The legal ins and outs of implementation periods: Part 1 - avoiding the negotiation noose

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In this first part of his analysis of the legal and treaty ramifications of the Florence speech "implementation period" proposal, Martin Howe QC explains that:

> The EU only has the legal power under Article 50 of the Treaty on European Union to agree transitional or interim arrangements once the destination to which the transition leads has been agreed, at least as a framework. There is no power under Article 50 for the EU to agree an open ended transitional period of the kind which many business leaders seem to expect in order to allow time for negotiation about the future relationship.
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> Because the EU cannot agree to a transitional period until the framework of the future relationship has been agreed, it is impossible for the EU to agree to a transitional period until late 2018 at the earliest. Hopes that such a transition can be agreed "*by the end of this year*" are naive and totally unrealistic.
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> The EU27's negotiating strategy dictates that they will not agree to a transition period until the UK has succumbed to their demands about the EU's legally meritless financial claim, citizens rights, ECJ jurisdiction, and other matters. From the EU27's perspective, granting an interim period would let the UK off the hook, contrary to the EU27's strategy to force the UK up against the wall of the

hard deadline for exit in March 2019.

It is quite possible however that the EU27 could make warm noises about agreeing to a transition in principle if other matters are agreed, but without legally committing themselves to it. This would create an extremely dangerous trap, since the dangling prospect of a transition period would create a noose round the UK's neck as we defer preparation for a "no deal" exit. That noose would be drawn tight by a failure to conclude and ratify the withdrawal agreement at a late stage. The UK would then be exposed to caving in to unreasonable or impossible demands as a price of the getting the transition.

The Prime Minister's Florence speech on 22 September 2017 proposed that there should be an "implementation period" of around 2 years after the UK leaves the EU on 29 March 2019. This "implementation period" proposal raises a number of complex legal issues, which are generally not well understood, but are of critical importance. Since the ramifications are too involved to be covered in a single article, Martin Howe QC, Chairman of Lawyers for Britain, will be writing a series of articles covering the different aspects. Here, in the first article of the series, he explains the nature of different kinds of "implementation" or "transitional" arrangements and legal powers which govern, and how, if not handled in the right way, proposing an implementation period could create a negotiating noose for the UK's own neck.

1. 'Implementation' vs 'transitional' arrangements - what that means

The words "transitional" or "interim" can be used to describe widely differing arrangements which in theory the UK might be subject to in the course of leaving the European Union.

First, it is possible to envisage short-term transitional arrangements which allow time for orderly migration from the arrangements which prevail while the UK is an EU member state to the arrangements which will be put into place for the long term after the UK leaves. For example, one might envisage agreement being reached between the UK and EU on a system allowing financial services companies in the UK to trade into the EU market, and those in the EU vice versa, on the basis of mutual recognition of minimum standards of regulation in the home country. The current EU membership regime permits cross-border trading on the basis of "passporting", where financial services companies are regulated under common EU rules.

In order to allow orderly migration of financial services companies from the present passporting regime to the new mutual recognition regime, one could envisage a transitional period during which the UK maintains rules which are in line with EU rules and during which financial services companies can continue to trade cross-border in both directions under the "passporting" regime, so as to allow them time to set up their licences and procedures under the new mutual recognition regime.

It is important to realise that such a transitional agreement or implementation period would only be agreed once agreement has been reached on what should be the end point of the transition - at least agreement in outline or principle, even if details remain to be filled in. If

agreement is reached on the end-point arrangements, there should then not be much difficulty in also reaching agreement on sensible implementation periods and arrangements, since there will then be a mutual interest on the part of the UK and EU27 in minimising disruption while the new arrangements are phased in.

Such closed-ended - or "bridge" - transitional arrangements are recognised in principle as acceptable in paragraph 6 of the European Council's Brexit April 2017 negotiating guidelines:-

> "6. To the extent necessary and legally possible, the negotiations may also 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 the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

In fact, the Prime Minister's Florence speech proposes this kind of arrangement. She said:

> "If we adopt this vision of a deep and special partnership, the question is then how we get there: how we build a bridge from where we are now to where we want to be."

However, another kind of 'transitional' arrangements has been proposed, notably by business and financial interests including the CBI. Under this second kind of imagined transitional arrangement, there would be a general agreement to extend the EU's existing internal market and other treaty provisions to the UK for a period after the UK formally leaves the EU, while negotiations carry on about the UK's future long term relationship with the EU. In the CBI's preferred variant of this proposal,

this ‘transitional’ period would extend indefinitely while negotiations continue about the UK’s future relationship with the EU.

Such open-ended ‘transitional period’ proposals have very obvious political and economic drawbacks. During the transitional period, the UK would have left the EU “in name only”, still being subject to the EU’s rules and regulations, paying into the EU budget, and having to accept uncontrolled free movement of persons. The big difference is that the UK would no longer have a vote on the rules and regulations to which it would be subject, and therefore would have vassal status.

In the absence of prior agreement on the post-exit trade framework, business would be left with a further extended period of uncertainty about whether a long term trade agreement would be reached and the nature of that agreement if it were reached. Development of our international trade policy would also be set back, because our international partners would not know the nature of our future relationship with the EU and therefore what the UK’s freedom of action would be in entering into future trade treaties and what the UK would or would not be able to deliver once it had finally left the transition period.

All these disadvantages would be suffered simply to buy more negotiating time. But Parkinson’s law means that negotiations would simply extend to use up the time made available to them, leaving the UK at the end of the transitional period in the same position it would have been in March 2019 without a transitional period.

However, leaving aside for the moment these obvious political and

economic drawbacks, what the proponents of this kind of 'transitional' arrangement fail to understand is that it is legally impossible for the EU to agree to an open ended transitional arrangement within the framework of Article 50. This is part of a wider lack of understanding of the scope of what the EU can and cannot agree as part of the "*arrangements for withdrawal*" under Article 50.

2. The legal basis of "transitional" arrangements

It is important to understand the legal basis of the EU's power to enter into possible transitional arrangements with the UK. The EU27 are currently negotiating with the UK about the terms of an agreement which would be authorised under Article 50(2) of the Treaty on European Union ("TEU"). This reads:-

> "2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out **the arrangements for its withdrawal**, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament." (emphasis added)

The first important point to note about the above treaty Article is that it authorises an agreement "*setting out the arrangements for [the UK's] withdrawal*". Thus, only "*withdrawal arrangements*" may be included in the Article 50 agreement. The agreement cannot extend to wider or other possible terms or agreements between the EU and the UK which do not form part of the actual "*withdrawal arrangements*". While the withdrawal

arrangements are explicitly to take account of the framework for the future relationship, Article 50 does not itself empower the EU to enter into a treaty with the UK regulating the UK's future relationship with the EU. The power for the EU to enter into such a treaty is to be found elsewhere, under Articles 216 to 219 of the Treaty on the Functioning of the European Union ("TFEU"), which authorise the EU to make external agreements on trade and other matters.

The European Council, based on the advice received from the Council's legal service, are willing to accept that closed-ended or "*bridge to a destination*" type transitional arrangements are capable of counting as part of the "*arrangements for withdrawal*" and so fall within the vires of Article 50, even though they may extend in time after the actual date of withdrawal. That is why the European Council uses the wording it does in paragraph 6 of its Guidelines quoted above, since these reflect the limits of its Article 50 power regarding transitional arrangements.

However, an open-ended 'transitional' arrangement of the kind discussed above (i.e. one without a pre-agreed framework for the future relationship) is far harder to classify as constituting an "*arrangement for withdrawal*". It cannot be regarded as a "*bridge to towards the foreseeable framework for the future relationship*" if that framework is yet to be negotiated and agreed. It is a post-exit relationship, albeit one which it is envisaged will be revised and replaced with a longer term permanent relationship after a limited period. As such, it *cannot be authorised under Article 50*.

There is a further legal bar against the EU agreeing an open-ended

transitional or interim relationship. That arises under Article XXIV of GATT 1994, which authorises WTO Members not to charge their normal tariffs only against countries with which they have a free trade area or customs union agreement, or "*an interim agreement leading to the formation of*" a customs union or free trade area. After the UK leaves the EU on 29 March 2019, the only lawful way in which we can continue to charge each other zero tariffs is if an actual free trade agreement is concluded or in force, or if there is an interim agreement leading to the formation of a free trade area. In the absence of prior agreement in principle on the free trade agreement, that condition for the application of Article XXIV would not be satisfied.

For the reasons explained, an open ended transitional arrangement would not be an "*arrangement for withdrawal*" which falls under Article 50(2) TEU. It follows that it could only be agreed by the EU under its general external treaty-making powers in the TFEU. In view of the nature of the agreement, it is almost certain that it would rank as an "*association agreement*" under Article 217 TFEU, with the consequence that concluding such an agreement requires: (1) unanimity in the Council of Ministers under Article 208(8) TFEU; and (2) the consent of the European Parliament under Article 218(6)(a)(ii) TFEU. The unanimity requirement contrasts with the qualified majority requirement for a withdrawal agreement under Article 50, although European Parliament assent is required in both cases.

A further consequence follows from the fact that the EU is currently of the view that it cannot conclude an external agreement on its future relationship with the UK under the TFEU, until the UK has actually

ceased to be a Member State. This view is based on the wording of Article 216 TFEU which authorises concluding agreements with "*one or more third countries*", and the UK will not become a "*third country*" until after 29 March 2019. The EU may well be being over-cautious about its powers in this respect, since such an agreement would only come into force and take effect once the UK has become a third country, so it would indeed at that point be an agreement between the EU and a "*third country*." A similar argument was accepted in order to allow the EC (as it then was) to enter into an external agreement with Denmark on matters falling within Denmark's justice and home affairs opt-out Protocol, because Denmark was acting effectively as a "third country" in relation to matters falling within that Protocol.

However, the EU cannot be forced to change its posture on this point, and at the moment it seems to insist that any EU-UK agreement falling outside Article 50 TEU cannot be concluded until after the date of actual exit; and indeed the formal steps necessary to conclude the agreement, which consist of a vote in the Council of Ministers and a vote in the European Parliament, cannot take place until then either. Thus, even if a draft agreement were to be agreed at a political level, it would inevitably be subject to approval by subsequent votes in which (1) any Member State with a grievance or an additional political demand (e.g. Spain over Gibraltar, or Greece over the return of the Elgin marbles) could throw a spoke in the works by vetoing the deal in the Council of Ministers, and (2) the European Parliament could block approval, either altogether, or in aid of additional political demands of its own.

3. Negotiating and agreeing the implementation period

It seems to be assumed in some business quarters that an implementation period can be agreed with the EU before the end of the current year. Indeed, on 4 October 2017, the Lord Mayor of the City of London urged the government to "secure" a Brexit transition period by the end of this year,[1] and his demand was supported by Sam Woods, Deputy Governor of the Bank of England.

This however is quite impossible. First, it is impossible for legal reasons. A transition period cannot legally be agreed by the EU in the absence of an agreement on the framework for the future relationship. The EU27 have not yet even begun to talk to the UK about the future relationship, and the signs are that they will deliberately postpone the start of such talks in order to put pressure on the UK to give way to their financial demands. Even wild optimists cannot envisage an agreement being reached on the framework for the future relationship until late 2018 at the earliest. Hence, it will not be possible (even if it wanted to) for the EU to agree to an implementation period arrangement until late 2018.

But that assumes that they would want to in the first place. Such an assumption rests on a completely uniformed and mistaken view of the EU27's negotiating objectives and strategy.

The EU27's current negotiation strategy is to get the UK to agree to make very large financial payments post-Brexit to which the EU27 has no legal entitlement, as well as to submit to a deal satisfactory to them on the

1 . http://www.cityam.com/273208/lord-mayor-london-andrew-parmley-urges-government-secure

status of EU citizens in the UK and on the UK-Irish border. In order to get the UK to agree to what they demand up front, the EU27 are dangling the prospect of the possible free trade deal which the UK wants, but to be negotiated in outline only at a later stage of the process.

By taking this line it is strongly arguable that the EU27 are acting in breach of Article 50 itself, which clearly mandates that the withdrawal arrangements shall "*take account of*" the framework for the future relationship. Clearly, it is not possible to "*take account of*" that framework until it has been discussed and agreed at least in principle or in outline, a point which is glaringly apparent in the discussions about Irish border customs arrangements. Nonetheless, the commitment of the EU27 to their negotiating strategy is so strong that they are willing to disregard the legalities if it suits them.

Because of the hard deadline on the end of UK's EU membership in March 2019, the EU27 believe that time is on their side. Hence M Barnier's repeated references to a "ticking clock". In their view, they only need to hold firm to their position, and threaten to delay or derail a prospective trade agreement, and the UK will be forced to buckle to their demands.

The only way in which the UK can possibly resist unconditional surrender to all the EU27's demands is to prepare to leave, and in fact be ready to leave, the EU on 30 March 2019 with no agreement, if that should prove necessary. This would face the EU27 with the prospect of receiving no money at all, coupled with facing barriers to access to the UK market for their exports to the UK, which greatly exceed the UK's

exports to the EU27.

However, the EU27 are continually bolstered in their belief that the UK will cave in to their demands when pushed up against the wall by their information sources in the UK. These are heavily skewed towards the Remain-supporting media: the FT, The Times and BBC. In addition, they are aware that Labour's General Election manifesto said that "*Labour recognises that leaving the EU with 'no deal' is the worst possible deal for Britain and that it would do damage to our economy and trade*." M. Barnier and the EU27 could be forgiven for being left with the firm impression that the UK at all levels is desperately keen to secure a trade deal with the EU at almost any cost. If so, in their calculation their strategy of forcing the UK up against the wall of the hard deadline in March 2019 will get them the result that they want.

From the perspective of the EU27, a UK request that the EU27 agree now to a transitional period of about 2 years will simply be regarded as a request by the UK to be let off the hook. *It is quite inconceivable that the EU27 will be prepared to agree at an early stage to the implementation period arrangement, even if it legally could*. From the EU27's perspective, that would be to remove the time pressure on the UK to agree to their demands. Expectations that such an early agreement would be forthcoming are therefore naive at best.

Instead, the most likely response of the EU27 is probably not to reject the proposal out of hand, but instead to dangle the prospect of agreeing to an interim deal at the end of the negotiating process, provided that the UK agrees to all the EU27's demands. The first part of those demands are

likely to relate to the terms of the interim period itself: full continued payments by the UK into the EU budget, quite possibly with Mrs Thatcher's rebate removed; full continuation of free movement of persons with full permanent status to be granted to every single EU national who enters the UK up to the last day of the transitional period; and full subjugation to EU law making, enforcement and judicial structures.

4. Fashioning a noose for our own neck

However, the prospect of a transitional period promised in vague terms, in the absence of firm legal agreement that there shall definitely be such a period, would create a dangerous noose round the UK's neck.

Until such an interim deal were actually legally agreed and ratified (which could not be until a very late stage for the reasons explained above) the UK would be totally exposed to "salami-slicing" of additional demands. It would be open to the EU or to the European Parliament to add additional demands as a condition of not vetoing the deal, up to the moment when it is actually ratified.

The dangers inherent is this situation would be considerably increased by the inevitable "goof off" effect if an interim agreement is in prospect. Instead of working on the basis that they must be ready to leave the EU on 30 March 2019, if necessary with no agreement, Whitehall and businesses would be encouraged to defer and delay necessary preparations in the belief that they need not bother to be ready until the end of the interim period 2 years later.

This would mean that a late stage refusal of the EU27 to grant the

requested interim deal would have an increasingly calamitous effect the closer we get to 30 March 2019. As that date approaches, bargaining power would swing further and further to the EU27. The UK would have wilfully and voluntarily manoeuvred itself into a position where it would have no choice but to agree to any additional or enhanced late stage demands of the EU27, or the European Parliament, or of any individual member state. There is also, as pointed out by Sir David Edward a former judge of that court, a real possibility that the ECJ might rule the withdrawal agreement to be contrary to the EU treaties at a very late stage before it is due to come into force.

The only way to diminish this calamitous danger is for the country and individual businesses to prepare come what may for a "no deal" exit. The implementation period proposal cannot possibly deliver what misguided business leaders seem to expect from it, which is certainty about the future relationship which allows them to avoid making contingency plans for a no-deal exit in March 2019.

Therefore the only way in which Prime Minister's Florence speech proposal for an implementation period can avoid becoming a noose fashioned by the UK round our own neck, is if we prepare for no deal and carry on getting ready for no deal right up to the point when (or if) the arrangements for such a period are legally agreed by all necessary parties and signed off by the ECJ.

On 11 October 2017, Mr Hammond, Chancellor of the Exchequer, wrote an article in The Times, in which he claimed that the government and the Treasury are planning for every outcome, including a no-deal scenario,

that "*we will find any necessary funding*". Unfortunately, he destroyed the whole effect of this apparent determination to prepare for a no-deal scenario by adding the words: "*and we will only spend it when it's responsible to do so*." Unfortunately, these words send a clear signal to the EU27 (who do read articles in The Times) that the government is only bluffing about getting reading for a no-deal scenario.

Indeed, these words so shockingly undermine the recent efforts of the Prime Minister and other ministers to say that the UK will be ready for a no-deal scenario that one must wonder why they have been said. Mr Hammond and the Treasury, having ushered the UK into the position of putting the transition period noose round its neck, are effectively trying to kick over the chair on which we are standing which would force the UK to succumb to the EU's demands.

The only way to escape the noose which we are fashioning for our own neck is to make *real* preparations for exiting without a deal. These preparations must not be, and must be seen not to be, a bluff.

5. Further instalments to come

In the following parts of this series of articles, I will deal with the reasons for the implementation period proposal and its likely economic and non-economic costs, and the likely legal basis and terms of the agreement.