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What is "No Deal" ?

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Summary

- The Brexit debate has been ill-served by lack of precision when people talk of a 'No Deal' situation.
- Brexit opponents talk in terms of a total default and collapse almost on trade war terms - where no single piece of paper at all has been signed off. The objective of this is to discredit other options, through a continuation of 'Project Fear'.
- 'No Deal' turns out to be a debate on a false premise. This scenario is not credible.
- There are, however, three realistic potential consequences to talks based on the Chequers draft collapsing;
 - Minimalist Brexit – based on WTO terms, but also building on them with a spaghetti arrangement covering individual areas. Examples include access to particular customs IT systems, presumption of conformity under the Database of Mandates, or continued recognition of specific UIA-listed bodies as national standards certifiers within their field.
 - Defaulting to an off-the-shelf FTA model, and potentially expanding outwards from that as per above.
 - A call to renege on Brexit, with all the consequences that would ensue.
- The almost inevitable consequence of a No Deal scenario emerging is an *ad hoc* package deal, and a level of additional bilateral coverage on top of what the WTO provides. But its form is highly variable; and the greater the time constraints, the less comprehensive and 'tidy' the coverage of the package will be.
- The default scenario of a set of ad hoc arrangements means No Deal coverage should be more honestly discussed in terms of delivering a **Strongly Mitigated No Deal**. The exact level of mitigation cannot be predicted and is a significant variable.
- But given the strategic direction of the EU and the damage from close orbit, No Deal really will be better than 'Chequers Minus' – definitively a Bad Deal.

A Platonic conundrum

When is No Deal not a No Deal? This existential question, and the inability of various parties to adopt a common language for Brexit, has been profoundly damaging to a debate already of tremendous complexity.

It is in itself an enduring legacy of the Remain campaign's chosen tactics from the referendum.

Military planners do their work by looking at two levels of probability; the *Most Likely Enemy Course of Action*, and the *Most Dangerous*. This allows for the commander to prepare for a set of contingencies even if Plan A starts to go tremendously wrong. However, in designing their scenarios, planners also have to ensure that they are plausible.

The referendum's Remain press team, abetted by George Osborne's Treasury spinners, made great play of painting an apocalyptic picture that was implausible even for the most dangerous course of events, and then by portraying it as gospel certitude.

In reality, even the most frugal default terms that would emerge from a breakdown in Brexit talks are almost certainly to be mitigated by certain bilateral agreements being signed off to ensure some measure of continuity. In that sense, **there is no such thing as a No Deal**. Or rather, it would take a calamitous turn of events, equating to a total breakdown in diplomatic relations between the UK and EU27, to generate the conditions for absolutely zero additional elements to emerge.

We might usefully here cite the example given by the Chancellor, Philip Hammond, when he appeared before the Treasury Select Committee on 11 October 2017. Prompted on whether flights between the UK and the EU would be grounded after the UK left, he said that it was theoretically possible;

"It is theoretically conceivable in a no-deal scenario there will be no air traffic moving between the UK and EU on 29 March, 2019."

However, he continued,

"But I don't think anybody seriously believes that is where we will get to."

Explaining further, he observed,

"On that specific point, it's very clear that mutual self-interest means that even if talks break down, even if there is no deal, there will be a very strong compulsion on both sides to reach agreement on an air traffic services arrangement."

Thus, even in a No Deal scenario, it is envisaged that mutual self-interest will still lead to a deal on this particular area. If not here, why not in other specific examples? It is consequently logical that an air traffic services arrangement would form but one element of a bundled package, covering a much wider range of individual areas, over issues of mutual administrative interest.

Recognising this difference in interpretations on what No Deal really looks like is not the same as saying that there will not be problems that arise from a failure to deliver a ranging Brexit deal. But it is to suggest that those scaremongering on an epic scale, about disasters that will not happen, are doing everyone an immense disservice. Apart from undermining confidence in the economy, this is distracting analysts and planners from genuine areas that do need to be addressed, resolved or mitigated in the talks.

Ambiguity, and the endurance of Project Fear

It is not only anti-Brexit campaigners who have adopted their own narrow and plutonic definitions over what they mean by No Deal. It is a condition that affects think tanks and academics too.

The consequence is that those with whom they are engaging assume a worst case scenario applies as the universal default, despite the range of possible outcomes. We might christen this the **Marvin Principle**, after the paranoid and clinically depressed robot in Douglas Adams novels.

The Institute for Government, for example, has recently generated a paper looking at the impact of No Deal as expounded in horrifying nakedness.¹ It does so by contrasting the end state with two other options – Single Market membership, and Customs Union membership. Excluding any other route, it summarises No Deal terms as excluding any possible mitigating bilaterals:

“That no major trading partner trades with the EU on WTO terms alone indicates the unattractiveness of this option.”

The paper is from the outset predicated upon a straw man argument, while it even identifies in passing the very fourth option that it declines to develop further. This is a considerable pity, especially as the paper lists a number of the specific problems that could be covered, only to be dismissed as not in scope under a default arrangement.

Even more peculiar has been another very recent paper by the EEIW (Europäische Wirtschaft und Internationale Wirtschaftsbeziehungen). This is particularly worth highlighting as an example as it has been emailed to MEPs with a cover note that declared,

“As the debate about a potential ‘No deal’ Brexit intensifies, you may be interested in our analysis on the cost of no deal.”

The research note was entitled “The True Cost of Brexit”.² The core element of it is centred on “A Cost-Benefit Analysis of BREXIT for the UK (assuming no UK-EU deal is reached).” The report states that the cost of No Deal will be “-15.8% (net) of UK national income.”

This huge figure is predicated on biblical scenarios, which in turn are simply lifted unquestioned from the ‘Project Fear’ output of the Treasury during the referendum. They include assumptions on a full tariff schedule; the price impact of tariffs on competitiveness for exports; an additional reduction in production; a putative and fanciful estimate of the purported benefits from the Cameron negotiations; and depreciation of Sterling (despite the OECD already identifying the Pound as heavily overvalued before the referendum). None of these allow for the slightest prospect of bilateral mitigation: Zero Deal is taken at bleak face value.

One might be surprised at this blanket set of assumptions, but then in the annexes themselves, the author goes on to say,

¹ https://www.instituteforgovernment.org.uk/sites/default/files/publications/5704%20IFG%20-%20Frictionless%20Trade%20Web_0.pdf

² http://www.eiwi.eu/fileadmin/eiwi/Daten/Publikationen/Gelbe_Reihe/disbei234.pdf

- A “fair result” for the referendum would have been 52% Remain, but the Cameron Government got their leaflet wrong and committed an “information blunder”;
- The banking crisis and scapegoating after it is the reason why immigration is a political issue in the UK;
- The referendum was “disorderly” and so its result does not count;
- The UK did not have a great enough understanding of EU institutions to make an informed decision;
- The EU needs a much bigger budget.

We note in passing that the author is a Jean Monnet Professor: we cover that particular issue and its threatened impact on academic impartiality elsewhere.³

It is fairly widespread now to see ‘No Deal’ categorisation as being synonymous with the absolute worst case scenario without any prospect of mitigation. This redefinition of the Linnaeus system has generated a false isolate. Worse, in this instance, politically-driven interpretation of the No Deal worst case scenario has been lifted and cited as academically gospel. George Osborne’s poisoning of the well from his time at the Treasury continues to yield bitter dividends, and to underwrite the No Deal Misnomer.

The differences at a glance

The following shows a summary chart of what No Deal means, depending on with whom you speak.

Baseline	Add bilaterals and multilaterals EU has signed with WTO states	Also agree new bilaterals to cover specific gaps
WTO shell	WTO+	WTO++
Off the shelf FTA	Canada+	SuperCanada

In terms of colour coding,

Red is what supporters of continued EU membership mean, when they talk about a ‘No Deal scenario’ – it is the WTO treaties and absolutely nothing else tacked on, no matter how small.

Blue is what opponents of continued EU or EEA membership mean, when they talk about a ‘No Deal scenario’.

Green is the range of prospects of where the more likely default will be if the talks break down – in other words, something more considerable gets patched together in a hurry.

The scope for public confusion over what people mean, about where the negotiators will turn to if the Chequers draft collapses (i.e. the EU levies extra demands), is clearly considerable.

³ http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/research_interests_with_covers_10.pdf

Let's briefly explore the table. The left hand column, 'Baseline', refers to the starting point. Essentially, is the Commission prepared to accept another default off the shelf? It might, or it might not. Barnier's infamous 'step diagram' PowerPoint picture suggests that it would: the first step of the Commission's listed options was made up of existing FTA deals. It is also significant that the RSK and Canada models were both listed side by side.

The middle column refers to the bilateral and multilateral agreements that the EU has signed with developed countries - including those with which it operates on WTO terms - that allow for example planes to fly into one another's airspace. These are on review largely not contentious, could be added onto any baseline, and even individually already start to mitigate significant bilateral impact. Their functionality is often more noticeable where there is no FTA baseline.

The final column refers to the possibility that deeper one-off agreements can also be reached. These could be possible if both parties accept that the UK and EU currently apply equivalent standards and recognise each other's public and private sector certifying authorities, and resolve to allow these to continue in a particular area. In some fields it is possible that individual or grouped bridging arrangements could be met. In a number of areas though, the Commission may closely associate a particular deal as a positive gain from the Four Freedoms – in particular the free movement of people – and decline to sign unless there are corresponding costs added too. There is thus significant uncertainty over how extensive this range will be.

We supply a significant list (220 pages) of areas falling into these two right hand columns in our *Brexit Risk Register*: our assessment after a three month study is that perhaps 80% of areas by volume are replicable or bridgeable, since they are non-contentious and provide administrative functionality rather than competitive advantage. No Deal gaps are then significantly mitigated. The extent is a matter of interpretation and debate - but we have not had that debate.

Types of default

Let's develop this further. There are two possible avenues that emerge if talks fail.

A key variable is whether or not the Government's proposals fall, but with enough goodwill for the parties to default to a free trade agreement (FTA) model rather than the international WTO default. This does not appear to be too challenging a bar to set.⁴

This in turn is then adjustable by the extent to which other agreements can be bolted on.

In consequence there amounts to sliding scales of what might emerge from a collapse in the talks, with some of the models clearly not looking anything like a No Deal at all.

We can summarise them as follows;

⁴ Particularly if the EU's interest in managing the financial settlement is taken into consideration. But any greediness by the Commission in seeking to add a permanent payment in exchange for a complex FTA would breach Government red lines.

Category	Model	Nature
Barebones	WTO	Absolutely nothing is agreed – a complete no deal that defaults to international baseline terms. Only plausible if negotiations have become so bitter a trade war has begun.
	WTO snapkit	Adds bolt-ons drawn from the precedent of EU bilaterals and multilaterals with WTO states. Some mitigation of transition gaps.
Precedential package	FTA	Off-the-shelf free trade agreement.
	FTA snapkit	CETA deal, with additional bolt-ons (as above), plus new elements where mutual recognition is not controversial and both standards and certifiers are trusted.
	Best Precedent	'Best of' FTAs and bilaterals and multilaterals, plus coverage allowing for gradual managed divergence across selected aspects of 35 De-Accession Chapters.
Renege on Brexit	EEA	Transitional membership would be compatible with the Brexit vote, but is unlikely to actually end up delivering Brexit and does not address key pledges.
	EU	Democratically catastrophic.

In practice, this means that what emerges in the aftermath of a collapse in the talks will be based on one of two packages (we will cover a retreat from Brexit later).

(i) The barebones defaults

EU trade with the UK in this scenario would be covered by the EU's international commitments. The most significant are the WTO agreement, and the General Agreement on Trade in Services. A considerable amount in recent years has been written on both (particularly the former).

The majority of EU tariffs that would be levied as a default are low, though in certain sectors they are significant. They would be reciprocated by the UK, though it might choose to unilaterally (but universally) reduce them in a particular area. Quota share also becomes an important variable in some sectors.

A significant number of Non Tariff Barriers (NTBs) would emerge. The negative impact of these would also though be reciprocated.

Mitigating these, or ensuring they do not emerge, makes up the overwhelming function of the + and ++ elements, and will constitute a significant difference on how international trade will look – and how big a jolt will happen for both sides at the point of transition.⁵

⁵ We might note in passing, but leave to another (necessarily complex) paper, that much of the No Deal Wasteland Scenario fails to reflect on a panoply of other factors that arise from standard business contingency planning or are self-regulated by the free market itself over the medium term.

(ii) Off the shelf FTA

The Commission has already conceded that a CETA deal is an option. If for whatever reason it retreats from this stance, there are a still large number of trade agreements of very different forms that it has agreed in the past, and which could instead be pulled from the shelf.

In a past audit, we have identified 42 different types of trade deal, assigned individual official names.⁶ Some are irrelevant to Brexit because they involve a customs union, which has been ruled out. Some are tailored towards OCTs and microstates, and will contain clauses that would be seen as unbalancing if applied to a larger country. Some are largely irrelevant because they provide a framework for development aid, though even here certain clauses do reduce trade barriers beyond WTO provision. Some relate to transitional periods in a country's history, or to a specific set of economic circumstances. However, the list does usefully demonstrate that there is no lack of off-the-shelf precedent for the EU signing up to a bilateral treaty to reduce Technical Barriers to Trade.

Model	Example
Transitional Europe Agreement Establishing an Association Pre-accession	Bulgaria
Outermost Region (OMR)	Guadeloupe
Free Trade Agreement plus bilateral(s)	Switzerland, Faro
Transatlantic Trade and Investment Partnership (TTIP, pending)	USA
Comprehensive Trade and Economic Agreement (CETA, ongoing)	Canada
New Generation Free Trade Agreement	South Korea - different sub models
Bilateral Stabilisation and Association Agreement: Non-reciprocal trade preference agreement with bolt-ons	Macedonia (formerly)
Free Trade Agreement	Malaysia (ongoing) - different sub models
Agreement on Commercial and Economic Cooperation (ACEC)	Canada (previously)
Agreement on Trade and Economic Cooperation	Mongolia
Economic Partnership, Political Coordination and Cooperation Agreement (EPPCCA)	Mexico
Interim Agreement on Trade and Trade-related Matters	Bosnia
Informal backdoor legacy association (no official term)	Algeria after independence
Trade Agreement	Colombia
Economic Partnership Agreement (EPA)	CARIFORUM (provisional)
Association Agreement and Additional Protocol	Chile
"Association Agreement with a strong trade component"	Central America
Euro-Mediterranean Agreement Establishing an Association (EMAA)	Israel

⁶ The 42 list (as it then stood) with explanations can be found here:

<http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/42.pdf>

Interim Economic Partnership Agreement	Madagascar
Comprehensive Partnership and Cooperation Agreement	Vietnam
Partnership and Cooperation Agreement (PCA)	Russia
Trade, Development and Cooperation Agreement (ATDC) - Asymmetric free trade agreement	South Africa
Generalized/Global System of Preferences Plus status (GSP+)	Costa Rica
Generalized/Global System of Preferences – WTO default with preferential rates for developing country	South Sudan
Partnership Agreement	Lomé Agreement
Cooperation Agreement	Syria
Most Favoured Nation (MFN) plus Joint Programming	Namibia
WTO MFN default	United States
Agreement on Trade and Commercial and Economic Cooperation (ATCEC)	USSR (previously)

This in turn generates three possibilities;

- Both parties could accept an existing model from the list (or even the Commission’s operational draft of any treaty yet under discussion) as a default. It is likely that certain elements, particularly quota, would be subject to review.
- Existing treaties could be used as an **FTA Snapkit** – the most advanced clauses could be lifted as relevant from across all treaties (for example, dropping reference to Japanese rice and replacing it with a reference to CETA wheat and dairy). This would ‘power ranger’ up into a more developed treaty. While this would draw from across the complete treaty horizon, the clauses would all have individual precedent in being material the Commission has agreed to in the past.
- There is then the prospect of taking one or other of the above a step further, by then adding on additional elements from existing separate bilateral treaties, and/or recognising existing provisions currently operating under an EU rubric but replicable bilaterally.

It must be stated that available time is a limiting factor here, even in terms of adapting an existing text. However, in December 2017, Michel Barnier conceded the principle that an outline FTA could be signed by March 2019, and negotiations over the content could continue over the transition period.⁷ While several important months will have been lost since then, the concept of a two-phased approach to drafting the FTA is on the table.

Let’s turn now to the bolt-ons.

⁷ <https://www.politico.eu/article/michel-barnier-full-trade-deal-impossible-by-brexit-date/>

The precedent of the 'Plus' in WTO+

The EU and many other countries trade on WTO terms, but also apply a varying number of additional extras. These reduce specific areas of trade friction, and - importantly but a detail far less appreciated - legally allow cooperation and funding to happen in fields considered of common worth. They have been signed over many decades and do not form a unifying treaty bloc, meaning that they are often overlooked as deliverables and indeed collectively are not even deemed worthy of being categorised with a structural name (in contrast to grouped bilaterals sometimes of equal or lesser significance, contained in that list of 42 examples above).

Certain questions therefore arise: how extensive are these; what difference does it make if these are also included in the WTO package; and how likely is it that this would happen?

To review this, we might usefully take the example of the USA, whose EU trade volume is broadly speaking on a par with the UK's. As TTIP has not been ratified, the EU trades with the United States under WTO terms. These are then further modified by the addition of precisely such bilaterals.

Those agreements in essence are what differentiate between a *Default No Deal* à la Napoleonic Blockade, and a *Developed No Deal* which helps mitigate some of the transitional hassle.

There are in fact 147 agreements listed on the EU Treaties database as being in force between the two parties.⁸

For comparison, there are 71 agreements with China, and 97 with Russia - despite there being a form of trade war currently ongoing with the latter.

Of those 147 US agreements, it turns out on audit that 85 of them are in fact international agreements to which both the EU and the US are signatories, but along with many other states. The European Commission is not the guardian of these. This means that the UK can opt to sign up to these agreements in its own right.

That then just leaves 62 agreements, of which a small number are annexes to existing arrangements accommodating some comparatively small change.

Furthermore, some of these cover areas where the UK has existing treaty commitments or might be assumed to retain current ones assumed on its part by the EU. An example here is where the EU and US signed an accord on opening up government procurement to international bids. Through EU membership, the UK is already signed up to the WTO Agreement on General Procurement. Its governing principle fits in closely with established UK procurement policy, and we can assume that both parties will remain covered by such commitments as the UK will not seek to denounce its affiliation. But the example is particularly striking because the UK (as more culturally inclined to free market public sector bids) is a disproportionately heavy user of the common database for notifications, meaning that continental businesses would be disproportionately affected if the UK was no longer allowed into a common scheme. In this case, the potential impact on EU businesses

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<http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=6063&countryName=United%20States%20of%20America&countryFlag=treaties>

would run into billions: it is in the EU's economic interest to encourage the UK to sign up to the system.

A No Deal scenario is realistically likely to see a number of these agreements incorporated into any mitigating 'padded no deal'. The fact that these agreements are set in precedent and largely uncontroversial means they can be largely cut and pasted. It is a legitimate area for debate as to what proportion of the total will genuinely be subject to negotiating difficulties; it is not credible however to simply rule them out or simply ignore them. In particular, one argument that has been used is that some of these agreements are "long" and therefore will take time to negotiate. This is a complete misreading (or lack of reading) of the actual content of most of these texts beyond glancing at the section headings.

We can break down the US-EU agreements into the following categories;

Area and number of treaties	Comment
Ease of access Reciprocity in aviation safety - 3 Customs facilitation – 1	Only a couple of these areas appear to genuinely require negotiation from a UK perspective, and then from a starting point of full compliance and mutual recognition of standards and certifiers. (On a motivational point, the UK is also inconveniently sited as an obstacle for the EU's transAtlantic flight path if an aviation safety deal is spitefully blocked; and Heathrow slots remain prized.)
Bolted onto WTO Aviation competition rules - 3 Services agreement - 1 Banana policy – 1 Amending subsidy, tariffs or amending quotas – 7 Process of appeal to trigger anti-competition investigation (Positive Comity) - 4	
State spending Government procurement - 1	UK can sign up to the WTO Agreement on General Procurement (which fits in closely with established UK procurement principles)
Compliance testing and Mutual recognition Voluntary labelling code - 3 Principle of Mutual Recognition Agreement - 1 Mutual recognition of wine practices - 2 Mutual recognition of marine equipment – 1 Equivalence in beef and pork – 1 Equivalence in animal sanitary (with authorisation for (local) regional rather than national/bloc zoonosis bans) – 2	The MRA on pork and beef should be noted in the context of concerns over the Irish border trade, particularly given pan-island zoonosis listings, and herd registration schemes.
Security, policing and defence Military/Security cooperation – 4 Nuclear non-proliferation Counternarcotics - 1 Extradition processes – 1 Mutual legal assistance - 1	An area the EU is keen to see the UK cooperate closely in (too closely, in fact).
Space Cooperation over Galileo (using international standards) – 1	Particularly ironic given the European Commission threat to withhold cooperation/participation.

Legal basis Legal basis for mutual cooperation in research – 6 Legal basis for education/training cooperation - 2 Nuclear cooperation - 3	Straightforward legal bases that allow joint activity with budgets. An agreement on nuclear cooperation is somewhat forced on the EU given the shared nuclear reactor is physically sited in the UK.
Data rules Sharing of data - 8	These precedents avoid an overweening role for the CJEU.
Not relevant Issues relating to accession countries - 2 Minor admin (agreement on how to calculate duties on husked rice) - 1	Not relevant

We might take the example then of the mutual recognition of compliance testing. This is a principle also variously deployed in agreements with Canada, New Zealand, Japan, Australia, and Israel. These allow for testers in the other party to be considered as legitimate authorities to sign off an export as compliant with the market rules of the other. In the case of the US-EU protocol, the six product sectors cover Telecommunications, Electromagnetic Compatibility (EMC), Electrical Safety, Recreational Craft, Medical Devices, and Pharmaceutical Good Manufacturing Practices. A WTO+ deal might include carrying this across for the UK. A WTO++ agreement could extend the list, and in a best case scenario could extend the direct applicability of standards surety provided through more fulsome mutual recognition of standards. Realistically, we anticipate the Commission would not universally agree to this (especially at this late stage of the talks) though there might be individual areas where something approaching this remains deliverable.

Separately, amongst the treaty listings, there are 85 agreements that are not *bilateral* but *multilateral*. Only one of these appears to be implementing an EEA-US agreement - the majority are international agreements.

The subject matter of these, for reference, break down as follows;

Area	Issue and number of treaties
Strategic Scale	Environment – 20 Health - 1 Development/aid - 2 Fisheries – 11
Law	Anti-corruption – 1 Crime – 1 Narcotics – 1 Trafficking - 2
Facilitating	Jurisdictions – 1 Civil law – 2
Enabling	Customs management – 5 Scientific cooperation – 8 Nuclear cooperation - 8 Air transport - 3
Trade specifics	Duty agreement – 1 Coffee - 2 Vehicles – 2

	Aircraft production - 1 Grains – 1 New plants - 1 Copyright and Trademark – 4
Permitted protectionism	Market oversight/intervention entities - 4
Sovereign status	Treaty of Amity and Cooperation in Southeast Asia-1 UN treaty amendment rights - 1

Taken together, these two lists demonstrate that there is precedent for the EU to extend, by means of separate agreements, its relationship with third parties with which it trades on WTO terms. These could with Brexit be replicated and possibly developed further without raising the question of the ‘sanctity’ of the Single Market in the eyes of the Commission.⁹

The Double Plus factor

The extent to which the EU will agree to working in bulk through bilaterals is an unknowable. As we stated before with reference to our Risk Register, the range of administrative issues constitutes a major list. A significant portion of it is deliverable even with a WTO baseline. The remainder depends on the flexibility of the Commission, with the end settlement most likely topped off by last minute intervention by the Council in specific areas of national or corporate concern.

The principle of Mutual Recognition, rather than shadowing EU rules, has already been established in a range of areas. The Government’s ‘Road to Brexit’ speeches make great play of this, underlining how the UK and EU already share common standards and common certifying practices.¹⁰

In her Florence speech for example, the Prime Minister observed,

“The eyes of the world are on us, but if we can be imaginative and creative about the way we establish this new relationship, if we can proceed on the basis of trust in each other, I believe we can be optimistic about the future we can build for the United Kingdom and for the European Union.”

The Brexit Secretary developed this point at Vienna;

⁹ It is also worth here noting that this does not preclude the UK adopting a policy of unilateral mitigation to ease Brexit Day customs transition. It would be possible for the UK to continue to recognise existing administrative mechanisms for products coming in from the Single Market, since (say) an imported ironing board considered safe the day before Brexit will still be built to the same previously-recognised standards if it arrives at a UK port from the EU after Brexit Day. It should, however, be noted that WTO rules preclude this approach from being a permanent set of affairs unless incorporated into a treaty or applied universally to all imports, including those outside the EU. However, we contend that a short term deployment of this principle, associated with a declaration that the UK was heading towards greater free trade principles and was not looking at such as being more than a stopgap under exceptional circumstances, would not generate complaints at the WTO unless it stretched into the medium term – which would in any event be evidence of policy gridlock and an extreme level of negotiating failure by Whitehall, and a bigger problem in its own right.

¹⁰ Reviewed in http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/ex_cathedra.pdf

“A crucial part of any such agreement is the ability for both sides to trust each other’s regulations and the institutions that enforce them. With a robust and independent arbitration mechanism.

“Such mutual recognition will naturally require close, even-handed cooperation between these authorities and a common set of principles to guide them.

“And the certainty that Britain’s plan — its blueprint for life outside of the European Union — is a race to the top in global standards.

“And not a regression from the high standards we have now

“It will provide the basis of trust that means that Britain’s regulators and institutions can continue to be recognised.”

The Prime Minister’s subsequent Mansion House speech made this point;

“In particular we will want to make sure our regulators continue to work together; as they do with regulators internationally. This will be essential for everything from getting new drugs to patients quickly to maintaining financial stability. We start from the place where our regulators already have deep and long-standing relationships. So the task is maintaining that trust; not building it in the first place.”

Also observing,

“Many of these regulatory standards are themselves underpinned by international standards set by non-EU bodies of which we will remain a member – such as the UN Economic Commission for Europe, which sets vehicle safety standards. Countries around the world, including Turkey, South Africa, South Korea, Japan and Russia, are party to the agreement.”

It was precisely this ambition which underwrote the version of the White Paper produced by David Davis and the DExEU team.

Pursuing new agreements on equivalence was always going to be a challenge even from the UK’s starting point of full compliance, despite the UK’s declared willingness to sign up for it: if the EU were just about trade it would still be just a Common Market, but of course the Commission has greater ambitions than that. Two years of vacillation and delays have since undone much of the opportunity once on offer. Nevertheless, delivering on any aspect of this equivalence model will do global trade liberalisation a great service, even if at this late stage it is only delivered in part.

Less problematic should be areas in a given competence where specific third party precedent may not exist, but where parallel arrangements do exist in other EU structures. Here, let’s simply consider what would go into any agreement over a Euroquango where it has been agreed the UK might usefully assume a brand new form of external status.

Basic treaty content needed for a minimalist bilateral Strategic Association Agreement in a given field

- Define areas of cooperation (in doing so, note those areas covered by other international treaties).
- Designate Points of Contact.
- Designate Competent Authorities.
- Define extent, timeframe (e.g. 24/7 or working hours), transmission mechanisms, format, authorisation, justifications, grading of source material, for exchange of information.
- Define limits of use, remedies, retention, deletion.
- Define recourse and requirements on verifications, authorisation for reuse.
- Establish provisions for data transmission and retention, confirmation of receipt, technical protection of data held, verifications, destruction of wrong data.
- Define processes for recording data shared.
- Set out limits and mechanisms for right of refusal (confines of agreement, law, national security, government interests, excessive costs, ongoing investigation) and possibility of offering partial or conditional compliance with the request.
- Agree rules on disclosure by either party.
- Confirm adherence to classification and caveats set at point of issue, within the context of operational flexibility, and agree mechanisms to review classification.
- Establish processes for regular consultation.
- Allow access to training and meetings of mutual interest.
- Agree to posting of liaison officers, and ascertain associated working modalities.
- Agree to cover working expenses and establish mechanism to cover extraordinary expenses.
- Introduce a Savings Clause (i.e. this agreement does not affect any other agreement on the exchange of information through another treaty).
- Set up a Dispute Mechanism.
- Agree (limits to) Liabilities.
- Indicate methodology to amend the agreement.

On review, it transpires that there are often existing normative options or principles that can be cut and pasted from other international deals or indeed from EU internal processes, even where it is an agreement in a different field or treaty competence. Drawing up a given model with which the Commission is at ease itself immediately generates a blueprint that can be replicated across the board for other teams. Instances of indirect, or horizontal, precedent may be cross-applied whether they relate to certification methods, principles of IT access, third party inspector rights, roles for private sector quality surveyors, safety certification processes, data protection processes, and so on.

Clearly, the extent to which No Deal prep is able to deliver on these areas will depend on several variables. These include above all the available time; but also, staff talking to one another to share emerging standard models; the continued commitment of personnel and resources; and a recognition that No Deal work does need to be done to the level of providing competent, credible and deliverable insurance.

Getting ‘++’ deal that takes this further need not be much more difficult, but at its very top end is fundamentally a matter of ambition predicated upon opportunity and the willingness of the other side to cooperate, a political precondition which we must accept may well be lacking. Getting a good and ranging deal, which is rationalised in a way that the Commission finds ‘ecologically acceptable’

to the Four Freedoms, will be an uphill task. This is why it is a loss that the FTA++ model was dropped in favour of the Chequers deal when there was still time to generate a truly ambitious one.

Can we retain some element of optimism over these bolt-ons? There remains notable overlap in what negotiators for both the Chequers approach and the No Deal approach are seeking to achieve, meaning that a lot of the wiring will get fixed in either eventuality. There is also a considerable appetite within the EU to lock the UK into a number of areas where the UK's absence would be felt - the EU's security and defence apparatus, for example, as well as fisheries and other areas (a greater appetite indeed in some sectors than would be healthy for the UK to agree to). So even if Chequers stalls, there are real prospects of the Commission consenting not just to bolt-ons that are modelled upon existing EU bilaterals signed with the likes of the United States, but also with coming up with a number of fresh ones too.

The power of precedent

We have raised the issue of precedent for a good reason. A persistent Barnier 'line to take' has been that he will not sign up to any agreement that even remotely undermines the operation of the Single Market; and this in particular is vociferously tested against there being a precedent that the EU has signed up to in the past. But as we have seen, precedent also works in favour of delivering something off the shelf if talks break down.

The WTO slim line deal is self-evidently predicated upon such a scenario, since it is not dependent upon the Commission resolving to do anything at all other than wait for the Article 50 timer to run out. (Assuming, of course, it is happy losing the UK's outstanding financial liabilities and triggering an internal funding crisis.)

The 'off the shelf' FTA deal, whether Canada's *Comprehensive Economic and Trade Agreement* or South Korea's *Free Trade Agreement* or Japan's *Economic Partnership Agreement* (EPA), is predicated on existing models.

Modifying these further by lifting certain sections from one treaty and putting them into an aggregated new Brexit one would also be based on direct precedent, though it is possible inserting or deleting particular clauses would raise questions about further rebalancing the text, since the original negotiations may have conceded one point in order to win another.

A '++' deal is a bigger challenge. The precedent is practical and pragmatic, since the UK currently has many areas where there is extremely close administrative association. The Commission however identifies some of these areas as also carrying direct burdens from across the Four Freedoms whose costs would need to be replicated or mimicked as well. Clearly, a trade deal that mirrors the Single Market is not deliverable while retaining the UK's red lines, most notably removing the unifying role of the CJEU and also allowing for free movement of people. However, there are still a considerable number of areas of administrative facilitation that are small wins with small cogs.

Two additional elements provide the EU negotiators with the 'excuse' to do a deal, if they are genuinely interested in having one. The examples of Algeria, East Germany and Cyprus inform us as to the prospect of bending the rules over the Irish border. This we cover in a separate paper.¹¹

But to these we should add the enabling clause of Article 8 of Lisbon. Most significantly, this was drafted and released very early on during the Convention on the Future of Europe, and came out at the same time as the future Article 50. The two elements might almost have been different sides of the same coin, and were seen as interconnected at the time of their release. Article 8 recognises that not all of the continent of Europe will be in the EU, and it generates the legal authority to develop around that.

This **Good Neighbour** clause provides Team Barnier with full legal authorisation to develop a *Deep and Special Relationship* with the UK. The article states,

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

These clauses are now very important. As a result, Michel Barnier does not require further precedent or sanction to pursue a 'double plus' deal with the UK – the authorisation is already there in the treaties themselves.

The question that arises instead is over the extent to which he is actually willing to pursue such an approach – which is very much an open question, and subject to a massive sliding scale. On the balance of probabilities, it would appear to sit on the low end, but could include a number of low profile but administratively important elements.

Reneging on Brexit

The remaining option, if talks collapse, is to declare that Brexit should not happen at all, and that the UK should remain in the EU – possibly by generating a fig leaf of a referendum with the intent to skew it, which is how the system has operated in the past with other countries that dared vote against the EU project.

In a past Red Cell paper, we have set out how the UK staying in the Customs Union would be reneging on a Leave vote because of commitments set out during the campaign.¹² We have in another paper also set out how staying in the Single Market carries the same effect and would be another broken pledge.¹³ In other papers we have further detailed why both of those options are

¹¹ <http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/brexit%20dreary%20steeples.pdf>

¹² http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/uncustomary_zeal.pdf

¹³ http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/eea_pledge-.pdf

poor choices regardless of those commitments. But the fact remains that neither can be legitimately packaged as delivering on the Leave vote.¹⁴

A tremendous prize is now at stake – the soul of the continent.

If the UK does not generate a meaningful Brexit, it will have signally failed to seize the strategic imperative. The Heath Government's decision to abandon EFTA came close to fatally destroying what we might call (in parody of China) the **One Continent, Two Systems** approach to post-war European development. Originally, there were three systems – the Eastern bloc and COMECON; the EEC's politically integrating Customs Union; and the free trade intergovernmental bloc of EFTA. The UK's retreat from the EFTA model drew a high-critical mass of the EFTA states into its competing Western European model, with its high regulation and deeply assimilating aspirations. The collapse of the Soviet Union then (thankfully) removed the third model. This has though left the EU, disastrously, with a near-monopoly on the vision for how the continent will develop.¹⁵

By extreme good fortune, Brexit has generated a rare strategic opportunity of the first order. The problem is that those located and selected to exploit it, are the very people who have been most shaped and moulded by the model they need to overturn.

The EU model is one of ever-closer union, competency annexation, and implausible deniability. It is managed through a mixture of corporatist collectivism, civil service parochialism, and anaerobic democratic façadism. It is predicated upon a retreat from Globalism into Big Regionalism, and the suppression of the traditional – with the exception only of what fits onto a food label, or can itself be coerced into building the wider continental identity. It is a cultural enzyme and democratic corroder. The gains from border (but not internal) trade are its political opiate.

Transitioning from the EU system will cause the UK administrative and trade difficulties, in some cases potentially painful ones over the short term. That is hardly surprising, given the pile of paperwork contained in the *acquis* is as tall as Nelson's Column, and tens of thousands of civil servants are centrally employed expanding it on a daily basis. Complexity, however, is not excuse to repudiate democracy – particularly if the problem will only ever get harder to correct with time.

Reneging on Brexit, particularly given the unswerving direction of travel of the EU and its propensity to generate negative headlines all by itself, is not a plausible option for the democratic stability of the country.

¹⁴ The EEA option can legitimately be argued to operate as a valid staging post. However, UK participation can effectively be vetoed by any of the EEA members, meaning the UK would have to concede bartering chips simply to pursue this route: the track record of EU states towards accession countries is particularly enlightening on likely precedent for exploiting opportunities for pursuing selfish self-interest here. The longer term problem is that the UK is likely to remain mired in the EEA, which will be seen as an opportunity to coerce the UK back into EU membership – and on even worse terms.

¹⁵ The realities of this evolution are explained by Dr Alatalu here:

http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/contemporary_balkanisation.pdf

Brexit's shock absorbers

From the outset, even on its own terms the apocalyptic 'No Deal' vision has always been a misnomer. Leaving the EU on a literal No Deal setting could only happen if the UK not only departs from the EU, but also repudiates its membership of the WTO and many other international bodies on the same day. Meanwhile, the world has moved on massively in the last 40 years, and particularly in the last 20. The trade barriers that drove the UK into the EEC in the first place have shrunk massively thanks to trade liberalisation. Even the catastrophe has atrophied. The anti-Brexit threat of 'WTO and nothing else' does not carry the impact it would have thirty years ago.

That scenario, however, is not in genuine prospect. Something else is: a **Strongly Mitigated No Deal**.

The EU has demonstrated extensive precedent in forming a jigsaw compilation of bilateral agreements, which it pursues out of self-interest. The 'No Deal WTO default' therefore turns out to also include opportunities to remove many concerns, especially the most touted ones, and to mitigate many of the rest.

There is a further prospect. If talks collapse, the default result may yet mean both sides agreeing to turn to an off-the-shelf FTA. This itself could be subjected to last minute '**meccano upgrades**'. Such an end model would certainly fulfil the key criteria demanded by the Leave result.

We do not hold our breath on the most optimal of the range of outcomes emerging from a late breakdown of talks. Furthermore, Brexiteers are not blind to the genuine concerns of certain exporters or professional bodies, nor unmindful of the practicalities of customs arrangements or just-in-time systems.

There will be a business cost for leaving the EU whatever happens. It must be said though that this too was factored into the referendum debate that delivered a Leave vote – even when it was scripted by Project Fear's worst case playwrights.

The task now is to mitigate those numerous elements of business concern that do exist, but without coming at the cost of those many strategic wins to be gained from Brexit. Unlike customs minutiae, these latter have not been discussed by Brexit shuffle footers over the last two years, but they must not be forgotten now as dissident chefs turn up the kitchen stoves.

Much remains uncertain, and a great deal may only be resolved at the last hour. Maximising the fall back planning now means reducing the rushed nature of any 'Supermarket Sweep' hurried deal-making to come. But to discuss how best to smooth transition, we need to have an honest debate based on what truly are the options in prospect, including the default. It helps if we all begin by understanding each other's starting point terms.

About the Author



Dr Lee Rotherham has been an adviser to John Major’s whipless rebels, Eurosceptic MEPs, three Shadow Foreign Secretaries, the Conservative delegate to the Convention on the Future of Europe, a delegate to the Council of Europe, and government ministers. He was Head of Opposition Research for the No Campaign in the AV Referendum, and Director of Special Projects at Vote Leave, the designated pro-withdrawal campaign during the 2016 referendum.

He has twice been a Conservative candidate in General Elections, in 2001 in St Helens South (the “butler campaign”), and in 2005 in Rotherham standing against the then-Europe Minister. Outside of Westminster he has worked in publishing, teaching, heritage, and in Defence.

He has been very extensively published in academia and across think tanks. His publications as author or co-author include *The EU in a Nutshell*; *Ten Years On - Britain Without the European Union*; *Change or Go*; *Plan B for Europe*; *Controversies from Brussels and Closer to Home*; *Manning the Pumps*; *Hard Bargains or Weak Compromises*; *The Hard Sell*; *Bloc Tory*; *Common Ground*; *A Spotter’s Guide to Sound Government Policies*; and the award-winning *Bumper Book of Government Waste* and *Brown’s Wasted Billions*. His historical works include *A Fate Worse Than Debt – A History of Britain’s National Debt from Boadicea to Cameron*; *The Sassenach’s Escape Manual*; and tour guides to Roman Britain, colonial North America, the Hundred Years War, and the Apocalypse.

Lee is a reservist in the British army, and has served on three overseas deployments

