

# Heading for disaster

**Roger Liddle**

---



*Credit: Ben STANSALL / AFP*

# Table of contents

|   |           |
|---|-----------|
| <b>Executive summary</b>  | <b>3</b>  |
| <b>The marked shift in government policy to a much harder Brexit</b>  | <b>4</b>  |
| <b>The December 2020 deadline and the return of ‘no deal’</b>   | <b>6</b>  |
| <b>The Northern Ireland Protocol</b>  | <b>7</b>  |
| <b>The ‘level playing field’ conflicts that limit the scope and depth of the UK-EU Free Trade Agreement</b> | <b>10</b> |
| <b>The prospect of deadlock on fishing</b>  | <b>13</b> |
| <b>The UK government’s narrowing vision of its future relationship with the EU</b>                          | <b>14</b> |
| <b>Conclusion</b>   | <b>16</b> |
| <b>Endnotes</b>   | <b>19</b> |

---

## ABOUT THE AUTHOR



**Lord Roger Liddle** has been a Labour member of the House of Lords since 2010. From 1997-2004, he was European political adviser to the Prime Minister, and from 2004-2007, a member of the cabinet of the European Trade Commissioner and the President of the European Commission’s Bureau of European Policy Advisers.

---

## DISCLAIMER

The support the European Policy Centre receives for its ongoing operations, or specifically for its publications, does not constitute endorsement of their contents, which reflect the views of the authors only. Supporters and partners cannot be held responsible for any use that may be made of the information contained therein.

# Executive summary

The current UK-EU negotiations are heading for disaster – not inevitably in terms of a ‘no deal’ outcome, but rather the probability a ‘bare-bones’ trade arrangement, with some limited add-ons. This will resolve little of the long-term issues surrounding the future UK-EU relationship. Instead of setting the UK and EU on a stable path of post-Brexit cooperation, and on the values and interests that both parties share, the relationship will in all likelihood be blighted by tensions generated by continual trade disputes over regulatory divergence and unfair competition.

Since Boris Johnson became Prime Minister, the British government has steadily abandoned his predecessor Theresa May’s ambition for a ‘deep and special’ post-Brexit partnership with the EU. Rather, the Johnson government prioritises sovereignty and independence over economic integration and institutionalised cooperation – such as might have been the case on security and foreign policy. The government now rejects important parts of the Political Declaration that the Prime Minister himself agreed to, alongside the revised Withdrawal Agreement, in October 2019.

The British government also appears reluctant to implement the Northern Ireland Protocol, also agreed last October, fully. That Protocol, in practice, kept Northern Ireland in the EU Customs Union and Single Market, to avoid a hard border on the island of Ireland. However, this would also necessitate some border checks on the movement of goods between Northern Ireland and Great Britain. The British government displays extreme reluctance to face up to this reality.

The trade negotiations are bogged down in disputes over level playing field commitments and fishing rights. The EU should be more accommodative on state aid provisions (where its original aim was that EU state aid rules continue to apply ‘to and in’ the UK). However, an agreement will also be difficult to reach if the British continue to rule out the principle of level playing field commitments from the trade treaty as an unacceptable intrusion on its national sovereignty.

Similarly, the EU will have to accept the changing reality of fishing quotas that its member states presently enjoy due to Britain’s departure from the Common Fisheries Policy. Nevertheless, it is unreasonable that, as a newly independent coastal state, the UK should be free to set its own national quotas for Continental fishers on a yearly basis, while ignoring the position established for decades past.

On security questions, British refusal to accept any common basis for the judicial oversight of executive agency cooperation will limit the scope of application for present arrangements. In addition, the UK has rejected any form of institutionalised cooperation with the EU in foreign policy. Finally, the British government rejects an overarching institutional framework that monitors and develops its relationship with the EU.

Brexit is a fact of life, but the relationship between Britain and the European Union will remain a hot topic of debate and division for years to come.

The negotiations on Britain's future relationship with the EU have looked for months to be on a collision course for failure. Avoiding this will require mutual give and take. Principally, the British government needs to climb down from its self-imagined pedestal of Brexit triumph. Economically, for the UK, huge risks are piling on top of the grave COVID-19 emergency: the negative impacts of 'no deal', or a very bare-bones trade deal, which is probably where we are heading.

Equally, the failure of trade imperils Britain's future relationship with our European friends and allies beyond Brexit. A dramatic rethink is imperative. It must start in London – in the office of Boris Johnson, the Prime Minister – now.

## The marked shift in government policy to a much harder Brexit

From the commencement of the December 2019 general election campaign, British government policy has shifted towards a much harder Brexit. Mrs May's commitment to a "deep and special partnership" with our former EU partners<sup>1</sup> lies in the dustbin of history. Even the warm sentiments contained in the Political Declaration that Boris Johnson agreed with the EU's leaders as recently as last October have been tossed aside.

The scope of this dangerous new divergence was carefully analysed in a report of the House of Lords' European Union Committee,<sup>2</sup> which compares the positions agreed in the October Political Declaration with the Council of the European Union's latest negotiating mandate<sup>3</sup> and the UK government's Written Ministerial Statement<sup>4</sup> and White Paper.<sup>5</sup> The Committee, in its measured and objective way (with some leading Brexiteers to be counted among its current membership),<sup>6</sup> detected that the UK and EU had shifted their positions somewhat. The Select Committee's report was debated in the Lords on 16 March as the COVID-19 crisis was coming to a head in the UK. This Discussion Paper draws on that debate.

---

### The warm sentiments contained in the Political Declaration that Boris Johnson agreed with the EU's leaders as recently as last October have been tossed aside.

---

According to the judgment of the Lords' Select Committee report, the EU Council Decision "taken as a whole [...] is a development of, rather than a departure from, the [Political Declaration]."<sup>7</sup> By contrast, their view of the UK government's new approach was much starker:

"While the Political Declaration, whatever its limitations and ambiguities, embodied a shared understanding of the future relationship, *that shared understanding has now disappeared.*"<sup>8</sup>

The Political Declaration Johnson agreed to last October was a key element of what he memorably described as his 'oven-ready deal'.<sup>9</sup> As Lord John Kerr of Kinlochard put it in the Lords debate,

"The [government's thesis] seems to be that the political situation in the UK is now different, so we can just pick and choose the [bits of the Political Declaration] we like. [...] [A]iming low [...], we increase the chances of getting something agreed by the end of the year."

It will be "a narrow deal, a shallow deal and a very bad deal – but if that is what we want, I think it is possible."<sup>10</sup>

There has been a fundamental shift of ambition in the type of post-Brexit relationship the UK is now seeking from the EU. In contrast to Mrs May's approach, for all of Johnson's warm words about our European friends, there is nothing *deep* about the economic partnership he is now seeking. A more accurate description would be *distant*; an outcome that is distinctly 'Canada minus minus', not 'Canada plus plus', to borrow the trademark jargon of David Davis, the former Secretary of State for Exiting the European Union.

Britain is now seeking nothing special from the EU. Rather, we want our relations with Europe to be on a par with every other friendly sovereign state in the world. Our own sovereignty and independence come first: the realities of our geographical proximity, the depth of economic interdependence on both sides of the Channel, or our shared common interests and values with our nearest neighbours are all secondary to this higher cause.

This hardening of the government's Brexit policy started with Mrs May's overthrow, but its full extent only became visible in the first weeks of 2020. Mrs May viewed Brexit as an exercise in damage limitation. A cautious Remainer by instinct, she could never bring herself to talk of Brexit's benefits enthusiastically. She defined Brexit in simple terms – 'taking back control of our money, laws, and borders' – those rank-and-file Conservatives understood. And yet, she wanted a Brexit that kept the UK economically close to the EU but also evaded the EU's free movement rules. As an instinctive unionist, she

prioritised a Brexit strategy that did not risk the unity of the UK. She solemnly pledged to uphold the open border in Ireland in keeping with the 1998 Good Friday Agreement. And as a former Home Secretary, sustained close cooperation with our European allies on questions of security was a vital concern.

---

**Britain is now seeking nothing special from the EU. Rather, we want our relations with Europe to be on a par with every other friendly sovereign state in the world. Our own sovereignty and independence come first.**

---

To achieve these objectives, she was prepared to bend her red lines. She pushed for regulatory alignment in goods; a Northern Ireland backstop that would effectively have kept the whole of the UK in the EU Customs Union for a long interim period; and an eventual deal on customs facilitation that would have resulted in 'frictionless' trade and the avoidance of new controls at the UK-EU border. She was less specific about services trade: she was keen to promote extensive mutual recognition arrangements as long as the EU would give the UK leeway to relax the free movement obligations of the EU Treaties. A tougher line on immigration both suited her personal instincts and, as she saw it, met the main concern of Leave voters in the referendum.

Boris Johnson's worldview is different. Political scientists do not doubt that in 2016, fears of mass immigration produced the Leave victory. Some would argue that Vote Leave's exploitation of immigration was cynical and, at times, xenophobic. For Johnson, it was all part of legitimate hardball in playing the political game to win: in his eyes, the Remainers' scare stories were just as exaggerated. As someone who boasts of his Turkish ancestry and is a natural libertarian at heart, stopping immigration was never part of Johnson's personal motivation for backing Leave.

To the extent that he actually ever wanted to leave the EU (about which there is legitimate doubt), Johnson the Leaver had made his name as a Brussels journalist with horror stories – always hyped, frequently false – of Brussels bureaucracy and overregulation. His view of his inner self tells him he could be a new Churchill leading England (as Churchill himself would have put it) to 'restored greatness'. It was the Churchill of the grand imperial vision, with his sense of our country's unique history and place in the world, and his instinctive belief in the British buccaneering spirit across the 'open seas' that stirred the Johnson imagination.

Johnson has somehow convinced himself that the restoration of our sovereignty and independence

(as Brexiteers love to describe it) is a reassertion of British greatness. This fatally confuses 'power' with 'sovereignty'. *Sovereignty* is essentially a legal concept; *power* is the ability to make things happen. The Johnsonian worldview follows from this confusion and ignores the brutal realities of Britain's global position in the post-COVID-19 world.

---

**The Johnsonian worldview ignores the brutal realities of Britain's global position in the post-COVID-19 world.**

---

What mattered to Johnson politically was the perception of his negotiating triumph in Brussels last October, tearing up Mrs May's hated Northern Ireland Protocol and substituting another. He successfully shrouded the practical substance in obscurity, although he must have realised that the terms were constitutionally challenging, to say the least.

The painful cries of betrayal from his once-loyal Unionist supporters were crowded out by the shrieks of delight from the English Brexiteers. For them, the scrapping of Mrs May's all-UK backstop ditched the requirement for regulatory alignment with Brussels, at least for Great Britain. It also opened the vista of their dreams: an arms-length free trade agreement (FTA) between Great Britain and the European Union, in which Britain could free itself entirely of EU jurisdiction. This 'Canada-style' trade deal is what the Brexiteers had proclaimed in 2017 as "one of the easiest in human history."<sup>11</sup> So much so that it would deliver "the exact same benefits" as UK membership of the European Single Market.<sup>12</sup> We will soon find out how far that rosy forecast falls short of the truth.

All that stood in the way of this happy, and in their view logical and rational, outcome was the intransigence of the Brussels ideologues who wanted to punish Britons for daring to vote to leave the EU and set an example to any other member state tempted to show such defiance. Surely the big member states, anxious to protect their huge export surpluses with the UK, would call a halt on this self-defeating nonsense.

---

**Once a government of 'Brexit's true believers' formed, it resolved to demonstrate to the bureaucrats of Brussels that this was a British government that would not be pushed around by the paper tigers of the European Commission.**

---

For Brexiteers, the October deal created a moment of true hubris: their long-standing goal was within their grasp. Once an 80-seat majority had been won in December and a government of ‘Brexit’s true believers’ formed, it resolved to demonstrate to the bureaucrats of Brussels that this was a British government that would not be pushed around by the paper tigers of

the European Commission who, in their view, lack all democratic legitimacy.

By early 2020, this triumphalist shift in Brexiteer psychology had transmuted itself into a set of impossible negotiating positions.

## The December 2020 deadline and the return of ‘no deal’

Minister for the Cabinet Office Michael Gove announced that the government would not seek to extend the transition period beyond December 2020, shortly after the December 2019 general election had been agreed to by the Opposition parties in a Commons vote. This was despite the fact that the Withdrawal Treaty the Prime Minister had just signed on behalf of the UK allowed for a transition period of up to two years by mutual agreement.

Gove proclaimed this new manifesto commitment around the same time as Nigel Farage’s decision to withdraw Brexit Party candidates from Conservative-held seats. Conspiracy theorists may detect a linkage. The Brexit Party’s move was certainly decisive in uniting the Leave vote behind the Conservatives, whereas Remain supporters were fatally split. Since the Johnson triumph, the new policy has now been legislated for in the European Union Withdrawal Agreement Act 2020, which gained the royal assent at the end of January.

---

**Hard-line Brexiteers see no difference between trade arrangements between jurisdictions some 11,000 miles apart and trade across the English Channel with nation-states that are part of a single continent.**

---

Since December, the government has stepped up the bluster. As the Lords’ Select Committee noted, “the Government has now indicated, that if the ‘broad outline’ of an agreement is not clear by June, it may ‘move away from the negotiations’ and focus on domestic preparations for the end of the transition period.”<sup>13</sup>

In plainer words, Britain would be back in the territory of preparing for ‘no deal’. The government has invented a new euphemism for this: an Australia-style trading relationship with the EU. This is a phrase that came

into common ministerial use in early 2020. It is a euphemism for the fact that Australia does not have an FTA with the EU. Australia trades with the EU ‘on World Trade Organization terms’ – the state of grace that Nigel Farage and other hard-line Brexiteers have long espoused. In their minds’ eye, they see no difference between trade arrangements between jurisdictions some 11,000 miles apart and trade across the English Channel with nation-states that are part of a single continent.

The facts suggest otherwise. Academic studies identify geographical proximity as the most significant factor in trade integration.<sup>14</sup> Also, the EU, with the UK in the driving seat, has spent the last half-century peacefully removing not only all tariffs and quotas but also internal barriers to trade, to create the wealthiest and most integrated single market in the world.

‘No deal’ is not perhaps as challenging a scenario as it would have been 12 months ago. The Withdrawal Agreement at least provides guarantees of rights for EU citizens living in Britain, and UK citizens living on the Continent. There is also the point that Lord Gavin Barwell, former Downing Street Chief of Staff, made to great effect in the Lords debate: “there is not a huge economic difference between the deal the Government are seeking and no deal.”<sup>15</sup>

The Johnson government has already signalled that a Canada-style FTA would be the end of *frictionless* trade as we know it. It now accepts that its version of Brexit requires new bureaucracy and increased costs for UK importers and exporters. These burdens could be minimised, though not removed, by an ambitious FTA. Nevertheless, a bare-bones deal is presently the more likely prospect.<sup>16</sup>

---

**The more industry is unprepared for the new trading arrangements, the greater the likelihood of disruption at the ports as lorries join queues to check that their paperwork is in order.**

---

The Barwell judgment assumes, however, that businesses would have adequate time to prepare for ‘no deal’. The COVID-19 crisis makes this assumption optimistic. The more industry is unprepared for the new trading arrangements, the greater the likelihood of disruption at the ports as lorries join queues to check that their paperwork is in order. One factor that might mitigate these risks is the temporary reduction in cross-Channel freight traffic due to the COVID-19 economic lockdown. But to not anticipate a rapid recovery in freight traffic means assuming permanent disruption to the ‘just in time’ supply chains, upon which hundreds of thousands of UK manufacturing jobs presently depend.

The risk of potential chaos could, of course, be reduced by promises of goodwill on both sides. The British government announced unilaterally in June 2020 that for an indeterminate initial period, it would wave through lorries arriving in the Channel ports without conducting full checks. In other words, not doing the checks with the thoroughness that future UK and EU law will require. Unfortunately, such gestures of goodwill in Continental ports cannot be guaranteed and would be in breach of EU law.

## The Northern Ireland Protocol

A major obstacle to ‘goodwill’ is a looming dispute about the interpretation and implementation of the new Northern Ireland Protocol. The ‘May backstop’ had provided for the whole of the UK to remain members of the EU Customs Union temporarily, thereby avoiding the immediate need to institute a new customs border between UK territory and the Republic of Ireland. To the great joy of businesses like car manufacturers, the May backstop put off the prospect of a new customs and regulatory border between the UK and the Continent indefinitely. The whole of the UK would have required the whole of the UK to abide by what was euphemistically described as a ‘common rulebook’ for trade in goods – in effect, EU Single Market rules.

---

**The ‘May backstop’ had provided for the whole of the UK to remain temporarily members of the EU Customs Union, thereby avoiding the immediate need to institute a new customs border between UK territory and the Republic of Ireland.**

---

The May backstop would remain in place until “alternative arrangements” that avoided the need for a hard border between Northern Ireland and the Republic were instated.<sup>17</sup> Much effort was made to envisage what these alternative arrangements might be. However, none were to the satisfaction of the European Commission, which dismissed a variety of high-tech solutions as unviable for the foreseeable future.

The EU – both the Commission and the member states – consistently refused to put a firm end date on the ‘temporary’ May backstop, despite attempts at assurance in

the Presidents of the Commission and European Council’s letter to May.<sup>18</sup> The fact that this issue could not be fudged was made crystal clear in the advice Geoffrey Cox, the then Attorney General, gave to the Cabinet.<sup>19</sup>

Member states displayed an impressive unity of purpose when defending the Republic’s position on the Irish border. By supporting the small member state consistently, the EU demonstrated that one of its founding principles – the equality of member states – still counted.

The British have always sneered at the concept of EU solidarity, which, of course, can break under the pressure of divided interests. Nonetheless, member state unity behind the Republic of Ireland’s position came as a shock to Brexiteers who had always assumed that EU solidarity would break apart as larger countries on the Continent begin to assess the cost of ‘no deal’ for their favourable trade balance in UK markets. The Brexiteers were caught out, once again, in imagining that what held the EU together was nothing more than a crude economic calculus.

The ambiguity over the *temporary* nature of the May backstop suited the EU negotiators as much as the UK. Its terms challenged the classic Brussels doctrine of the ‘indivisibility of the four freedoms’, as trade in goods was to be treated separately from trade in services. Also, while the free movement of goods would continue as before, the free movement of people would not.

---

**The ambiguity over the temporary nature of the May backstop suited the EU negotiators as much as the UK.**

---

This flexibility on the part of the EU was never properly recognised in the UK. Hard-line Brexiteers piled pressure

on Mrs May to terminate the proposed backstop. In their eyes, it reduced the UK to a ‘vassal state’ for an indeterminate period.

Throughout this time, the UK would be forced to accept new EU laws without having any decision-making power over them. Vassalage could only be ended by specific EU assent that some ‘alternative arrangements’ could be made to work. No trust existed that this point would ever be reached. The Brexiteers then concluded that nothing short of a so-called clean break would satisfy their vision for Brexit.

The Brexiteers were right in terms of the backstop’s legal effects: the question was whether the backstop was a price worth paying for maintaining peace in Ireland and preserving the unity of the United Kingdom. Simultaneously, the backstop facilitated a ‘softer’ form of Brexit for what would be an extended and possibly indefinite period. Mrs May failed three times to win a Commons majority for her deal. She lacked the political skills to win that argument in the Conservative Party, too. She then sat on the decision to seek a cross-party agreement in support of her deal until far too late, by which time the Brexiteers had already resolved to bring her down. History may well be kinder to her endeavours.

Boris Johnson’s success in ditching the May backstop depended on his willingness to make a different set of bold, but what may prove to be just as difficult, choices. The essence of the Johnson backstop is to separate the post-Brexit regulatory treatment of Northern Ireland from Great Britain. Northern Ireland remains *de facto* in the EU Single Market and Customs Union. Concerning trade and regulation, Northern Ireland will become subject to EU jurisdiction *indefinitely*, without having any say over those laws, of course – or, at least, while it remains a constituent part of the UK. In broad terms, this was roughly the same proposition that the Commission had put forward 18 months before, in the draft Withdrawal Treaty that was published in spring 2018. Mrs May had promptly rejected this proposal as impossible for any British Prime Minister to accept!

The unstated problem with the Johnson backstop for Unionists is that it gives a tremendous impetus to the case for Irish unity – although some members of the Northern Irish business community do see the practical economic benefits of having the best of both worlds. Northern Irish Protestant politicians, who have defined their politics by defending the Westminster Union stubbornly, inevitably took umbrage. In their view, the new Protocol had been imposed without any proper consultation, altering, in a fundamental and unwelcome way, the constitutional status of Northern Ireland. This contradicts a central principle underpinning the Good Friday Agreement starkly: no such fundamental change in Northern Ireland’s status can be agreed without the assent of the representatives of both Northern Irish communities.

On the face of it, the new Protocol amounts to a significant step towards a ‘United Ireland’. The mechanism for ‘democratic’ consent the UK government instituted was feeble: Northern Ireland could only escape from

the Protocol through a cross-community consensus at Stormont that was never likely. How could a Conservative and Unionist Prime Minister have done this?

The answer seems clear. The Prime Minister has had considerable difficulty in facing the reality to which he has solemnly committed. However, he must have been aware of the basics of the proposition that he had personally agreed to in previous conversations with former Taoiseach Leo Varadkar and President Jean-Claude Juncker. He went on to sign the Withdrawal Treaty on that same basis.

---

### **Defining *fetter* is a far more debatable and ambiguous question than determining what an absence of *friction* is.**

---

In the Withdrawal Treaty text, the European Commission did its best to sugar the pill. Northern Ireland would remain part of UK customs territory constitutionally. Her Majesty’s Revenue and Customs (HMRC), not EU officials, would be responsible for administering the necessary controls. The Preamble to the Protocol loftily proclaimed the EU and UK’s “shared aim of avoiding [...] controls at the ports and airports of Northern Ireland”.<sup>20</sup>

Closer inspection of the text reveals, however, that these aspirations were explicitly limited and conditional. The aim to avoid controls at ports and airports is qualified “to the extent possible in accordance with applicable legislation and taking into account their respective regulatory regimes as well as their implementation”. It went on to declare that “nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom”.<sup>21</sup>

However, it is only the movement of goods from Northern Ireland to Great Britain that is ‘unfettered’. The text also significantly uses the word *unfettered*, and not May’s language of *frictionless* – a classic example of how a subtle change of a single word in a diplomatic agreement can point to differences of huge consequence. Defining *fetter* is a far more debatable and ambiguous question than determining what an absence of *friction* is.

In an appearance before the Lords’ Select Committee on 21 October 2019, just before the dissolution, the then Brexit Secretary, Stephen Barclay, confirmed under questioning from Lord Stewart Wood that the Protocol would require two-way checks on goods passing between Great Britain and Northern Ireland.<sup>22</sup>

In terms of short-term politics, Johnson got away with his bold stroke. The Withdrawal Agreement was never put to full Parliamentary ahead of the general election. Armed with an Agreement – any agreement –, he gambled



correctly on winning the country on a cry of ‘get Brexit done’. Nevertheless, in a campaign speech to a group of Northern Ireland businesspeople, Johnson appeared to dismiss the prospect of customs controls across the Irish Sea as something he would never tolerate as Prime Minister:

“if anyone asked [Northern Irish business leaders] in future to fill out paperwork they should tell them to call Number 10 and [Johnson] would tell them to ‘throw that form in the bin’.”<sup>23</sup>

In a later interview, Michael Gove refused to confirm what Barclay had said before the Select Committee. He pushed the question aside as a matter for the future; for the EU-UK Special Joint Committee set up under the terms of the Protocol to supervise the implementation of its provisions. However, the remit of this Special Committee, as clearly set out in the text, is to implement the provisions of the Protocol, not change its terms.

---

**If the UK government sought to renege on its commitments under the Protocol, the integrity of the EU customs border would be at risk. It would destroy any remaining trust on the integrity of its Single Market.**

---

In the Lords debate, Lord Kerr pointed out that the government “still [seem] in denial” of what they had agreed.<sup>24</sup> He spelt out the provisions of the Protocol – Articles 5, 6 and 12 – plainly.<sup>25</sup> The Annex to the Protocol lists 75 pages of EU laws that will apply to Northern Ireland and not Great Britain. Questions of interpretation and enforcement will be decided under EU jurisdiction and ultimately by the European Court of Justice (ECJ).

Lord Kerr recently visited Belfast with the Select Committee. What worried him more than the ministers’ apparent misunderstanding of the legal texts their government had signed was the fact that the Committee found “no evidence of any central or devolved government action to prepare to implement the protocol. [...] no one from HMRC [...] had, as of 25 February, given the business community of Northern Ireland any indication of what to expect or how best to prepare for it.”<sup>26</sup>

Some 2,500 trucks a day cross the Irish Sea to and from Northern Ireland, resulting in 850,000 movements a year. If the Polish-Ukrainian border is taken as a model, each lorry would have to satisfy 45 different checks to enter the EU Customs Union, while outgoing vehicles would undergo 31. “The Government in Dublin are well aware we are dragging our feet. So, too, is the Commission,” Kerr noted. Given that the Protocol is due to be implemented

from 1 January 2021, he found this situation “acutely disturbing – indeed, shocking.”<sup>27</sup>

A successfully concluded FTA between the EU and UK would, in some respects, reduce the scale of necessary checks – but even an ambitious FTA could not avoid them. If the UK government sought to renege on its commitments under the Protocol, the integrity of the EU customs border would be at risk. It would destroy any remaining trust on the integrity of its Single Market – which, for the EU, is an almost existential question.

Much more may well be heard of this ‘misunderstanding’ in the coming months: there is a belief in Brussels that the British government is set on radically changing the Protocol they signed only last October. The consequences for the whole UK-EU relationship could be catastrophic, and there is so little time. Without an extension of the transition deadline, the new border arrangements are due to come into force on 1 January 2021.

However, despite this tight deadline, the first meeting of the Ireland/Northern Ireland Specialised Committee, charged under the 2020 Withdrawal Treaty with supervising the implementation of the Protocol, did not take place until 30 April 2020. In other words, more than six months after the Withdrawal Agreement was signed and only eight months before it is due to come into effect.

Suspensions of British foot-dragging were heightened in April by the government’s aggressive rejection of a proposal to set up a European Commission office in Belfast, to supervise the new border arrangements. Four of Northern Ireland’s Nationalist and non-aligned parties – the Alliance, Greens, Social Democratic and Labour Party, and Sinn Féin, which together accounted for a majority of the Northern Irish electorate – had written a joint letter to Michael Gove in early April stating that they “‘felt strongly’ that an [EU office] in Belfast was necessary”.<sup>28</sup> On 27 April, Gove flatly rejected this request. He did, however, concede that the British government would “facilitate [...] ad hoc visits by EU officials”<sup>29</sup> – a minimalist interpretation of the Protocol’s provisions, designed to assuage Unionist sensibilities.

---

**It remains unclear how the EU’s usual notifications and controls for goods leaving its customs territory would be enforced post-Brexit, as well as how this would apply to goods originating in Northern Ireland more specifically.**

---

On 21 May, the Cabinet Office published a paper entitled “The UK’s Approach to the Northern Ireland Protocol”. It insisted that goods trade from Northern Ireland to Great Britain “should take place as it does now.”<sup>30</sup> The paper

was, however, largely silent on questions surrounding goods that originate in the Republic (or elsewhere in the EU) and are exported to Great Britain through Northern Irish ports and airports. It remains unclear how the EU's usual notifications and controls for goods leaving its customs territory would be enforced post-Brexit, as well as how this would apply to goods originating in Northern Ireland more specifically.

The Cabinet Office paper did concede that "some limited additional processes" would be necessary for goods arriving in Northern Ireland from Great Britain, but would be kept to an absolute minimum.<sup>31</sup> The Office stated that the government saw no need "to construct any new bespoke customs infrastructure".<sup>32</sup> However, they accepted the need to expand "some existing entry points" for agrifoods:<sup>33</sup> the government will uphold the current arrangement, treating

the whole of Ireland as a single area for the regulation of livestock and agricultural produce.

In a sense, the UK's compliance with the principle of controls on goods crossing between Great Britain and Northern Ireland can be regarded as progress. Nevertheless, the British underestimate the extent to which the integrity of the EU's Single Market and Customs Union is an existential issue for the European Commission. They have so far kept their counsel on the details of their proposals, presumably in the hope that behind-the-scenes pressure will persuade the British to live up to the legal obligations of the Protocol which the UK signed. We shall see. One suspects that the implementation of the Protocol could be a source of continuing tensions in UK-EU relations in 2021, and for years to come.

## The 'level playing field' conflicts that limit the scope and depth of any UK-EU free trade agreement

The October Political Declaration committed the UK and EU to an "ambitious, wide-ranging and balanced" economic partnership. It guaranteed "a level playing field for open and fair competition" while ensuring that both parties retain their autonomy to achieve "legitimate public policy objectives".<sup>34</sup>

"Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitment to ensure a level playing field."<sup>37</sup>

---

### The British government claims that the EU is now seeking something it never asked of Canada when negotiating their FTA.

---

However, the British government has now dropped any specific reference in its published objectives to "open and fair competition" or a "level playing field". David Frost, Britain's chief negotiator, went further. In a provocative speech in February, he described any Brussels-imposed rules to create a level playing field (LPF) as challenging "the fundamentals of what it means to be an independent country."<sup>35</sup>

As Lord David Hannay of Chiswick pointed out in the Lords debate, Frost's assertion contradicts the fact that the EU's "agreements with its neighbours – Norway, Switzerland and Ukraine, for example – all have elaborate level-playing-field provisions."<sup>36</sup>

The British government claims that the EU is now seeking something it never asked of Canada when negotiating their FTA. Nevertheless, paragraph 77 of the October Political Declaration underlined the differences between the UK's situation and the Canadian case:

The British government gives every impression of trying to renege on a principle that it signed up for contentedly less than nine months ago.

Not all the hardening of positions, to be fair, has been on the British side. France and other member states have toughened the language of the mandate the Commission originally proposed to the Council. In the most egregious example, the Council Decision demands that EU state aid rules should continue to apply "to and in" the UK.<sup>38</sup> In other words, the UK would be outside the EU but remain fully inside its regime of state aid rules. The UK might have its own domestic agency responsible for enforcement, but regarding the legal interpretation of these rules, the UK would effectively remain under EU jurisdiction. Also, whenever the EU adapts its rules or raises its standards, the UK is bound to follow, involving UK acceptance of so-called dynamic alignment.

State aid is not the only area where the EU is seeking a LPF for the future. It is proposing binding provisions in the trade treaty, to avert the risk of a 'race to the bottom' on standards. This LPF would cover the social dimension, including a floor of minimum labour standards, as well as consumer protection rules, environmental regulations and crucially climate change commitments. The EU is happy for the UK to design its own system of regulatory supervision and enforcement in these areas, as long as there is a jointly agreed system of dispute arbitration and jurisdiction (ultimately involving the ECJ on points of EU law). As these developed, future EU standards would,

according to the Council mandate, be taken as a ‘reference point’ in any dispute.<sup>39</sup>

British objections to these arrangements take on a surreal air. The British government insists that it has no intention of weakening existing EU standards in any of these areas, in the language of what the negotiators are calling ‘non-regression commitments’. Neither will it commit, however, to automatic future (i.e. dynamic) alignment, nor to any common system of legal enforcement or sanctions for defying said non-regression commitments.

---

### **France and other member states have toughened the language of the mandate the Commission originally proposed to the Council.**

---

Indeed, the British government is now resisting the inclusion of these non-regression commitments in a trade treaty with the EU, because this would hand the EU a legal basis for imposing trade sanctions on the UK if the EU were to judge, in the future, that any comparative weakening of UK standards is putting EU business at a competitive disadvantage. Instead, the EU should rely on taking Britain at its word.

The government protests that the EU is going back on its word. In 2018, the EU’s chief negotiator, Michel Barnier, offered the UK the option of a Canada-style FTA. However, these LPF conditions are not new demands the EU have suddenly made. As Gavin Barwell explained in the Lords, in all the meetings he attended between Theresa May and European leaders, insistence on a LPF was “always and consistently the European Union’s position”.<sup>40</sup>

The Commission’s Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU produced a detailed paper on the LPF more than two years ago. This paper made clear that the EU side would expect any comprehensive agreement to include governance arrangements for (i) ongoing management and supervision; (ii) dispute settlement; and (iii) enforcement (i.e. sanctions).<sup>41</sup>

---

### **The EU is happy for the UK to design its own system of regulatory supervision and enforcement in these areas, as long as there is a jointly agreed system of dispute arbitration and jurisdiction.**

---

On state aid, the Commission also made clear that “[i]nternational rules do not adequately address the (potential) distortive effects of subsidies on investment, trade and competition *and* the close integration of the UK in the EU economy and its value chains, the longstanding and deep trading relations, and the geographical proximity of the UK to the EU”. This all “[m]eans [that] the EU-UK agreement will have to include robust provisions on State aid to ensure a LPF with the Member States.”<sup>42</sup>

The EU was always adamant that the situations of the UK and Canada are incomparable. The scale of market access allowed in any FTA would depend on UK acceptance of these LPF principles. However, in Barwell’s view, the government appears to be “rejecting not just dynamic alignment but any enforceable, non-regression clause” and “asking the EU to trust us to keep our word”.<sup>43</sup>

These arguments may come across as technical and nit-picking. But the principles behind these LPF arguments go to the heart of what Leavers imagine Brexit is all about, and Remainers most fear. For years, Brexiteers made the argument that one of the ‘opportunities’ of Brexit is to escape the incubus of EU regulation ‘holding Britain back’.

---

### **The principles behind these LPF arguments go to the heart of what Leavers imagine Brexit is all about, and Remainers most fear.**

---

Nevertheless, the government now denies that its motivation for Brexit was to ever indulge in a ‘race to the bottom’ on consumer, environmental and labour standards. Johnson has departed from many essentials of May’s approach, but significantly not her insistence that outside the EU, the British government intends to maintain and build on the EU’s high standards. This is despite the consistent record of many Brexiteers making a case for Brexit as a deregulatory project that is designed to liberate British business from burdensome EU rules that would, in Nigel Lawson’s words, “finish the Thatcher revolution”.<sup>44</sup>

One would like to take May and Johnson at their word. Their position must partly reflect a political calculation that the motivations of many Leave voters of the 2016 referendum, who then supported the Conservatives in the December 2019 general election, were *not* to lower Britain’s standards of environmental, consumer and labour protection. This is notwithstanding the long-standing deregulatory ambitions of the most committed Conservative advocates of Brexit.

That explains why the government disavows any intention to initiate a deregulatory race to the bottom.

However, it strikes the EU side as odd that Britain then refuses to make a binding commitment to a form of continued regulatory alignment. Is this because it wants to keep the option of a deregulatory push for competitive advantage open for the future? The British government claims that their objection is rooted in a basic question of sovereignty. But why get so exercised about sovereignty if one has no intention of using it to change and/or weaken EU laws?

Let us consider these LPF controversies in terms of their practical impact.

An area of looming controversy is the question of climate change commitments. Apart from a minority of climate change deniers, majority opinion in the UK would want to see the UK and Europe acting as one; to demonstrate global leadership by setting ambitious domestic targets for carbon reductions and thereby leveraging stronger global commitments to tackle the climate emergency. This will not happen if Britain games the EU on targets for cutting carbon emissions and seeks a comparative competitive advantage. So why not rule out such a nonsense policy that would command little public support in the provisions of a forthcoming trade deal with the EU?

On state aids, it has long been recognised that there are few long-term winners in a competitive bidding war to subsidise loss-making enterprises between and within member states. There is, however, a case for state aid serving major business restructuring, by incentivising corporate investments which might otherwise be diverted to other parts of the world and promoting jobs and growth in disadvantaged regions. State aid rules attempt to make a distinction between ‘good’ and ‘bad’ state aid.

The UK has been a strong supporter of this regime and had a decent record of abiding by EU rules more rigorously than other member states. It seems implausible that a British government, particularly a Conservative government (former Opposition Leader, Jeremy Corbyn, might well have given a different answer), would want, in terms of practical policy, to be free to outcompete EU member states’ scale of subsidies to the private sector.

This is particularly true of the situation emerging from the COVID-19 emergency. Government intervention to support hard-hit companies is on the rise across Europe. In the past months, almost half of Commission-approved state aid claims have been for German businesses.<sup>45</sup> Some member states fear that they lack the fiscal clout of Germany to match its willingness and capacity to bail out at-risk firms. State aid rules offer some protection against the law of the jungle. Would this not be to the advantage of the UK?

The Johnson government looks, of course, at the state aid question in terms of sovereignty, and not its practical effects. But the reality is that Europe is a highly integrated economic area. Most largescale UK companies

are no longer ‘British’; they now consider themselves to be European or global. To take an obvious example, the survival of Airbus manufacturing in the UK is not just a question for the British government.

---

### **State aid rules offer some protection against the law of the jungle. Would this not be to the advantage of the UK?**

---

In practice, Britain cannot separate itself from EU debates about state aid. If Britain tries to go its own way, in defiance of a common European position, it will simply expose itself to the risk of unpredictable and disruptive trade sanctions.

Rejecting the principle of a LPF could have huge implications for jobs and people’s livelihoods. If Britain refuses to make these commitments in a proper enforceable way, we could well face the constant threat of trade sanctions from the Commission. Trade defence instruments, including tariffs, could be imposed legitimately if the UK seeks to introduce any significant measure the EU unilaterally judges to be unfair competition. Even the *threat* of imposing such tariffs in short order could have seriously disruptive effects on investment in the UK’s sectors, on which hundreds of thousands of jobs depend (e.g. automobile). This would create a highly unstable business environment for future inward investment.

According to recent reports, the UK is open to a compromise whereby it would avoid making LPF commitments in an FTA, but accept that if Britain exercised its sovereign right to diverge and the EU took the view that these moves represented unfair competition, then the FTA would hand the EU the right to impose retaliatory tariffs.<sup>46</sup> This would be a thoroughly bad compromise. It would not remove investment uncertainty from the private sector: the car industry might find itself facing a 10% tariff at short notice.

Even more damaging would be the consequences for the longer-term UK-EU relationship. It is unlikely that post-Brexit, the pressures for regulatory divergence within the Conservative Party will somehow disappear. For some, not to diverge would be a betrayal of Brexit. The result would be continued argument and dispute over regulatory and trade issues between Britain and the EU. This would result in a mutual lack of trust that damages the relationship and limits the potential for wider UK-EU cooperation. Britain’s dogmatic insistence on its new sovereign rights post-Brexit could come at a high economic and political price.

The heated debate over LPF commitments goes to the heart of whether or not tariffs and quotas on trade in goods can be avoided in a UK-EU FTA. If successful, it would

be the most politically visible achievement of the FTA. It would also make the Northern Ireland Protocol much easier to manage – at least, until the UK establishes, as the present government fully intends, differential tariffs with other trade partners in future FTAs.

---

### **Britain’s dogmatic insistence on its new sovereign rights post-Brexit could come at a high economic and political price.**

---

However, the high public profile given to tariff- and quota-free access to trade in goods downplays the economic importance of market access to services, where tariffs are irrelevant. From the point of view of the UK’s national interest, trade in services should arguably be of equal, if not higher, priority than trade in goods. In the latter, the EU surpasses the UK easily; in the former, it is the UK that boasts a large and buoyant surplus. Nonetheless, without the benefit of the EU Single Market, UK service providers face significant obstacles to continued ease of market access.

These obstacles are often complex and subtle: differing national regulatory regimes are still important in some sectors. However, the Single Market – at least, in theory – grants service providers rights of establishment and operation in any member state, with legal and enforcement remedies. EU rules provide for the mutual recognition of professional qualifications. ‘Free movement’ presently allows UK citizens to offer their services to any EU member state. No FTA that the EU has ever signed outside of the European Economic Area offers service industries such advanced freedoms.

The British government has done little to justify such liberal treatment. Government proposals on the immigration regime it will launch at the end of the

transition period offer no special rights to EU citizens. In fact, the central claim of the Home Secretary, Priti Patel, is that her policies will remove the ‘unfairness’ of the free movement rights EU citizens currently enjoy.<sup>47</sup> At the same time, notions of equivalence are imperilled by the government’s insistence that the prosperity of a ‘Global Britain’ depends on its boldness when pursuing a divergent path to the EU.

---

### **The high public profile given to tariff- and quota-free access to trade in goods downplays the economic importance of market access to services, where tariffs are irrelevant.**

---

Essentially, the UK is asking to have its cake and eat it. The consequence will be reduced market access and a long-term loss of opportunity for British service industries.

Paradoxically, the City of London may survive the new regime the best: financial services account for about a third of the UK’s service trade with the EU. Although the European Central Bank may eventually insist that certain activities in financial trading be located in the eurozone, London has huge advantages as a financial centre that serves the whole of Europe and no other city can match. These competitive advantages may have eroded, but nonetheless are unlikely to disappear.

The British strengths most under threat are in sectors as diverse as law and management consultancy, aviation, culture and design, architecture, films and broadcasting, and perhaps even sport. The sadness is in the loss of opportunity for some of Britain’s brightest and most promising youths.

## **The prospect of deadlock on fishing**

Fishing remains the other major obstacle to a limited FTA. The EU has taken a political decision to put fishing at the front of the negotiating queue, initially insisting in the Council mandate on an agreement by June this year. The protection of EU fishing rights in British waters has effectively become a precondition of reaching a wider FTA. The UK points to the legal reality that post-Brexit, the UK becomes an “independent coastal state”,<sup>48</sup> like Norway and Iceland, and outside the jurisdiction of the EU’s Common Fisheries Policy (CFP). Britain proposes to allow Continental fishers access to UK fishing grounds on the basis of a system of quotas, negotiated yearly with a fully sovereign UK making

autonomous decisions outside any form of treaty-based EU jurisdiction.

---

### **The protection of EU fishing rights in British waters has effectively become a precondition of reaching a wider FTA.**

---

On both sides of the Channel and North Sea, fishing is an issue of marginal economic significance yet extreme political sensitivity. UK fishing communities have, from Britain's EU membership in 1973, complained of a rotten deal. The CFP was instituted at the last moment before the UK joined, when Britain had virtually no say in how it would work.

There is politics here, too. Scottish Conservatives have used fishing as a weapon against the pro-European Scottish National Party. Similarly, Brexit-supporting Conservatives in the fishing communities of South West England have railed against the pro-EU Liberal Democrats.

As Baroness Sheila Noakes, one of the House of Lords' most committed Brexiteers put it, the escape from the CFP is "symbolic of what it means to be a free nation".<sup>49</sup>

Michael Gove, whose adoptive parents were in the Scottish fishing trade, has promised from his now elevated position in the Cabinet Office, supervising the Brexit negotiating strategy, that the demise of the CFP's control of UK fishing would lead to a renaissance of "tens of thousands" of new jobs in the sector.<sup>50</sup>

As a committed conservationist, Gove also believes in strict controls on total catches. The logic of his position is that these new UK jobs would, therefore, come at the expense of fishing communities in France, Spain and other coastal EU states. This cannot be a happy or acceptable prospect for French President Emmanuel Macron, who is already set to face a difficult re-election battle in May 2022. As so often is the case, the British make the mistake of thinking that their own political problems are unique and exceptional.

The facts of life in fishing limit the scope for simplistic assertions of sovereignty. Half of the fish landed in UK ports is not consumed domestically – most of it is exported to the EU, while Britain imports lots of fish landed on the Continent. In the event of a failure to agree

on an FTA, the potential imposition of EU tariffs on UK exports would disrupt this mutually beneficial trade gravely. The interests of UK fishing communities are also in conflict. In Scotland, for example, the West Coast's salmon, lobster and shellfish exporters take a different view to the East Coast deep-sea fishers.

---

**The EU is arguing that there should be no change in existing fishing rights. Gavin Barwell argued that this is "not reasonable".**

---

On the face of it, the EU is arguing that there should be no change in existing fishing rights. Gavin Barwell countered in the Lords debate that this is "not reasonable".<sup>51</sup> As a general argument, the EU always insisted in talks with his former boss, Theresa May. While she pleaded for as little change in the status quo as possible, it is simply impossible that Brexit will change nothing. On fishing, the EU must accept this reality. It currently appears that the EU's rigid position may be softening.

Politics, however, demands that any change in the status quo should be cautiously phased and measured. A compromise would be to guarantee Continental fishers the certainty of a high but gradually declining proportion of their existing catch as time unfolds. Whether Gove is in the mood for such flexibility is questionable. Any deal will be a hard sell to the fishing communities, considering the extravagant promises that are still being made. As David Hannay put it in the Lords debate, it is nonetheless "not too late [...] to reach mutually beneficial arrangements over fisheries which give our fishers a better deal than they had in the past, so long as we do not take an all-or-nothing approach."<sup>52</sup>

## The UK government's narrowing vision of its future relationship with the EU

Besides these fierce disputes over LPF commitments and fisheries, it is the UK government's narrowing vision for the future EU relationship which is the most alarming aspect of the shifts in UK government policy since the general election. However, it has so far received the least attention because of the typical British preoccupation with trade that underplays the wider political role of the EU. The UK-EU relationship is not just economic. EU cooperation now plays a vital role in the UK's national security.

For example, British participation in the European Arrest Warrant (EAW) has simply been abandoned; tossed outside without a Home Office ministerial statement

of explanation, nor any debate or vote in Parliament. As recently as 2014, as the then Home Secretary, May undertook a painstaking review of all of the EU's different Justice and Home affairs measures which Britain had signed up for in the Lisbon Treaty in 2009, but was then given the opportunity to opt out of after five years. After much-anguished deliberation and with the unequivocal advice of the nation's leading security and police experts, she came to the view that participation in the EAW was far too valuable to lose.

Brexit does not prevent our continued participation in the EAW. The government has unilaterally decided

that because such sensitive cooperation can only take place under the rule of law, Britain cannot be part of it, because we would have to remain under a regime of law in the final analysis interpreted by the ECJ.

On the rest of the security agenda, the government insists on its support for pragmatic cooperation between national authorities. However, any agreement cannot “constrain the autonomy of the UK’s legal system in any way”.<sup>53</sup>

---

**It is the UK government’s narrowing vision for the future EU relationship which is the most alarming aspect of the shifts in UK government policy since the general election.**

---

John Kerr, in the Lords, pointed to the fact that because the British government “robustly rejects the idea of any role for the Court of Justice”, this will have wide-ranging consequences.<sup>54</sup> Police and security forces cannot exchange data which is vital in the fight against terrorism without there being commonly accepted rules for how and in what circumstances this can be done. Countries that have lived under fascism and communism within living memory will never accept anything otherwise.

And yet, the UK government has now decided that it cannot accept the last analysis of the rulings of British courts on these questions being subject to the oversight of the ECJ. Rejection of any role for the ECJ is not required of Brexit per se, but only of a highly purist and sovereigntist definition of Brexit. This position has long been an article of faith among ideological Brexiteers, of course. It only became explicit government policy in the last few months, however.

The Northern Ireland Protocol that Johnson agreed to as part of his Withdrawal Agreement is crystal clear that in any dispute about its interpretation, the ECJ remains the final arbiter on any point of Union law. In the Lords debate, Barwell pointedly read out a passage of the signed Political Declaration:

“should a dispute raise a question of interpretation of provisions or concepts of Union law, [...] the arbitration panel should refer the question to the Court of Justice of the European Union (CJEU) as the sole arbiter of Union law, for a binding ruling”.<sup>55</sup>

What the British government signed up for in October, it casually overturned the following February – without any willingness on its part to subject such a crucial change of policy to Parliamentary scrutiny!

In Prime Minister’s Questions on 3 June, Johnson’s predecessor, Theresa May, asked for “reassurance that as from 1 January 2021, the UK will have access to the quality and quantity of data that it currently has through Prum (Convention), Passenger Name Records, ECRIS (European Criminal Records Information System) and SISII (Second generation Schengen Information System)”.<sup>56</sup> The Prime Minister was not able to offer that reassurance. In truth, the negotiations on these vital security questions are bogged down in arguments about the need for judicial supervision over executive agency cooperation which conforms to European standards of human rights.

The EU is doing its best to be accommodative of the British position. Given the UK government’s new red line ruling out any intrusion of the ECJ on British sovereignty, it has sought to underline the importance of Britain accepting the European Convention on Human Rights (ECHR). As the rulings of the Strasbourg Court are legally quite separate from the ECJ, one might have assumed that this was a reasonable ask of the British government.

---

**Rejection of any role for the ECJ is not required of Brexit per se, but only of a highly purist and sovereigntist definition of Brexit.**

---

As Barwell emphasised in the Lords debate, the Political Declaration stated that the “future relationship should incorporate the United Kingdom’s continued commitment to respect the framework of the European Convention on Human Rights”.<sup>56</sup> However, the British government is now insisting that “[t]he agreement should not specify how the UK or the EU Member States should protect and enforce human rights”.<sup>57</sup>

The Johnson government still claims that its policy is to accept the ECHR, but it refuses to affirm that position in an international treaty with the EU. The government appears to believe that a system of executive cooperation between police and intelligence agencies can be made to work without any binding framework of legal oversight. It seems that their objection has nothing to do with the EU per se, but rather concerns the notion that the EU courts should exercise such oversight. This appears to be in keeping with the UK’s wider preference for strengthening the executive at the expense of the judiciary, and its scepticism about judicial activism in the field of human rights. The government is now replaying unresolved arguments within the Conservative Party about the status of human rights protections at the European level.

Consequently, the EU has toughened its stance to clarify that any UK departure from the ECHR status quo will

lead to the automatic suspension of the provisions of the UK- EU agreement that depend on them. As Gavin Barwell put in the Lords, “[i]f we could resolve this issue [on security issues] in relation to the ECHR, the two parties are not that far apart”.<sup>59</sup> We shall soon see if that tone of qualified optimism is justified.

---

### **The Johnson government still claims that its policy is to accept the European Convention on Human Rights, but it refuses to affirm that position in an international treaty with the EU.**

---

As for cooperation with the EU on foreign policy questions, the UK government’s new policy now dismisses the prospect of a “joint institutional framework”.<sup>60</sup> All it seeks is “friendly dialogue and cooperation”.<sup>61</sup> To this end, John Kerr recounted in the Lords debate how the British government had specifically “rejected the Commission’s idea that one of the negotiating groups [...] should cover external relations topics.”<sup>62</sup>

This ignores the view of most international relations experts that institutions matter to outcomes: they create a framework of regular meetings at the ministerial or senior diplomatic level. They bring officials together to develop close ties across countries. They facilitate an instinctive mutual understanding of what underlies each government’s approach. They make common positions easier to forge and re-forge week by week, as situations develop and change. As David Hannay put it in the Lords, the government should ask themselves a simple question:

“Will we have more or less influence on the formulation of EU policies if we refuse systematic co-operation?”<sup>63</sup>

Instead of opening the door to continued close European cooperation, the government wants to limit contacts to ad hoc exchanges.

## **Conclusion**

Politics and events have both intervened to ensure that what emerges from the current UK-EU negotiations will match none of the adjectives which successive British prime ministers once promised to achieve. There will be nothing ‘deep and ‘special’ about the future UK-EU relationship; there is little that is ‘ambitious’ and ‘wide-ranging’.

There is still a reasonable doubt as to whether there will be any FTA at all. If there is an agreement, as I judge most

Where is the government’s ambition for building up the equivalent of the Five Eyes intelligence partnership among our European friends; strengthening European cooperation within the NATO; and establishing common European positions in vital international organisations, such as the World Health Organization and other UN bodies? Its attitude does not measure up to the need for ever-closer cooperation with our neighbours, who most closely share our values and interests.

Most significantly, the government now rejects the notion of an overarching institutional framework for the UK-EU relationship. The possibility of a ‘UK-EU Association Agreement’ was included in the Political Declaration but has since been ditched by the UK. The government seems to prefer a suite of agreements to a single association agreement, repeating John Kerr’s description of “the EU’s unhappy experience with Switzerland [...]. We were one of the many member states to agree that the Swiss experiment should never be repeated. I expect the others still feel the same.”<sup>64</sup>

---

### **The UK government now rejects the notion of an overarching institutional framework for the UK-EU relationship.**

---

Cynics may question the value of such formal structures as typical of the institution-building that the EU so loves. However, without a clear partnership framework, the UK-EU relationship runs the risk of being characterised by and always at risk of being poisoned by interminable trade disputes. There must be something in place that keeps everyone’s eyes on the big picture: our common defence of the values of democracy, human rights and the rule of law. As Barwell put it in the Lords in an appeal to his fellow Conservatives, “let us not mislead ourselves that an association agreement [with the EU] is somehow inconsistent with the decision of the British people.”<sup>65</sup>

likely, it will, at best, be a ‘bare-bones’ trade deal. Perhaps it will be sufficient to prevent immediate disruption to trade, with some provisional arrangements on security added on – but not much more. In consequence, the economic ties that have bound Britain ever closer to the principal markets of the Continent over 47 years of EU membership will weaken significantly and exponentially as businesses make their own dispositions in light of the new marketplace and regulatory realities.



No one can forecast precisely what this will mean for the British economy a decade or so hence. Brexit-supporting cynics believe that any adverse consequence will be lost in the unprecedented recession most economists are expecting in the wake of the COVID-19 emergency. Brexit believers put their faith in the shock that the UK economy is currently enduring, and hope that a new, more successful and dynamic economic model will emerge from all the temporary chaos and grief to carry Brexit Britain forward with new momentum.

---

**The bare-bones FTA that could emerge this autumn would not offer a settled basis for future economic and political cooperation between Brexit Britain and the European Union.**

---

They may, of course, be proved right. However, the ‘Remoaner’ refusal to accept the reality of Brexit does not make one more than a little sceptical. In my view, the bare-bones FTA that could emerge this autumn would not offer a settled basis for future economic and political cooperation between Brexit Britain and the European Union. Instead, the prospect is for continuing ‘mini trade wars’ over such issues as fishing quotas and LPF disputes, magnified by Brexiteer assertions of sovereignty and their manifestation in the form of divergence from EU law and practice.

Whether future political leaders on both sides of the Channel can rise above this continuing cacophony of noisy argument and petty dispute to cooperate closely on the grand common challenges our nations face – COVID-19, terrorism, migration, the climate emergency, relations with China and Russia – must remain an open question.

Fundamentally, what will have driven this outcome is the Johnson government’s determination to ‘get Brexit done’. This is the campaign slogan that sealed Johnson’s general election victory last December. It is also the binding theme that unites the present-day Conservative Party, much as it remains divided by different visions of Brexit.

On the one hand, there are the hyper-globalisers who are keen to see Brexit, in Nigel Lawson’s words, “complete the Thatcher revolution”; liberate Britain from the incubus of EU regulation; and chart a new course as a buccaneering, free-trading global nation. On the other, there are the newly victorious Conservative representatives of ‘left behind’ towns and old mining districts whose voters somehow imagined that ‘Europe’ or ‘Brussels’ was an alien threat to their traditional way of life, voted Leave as a cry of protest, and were outraged that the Westminster elite ‘conspired to ignore’ the people’s 2016 referendum decision for more than three years.

‘Getting Brexit done’ drove the Johnson government to set aside any question of an extension to the December 2020 deadline for the completion of the future relationship’ talks, even though Article 132 of the Withdrawal Treaty that Johnson signed only last October explicitly allowed for such an extension of up to two years. A pledge was made early in the general election campaign that there would be no Brexit extension beyond the end of this year. That pledge was carried into UK law in the January 2020 Withdrawal Act.

The COVID-19 emergency presented the British government with a perfectly legitimate excuse for backtracking on this commitment (which, in legislative terms, could easily have been done by the statutory instrument provided for in the Withdrawal Act). The government could have made a powerful case to Parliament for such a decision, based on the disruption caused to the negotiating timetable by having to conduct meetings online; the necessary diversion of civil service resources from the negotiations to tackling the COVID-19 crisis; the lack of political time and space for ministers and heads of government to resolve outstanding clashes of position; and the practical difficulties of putting new border arrangements in place by January 2021, given the pressures on the civil service administration and especially business, due to the disruption COVID-19 caused.

In the face of these facts, one might imagine that any rational government would have abandoned what was already an exceedingly ambitious timetable. However, for the Johnson government, ‘getting Brexit done’ trumped all these arguments. The opportunity provided in the Treaty for an extension passed at the end of June. The negotiations are now on a course of either reaching an agreement by September, or bursting. The final three months of the year will be needed to polish the legal text before securing ratification. This self-imposed timetable inevitably limits the scope of what can be agreed.

---

**The EU is not a perfect entity: as an overly complex hybrid of supranationalism and intergovernmentalism, it is in a constant state of evolution. With the exigencies of politics, it endures many ups and downs, evolving from one crisis to the next.**

---

The reality of Brexit does not, however, alter two simple facts of life. First, Britain’s geographical proximity to the rest of the European Continent is God-given: no attempt to ringfence the British Isles from the affairs of its Continental neighbours has lasted any sustained length of time since the Middle Ages.

Second, the European Union is a powerful entity with which Brexit Britain will have to coexist. Brexit has not destroyed the EU, as some its most enthusiastic

devotees once hoped. If anything, opinion polls suggest that it has strengthened popular commitment to the EU in many member states. The EU is not a perfect entity: as an overly complex hybrid of supranationalism and intergovernmentalism, it is in a constant state of evolution. With the exigencies of politics, it endures many ups and downs, evolving from one crisis to the next. But the will to make it work, in the face of all the populist pressures, remains a powerful force in most member states. The EU had a bad start to the COVID-19 crisis, but it now looks as though it may emerge from it stronger and more integrated, especially if the Merkel-Macron plan becomes a reality.

The EU accounts for 40% of UK trade. It is a massive regulatory presence on the global stage. Security

cooperation with the EU is vital to safety on our streets, and most of its members are our NATO allies. It may not punch its weight politically as much as it could, but in international relations, it can and does make a difference. For all these reasons, post-Brexit Britain cannot avoid seeking a strong and cooperative relationship with the EU.

The likely outcome of this year's 'future relationship' negotiations suggests that, on this crucial test, this rushed effort will have been a failure. Much will be left to the future, and there is legitimate room for doubt as to whether the present British government is equal to the task.

- <sup>1</sup> BBC News, “Brexit: Theresa May eyes ‘special partnership’ with EU”, 28 March 2017a.
- <sup>2</sup> European Union Committee (2020), “[Report pursuant to section 29 of the European Union \(Withdrawal Agreement\) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#)”, London: House of Lords.
- <sup>3</sup> European Commission (2020), [Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland](#), COM(2020)35 final, Brussels.
- <sup>4</sup> Johnson, Boris (2020), “UK/EU relations: Written statement – HCWS 86”, London: UK Parliament.
- <sup>5</sup> UK Government (2020), “[The Future Relationship with the EU: The UK’s Approach to the Negotiations](#)”, London.
- <sup>6</sup> For example, the former Chancellor of the Exchequer, Lord Lamont of Lerwick, and Lord Cavendish of Furness.
- <sup>7</sup> European Union Committee (2020), *op.cit.*, para.17.
- <sup>8</sup> *Ibid.*, para.22. Emphasis added.
- <sup>9</sup> Johnson, Boris, “[A deal is oven-ready. Let’s get Brexit done and take this country forward](#)”, *The Telegraph*, 05 November 2019.
- <sup>10</sup> House of Lords, “[House of Lords debates: Monday, 16 March 2020](#)”, 16 March 2020.
- <sup>11</sup> BBC News, “[EU trade deal ‘easiest in human history’](#)”, 20 July 2017b.
- <sup>12</sup> Davis, David, “[House of Commons, 24 January 2017, Volume 620](#)”, House of Commons, 24 January 2017.
- <sup>13</sup> European Union Committee (2020), *op.cit.*, para.27.
- <sup>14</sup> Kaczmarczyk, Patrick, “[Why distance matters in trade](#)”, *LSE Brexit*, 23 February 2018.
- <sup>15</sup> House of Lords (2020), *op.cit.*
- <sup>16</sup> Michael Gove announced in late April 2020 that up to 50,000 new customs agents might be needed. The government is setting up a customs training academy. Gallardo, Cristina, “[Michael Gove: Coronavirus will ‘concentrate the minds’ of EU Brexit negotiators](#)”, *POLITICO*, 27 April 2020.
- <sup>17</sup> European Council (2018), [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018](#), p.301.
- <sup>18</sup> Tusk, Donald and Jean-Claude Juncker (2019), [Joint letter of President Tusk and President Juncker to Theresa May, Prime Minister of the United Kingdom](#), European Council.
- <sup>19</sup> Cox, Geoffrey (2019), “[Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement](#)”. *The Times*, “[Geoffrey Cox’s Brexit legal advice: the attorney-general’s letter in full](#)”, 05 December 2018.
- <sup>20</sup> European Council (2018), *op.cit.*, p.303.
- <sup>21</sup> *Ibid.*, p.303. Emphasis added.
- <sup>22</sup> Courea, Eleni, “[UK Brexit secretary stumbles over detail of deal with EU](#)”, *POLITICO*, 21 October 2019.
- <sup>23</sup> Maidment, Jack, “[‘Tell them to call me and I will tell them to throw the form in the bin’: Boris Johnson insists Northern Ireland businesses will NOT have to fill out customs paperwork when they send goods to the rest of UK after Brexit as he contradicts Stephen Barclay](#)”, *MailOnline*, 08 November 2019.
- <sup>24</sup> House of Lords (2020), *op.cit.*
- <sup>25</sup> The purpose of the Protocol is to remove the need for a hard border on the island of Ireland, which in turn will become the legal boundary of the separate customs territories of the EU and UK. As such, Article 5 obliges the British government to collect, on the EU’s behalf, EU customs duties on goods moving from Great Britain to Northern Ireland, except for categories of goods which the EU and UK jointly agree has no risk moving into the Republic. Article 6 spells out how the EU Customs Code will apply to Northern Ireland, and hence how *EU export checks* will be applied on goods moving from Northern Ireland to Great Britain. Article 12 gives the EU *the right to monitor and supervise* UK administration of the Protocol under the ultimate jurisdiction of the European Court of Justice.
- <sup>26</sup> House of Lords (2020), *op.cit.*
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Morris, Allison, “[Bad faith in decision to refuse EU office request](#)”, *The Irish News*, 03 April 2020.
- <sup>29</sup> BBC News, “[Brexit: Michael Gove writes to parties over EU presence in NI](#)”, 02 May 2020.
- <sup>30</sup> Cabinet Office (2020), “[The UK’s Approach to the Northern Ireland Protocol](#)”, UK Government, para.17(1).
- <sup>31</sup> *Ibid.*, para.17(3).
- <sup>32</sup> *Ibid.*, para.32.
- <sup>33</sup> *Ibid.*, para.17(3).
- <sup>34</sup> Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), [Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators’ level on 17 October 2019, to replace the one published in OJ C 661 of 19.2.2019](#), TF50 (2019) 65, European Commission, para.17-18.
- <sup>35</sup> Frost, David, “[David Frost lecture: Reflections on the revolutions in Europe](#)”, Université Libre de Bruxelles, 17 February 2020.
- <sup>36</sup> House of Lords (2020), *op.cit.*
- <sup>37</sup> Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), *op.cit.*, para.77.
- <sup>38</sup> European Council (2018), *op.cit.*
- <sup>39</sup> European Commission (2020), *op.cit.*
- <sup>40</sup> House of Lords (2020), *op.cit.*
- <sup>41</sup> Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2018), [Internal EU27 preparatory discussions on the framework for the future relationship: ‘Level Playing Field’](#), TF50 (2018) 27, European Commission.
- <sup>42</sup> *Ibid.*, p.7. Emphasis added.
- <sup>43</sup> House of Lords (2020), *op.cit.*
- <sup>44</sup> Lawson, Nigel, “[Brexit gives us a chance to finish the Thatcher revolution](#)”, *Financial Times*, 02 September 2016.
- <sup>45</sup> *EURACTIV*, “[Germany gains most from relaxed EU state aid rules](#)”, 04 May 2020.
- <sup>46</sup> See e.g. Forsyth, James, “[Is this the deal that could break the Brexit deadlock](#)”, *The Spectator*, 18 June 2020.
- <sup>47</sup> BBC News, “[Brexit: EU migration rules ‘to end straight after no-deal’](#)”, 19 August 2019.
- <sup>48</sup> Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), *op.cit.*, para.71.
- <sup>49</sup> House of Lords (2020), *op.cit.*
- <sup>50</sup> Gove Michael, “[Regaining control of our fisheries is a great opportunity for Britain](#)”, *The Times*, 04 July 2018.
- <sup>51</sup> House of Lords (2020), *op.cit.*
- <sup>52</sup> *Ibid.*
- <sup>53</sup> Johnson (2020), *op.cit.*
- <sup>54</sup> House of Lords (2020), *op.cit.*
- <sup>55</sup> Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), *op.cit.*, para.131.
- <sup>56</sup> *Ibid.*, para.7.
- <sup>57</sup> UK Government (2020), *op.cit.*, para.31.
- <sup>58</sup> Read, Jonathon, “[Former PM Theresa May expresses doubt over Boris Johnson’s plans for coronavirus and Brexit](#)”, *The New European*, 03 June 2020.
- <sup>59</sup> House of Lords (2020), *op.cit.*
- <sup>60</sup> Johnson (2020), *op.cit.*
- <sup>61</sup> UK Government (2020), *op.cit.*, para.8.
- <sup>62</sup> House of Lords (2020), *op.cit.*
- <sup>63</sup> *Ibid.*
- <sup>64</sup> *Ibid.*
- <sup>65</sup> *Ibid.*

The **European Policy Centre** is an independent, not-for-profit think tank dedicated to fostering European integration through analysis and debate, supporting and challenging European decision-makers at all levels to make informed decisions based on sound evidence and analysis, and providing a platform for engaging partners, stakeholders and citizens in EU policymaking and in the debate about the future of Europe.

The **Europe's Political Economy Programme** is dedicated to covering topics related to EU economic policy, in a context of increasing globalisation and rapid technological change. From an intra-EU point of view, the Programme provides expertise on reforming and strengthening the Economic and Monetary Union (EMU) and regional economies; ensuring a holistic approach to industrial policy; supporting the Single Market and digital policy; as well as optimising the use of the EU budget and its programmes. Within the international context, the Programme focuses on trade policy and multilateral governance systems. The Programme's team is also a skilled analyst on the process of Brexit and the long-term relationship between the United Kingdom and the EU.

The activities under this Programme are often carried out in cooperation with other EPC Programmes, with whom there are overlaps and common interests. For example, this is the case for work related to Brexit and differentiated integration, skills and labour markets, sustainability and strategic autonomy.

With the strategic  
support of



King Baudouin  
Foundation

*Working together for a better society*



With the support of  
Europe for Citizens Programme  
of the European Union