.

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## How could this work?

Again, a mixed agreement may be necessary, though this would depend upon the extent to which the *acquis* would be rolled over. If the political elements of EU cooperation were to be preserved, there would be a need for a mixed agreement for the following reasons:

Firstly, the practice of the EU is to conclude association agreements as mixed agreements, as they tend to feature a political dialogue, which member states claim falls within their purview.

Secondly, if the effects of the transition period were to be extended (partly) beyond the transition and into the future relationship, this would most probably only last temporarily. For example, this could be achieved by including a sunset clause (e.g. the continuation of the European Arrest Warrant ending after five years) in the agreement.

However, this raises the question of whether Article 217 TFEU could serve as a legal base for such a temporary

arrangement. After all, an association agreement has the purpose of fostering close ties between the EU and its partners; and *not* of incrementally loosening such ties. While Article 217 TFEU could be replaced by another legal base in the case of EU criminal law (e.g. implied powers under Article 82(1)(d) TFEU),<sup>24</sup> an extension in areas like migration or indeed foreign and security policy might not be possible without concluding a mixed agreement.

Furthermore, any such solution would require careful drafting. For instance, the extension of the European Arrest Warrant would require the extension of the principle of mutual trust beyond the transition phase and into the future relationship. However, mutual trust is generally reserved for relations between EU member states. Its application during the transition phase is possible because the UK accepted the entire EU *acquis* during that time, particularly the principle of sincere cooperation and the continued application of the Charter of Fundamental Rights.

Hence a partial continuation of the *acquis* would require the UK to commit to abiding by the foundations of the EU legal order. Moreover, some areas of EU law are difficult to divide up. For instance, it would be difficult to have a limited FTA in goods in place and enforced by 1 January 2021, but to continue the freedom to provide services or the free movement of capital beyond that date.

## Why might this lead to problems?

The conclusion of a partial extension would challenge the EU’s red line of no cherry-picking and might even lead to challenges about its compatibility with the World Trade Organization’s (WTO) most-favoured-nation (MFN) principle. If granted a special status, the UK could enjoy access to the Single Market that is not available to the other most favoured nations with which the EU trades.

However, a partial extension that only applies to, for example, trade in services is likely to be permitted under the slightly different MFN provisions in the WTO’s General Agreement on Trade in Services (GATS). The partial extension would need to encompass all trade in services; it would be impossible to grant preferential access for selected services, an approach which might be favoured by the UK.

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Furthermore, a partial extension presupposes that the EU and UK conclude some sort of basic trade deal before the end of the year and agree on most of the fundamentals: the level playing field provisions, overarching governance structure and the implementation of the Withdrawal agreement, especially the Protocol on Ireland and Northern Ireland and the provisions on citizens' rights. The Joint Committee that oversees the implementation of the Withdrawal Agreement has so far only met once. The timely implementation of the Irish protocol as soon as a basic trade deal takes effect, to ensure a functioning customs border, remains a Herculean task.

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The EU would also insist on a governance framework to manage the temporary arrangement and resolve any disputes. Wherever the EU *acquis* continues to apply, the UK would have to accept the continued jurisdiction of the ECJ and therefore cross one of its red lines.

Since the start of the negotiations, the EU's preference for one deal with an overarching governance structure has conflicted with the UK's inclination for separate agreements covering different sectors. This struggle might resurface later this year when the UK realises that at the very least, a partial extension is needed. Instead of extending parts of the EU *acquis* beyond the transition period, the UK might seek unilateral measures and selected 'mini deals' in areas that are of mutual interest.

This form of 'managed no deal' would certainly not be acceptable for the EU, however. The complex Swiss arrangement is a warning shot to the EU not to offer numerous bilateral deals to the UK. It is also unclear

how temporary such an agreement would be and if it would, therefore, create the legal certainty urgently needed by businesses.

Despite the temporary character of the 'bridging period', the EU and UK would need to agree on a basic deal before the end of the year that includes permanent solutions to these fundamental questions. This would pose an immense challenge. The first negotiation rounds have so far revealed seemingly unbridgeable divisions on the nature of the agreement, the level playing field, fisheries, and judicial and police matters. Another challenge would be to calculate the UK's financial contribution resulting from a partial extension. It is far from certain that the EU and UK would be able to find common ground on these questions in the little time that is left. Both parties will be caught in a vicious circle, unable to settle the key issues of the future partnership in the remaining time.

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### **A partial extension might be an easier sell in the UK than a wholesale one.**

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Meanwhile, a partial extension to allow for more time would presuppose a basic agreement on these very same issues. Thus, a partial extension of the transition period would meet similar legal and political hurdles to those of the amendment solution. The key difference might be, however, that politically, a partial extension might be an easier sell in the UK than a wholesale one.

Nevertheless, easy to sell to the public does not imply easy to negotiate. Agreeing on a bridging period would involve detailed negotiations and political trade-offs. In the worst-case scenario, the result might be more complex than a wholesale transition, economically inferior to an encompassing deal, and politically just as sensitive due to the fundamental differences on sovereignty, level playing field and governance.

## **4. How to prepare for these scenarios?**

### **4.1 OPTION 1: ASK THE ECJ TO CLARIFY THE REACH OF ARTICLE 50 TEU**

The main legal difficulty in extending the transition period after 30 June 2020 stems from existing legal uncertainty over the scope of Article 50 TEU. Even if the UK fails to request an extension in time, the process for extending the transition period would be a lot less onerous if Article 50 can serve as a legal basis for amending the Withdrawal Agreement, instead of having to conclude and ratify a mixed agreement. Under

Article 50, the EU alone could agree to an amendment by way of a qualified majority of the Council and approval of the European Parliament.

The only way to achieve clarity over whether Article 50 can be used for this purpose would be to request an Opinion from the ECJ under Article 218(11) TFEU:

"A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement

envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”<sup>25</sup>

This procedure is particularly suited for verifying the EU’s competence to conclude an agreement before ratification, to ensure that the Union does not commit to something internationally without being able to comply under EU law.

In terms of subject matter, the Court only has jurisdiction to decide on the compatibility of “agreements envisaged” with the Treaties; it cannot answer hypothetical questions. However, in this regard, the hurdles are not too high to overcome. The Court has accepted questions in the past concerning agreements whose negotiations had not even started yet as long as it knows the purpose of the envisaged agreement.<sup>26</sup> In other words, the Court needs sufficient information on the actual content of the agreement.<sup>27</sup>

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Arguably, this condition would be fulfilled in this case. The content of an extension of the transition period is known and laid out in detail in Articles 126 to 132 of the Withdrawal Agreement. The key question is whether the continued claim by the UK government that it would never seek an extension would be enough to render the question of competence hypothetical.

However, this line of argument would ignore the real need for clarity. If the question of having to extend the transition period beyond the procedure envisaged by the Withdrawal Agreement arises, the EU must be able to obtain confirmation about the legal basis on which this can be done.

The timeframe for the delivery of an opinion by the ECJ varies considerably. The shortest period between an opinion request and its delivery was circa six weeks,<sup>28</sup> but it often takes around two years. The Court is known to decide quickly, however, when time is of the essence. For instance, the case of *Wightman* – a preliminary reference concerning the revocability of the Article 50 notice – was delivered within two months.<sup>29</sup>

## **4.2 OPTION 2: TAKE STEPS TO ENSURE THE SWIFT RATIFICATION OF A MIXED AGREEMENT**

If a request for an opinion is not made, or if the ECJ decides that the legal base of Article 50 is not applicable,

the European Commission should try to ensure that the drafting and ratification of a mixed agreement to amend the Withdrawal Agreement are done swiftly. Certain steps can already be taken in advance: first, the relevant clause could be drafted. Second, the Council could give the Commission a negotiating mandate to agree on such an amendment. Third, the Council, European Parliament and member states could provide necessary input regarding the acceptable length of the transition period, for example. Fourth, the member states could try to prepare the ground for swift ratification internally and explore any potential difficulties within their respective legal and political orders.

To avoid last-minute delays, like in the case of the EU’s FTA with Canada, possible disagreements should be identified as early as possible. Potential points of contention that could delay the ratification process are the length and conditions of the extension. Regarding the former, it can be expected that the UK will ask for the shortest extension possible and maximum flexibility. The EU should insist on extending it for at least one year. Anything shorter would not be sensible, especially since a second or third wave of the COVID-19 pandemic is possible.

The EU could also set out the method by which the UK contribution would be calculated now to create transparency and clarity, including any implications for the UK’s participation in EU programmes.

The EU must consider how it can take a unified approach on these issues, potentially without the usual all-night summit and having to coordinate via videoconferences. Without the personal touch of a summit nor the private conversations and side meetings between heads of government, it will become much more difficult to control potential sources of conflict and achieve a political compromise.<sup>30</sup> This leads to the question of how politics will evolve and how the EU27 and UK might change their approaches over the next few months.

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**Without the personal touch of a summit nor the private conversations and side meetings between heads of government, it will become much more difficult to control potential sources of conflict and achieve a political compromise.**

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## 5. How might politics shift later this year?

When the pandemic struck Europe, EU member states at first struggled to work collectively on coping with the immediate economic fallout. And there are more medium- and long-term challenges which will require the EU's full attention still to come. A timely request under Article 132 of the Withdrawal Agreement would, therefore, constitute the legally watertight and politically least controversial way of guaranteeing a smooth extension. Most Europeans have already accepted the need for more time – not only to negotiate a future deal but also to implement the Northern Ireland Protocol – and would accommodate a request if it is made before 1 July.

Nevertheless, the sooner the UK requests an extension, the better: the process of agreeing to an extension request under Article 132 does require some time. The Joint Committee can only formally adopt the decision to extend the transition period after the terms and conditions, including the UK's financial contribution, have been decided. While the EU and UK will require time for their internal discussions, the UK will additionally have to repeal its domestic ban before being able to agree to an extension. The 1 July deadline also coincides with the target date to conclude and ratify a new fisheries agreement. Given the political sensitivities on both sides, this will only add fuel to the fire.

### 5.1 HOW POLITICS COULD SHIFT IN THE EU

Any request that comes after the 1 July deadline will be legally tricky and politically controversial. Some EU countries are hit especially hard by the COVID-19 health and economic crisis. The EU27 will have to step up solidarity and collaboration in the coming months.

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**The EU would be well advised to take a unified position in the face of any late requests.**

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A first test will be the negotiation of the still pending Multiannual Financial Framework (MFF). Finding an agreement on the next EU budget was extremely difficult even before the crisis hit. Now, as a result of the crisis, heavily affected countries like Italy and Spain might be unable to make their expected contribution.<sup>31</sup> Agreeing to a budget under the new circumstances will be even more complicated. With intra-EU solidarity being tested like this, will they be willing to agree to the 'special treatment' of the UK once the extension deadline has expired?

The three previous extensions of the negotiating period under Article 50 TEU suggest that not all member

states are willing to grant further concessions to the British government. Patience is running thin. The EU would, however, be well advised to take a unified position in the face of any late requests and take the steps outlined above to prepare for such a scenario. An orderly transition into the new relationship and a close partnership on friendly terms is in the EU's long-term political and economic interests.

Nevertheless, a late request from the UK might trigger individual vested interests to rise to the surface and override this long-term thinking. Unlike the negotiations on the UK's withdrawal, the negotiations on the future relationship include highly politicised topics like fisheries and trade. Depending on political dynamics, western, coastal EU countries might demand more on fisheries; or countries impaired by the economic downturn might seek a higher financial contribution from the UK. Either way, these political dynamics will make it more difficult to agree on the terms and conditions of a last-minute extension. This cocktail of vested interests and a ticking clock will only increase the likelihood of an accidental no deal.

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**Unlike the negotiations on the UK's withdrawal, the negotiations on the future relationship include highly politicised topics like fisheries and trade.**

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### 5.2 HOW POLITICS COULD SHIFT IN THE UK

However, even if the EU is willing to accommodate a late request, it remains to be seen if the UK will ask for it. The EU has been clear that the request must come from the UK. For now, it seems unlikely that the UK government will ask for an extension before the end of June. It is uncertain if there will be a change of heart later this year.

There are strong reasons to think that despite the COVID-19 outbreak, Johnson will run down the clock and count on last-minute concessions from the EU to get a deal and, if unsuccessful, risk 'no deal by default':

- ▶ The UK government has repeatedly emphasised that prolonging the transition contradicts the point of Brexit (e.g. the UK gaining legal and political autonomy). Avid Brexiteers regard the current terms of the transition period as unfavourable to the UK and will not ask to prolong that state.<sup>32</sup>
- ▶ The government is willingly taking into account that Brexit implies economic costs and disruptions. Some

Brexiters even believe that the disruption caused by the COVID-19 outbreak will drown out the Brexit fallout.

- ▶ Johnson seems to think that the EU is weak and divided in the face of the COVID-19 crisis. According to this belief, the looming deadline will concentrate minds and force a divided EU to make concessions at the end of the year.
- ▶ It is unlikely that domestic pressures will force Johnson's hand. Since winning a large majority in December 2019, he has faced little opposition. Meanwhile, the other parties seem unwilling or unable to forge effective alliances against him in the Brexit debate.

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### **Brexiters fear any extension could be a ploy to trap them in an endless rule-taking relationship with the EU.**

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Johnson's assumptions, however, fail to take into account that the EU's highest priority is the integrity of the Single Market, and the European project as a whole. Therefore, the EU will not agree to a deal at any cost.

So what happens if Johnson realises he cannot get his desired Canada-style free trade deal from the EU? With economic pressure rising, it is conceivable that the UK government will deem it necessary to explore either a full extension or a rebranded, partial extension to ratify and implement a basic deal while also working out the

## **Conclusion**

Given the severe global impact of the pandemic, an extension request to the transition period is an economic necessity and the politically sensible choice. Nevertheless, the timeframe to agree to an extension under the provisions of the Withdrawal Agreement is closing rapidly. Any extension request that is made after the July deadline will not be an easy feat. As shown in this paper, all the available options imply difficult legal obstacles and political trade-offs.

In any case, the UK must decide that it wants an extension, and then ask for it. That seems far from certain for now. With growing economic and public pressure, the prime minister could, however, still change his mind. The UK might decide to ask for an extension later this year, but by then, it will be legally tricky and, worse, political obstacles might return domestically and within the EU. The UK should be aware that it will be extremely difficult

details. In addition to pressure from businesses affected by both COVID-19 and Brexit, rising public pressure might help push the UK government towards a last-minute extension request. Surveys already show a rise in public support for a delay,<sup>33</sup> which might increase further once British voters fully recognise the long-term effects of the current health and economic crisis.

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### **Johnson's assumptions, however, fail to take into account that the EU's highest priority is the integrity of the Single Market, and the European project as a whole.**

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Due to the domestic situation in the UK, the government would likely ask for the shortest extension possible, with as little conditions as possible, since Brexiters fear any extension could be a ploy to trap them in an endless rule-taking relationship with the EU. However, the EU would apply the same terms and conditions to a late extension as it does on the current one – i.e. a time-limited extension of up to one or two years and a financial contribution. At this point, the above described legal and political and political difficulties (see 3.3.) will come into play, making it uncertain if an agreement can be reached.

When Johnson realises that the EU is neither willing to make a deal at any price nor agree to an extension without conditions, he might opt for no deal and hope to get away with it amidst the ongoing economic crisis.

to negotiate an extension request in the middle of an unprecedented economic crisis, with some EU states being hit disproportionately hard. The EU, on the other hand, should still prepare for a late request and think about how to maintain its unity, even if things get messier.

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### **The UK might decide to ask for an extension later this year, but by then, it will be legally tricky and, worse, political obstacles might return domestically and within the EU.**

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The UK is playing with fire if it is counting on a weakened and divided EU to make concessions later this year. The EU has shown remarkable unity when it comes to Brexit and protecting the integrity of the Single Market, and it will not make a deal at any price. The UK should also be careful as a divided EU will settle on the lowest common denominator as the default solution. The chance of ‘no deal by default’ would thus increase. If Johnson’s aim is to achieve a deal, a fragmented EU is not in the UK’s interest.

Although the UK is refusing to ask for an extension now, the extension question might resurface later this year. At that point, it will be far more difficult to agree to it. By not asking now, Johnson adds even more uncertainty to the mix. Whichever way you look, there is, once again, a high chance of a no-deal Brexit.

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- 1 [IMF World Economic Outlook \(2020\), “The Great Lockdown,”](#) Chapter 1.
- 2 Bank of England (2020), [“Monetary Policy Report and Interim Financial Stability Report”](#)
- 3 See Zuleeg, Fabian (2020), [“The need for a longer transition,”](#) Brussels: European Policy Centre.
- 4 Owen, Joe (2020), [“The coronavirus response means the government will need to extend the Brexit transition period,”](#) London: The Institute for Government.
- 5 As set out in the European Commission’s Political Declaration, both sides will also have to conclude an agreement on fisheries by then, making 1 July 2020 a target date in two respects.
- 6 European Union and United Kingdom (2019), [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/C 384 I/01, Art.152\(1\).](#)
- 7 The formulation “up to 1 or 2 years” seems to leave some room for interpretation. However, the German and French wording (“um höchstens ein oder zwei Jahre” and “d’une période maximale d’un ou deux ans”) respectively support the view that it is either one year or two years, and nothing in between.
- 8 See e.g. Wooding, David, [“BREXTRA TIME Britain wants pay-as-you-go Brexit as trade deal is ‘impossible’ before December’s deadline,”](#) *The Sun*, 12 April 2020.
- 9 See European Union and United Kingdom (2019), *op.cit.*, Art.166(3).
- 10 N.B. UK legislation refers to the transition period as the “implementation period”.
- 11 The first extension was agreed on 22 March 2019 (one week before the deadline), the second on 11 April (one day before the deadline), and the final on 28 October (three days before the deadline).
- 12 See Article 39 of the Vienna Convention on the Law of Treaties.
- 13 See e.g. European Union and Republic of Korea (2018), [Protocol to the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, to take account of the accession of the Republic of Croatia to the European Union, ST/7730/2016/INIT](#) (based on Articles 207 and 212 TFEU); European Union and Swiss Confederation (2015), Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (based on Article 115, in conjunction with Article 218(6)(b) and the second subparagraph of Article 218(8) TFEU).
- 14 European Union (2012a), [Consolidated version of the Treaty on the European Union](#), Article 50(2).
- 15 See European Union (2003), [Title X: Union membership](#), CONV 648/03, Brussels, Annex II, p.9, where it says that “while it is desirable that an agreement should be concluded between the Union and the withdrawing State on the arrangements for withdrawal and on their future relationship, it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance.”
- 16 With the exception of structured cooperation.
- 17 See e.g. the most recent association agreements concluded with Ukraine, Moldova, Georgia and Lebanon.
- 18 Judgment of 30 September 1987, [Demirel v Stadt Schwäbisch-Gmünd](#), Case 12/86, ECLI:EU:C:1987:400, para.9.
- 19 The unanimity requirement results from several legal bases, notably Article 207 TFEU which covers trade in all types of services, intellectual property law and foreign direct investment.
- 20 The changes would simply be subject to the requirements of the Constitutional Reform and Governance Act 2010, which requires treaties to be laid before both Houses of Parliament. The ratification process can only be stopped if there is a successful motion that the treaty should not be ratified.
- 21 UK government (2020), [“European Union \(Withdrawal Agreement\) Act 2020,”](#) Section 39(2).
- 22 See *ibid.*, Schedule 4, Part 1, Clause 5.
- 23 Recently, another proposal for an implementation period was floated by Theresa May’s former special advisor on Europe, Raoul Ruparel; a conditional extension that is agreed now as a contingency plan to be triggered at a certain point later this year if a deal is in sight and an extension is needed to prepare businesses and implement the changes. Under Ruparel’s proposal, an extension would be conditional on whether an initial deal has been reached, which could be signalled by a vote in the House of Commons. While the conditionality aspect might alleviate UK fears about endlessly prolonging negotiations, the proposal presumes that the UK and the EU agree on the conditions of an extension (length and financial contribution) before the end of June. With view to UK domestic politics, this seems very unlikely.
- 24 These implied powers were used to conclude the agreement with Norway and Iceland on the surrender procedure. See Council of the European Union (2014), [Council decision of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, 2014/835/EU.](#)
- 25 European Union (2012b), [Consolidated version of the Treaty on the Functioning of the European Union](#), Art. 218(11).
- 26 Opinion of 28 March 1996, [Opinion pursuant to Article 228 of the EC Treaty, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms](#), Opinion 2/94, ECLI:EU:C:1996:140, para.11.
- 27 Opinion of 18 December 2014, [Opinion pursuant to Article 218\(11\) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties](#), Case Opinion 2/13, ECLI:EU:C:2014:2454, para.147.
- 28 Opinion of 10 April 1992, [Opinion pursuant to the second subparagraph of Article 228 \(1\) of the EEC Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area](#), Opinion 1/92, ECLI:EU:C:1992:189.
- 29 Judgment of 10 December 2018, [Andy Wightman and Others v Secretary of State for Exiting the European Union](#), Case C-621/18, ECLI:EU:C:2018:999.
- 30 See Greubel, Johannes (2020), [“Governing in times of social distancing – The effects of COVID-19 on EU decision-making,”](#) Brussels: European Policy Centre.
- 31 See *ibid.*
- 32 See Singham, Shankar, [“Brexit – and why the transition period must not be extended beyond December this year,”](#) *ConservativeHome*, 14 April 2020.
- 33 See for example [YouGov](#), 15 May 2020.

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