



## BRIEFING PAPER

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# Brexit: Council Directives for Negotiations on Transition

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## Summary

This Commons Library briefing paper looks at the January 2018 negotiating directives drawn up by the Council of Ministers, in light of the guidelines established by the European Council in December 2017. Their content sheds light on any 'red lines' the EU might have in place for Phase 2 of the negotiations with the UK regarding withdrawal from the European Union.

### Council Negotiating Directives

Council of Ministers' negotiating directives expand on the European Council's [overall political guidelines](#) for a negotiation, so as to give the European Commission (as negotiator for the Article 50 Treaty on European Union – TEU – process) clear instructions on the outer limits of the EU's negotiating position. For Phase 2 of the Article 50 TEU negotiations, as these cover new aspects of the withdrawal process – namely, a possible transition period and a framework for a future partnership – the Council set out [new negotiating directives](#) on 29 January 2018 ('January Directives').

### Contents of the January 2018 Directives

The January Directives have two sections. Section I sets out outstanding issues from the Phase 1 negotiations that will need to be discussed early in the Phase 2 negotiations. It also includes a commitment to turn the Phase 1 Joint Report into binding legal commitments for both the EU and the UK.

Section II sets out the EU's position on a transition agreement (referred to as an [agreement on an implementation period](#) by the UK). In summary, it specifies that in the view of the EU, a transition will:

- Be time-limited, and end by 31 December 2020.
- Require the entire body ('acquis') of EU law to continue to apply to the UK, including in areas relating to free movement of people and the EU's customs and trade laws and policies, and including new EU laws that will enter into force during the transition period.
- Require the UK to remain within the CJEU's jurisdiction.
- Preclude the UK from 'being able to conclude' its own trade agreements, unless specifically authorised to do so by the EU.
- Preclude the UK from having representatives in the EU institutions and in EU agencies, as it will no longer be a 'Member State'.

The January Directives are very similar to the European Council political guidelines for Phase 2, and commentators have consequently noted that there does not seem to be significant scope for negotiation in the EU's position on transition.<sup>1</sup>

### Implications of the January 2018 Directives for UK Brexit Policy

The position on transition articulated in the Council Directives has implications for the ability of the UK government to achieve a number of the [priorities that it has set out for Brexit](#), at least during the transition.

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<sup>1</sup> See, for instance, Adam Fleming, '[EU agrees Brexit 'transition' negotiation guidelines](#)', *BBC*, 29 January 2018.

## 4 Council Directives for Negotiations on Transition

First, divergence from EU law will not be possible in this proposed transition framework. Second, a commitment to remain in the EU's customs union and to adhere to its trade policies, as well as the preclusion of the UK becoming bound by new trade agreements, has consequences for the development of the UK's global trade strategy. Third, a new immigration policy for EU nationals cannot be implemented during the transition agreement under the Council Directives. Finally, the EU demands that the CJEU will continue to be a binding source of authority in the UK during the transition, making the UK's 'red line' of ending CJEU jurisdiction unachievable during that time.

### **The Next Steps in Article 50 TEU Negotiations**

There is divergence between the UK and the EU positions on transition, as has become clear in the 21 February DExEU [response](#) to the 7 February [draft transition agreement text](#) produced by the Commission on the basis of the January Directives. There appears to be room for clarification on many aspects of both parties' positions on a transition agreement, but there are some 'substantial' differences in areas such as the extent of coverage of EU law to the UK, and the ability for the UK to express opinions on new legislative initiatives.

A 'joint declaration' on a transition agreement is desired by the 22-23 March European Council meeting, so that the negotiating parties can then proceed to the Phase 2 discussions about the framework for a future partnership.

# 1. What are Council Negotiating Directives?

## Summary

Under Article 218(2) of the Treaty on the Functioning of the European Union (TFEU), the Council of Ministers is the body responsible for opening trade negotiations, adopting a trade agreement, and setting out the EU's negotiating directives. It updated these negotiating directives on 29 January 2018, in light of the start of Phase 2 of the Article 50 TEU process.

## 1.1 Treaty Context for the Negotiations

Under [Article 50](#) of the Treaty on European Union, the negotiations that will result in UK withdrawal from the European Union take place in two distinct phases: one arranging for withdrawal, and one arranging for a framework for the future relationship between the EU and a departing Member State.<sup>2</sup>

[Phase 1 of the negotiations](#) concerned five key issues that a future Withdrawal Agreement will need to adhere to in order to be ratified by both the EU and the UK:

- The rights of citizens;
- The financial settlement;
- The issues relating to the island of Ireland;
- 'Other separation issues'; and
- The governance of the Withdrawal Agreement.

This phase of the negotiations was completed successfully on 15 December 2017, when the European Council agreed that "sufficient progress" had been made in the negotiations to move on to the next phase.<sup>3</sup>

Phase 2 moves the negotiations on to discussing two separate but related matters: 'transition' and 'the framework for the future relationship'. The EU sets out its position in negotiations like the Article 50 TEU negotiations in two stages: first, the European Council adopts general guidelines; and second, those guidelines are elaborated on by the Commission in draft negotiating directives. The Council of Ministers then adopts a final version of these negotiating directives, amending them as appropriate.

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<sup>2</sup> Such a 'framework' for the future relationship only establishes an '[overall understanding](#)' of the future relationship between the UK and the EU – actual negotiations for an agreement establishing that relationship cannot commence until the UK stops being an EU Member State.

<sup>3</sup> See Commons Briefing Paper 8183, [Brexit: 'sufficient progress' to move to phase 2](#), 19 December 2017, for further information on phase 1.

## 6 Council Directives for Negotiations on Transition

As these negotiations cover different matters to the Phase 1 negotiations, the European Council issued new guidelines on [15 December 2017](#), and the Council of Ministers<sup>4</sup> supplemented the existing negotiating directives for the Commission with an [update on 29 January 2018](#). The European Council intends to supplement these in March 2018 with further guidelines on negotiating the framework for the EU's 'future relationship' with the UK; these March guidelines, too, will result in the adoption of negotiating directives by the Council of Ministers.

The [original negotiating directives](#) issued by the Council in May 2017 remain in force, but are supplemented by specific provisions in the January 2018 guidelines that set out what the European Commission, as main negotiator for the EU, can commit to in the Phase 2 negotiations, particularly on transition. They are of key interest to the UK government, as they indicate what Michel Barnier and his team of negotiators are permitted to offer during negotiations.

Since publication, the January Directives have been supplemented with draft work by the Commission to turn the negotiating directives into legal text, particularly on the desired transition agreement. This Commission [position paper](#) was published on 7 February 2018, and on 21 February 2018 the UK's Department for Exiting the EU (DExEU) issued a [response](#) to it, amending significant portions of the text in advance of the negotiations. These 'draft transition agreement texts' will be referred to throughout the briefing where they clarify the EU or UK position as set out to date – and they will be specifically analysed in Section 4 of the briefing.

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<sup>4</sup> Under Article 50 TEU, negotiations take place according to the procedure set out in Article 218 TFEU, under which the Council opens, sets out negotiating directives for, and closes any negotiations.

## 2. The January 2018 Council Negotiating Directives

### Summary

The January 2018 update to the Council's negotiating directives cover both further issues relating to the 'orderly withdrawal' of the UK from the EU, and the shape of a possible transition agreement struck between the UK and the EU.

The contents of the January Directives on transition make clear that the EU has a specific form of transition in mind, which in short sees the UK adhering to all obligations of being a Member State, but without having the rights to participate in the EU (by having representatives in EU institutions and agencies) that come with being a Member State.

The Directives appear to leave very limited room for negotiation on what a transition agreement will look like.

### 2.1 Coverage

Despite Phase 2 of the negotiations formally discussing only 'transition' and the 'framework for future partnership' that will exist between the EU and the UK, the January 2018 update to the Council's negotiating directives ('the January Directives') also sets out continuance on a number of Phase 1 topics.

Article 4 of the January Directives consequently stresses that "negotiations in the second phase could only progress as long as all commitments undertaken during the first phase were respected in full and translated faithfully in legal terms as quickly as possible". It repeats that given the "unique circumstances and specific nature of issues related to the island of Ireland", there should continue to be a distinct strand of negotiations to work out "detailed arrangements" that will give effect to the outcome of the Phase 1 negotiations (Article 6).

#### **Issues Related to the Orderly Withdrawal of the United Kingdom from the European Union**

Section I of the January Directives sets out that in the view of the Council, the Phase 1 negotiations did not address all withdrawal issues in full. Consequently, the Phase 2 negotiations will address (though not exclusively) the following<sup>5</sup>:

- Governance of the Withdrawal Agreement
- Intellectual property rights
- Ongoing public procurement procedures
- Customs-related matters needed for an orderly withdrawal from the Union

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<sup>5</sup> Council of Ministers, [Negotiating Directives](#), 29 January 2018, Art 8.

## 8 Council Directives for Negotiations on Transition

- Protection of personal data and use of information obtained or processed before the withdrawal date.

Article 9 repeats a commitment to translating Phase 2 negotiations results 'into clear and unambiguous legal terms', including Phase 1 results – which may need to be adapted in light of the agreement on transition struck between the EU and the UK. Key here is that the Council stresses that the Phase 1 agreements on Citizens' rights should apply as from the end of the *transition* period, as opposed to from the date of withdrawal. The Prime Minister on 31 January [stated](#) that her position is that EU nationals arriving during the transition will not benefit from the Citizens' rights agreement. Guy Verhofstadt, president of the European Parliament and the EP's Brexit coordinator, suggested this will not be acceptable to the EU:

The maintenance of EU citizens' rights during the transition are not negotiable. We will not accept that there are two sets of rights for EU citizens. For the transition to work, it must mean a continuation of the existing *acquis* with no exceptions.<sup>6</sup>

The issue of free movement of persons during transition has not to date been specifically raised in either the Commission's original [draft transition agreement text](#), or in the UK DExEU's [amendments](#) to that text. However, a government spokesperson [suggested](#) that this does not mean that the PM has changed her position on the matter. It is therefore likely to surface in the negotiations.

### Transitional Arrangements

Section II of the January Directives sets out the Council's agreed directives on the negotiation of a 'transition' period – or, a period that enables both the UK and the EU to prepare for the future relationship without an abrupt March 2019 end of the applicability of EU law to the UK. This period has been referred to by the UK government as an 'implementation period'.<sup>7</sup>

Article 10 reiterates the core principles underpinning any agreement with the UK, as set out in the [original European Council guidelines](#) following Article 50 TEU notification by the UK.

#### Box 1: April 2017 Core Principles for Agreements with the United Kingdom<sup>8</sup>

- Any agreement will have to be based on a balance of rights and obligations, and ensure a level playing field;
- Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach;
- A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member;
- The four freedoms of the Single Market are indivisible and there can be no "cherry picking";

<sup>6</sup> 'Brexit: Guy Verhofstadt rejects Theresa May's plan to end free movement rights early', *The Independent*, 1 February 2018.

<sup>7</sup> 'The government's negotiating objectives for exiting the EU: PM speech', 17 January 2017.

<sup>8</sup> European Council, [Art. 50 TEU Guidelines](#), 29 April 2017, Art 1.

- The Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union. [This refers notably to the competence of the Court of Justice of the European Union.]

Article 11 highlights that the original European Council guidelines also set out specific conditions regarding transition arrangements.

### **Box 2: April 2017 Transition Arrangement Conditions<sup>9</sup>**

- To the extent necessary and legally possible, the negotiations may seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in light of the progress made.
- Any such transitional arrangements must be clearly defined and precisely limited in time.
- They must also be subject to effective enforcement mechanisms.

The remainder of the January Directives expands on these 'transition arrangement conditions', adding the following specific qualities that a transition agreement between the UK and the EU should satisfy.

### **Box 3: January 2018 Transition Arrangement Conditions**

- Any transitional agreement should cover the whole of the Union acquis, including Euratom. (Article 13)
- The Union acquis should apply to and in the UK as if it were a Member State. (Article 13)
- For acts adopted in the Area of Freedom, Security and Justice (AFSJ) by which the United Kingdom is bound before its withdrawal, the UK's ability to opt out of measures amending its commitments remains as it currently is. The United Kingdom, however, can no longer opt into measures in the AFSJ except for those that address its current commitments. (Article 13)
- During the transition period, Union law should have the same effect in the UK as it does in all other Member States; specifically, it should be directly effective and supreme. (Article 14)
- During the transition period, the UK should remain bound by the obligations stemming from agreements concluded by the EU, its Member States (on the EU's behalf), or jointly concluded by the EU and its Member States. However, the UK can no longer participate in any bodies set up by those agreements. (Article 15)
- Any transitional arrangements require the UK's continued participation in the Customs Union and the Single Market (with all four freedoms) during the transition. The UK should continue to comply with Union trade policy. It should also in particular ensure that its customs authorities continue to act in accordance with the EU's customs and border legislations. During the transition, the UK may not 'become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union'. (Article 16)
- Any time-limited prolongation of the Union acquis requires existing Union structures and instruments to apply – including CJEU competence. (Article 17)
- In particular, the full competences of all Union institutions should continue to apply in and to the UK during the transition period. However, the UK will no longer be represented in the EU institutions, nor will it be able to participate in the decision-making of such institutions. (Article 18)
- During the transition period, the UK will not attend meetings that are normally attended by Member State representatives; exceptionally, however, and on a case-by-case basis, the UK could be invited to attend meetings without holding voting rights to meetings that specifically concern the UK or require the UK's presence. How this is to operate should be made clear in the Withdrawal Agreement (Articles 19 and 20).

<sup>9</sup> European Council, [Art. 50 TEU Guidelines](#), 29 April 2017, Art 6.

- Specific consultations should be scheduled regarding the Common Fisheries Policy and fishing quotas during the transition period. (Article 21).
- The transition period should not last beyond 31 December 2020. (Article 22).

### 2.2 Negotiability

Simon Hix, Professor of Political Science at the LSE, [suggests](#) that the EU's position leaves little scope for negotiation, given that the European Council's guidelines from December 2017 put in place a significant number of overarching limitations to the Commission's power to negotiate:

Such transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, clearly defined and limited in time. In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the *acquis* adopted by EU institutions and bodies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply. As the United Kingdom will remain a member of the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to apply and collect EU customs tariffs and ensure all EU checks are being performed on the border vis-à-vis other third countries.<sup>10</sup>

Michel Barnier, the chief Brexit negotiator, on 9 February gave a press conference that confirmed that he was bound by the negotiating directives set out: he [noted](#) that substantial disagreement on what a transition should look like remained, despite the EU's "very logical" position, and that consequently, a transition agreement was "not a given". The 21 February DExEU [amendments](#) to the Commission's [draft transition agreement text](#) confirm that areas of disagreement remain.

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<sup>10</sup> European Council, [Art. 50 TEU Guidelines](#), 15 December 2017, Art 4.

## 3. Implications of the Council's January Directives for the UK

### Summary

The model of transition set out in the Council's January 2018 negotiating directives has implications for the extent to which the UK will be able to pursue some of the policy goals that the Government has set out for Brexit.

First, regulatory divergence does not appear possible, as the entire body of EU law will continue to apply to the UK for the duration of the transition in the Council's model.

Second, the UK is precluded from fully developing its own trade policy, as the EU's trade policy will continue to apply to the UK during the transition and the UK may not 'become bound' by its own trade agreements during the transition, unless given EU permission.

Third, the UK cannot implement a new immigration policy vis-à-vis EU nationals during the transition period, as the free movement of persons rules will continue to apply in full.

Fourth, ending the jurisdiction of the CJEU in the UK will not be possible during transition, as the Council's directives require ongoing oversight and enforcement of EU law by the CJEU during transition.

### 3.1 Overview

The January Directives are unequivocal about the type of transition agreement that the EU is willing to consider. The shape of any possible transition agreement was already agreed upon by the EU27 in April 2017, when the European Council's initial negotiating guidelines specified that "[s]hould a time-limited prolongation of the Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply".<sup>11</sup>

This position has not changed over time; the European Council's December 2017 negotiating guidelines repeat that a transition should take such shape,<sup>12</sup> and the Council's January Directives give the Commission the authority to strike only a very specific form of transition agreement.

#### Box 4: The Shape of Transition

- The UK's *obligations* vis-à-vis the EU remain unchanged: this is in terms of legal obligations, in terms of budgetary contributions, and in terms of the CJEU's role in oversight of the UK's compliance with EU law during the transition period.
- However, the UK will not be represented in any EU institutions over the course of the transition period, as it will formally be treated as a 'third country'.

<sup>11</sup> European Council, [Art. 50 TEU Guidelines](#), 29 April 2017.

<sup>12</sup> European Council, [Art. 50 TEU Guidelines](#), 15 December 2017.

## 3.2 Implications for Regulatory Divergence

### Opting Out of EU Law

The EU's position is one that means that several of the UK Government's priorities in negotiating Brexit would not be achievable during the transition period. Specifically, it would seem that taking ['control of our own laws'](#) would be delayed.

The entire body of EU law would continue to have legal effect during the transition period under the EU's proposal – which not only means that the substance of the relevant EU laws would continue to apply, but also their means of applying to the UK would remain as they are now. Regulations would continue to be directly applicable whenever they are enacted by the EU; and the principles of supremacy and direct effect, making EU law supreme to domestic law and permitting EU law to be relied upon in domestic courts, would also continue to apply.

Given that this EU position requires the continuance of direct effect and supremacy, the *European Union (Withdrawal) Bill 2017-19* as currently drafted creates new legal problems. The *European Communities Act 1972*, which embeds supremacy and direct effect into UK law, is due to be repealed on the date of withdrawal.<sup>13</sup> An equivalent to it, however, would be necessary to satisfy the conditions set out by the EU for a transition period. The *Withdrawal Agreement and Implementation Bill* [announced by the Government](#) must include a provision like this should the UK seek a transition with the EU under the terms set out in the January Directives.

The 'entire body of EU law' is, furthermore, not a static concept: any new EU law enacted during the transition period will need to be applied in the UK as it is now. In terms of regulations, this usually requires no further adoption of legislation in the UK; but directives would need to be translated into domestic law by Parliament for the purposes of this transition period. The EU insists on this because the EU Single Market functions on the basis of equivalence: if EU law in the UK were to 'freeze' on 29 March 2019, but EU law in all the other Member States developed further, the UK might obtain a competitive advantage by not modernising its version of internal market law.<sup>14</sup> Furthermore, two different 'versions' of the same EU laws operating in the EU27 and the UK could produce unwanted effects and create great uncertainty for both business and citizens, depending on the area of law changed.

The Government has commented on the matter of EU laws enacted during a transition period being applicable to the UK. When asked if any EU law adopted after 29 March 2019 would have effect in the UK, the Prime Minister responded on 9 October 2017:

Given the way things operate, it is highly unlikely that anything will be brought forward during that period that has not already started discussions through the European Union to which we are being party of until we leave and on which we would have been able to say whether that would be a rule that we would sign up

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<sup>13</sup> European Union (Withdrawal) Bill, clause 1.

<sup>14</sup> See European Council, [Art. 50 TEU Guidelines](#), 29 April 2017, Art 1.

to or a rule that we would not wish to sign up to. Any new rules put on the table during the implementation period, given the way these things operate, are highly unlikely to be implemented during the implementation period.<sup>15</sup>

EU laws adopted via the EU's [ordinary legislative procedure](#) ordinarily take approximately one year to be negotiated between the Commission, the Council and the European Parliament, and following the negotiations, there is normally a delay between the agreed text being adopted and the entry into force of the relevant EU law: all directives have a further two-year implementation period during which the Member States have time to prepare domestic legislation to give effect to the agreed EU directive. However, regulations can enter into force within several days of being adopted – meaning that under the EU's current terms, there very possibly will be regulations that enter into force, particularly near the end of the transition period, that underwent the ordinary legislative procedure without UK representation on any of the EU legislative bodies.<sup>16</sup> There may be further EU legislative proposals that will have commenced under the ordinary legislative procedure while the UK still attended the Council and had MEPs present, but that nonetheless were not brought to a formal vote until after 29 March 2019 – here, again, the UK will have no formal say on the content of legislation that will be binding on it all the same. The lack of representation in the EU institutions looks to be an agreed matter at this point: it is a condition the EU put forward, but which the UK has not objected to in its amendments to the Commission draft transition agreement text.<sup>17</sup>

EU tertiary legislation requires less negotiating time than the EU secondary legislation described above, but is nonetheless legally binding. Consequently, some delegated and implementing acts will enter into force during the transition period. In theory, delegated and implementing acts do not concern substantive legislative change – but in practice, commentators have expressed doubts about the extent to which these tertiary acts genuinely restrict themselves to technicalities alone.<sup>18</sup> The UK would ordinarily have representatives on so-called Comitology committees, which scrutinise tertiary legislation; but the exclusion from EU institutions in the view of the Commission includes Commission committees and expert groups, who per its draft transition agreement text 'may, upon invitation and on an case-by-case basis, exceptionally' attend such meetings, and will not be permitted to vote in them.<sup>19</sup> The UK has amended the Commission's draft transition agreement on this front, suggesting that UK representation on these bodies should be generally possible where it will assist the 'effective operation and application' of EU law during transition – and has

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<sup>15</sup> [HC Deb 9 October 2017](#) c53.

<sup>16</sup> As an example, the EU [regulation that ended roaming charges](#) started as a Commission proposal in June 2016, which was adopted by the Council and Parliament in May 2017 and entered into force in June 2017.

<sup>17</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), fn 1.

<sup>18</sup> Paul Craig, *EU Administrative Law*, 2012, pp137-139.

<sup>19</sup> European Commission, [Position paper: "Transitional Arrangements in the Withdrawal Agreement"](#), Art X+2(4).

removed the Commission's original condition that where the UK has representatives on these bodies, they are not to have voting rights.<sup>20</sup> It can be assumed that the UK wishes for more participation in the making of tertiary legislation very precisely because it is more likely to enter into force during the transition period than secondary legislation is.

As of February 2018, 29 pieces of EU secondary legislation have already been adopted by the EU legislative bodies but will only enter into force between 30 March 2019 and 31 December 2020.<sup>21</sup> More secondary legislation will undoubtedly enter into force between these two dates in the months to follow, as more legislative procedures are completed and deadlines for entry into force are agreed between the EU institutions. Any such legislation will, for the duration of a transition period as set out by the January Directives, be binding on the UK – and may require UK legislative action for the UK to comply with its transition obligations.

### Opting into EU Law

Recent comments made by the Government raise a further issue with the position set out by the EU. As set out in Box 3 above, the January Directives make clear in Article 13 that the UK's current ability to opt *into* select Area of Freedom, Security and Justice (AFSJ) initiatives will end upon the start of a transition period. This, however, seems to run contrary to what the UK Government is asking for in a transition agreement, which Michel Barnier has described as:

On Justice and Home Affairs questions: the UK wants to continue benefitting from new EU policies, the famous *opt-ins*, while at the same time it has decided to leave these policies at the end of the transition.<sup>22</sup>

The UK amendments to the Commission draft transition agreement confirm that the UK is pursuing a possibility for opt-in into Justice and Home Affairs and Schengen policies/legislation, though it indicates this is for discussion and would in any event be a case-by-case matter for the EU to decide upon.<sup>23</sup> The UK's reasoning behind wishing to retain an opt-in is likely to be its end-state desire for continued very close cooperation in these policy areas; it will be easier to strike a new bilateral agreement on cooperation in security matters if the UK has subscribed to the majority of EU measures in the field.<sup>24</sup>

## 3.3 Implications for Trade Policy

The ability for the UK to strike new trade agreements with non-EU countries has been a Government priority in its Brexit strategy since January 2017. On the subject of the possibility for the UK to start

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<sup>20</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), Art X+2 [4].

<sup>21</sup> As revealed by searching [Eur-Lex](#) on 12 February 2018.

<sup>22</sup> '[Press Statement by Michel Barnier Following this week's round of Article 50 Negotiations](#)', 9 February 2018.

<sup>23</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), Art X+1 [5A], [5B].

<sup>24</sup> See DExEU, [Draft Text For Discussion: Implementation Period](#), Art X+1 [5C], alluding to the possibility of such a future agreement (if existing) to enter into force during the transition period.

developing its own trade policy, the Council's January Directives set out the EU's position in Articles 15 and 16. This makes clear two separate but related matters about the ability for the UK to engage in trade during the proposed transition period.

### **'Rolling Over'/Grandfathering Trade Agreements**

In the view of the EU, for the duration of the transition period, the UK 'remains bound' by obligations stemming from agreements concluded by the EU. This would suggest that the UK remains bound by any free trade agreements struck by the EU. However, and of key interest, is that what is set out here appears to be a unidirectional commitment. The UK remains bound by *its* obligations – however, there is no mention of the third party to any such agreement also being bound to *its* obligations. Sam Lowe of the Centre for European Research provides a practical example of what effect this condition would have on the UK:

This could easily result in a scenario in which UK exporters are no longer able to take advantage of the EU's existing free trade agreements, but exporters located in countries with EU FTAs would continue to benefit from preferential access to the UK market on the same terms as now. To give a practical example: during the proposed transition, Korean car exporters would still be able to sell cars into the UK without being subject to border tariffs under the provisions of the EU-South Korea free trade agreement. UK car exporters selling into Korea, on the other hand, would no longer be covered by the agreement and would face Korea's tariffs of 8 per cent.<sup>25</sup>

It should be stressed that the European Council has little choice but to frame the transition of international obligations in this manner. The EU cannot commit third countries to maintaining trade agreements with the UK *as if* it were still an EU Member State: these third countries have concluded trade agreements with the EU, and while they can choose to treat the UK *as if* it were still an EU Member State, they can equally choose not to do so.

It consequently cannot be promised by the EU that its international agreements with third parties will continue to apply in full to the UK, as this is at the discretion of those third parties. The European Council, however, can promise to third parties that the UK will continue to apply those same trade agreements to the third parties as agreed if it makes this a condition of a transition agreement – and that is what it has indicated it wishes to do in Article 15.

This has consequences for the development of UK Trade Policy: for many third countries, 'rolling over' the existing trade agreements they have with the EU to the UK (both during and after transition) might be a sensible and fast way to provide certainty to traders. For others, the UK's withdrawal from the EU might be an opportunity to negotiate a different type of agreement with the UK alone. Reports have circulated that suggest that at least some current EU FTA partners (such as South Africa)<sup>26</sup> wish to make new demands of the UK post-Brexit. Under the

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<sup>25</sup> Sam Lowe, '[Of Transition and Trade Deals](#)', 16 January 2018.

<sup>26</sup> '[Fox Suffers South Africa Trade Setback](#)', *The Times*, 18 January 2018.

EU's negotiating guidelines, they (unlike the UK) will continue to benefit from the free trade agreements concluded while the UK was an EU Member State until 2021, and some (such as South Korea, and Chile)<sup>27</sup> are already indicating that if their EU trade agreements are to apply mutually during the transition period, they will expect a 'better deal' post-transition.

Sam Lowe has suggested that the UK should ask the EU for help in guaranteeing 'roll-over' of EU free trade agreements during the transition period, but also notes that this will give the EU significant leverage over the UK during the Phase 2 negotiations.<sup>28</sup> The European Council in April 2017 stated that where the EU "expects the UK to honour its share of all international commitments contracted in the context of its EU membership. ... a constructive dialogue with the United Kingdom on a possible common approach towards third country partners ... should be engaged"<sup>29</sup>, suggesting that it is willing to extend this help. A [technical note on international agreements during the transition period](#), published on 8 February 2018, suggests that requesting EU assistance in achieving a 'roll-over' is what the Government intends to pursue during the negotiations, and the UK's [response](#) to the Commission's [draft transition agreement](#) makes clear that it is keen to ensure that it can 'roll over' any existing trade agreements, despite the proposed general prohibition on concluding *new* trade agreements, as is discussed next.<sup>30</sup>

### Concluding New Trade Deals

Article 16 addresses the related matter of the extent to which the UK is free to pursue an independent trade policy while in transition. The wording of Article 16 is of particular importance, because it will determine to what *extent* such pursuit is permissible under the Withdrawal Agreement.

Free trade agreements are not simply agreed in a single step; under international law, the process of creating a new free trade agreement (or any other treaty) ordinarily involves the following steps:

- Negotiating: the process whereby delegations from two or more national governments debate the terms of the trade agreement.
- Signing: the process whereby the negotiating delegations formally signal governmental agreement to the terms of the trade agreement.
- Ratification: the process of domestically enacting the trade agreement, in line with domestic constitutional requirements. This is the point at which an international agreement becomes formally binding. (The EU refers to this step as '[conclusion](#)' of an agreement.)

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<sup>27</sup> ['EU trade partners demand concessions for Brexit transition rollover'](#), Politico, 2 February 2018.

<sup>28</sup> ['EU trade partners demand concessions for Brexit transition rollover'](#), Politico, 2 February 2018.

<sup>29</sup> European Council, [Art. 50 TEU Guidelines](#), 29 April 2017, Art 13.

<sup>30</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), explanatory notes to Art X+3.

- Entry into force: the trade agreement becoming legally binding in both countries, on an agreed date.

Article 16 of the January Guidelines commits the UK to remain a part of the EU's Customs Union and the Single Market. Neither of these commitments, however, would by default preclude the UK from engaging in its own trade negotiations; the prohibition of the EU Member States to conclude their own trade agreements is a key part of the EU's Common Commercial Policy and the general obligation on all EU Member States to 'sincerely cooperate' with the EU and its goals<sup>31</sup>, and is not an automatic consequence of being in a customs union with the EU. Article 16, however, also commits the UK to very generally 'continue to comply with Union trade policy', including all customs and border enforcement required. The final sentence of Article 16 makes clear that the EU in fact seeks to prohibit the UK from unilaterally concluding its own trade agreements:

During the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union.

The Common Commercial Policy is an exclusive EU competence.<sup>32</sup> Under Article 16, and its equivalent in Article X+3 of the Commission's [draft transition agreement text](#) (which specifies it applies to Union exclusive competences alone), the UK is thus in principle precluded from becoming bound by its own trade agreements during the transition period, as the principle of sincere cooperation (in Article 4(3) TFEU) has suggested; but there are several caveats to that preclusion.

First, the EU leaves open a possibility that it may authorise the UK to conclude trade agreements during the transition. Steve Peers [argues](#) that such EU approval can reasonably be expected by the UK if what it is attempting to do is 'grandfather' existing obligations into new UK-specific FTAs in some capacity, and this is indeed the interpretation of this provision that the UK is arguing for in its amendments to the Commission's draft transition agreement.<sup>33</sup> However, it appears to be a common understanding that the authorisation requirement precludes the UK from signing, for instance, entirely new trade agreements with the US while in transition, unless the EU specifically authorises this.<sup>34</sup>

Second, the wording of Article 16 stresses that the UK may not 'become bound' by new international agreements in areas of EU competence. Considering the ordinary process of Treaty adoption as set out above, this would mean that the UK is able to negotiate new trade agreements and can perhaps even sign them, but it cannot ratify them, and they cannot enter into force, as these latter two steps would make the UK 'bound by' new international agreements.

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<sup>31</sup> Article 4(3) TFEU.

<sup>32</sup> Article 3 TFEU.

<sup>33</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), Art X+3 [4].

<sup>34</sup> See DExEU, [Draft Text For Discussion: Implementation Period](#), Art X+3 [4], which is amended to make provision for 'rolling over' existing trade agreements, but retains the Commission's original provisions prohibiting 'becoming bound by' new trade agreements unless the EU approves it.

The extent to which this consequently prohibits the UK from developing an independent trade policy during the transition period is debatable. A very broad reading of the text suggests the UK simply cannot do 'trade' outside of the EU until the transition period has ended, as the UK must comply with the principle of sincere cooperation until then; but many commentators feel that given the specific wording used by the Council, the EU's current position offers more flexibility than its original statements on the UK's ability to negotiate trade agreements 'before withdrawal' did.<sup>35</sup> In this view, [articulated succinctly by DLA Piper](#) for Lexology, new trade agreements can be negotiated and signed by UK delegations; and ratification and entry into force will be possible from 1 January 2021 onwards. Michel Barnier [confirmed](#) this reading of Article 16 on 29 January 2018: 'talking to' other countries is possible under the January Directives, but 'implementing' any agreements is not.

Most commentators agree with Liam Fox, the Secretary of State for the Department of International Trade, that negotiating a trade agreement is likely to take longer than the 21 months that the UK will have between the withdrawal date and the end of the transition period.<sup>36</sup> If they are correct, David Davis' comments made on 26 January 2018 on the [impact of transition](#) will prove correct, and the Article 16 condition will not hinder UK trade policy to a significant extent. However, other commentators argue that because the UK is not negotiating from a blank slate, but rather negotiating from the starting point of existing trade agreements (albeit with the EU rather than the UK as the relevant party), that these trade negotiations with 'existing' EU partners could be substantially faster.<sup>37</sup> In that case, a transition agreement that incorporates Article 16 of the January Directives will delay enacting new UK trade agreements until 2021.

### 3.4 Implications for Border Control

The UK regaining 'control of immigration' figures prominently in both the [Government's Brexit negotiating strategy](#) and in the Joint Report concluding Phase 1 of the negotiations. As mentioned above, the Joint Report establishes a framework by which the EU rules on free movement of persons (and EU citizenship) stop applying within the UK at the time of withdrawal from the EU.<sup>38</sup> There is now, however, room

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<sup>35</sup> See, for instance, the [European Parliament's Brexit negotiations Resolution](#) from April 2017, Art 5, and commentary on the EU's position by Joris Larik: "Sincere Cooperation in the Common Commercial Policy: Lisbon, a 'Joined-Up' Union, and 'Brexit'", *European Yearbook of International Economic Law*, 2017, edited by Marc Bungenberg, Markus Krajewski, Christian Tams, Jörg Philipp Terhechte, Andreas R. Ziegler.

<sup>36</sup> See, for example, House of Lords European Union Select Committee, '[Brexit: the options for trade](#)' (HL Paper 72, 2016-17), para. 153 onwards; Swati Dhingra, '[Trade Deals with Third Countries](#)', 19 September 2017; '[Liam Fox: Post-Brexit trade deals 'some time away'](#)', *Sky News*, 1 February 2018.

<sup>37</sup> See, for example, Lord Price's comments on the 36 agreements that he believed ready to 'roll over' or re-conclude quickly when [giving evidence to the International Trade Committee](#), and Hugh Bennett, '[UK takes step towards independent trade policy as Government presents Trade Bill](#)', 7 November 2017.

<sup>38</sup> [Joint Report on Phase 1](#), Arts 6-41.

for substantial disagreement about the meaning of “the time of the UK’s withdrawal” as set out in the Joint Report.

Under the EU’s proposals, the entirety of the EU body of law – the *acquis* – will continue to apply to the UK during the transition period. This includes all EU rules on free movement of persons. The European Commission has [made it clear](#) that its view of the Joint Report is such that during any transition period, the Citizens’ rights commitments made in December will not yet apply.

However, the UK position is that the UK will formally withdraw from the EU on 29 March 2019 – and that this should have consequences for the status of those EU nationals who move to the UK when it is no longer a Member State, so after 29 March 2019. Specifically, the Prime Minister has said that in her view, EU nationals moving to the UK during the transition period will not be eligible for a ‘settled status’ in line with the commitments set out in the Joint Report:

When we agreed the citizens' rights deal in December we did so on the basis that people who had come to the UK when we were a member of the EU had set up certain expectations. It was right that we have made an agreement that ensured they could continue their life in the way they had wanted to - now for those who come after March 2019 that will be different because they will be coming to a UK that they know will be outside the EU. I'm clear there is a difference between those people who came prior to us leaving and those who will come when they know the UK is no longer a member.<sup>39</sup>

This position was neither confirmed nor denied when the UK government responded to the Commission’s draft transition agreement text: while that text appears to accept that the UK will be subject to the entire EU *acquis*, a government spokesperson [indicated](#) that the PM has not actually changed her position, and that the reason free movement of persons is not raised in the amended draft text is because it was not raised in the draft text by the Commission in the first place.

The wording of the Joint Report itself is less important on the issue of continuing free movement of persons rights than it may seem: even if the Commission, during negotiations, were to concede that the Joint Report did refer to 29 March 2019 as the relevant start day for the Citizens’ rights agreement, the Joint Report itself explicitly retains the possibility that any agreement on Citizens’ rights might need to be revisited ‘in case transitional arrangements were to be agreed in the second phase of the negotiations’.<sup>40</sup>

As this is not made clear in the DExEU amended draft transition agreement text, it thus remains possible that the UK may seek to obtain EU permission to end various of its free movement of persons obligations prior to the end of the transition period during negotiations; as noted, however, Michel Barnier has [noted](#) that this is a ‘major point’ of disagreement for the EU, reiterating the President of the European Parliament’s [statement](#) that the continuance of free movement of

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<sup>39</sup> [‘Brexit: Theresa May to fight EU transition residency plan’](#), 1 February 2018

<sup>40</sup> [Joint Report on Phase 1](#), Art 5.

persons is not a negotiable position. The Times [reported](#) on 23 February that this has been recognised by the UK government, and it stands ready to unilaterally offer permanent residency rights to EU nationals who move to the UK during transition, in a bid to ensure a transition deal will be struck swiftly.

### 3.5 Implications for Enforcement and Oversight

One specific ‘red line’ set out by the UK government that is challenged by the transition proposed by the January Directives is the oversight of the Court of Justice of the European Union. The UK has expressed [a clear desire](#) to end the CJEU’s jurisdiction in the UK as part of Brexit, but the European Council’s guidelines and the January Directives’ provisions on enforcement make clear that the EU intends for the CJEU’s jurisdiction in the UK to continue during the transition period.

The January Directives make explicit that during the EU’s proposed transition, the Commission will retain the right to ‘enforce’ EU law – by taking the UK to the CJEU if it believes the UK has not complied with any of its transition obligations.<sup>41</sup> Under the terms of the transition proposed, the CJEU would not have a UK judge or Advocate-General serving on it anymore – but CJEU rulings would remain binding on the UK, regardless of any UK involvement in disputes before the CJEU.

The January Directives do not address the question of whether the UK would still have standing before the CJEU – in order to challenge one of the EU institutions, or another Member State, over their respective adoption of or compliance with EU laws. However, Article 263 TFEU, which sets out the actions possible before the CJEU, states that standing is reserved for ‘Member States’ and the EU institutions. The UK Government in its [technical note on international agreements during the transition period](#) suggests that in its view, at best the UK can be treated *as if* a Member State in limited circumstances, but will not actually be a Member State during the transition period. However, the UK [amendments](#) to the Commission draft transition agreement text suggest that the UK is keen to ensure that unless specified otherwise in the Withdrawal Agreement, both its rights and obligations as stemming from the application of the Treaties remain intact.<sup>42</sup> Standing before the CJEU is a relevant ‘right’ stemming from the Treaties, and so whether the UK retains it during transition will consequently require clarification during the negotiations.

Also unclear from the January Directives is what will happen to the power and/or obligation of UK domestic courts to refer questions of EU law, where the law itself is not fully clear, to the CJEU for a binding interpretation. The January Directives do not consider this explicitly, and two views of the EU’s intentions here are possible. In one, as the UK is no longer a Member State, its courts are also no longer ‘Member State

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<sup>41</sup> Council of Ministers, [Negotiating Directives](#), 29 January 2018, Arts 17-18.

<sup>42</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), explanatory notes to Art X+1 [1].

courts' and thus cannot refer questions to the CJEU. In the other, however, the beneficiaries of the preliminary reference procedure are likely to be EU citizens (and/or their companies) attempting to exercise their EU law rights, rather than the UK itself – in which case the EU is likely to wish for domestic UK courts to retain the power to refer questions. The Joint Report may establish a precedent of sorts here: it sets out a continuance of the preliminary reference procedure in the UK for 8 years on all Citizens' rights matters, in order to ensure that the EU law underpinning those rights is consistently interpreted in the UK and in all other Member States.<sup>43</sup> In a similar vein, as the entire EU law acquis will continue to apply in the UK during the proposed transition period, it might be sensible to permit domestic UK courts to 'check' their interpretation of relevant EU law with the CJEU.

The UK government acknowledged last year that continued CJEU jurisdiction is likely during a transition agreement; the Prime Minister, on 9 October 2017, indicated that during the 'implementation period' the UK may "start off with the ECJ still governing the rules we are part of for that period, but we are also clear that we can bring forward discussions and agreements on issues such as a dispute resolution mechanism. If we can bring that forward at an earlier stage, we would wish to do so".<sup>44</sup> This position was confirmed in the UK's response to the Commission draft transition agreement provisions, which accepts CJEU jurisdiction.<sup>45</sup>

The 'discussions and agreements' referred to by the Prime Minister are not alluded to in the January Directives, however; there is no mention of the enforcement and governance of the final withdrawal agreement in the Directives, which limit themselves to discussions of transition alone, and do not appear to leave room for non-CJEU enforcement of EU law. Proposals in the UK's response to the Commission draft transition agreement text for a Joint Commission are limited, at this stage, to enforcement of the *Withdrawal Agreement* itself and any obligations the UK holds under that agreement, rather than on the meaning of EU law.<sup>46</sup>

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<sup>43</sup> [Joint Report on Phase 1](#), Art 38.

<sup>44</sup> [HC Deb 9 October 2017](#) c53.

<sup>45</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), explanatory note to Art X+5.

<sup>46</sup> DExEU, [Draft Text For Discussion: Implementation Period](#), fn 2.

## 4. The Next Steps in the Negotiations

### Summary

An agreement on transition is desired by the EU by the March 2018 European Council meeting. There are a number of areas in which the EU and UK positions, insofar as they have been set out in the Commission and DExEU position papers on a draft transition agreement text, appear incompatible, and where compromise will be necessary.

### 4.1 The Commission's Draft Withdrawal Agreement Text on Transition

On 7 February 2018, the Commission released a draft 'transition agreement' text that responds to the January Directives. While not itself legally binding, it is an attempt by the Commission to spell out in legal terms what the European Union's negotiating commitments and limitations are – and it is a document that the UK will directly respond to in engaging in the negotiations.

There are no surprises in the Commission draft transition agreement text, as it confirms the January Directives' positions.<sup>47</sup> It also supplements the directives established by the Council with detail on a number of points, including:<sup>48</sup>

- That the Commission understands the January Directives as precluding the UK from participating in any enhanced cooperation initiatives during transition;
- That in general, UK institutions are no longer to be treated as relevant institutions in the Treaties: meaning the UK Parliament is not included in references to 'national parliaments' and the Bank of England is not included in references to 'central banks'.
- That the UK may be consulted, on a case by case basis, when the EU engages in international relations with third parties – but it does not have to be.
- That the UK will be consulted during the December Fisheries Council, when fishing quotas are allocated to EU Member States – but it will not have representation in that Council, or voting rights.

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<sup>47</sup> One 'surprise' was footnote number 4, setting out a non-CJEU enforcement mechanism for the Withdrawal Agreement, but [this has been removed](#).

<sup>48</sup> For a detailed analysis, see Steve Peers, [Annotation of the proposed Withdrawal Agreement](#), 8 February 2018

## 4.2 The UK Amendments to the Commission's Draft Transition Agreement Text

On 21 February 2018, the UK's DExEU released an [amended version](#) of the Commission's draft transition agreement text. The differences between the negotiating parties that will need resolving, as set out in the Commission and DExEU drafts of withdrawal text on transition, are summarised in the table below.<sup>49</sup>

	<b>UK Position</b>	<b>EU Position</b>	<b>Agreement?</b>
Duration	'Strictly time-limited' – but with a possibility to extend.	Until 2020	<b>Negotiation needed:</b> the UK wants more flexibility here than the EU has offered.
Applicability of EU Law: General	Full acquis, with some exceptions, without new Treaty amendments, and with the possibility for opt-ins in JHA and Schengen.	Full acquis, including new introductions, but no more opt-ins for JHA legislation (where UK formally has an opt-out).	<b>Negotiation needed:</b> there is agreement generally, but not on exceptions/Treaty amendments/JHA legislation opt-ins.
Applicability of EU Law: Free Movement of Persons	PM statement January 2018: No right to 'settled status' for EU nationals moving during transition period. UK Draft Agreement: Full acquis applicable during transition, with settlement rights. (No exception to 'full acquis' proposed.)	Full acquis applicable during transition, with settlement rights.	<b>Yes</b> , though a UK government spokesperson has noted that the draft withdrawal agreement texts do not discuss free movement of persons explicitly.
Applicability of EU Law: Direct Effect and Supremacy	Applicable during transition in full.	Applicable during transition in full.	<b>Domestic action needed:</b> Withdrawal and Implementation Bill will need to cover this if ECA 1972 repealed.
Applicability of EU Law: Customs Union, Common Commercial Policy	No ability for UK to 'become bound by' new trade agreements during transition, unless it has EU authorisation or unless the trade agreement in question 'rolls over' an existing EU agreement.	No ability for UK to 'become bound by' new trade agreements during transition, unless it has EU authorisation.	<b>Negotiation needed:</b> general agreement that negotiation is possible but ratification is not; however, UK wishes exception for 'rolling over' third country FTAs.

<sup>49</sup> For a side-by-side comparison of the two texts, see Steve Peers, [Annotation of the proposed Withdrawal Agreement, version 2](#), 21 February 2018.

	<b>UK Position</b>	<b>EU Position</b>	<b>Agreement?</b>
Applicability of EU Law: Third Country FTAs to be 'Rolled Over'	Wishes for UK be treated <i>as if</i> a Member State – with EU help to persuade third country partners.	Willingness to help UK suggested by April 2017 European Council guidelines but no formal statement since then.	<b>Negotiation needed:</b> success here is also dependent on third countries.
Enforcement of EU Law: CJEU Role	Applicable during transition.	Applicable during transition in full.	<b>Negotiation needed:</b> future dispute resolution mechanism not yet developed.
Enforcement of Withdrawal Agreement: Joint Commission	Proposal for the Joint Commission to have oversight over the Withdrawal Agreement, and a commitment to act in 'good faith' from both the EU and the UK.	?	<b>Negotiation needed:</b> Joint Commission proposal likely to need fleshing out.
UK Participation in EU Institutions / Bodies / Agencies	The UK <i>should have</i> consultation rights in Comitology, expert committees, and discussions concerning international agreements etc, and to have decision-making powers where this results in the effective operation of EU law/Withdrawal Agreement during the transition. Also wishes for Parliament to be informed about new EU legislation.	No general institutional representation during transition; perhaps case-by-case involvement, <i>may be</i> offered by EU. During transition, UK parliament not to be treated as a 'national parliament', and UK not automatically present during EU-level discussions with its third country partners.	<b>No:</b> the UK wants significantly more institutional involvement than the EU appears to be offering.
Fishing Quotas	The UK wishes for a discussion on the UK's fishing quota <i>before</i> the official Council meeting in December.	The Commission will 'consult' the UK during the official Council meeting in December.	<b>No:</b> the UK wishes to discuss its fishing quota before formal decisions are taken, not to be consulted during that decision-making process.

All aspects of the transition agreement remain the subject of negotiation, and on a number of these points, the current negotiating positions of the UK and the EU are not fundamentally incompatible.

However, the table above and [comments made](#) by Michel Barnier on 9 February make clear that there are a few matters in which 'substantial disagreement' remains and that consequently the negotiations are not guaranteed to succeed. Should the forthcoming weeks of negotiations not produce an agreement by 22-23 March, the European Council can in theory use those days to revisit its own guidelines on transition, instead of producing new guidelines for 'future partnership' framework negotiations. While this would push back delivery of a transition agreement, a failure to agree on all aspects of a transition agreement by

late March does not automatically mean that a transition agreement will not be achievable at all.

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