The Red Cell

The Boris Deal: Meaningful Change, or Treaty Feng Shui?

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Introduction

The Theresa May texts that set out how Brexit was to happen were put before Parliament on three occasions. Each bill failed to be passed. Following further renegotiation, some changes were made and a new 'Boris Deal' was reached.

This paper does not aspire to provide an absolutely comprehensive comma-by-comma comparison between the two texts. Instead we focus on areas particularly open to interpretation or where there has been significant change – or notable lack of it.[1]

In summary, we can divide the issues into three categories.

There are areas where there remain notable concerns because of a failure to fully or partially amend the text. These include:

- The price tag (financial commitments and asset surrender, whose costs are classified);
- Implications for remaining to some extent in a Regulatory Union;
- An undefined treaty review mechanism, which may yet include a reintegration ratchet;
- The implications long term of the loss of the 2011 referendum lock;
- A commitment to remain in the ECHR system, and thus not being able to redress failings in the Human Rights Act.

There are other areas which we consider where we assess the risk to be overstressed. These include:

- The official language of the text;
- The long term subjugation of UK law to CJEU (Luxembourg Court) interference;
- The transition timeframe;
- Obligations from the principal of best endeavours/loyal cooperation;
- The democratic deficit during transition, including a lack of input for both MPs and experts.

In some of these fields, the concern originally arose in the May Deal because of the prospect of the UK being trapped in the transitional arrangements for an extended period of time. The concern is

[1] Those wishing to review the texts can find the old and new versions online. The original Political Declaration https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf can be compared with the renegotiated version https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840231/Revised_Political_Declaration.pdf. The May Withdrawal Agreement https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf can be compared directly with the new WA text https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

reduced with a more bounded transitional period - and indeed given a meaningful choice, these concerns themselves now operate as a stimulant for opposing any such extension.

Further issues exist as high-risk variables, which may lead to serious damage. Whether they do or not is down to the future stance of negotiators, and whether they negotiate weakly or seek to remain too closely locked into EU structures at a period of accelerated integration. Conversely, a strong and aware negotiating team could make use of ambiguous wording to develop a looser, bilateral arrangement that avoids these pitfalls. Possible bear traps include in particular:

- Failing to stand up for the rights of UK fishermen, or bartering them away;
- Too closely aligning to EU CSDP structures, budgets, and plans – at cost to NATO and the US security link;
- Failing to firewall UK interests by signing back up to the EU's JHA pillar;
- Failing to pursue an Association Agreement and an FTA, now enabled by the new text, and continuing to obsess with a Customs Union and Regulatory Union.

Finally, and completely overlooked, the Northern Ireland text removes what we have previously warned risked becoming a "Rioters' Charter" and replaced it with a proper review mechanism. This, and the inclusion of a set timetable within the Northern Ireland paragraphs, plus the shift in emphasis away from an assumption of Ulster staying locked in the EU Custom Union, de-escalates the text by introducing a natural break process.

In summary, we conclude that although a number of critical fault lines from the May original have not been fixed, overall **the Bo Deal is better than a bad deal** – but this comes with major caveats depending on there being the intent to deliver on its promise. If the modified Withdrawal Agreement and Political Declaration are both passed, the job is still only half done, and it may yet go badly wrong.

The End State

The Boris Deal contains significant improvement in terms of direction, and the form of the final treaty. The model is expressly set out as being much looser, based on bilateralism and cooperation rather than simply shadowing regulatory and customs processes.

Paragraph 19 of the Political Declaration of the new Boris text (PD19) sets this out in the wording of an ambitious FTA;

> *The Parties envisage having an ambitious trading relationship on goods on the basis of a Free Trade Agreement, with a view to facilitating the ease of legitimate trade.*

This is a new insert, establishing from fairly early on in the text a negotiating focus that mitigates the start of the original May draft (still retained in the Boris text) with its reference to regulatory and methodological alignment, and assuming that EU formats lie at the core to the UK's own domestic systems.

In PD120 we read that "the overarching institutional framework could take the form of an Association Agreement." This is in the original May Deal. It is an open question as to what this binds the negotiators to. In a separate paper, we elsewhere explore the massive range of treaty forms that the EU has historically signed – 42 (and upwards).[2] Of these, several include the word "association" – these include the models for pre-accession Bulgaria, the initial model for Macedonia, and Guernsey.

The possibility of drawing on the Guernsey model was a significant concern in the original pre-Boris text, as it carried big implications over pursuing a customs union, and a subservient one at that. "Association Agreement" is however more properly applied to the various models arising from the treaties with Chile, Central America, and Israel – in other words, FTAs falling well short of that approach. Given the added reference to the FTA route elsewhere in the text, this vocabulary might be argued to now contain new importance and meaning. **The consequential shift in how to reinterpret this specific vocabulary is probably accidental. Nevertheless, it is fortuitous.** The wording around this section tellingly also shifts away from being open-ended, from seeking a trade relationship in goods that is "as close as possible", to (PD20) one that is an "ambitious trading relationship on goods on the basis of a Free Trade Agreement".

It could still, contentiously, be observed that the word "agreement" lies in the singular, which might imply a move away from the Swiss model of separate texts rather than a single treaty, which packs all the baggage into a single location making any future reform harder. However, one should avoid reading too much into this given that, as we shall see, there are Fisheries and also Security elements whose settlement timeline is distinct from the main economic elements. A pillar arrangement could still be pursued, particularly if talks progress at different speeds.

Two neighbouring changes provide for some further improvements. PD24 changes the old May text that ran,

> *The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties' objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin*

This now becomes,

> *The economic partnership should through a Free Trade Agreement ensure no tariffs, fees, charges or quantitative restrictions across all sectors with appropriate and modern accompanying rules of origin, and with ambitious customs arrangements that are in line with the Parties' objectives and principles above*

This change provides a clear script shift away from a customs arrangement and into setting up an FTA. PD24 also adds a specific reference to cooperation on VAT issues, meaning that the subject is separated out as a bilateral issue not within the purview of shared management.

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[2] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/42.pdf

Aspects of the old May Deal that did show some potential have still been retained. PD20 includes the assertion that the UK and EU27 operate as separate markets, which carries implications for any attempt to seek to extend EU jurisdiction (an example being over attempts to create a Single Market in Defence by forced rationalisation of strategically important national industries). Again, PD22 carries across the intent to avoid tariffs and NTBs, while pursuing "ambitious customs arrangements". PD23 mirrors the former clause pursuing SPS recognition, so that "Disciplines on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) should build on and go beyond the respective WTO agreements", while the section on Services access and the recognition of a right to regulate differently is also the same. PD28 retains the big list of Services to go on the negotiating table. PD36 repeats the possibility of agreeing mutual recognition on financial services. These doors remain ajar.

Regulatory burdens

Certain of the original boundaries from May's Deal are kept that worry some supporters of the FTA route. Under PD21, the text retains an ambition of "combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition". Left to itself this suggests the UK will shadow EU regulations and fail to achieve a Brexit dividend of deregulating wherever red tape is identified – burdensome laws would still then be considered as being "out of scope" in future because they are automatically bolted on by the EU association terms.[3] But this in the Boris deal is now mitigated by a reference to a new Section XIV (aka para 77).

So how successful is this new safeguard? On one level, the ambition encompasses such a considerable scope that in terms of what it excludes by omission it is not particularly limiting. It aims to

> *uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards.*

The provisions contain an odd mixture of open and closed doors. They state that the future relationship "must ensure open and fair competition, encompassing robust commitments to ensure a level playing field", implying central controls to provide this. This however is accompanied by the requirement that application will be by sliding scale – "commensurate with the scope and depth of the future relationship," itself in turn then 'unmitigated' by referencing "the economic

[3] We explore the potential wins in depth in http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/brexits_red_tape_challenge.pdf

connectedness of the Parties". The section states that "commitments should prevent distortions of trade and unfair competitive advantages", but through "appropriate mechanisms" that could take various forms and leans towards devolved ones. It then commits the parties to promoting "adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the Paris Agreement" implying an acceptance of the costly Green agenda. This concern is reinforced if we cross reference PD70, where the UK will set up a national greenhouse gas emissions scheme to link up to the EU's.

Collectively therefore, the attempt to mitigate the pledge to regulatory alignment in this developed insert is only a partial improvement and leaves several areas of concern. There remains an inherent threat not just to the opportunity for future deregulation and regulatory divergence, but also the simple level of aspiration shown.

Whitehall needs clearer starting direction than Section XIV currently provides if it intends to properly unlock the FTA route.

Functionality

PD121 establishes a review mechanism on the working of the future relationship. This was in the original May text, and should have been accompanied by a UK statement of intent that avoided creating a ratchet. At the point of Brexit, the 2011 European Union Act – which required a referendum to take place if the UK signed up to further integration – falls. This removes a domestic safeguard against re-integration that might take place under a future UK Government. **A critical part of the final enabling Parliamentary Bill, lacking in the Boris Deal, will be ensuring that there is no 'rubber clause' in the treaty that avoids re-integration by stealth.**[4]

A positive aspect is the insertion of a new element emphasising that the principle method of conflict resolution between the two parties is not legalistic, but through **"discussion and consultation"** – a route pursued in for example the EU-RSK FTA that keeps the Luxembourg Court at bay. PD132 also includes a treaty suspension clause if breaches occur. The text runs,

> *The future relationship will also set out the conditions under which temporary remedies in case of non compliance can be taken, in particular obligations arising from parts of any agreement between the Union and the United Kingdom may be suspended in response to a breach by the other Party*

This is explored further in the clauses of the Withdrawal Agreement (WA) numbered 178-9. It allows for the joint arbitration panel, on request, to set a fine for non-compliance; and if not paid, to allow the aggrieved party to suspend parts of the agreement.

[4] The latest version of the flexibility clause is A352 TFEU, which is now deployable in any area rather than just in the Single Market competences. The intent behind it is to allow legal cover if ministers and the Commission want to pass laws in a competence not authorised in the treaties. The scope for political abuse is self-evident.

This more explicit reference to a penalty is something of a new dimension in the text, and we will come back to this later with respect to Northern Ireland. Such actions are only supposed to be temporary, and it makes a point of excluding social security payment obligations. But there is an unintended consequence of running the text in this way. In a set of circumstances where the end treaty is operating in a way that is no longer endurable by the UK, it does allow a mechanism for an (albeit messy) method of divergence.

Further refinement will be needed to return to the principles originally set out in the 2017 'Road to Brexit' ministerial speeches, where the UK would gradually diverge from the EU over time by slowly peeling away in particular sectors. WTO sanctions rules allow for a state to apply countervailing sanctions of equal value for a breach of trade rules, meaning the principle is already familiar in international law. The obvious solution is to divide UK-EU trade coverage into chapters, so that the trade treaty is a living text where sections are closed down over time. Unfortunately, this approach requires the European Commission to be flexible and innovative. The concept nevertheless even now is still worth floating.

Time

A critically important shake up in the deal is over time**, adding a sense of urgency and removing an assumption of drift**. PD139 introduces a concrete deadline, not dependent on hesitant talks over the Irish border that may on the EU27 side be bereft of any sense of urgency, and where it effectively holds a veto. Under PD139,

> *This programme will be designed to deliver the Parties' shared intention to conclude agreements giving effect to the future relationship by the end of 2020 as set out in paragraph 135. The European Commission is ready to propose applying on a provisional basis relevant aspects of the future relationship, in line with the applicable legal frameworks and existing practice.*

The timeframe that emerges is a conference in late June 2020, and a delivery date for the main deal of end December.

The first of the inferences arising is that a transition to a Strongly Mitigated No Deal end state remains on the table as a potential end state, assuming talks lead nowhere. The difference now is that 'No Deal' will come with a six month notice period, which by definition will redirect negotiators to aim for a less ambitious trade settlement, thereby avoiding the No Deal scenario anyway. The text induces a lowering of expectations if they are not met, and buys time for a form of deal to be delivered: *si vis foedum, para inertiam*.

Vastly more likely is that a form of FTA will be agreed, the variable simply being how much of those 35 Chapters we referenced above can be fitted into it. In this regard, the negotiations are back in the period of strategic reflection that we covered in late 2016.[5]

[5] See our 220 page Brexit Risk Register (limited distribution).

The length of the transition period is set out in WA126. To this is added a prioritisation system so that this is pursued "expeditiously" (PD140). This contrasts with the May Deal which just had a pledge to deliver a "proposed schedule" fixed around the timeframe for sorting out the NI border.

While there is an option to extend the transitional period, this is limited to a maximum of two years (not, as per the first released version of the May text, to "20XX"), and it is not assumed to be a likelihood. Indeed the wording implies it might be deployable, on a limited basis, just to certain sectors still under negotiation.

Significantly, extension has to be triggered before July, reducing the prospect of it happening.[6] However, a negative risk associated with this timing is that any attempt to pursue any form of extension now heavily risks bundling fisheries negotiations into those discussions (see below).

Transition

The original May texts were disastrously weak over the marginal amount of legislative input the UK held during the transitional period. This has not been directly addressed, but has been indirectly mitigated by reducing the risk of a forced extension.

WA128 provides for an institutional break for the EU with Parliamentarians, in effect meaning that MPs only find out what is on the agenda after it has entered into the public domain. WA128.5 sets out that UK experts are only allowed into expert meetings (which help EU officials in the critical starting phases of drafting legislation) only if specifically invited, on an issue relevant to the transition period. They have very limited input, and no voting rights, and then have to leave the room.

This was raised as an obvious concern with respect to the May draft, yet was ignored by the same Parliamentarians who have opposed Brexit on the basis that Parliament should be sovereign. The absurdity and hypocrisy of this approach is best reserved for a polemic.[7]

The matter is not addressed by any Boris text amendments, but becomes an issue only if the transition period becomes an enduring purgatory.

[6] We put to one side the prospect (with precedent) of the EU "stopping the clock", allowing talks to be extended at the last minute for a short bridging period.

[7] https://brexitcentral.com/the-mps-purporting-to-be-democracy-crusaders-ought-to-acknowledge-their-irrelevance-to-eu-law-making/

"Good Faith" and "Best Endeavours"

Could this democratic hiatus be abused by the EU side in order to pass laws damaging UK interests? There is precedent for such ill will, for example with the EEC's power grab over fisheries which was rushed into being in advance of UK/ Irish/ Danish/ (anticipated) Norwegian accession because of their rich fishing grounds. In this instance, the newly-limited timeframe reduces the risk, especially when coupled with a mechanism for arbitration that should now largely skirt CJEU involvement.

It was suggested that a "Good Faith Clause" should have been added to expressly forbid such Commission abuse (a telling admission by pro-EU think tankers), but that was on the basis that any transition would last 3-5 years when the incentive to do a stitch up would be greater.[8] While UK civil servants for their part have rigorously, indeed overzealously, been playing cricket during the negotiations, one can plausibly argue that the European Commission's approach has not. Examples include outreach to Remain lobbyists, and vigorously averse to negotiating at least transitional equivalence arrangements with a state that would already qualify for full EU membership.

Any such legal safeguard though would be unlikely to work, at least given precedent in Common Law. *Walford v Miles* [1992] found that enforcing the concept of 'good faith' was "unworkable in practice". *Petromec v Petroleo* [2006] at the Court of Appeal found that it could be, but only in the circumstance of a pledge where the variables were already basically known. *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] involved a commitment to negotiate through a referenced mechanism but not an obligation to reach an agreement.[9] Whether continental law on challenge will prove more generous is a different question, but one that one might expect would take longer to resolve than the UK is expected to be in transition for.

The 'Good Faith' clause has an associated point. Some critics of the Boris Deal also point to another element that has not been removed from the May text. WA184 requires that parties apply their "best endeavours" to deliver on what is in the PD;

> *The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration of 17 October 2019 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.*

The argument made is that this could be actionable if the UK fails to be 'generous' in making concessions to get a bad deal done. Our view is that this is an incorrect interpretation. It would be hard to evidence intent, making the challenge unprovable - short of there being either leaks or an injudicious statement by a minister.

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[8] https://www.ft.com/content/0110d34a-012c-11e8-9650-9c0ad2d7c5b5

[9] https://www.linklaters.com/en/insights/publications/tmt-news/uk---obligations-to-negotiate-in-good-faith-where-does-english-law-stand

It has to be noted that the UK Government has not been lacking in either in recent years. Nevertheless, the result would be largely of political rather than practical legal consequence, affecting the tone of the talks which one might assume would already be in a state approaching rupture. Given the existence of an arbitration panel within the texts themselves, we do not see how the CJEU might be brought in to adjudicate here, particularly as international mechanisms also exist in what would after 31 January then be a dispute between an independent UK and a separate EU. The May Government's own original interpretation declared that the principle is not revolutionary in international law; would fall to the dispute panel to settle rather than the CJEU; and would require clear evidence to find a breach.[10]

It is uncertain at whose instance the text was included. We suspect that it was introduced by the Commission, in whose favour it originally counted as a prompt to remind the UK side not to return to John Major-era obstructionism in order to try to gain extra negotiating leverage.

Why is the paragraph still in there? Perhaps simply to remind negotiators to be ambitious. If one reverses the verbs turning them from positive to negative, it becomes clearer that this spur is now directed more towards the Commission side. The removal of the Northern Ireland gridlock element provides a shift in emphasis in what this clause delivers, by implanting a sense of urgency through an added deadline.

Our take correspondingly is that its survival in the Boris Deal provides a prompt to the Commission (which they will probably unfortunately ignore), while also supplying a rod with which to beat the UK Government in the event of an abrasive indiscretion or leak from one of his senior advisors. In practical effect, however, any attempt by the Commission to apply it will merely be political cover and not a trigger for judicial intervention, and in this regard its remaining in the text can be considered as non-critical.

CJEU

PD131 sets up an Arbitration Panel to resolve disputes. With the May text, the text set out that that the CJEU is only there to interpret EU law. The original May draft ran,

> *Should a dispute raise a question of interpretation of Union law, which may also be indicated by either Party, the arbitration panel should refer the question to the CJEU as the sole arbiter of Union law, for a binding ruling. The arbitration panel should decide the 24 dispute in accordance with the ruling given by the CJEU. Where a Party considers that the arbitration panel should have referred a question of interpretation of Union law to the CJEU, it may ask the panel to review and provide reasons for its assessment.*

10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761153/EU_Exit_-_Legal_position_on_the_Withdrawal_Agreement.pdf

In the Boris text this has been tightened up to better set the boundaries of what the CJEU is being asked to do. It now states,

> *The Parties indicate that should a dispute raise a question of interpretation of provisions or concepts of Union law, which may also be indicated by either Party, the arbitration panel should refer the question to the Court of Justice of the European Union (CJEU) as the sole arbiter of Union law, for a binding ruling as regards the interpretation of Union law. Conversely, there should be no reference to the CJEU where a dispute does not raise such a question*

The remainder of the text survives. WA127 in particular asserts that EU law will continue to operate during transition. What changes is the expected timeframe.

It would be a mistake to interpret the text as meaning that the CJEU's role drags on indeterminately. It is fair to underline that the legal cut off period has not been reduced, meaning that cases covering decisions made in the course of 2020 can still subsequently be appealed against with the CJEU as a legacy court. This 'dead jurisdiction' is fixed for 4 years, or 8 years if reviewing cases such as existing free movement issues under WA158.

It would be wrong to read WA86 as placing the CJEU in the driving seat. However, there are other faults in the May Deal that haven't been fixed. Under the terms set out in WA171 on the selection criteria for panellists, and by extension WA164 those who sit on the joint committee, the emphasis on choosing specialists in EU fields infers an incidental bias on picking professionals who have graduated through the EU system. The inevitable effect is to generate a majority in any panel who will be sympathetic to the principles, cause and direction of EU integration – hardly an optimal team to have fighting your own country's corner on issues of sovereign liability.

Introducing a better mechanism for picking UK panellists would have avoided this risk.[11] As it stands, we must put our trust in a combination of a short transitional period combined with WA170. The timeframe requires 3 months before the dispute resolution mechanism is triggered, and another 3 months to set it up. That still leaves a risk of some fresh liabilities emerging over 2020, and the prospect of challenges and fines lost retrospectively.

Language

One specific concern that has been raised about the Boris Deal is that the CJEU might interpret EU law during the transition period in French where that text was in conflict with the English version, leaving sections of the text open to reinterpretation.

[11] The reader is encouraged to look at the history of Whitehall-picked panellists in border arbitration between the UK and US to see where the problem lies.

In fact, the reference document for the Withdrawal Agreement is the Withdrawal Agreement itself. In it, WA183 expressly states all language versions of the text are equally authentic, which includes English.

ECHR

One of the understated grievances from the Boris deal is the failure to change the text covering the Strasbourg Court. There remains a continued commitment to its framework.

PD6 and PD7 state,

> *The Parties agree that the future relationship should be underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation. The Parties agree that these values are an essential prerequisite for the cooperation envisaged in this framework. The Parties also reaffirm their commitment to promoting effective multilateralism.*
>
> *The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.*

Inclusion of a reference to the ECHR, rather than just the general principles behind the rights, was an error. It makes it harder for the UK subsequently to repatriate the human rights issue, generate a Charter of Rights and Obligations, bin the calamitous Human Rights Act 1998, fix the ambulance-chasing culture generating genuine grassroots bitterness at social injustices, and discourage 'lawfare' by campaigners seeking to change the law through the courts when they know they cannot muster a majority of voters.

It also, incidentally, means that the Conservative manifesto covering "ending the automatic release of the most serious violent and sexual offenders at the halfway point of their sentence as well as conducting an urgent review of sentencing" will have to generate a policy compliant with unpopular aspects of Strasbourg case law over tariff appeals. The concern has subsequently resurfaced over the early release of those convicted of terrorist offences.

CSDP

A review of the texts as they relate to Common Security and Defence Policy (CSDP) raises four key points:

- There is only one significant change to the text, though it is notable;
- Almost all of the material corresponding has not changed from the May Deal;

- The meaning/significance does shift with an accelerated transition timetable;
- That noted, the draft still may lead to Whitehall teams failing to seize the necessary clean break.

Consequently, in this area as in others, it falls to Brexit campaigners to continue to push HMG so that it will not sign the blank cheques on the table. Any agreements under CSDP ought to be debated in Parliament. Adding a Parliamentary scrutiny reserve here would also function as a time retardant to help maintain proper oversight, making it harder to sign up to 'salami slicing' deals in the future.

So let's consider the texts. The baseline is still the May Deal. PD78 aspires to a broad, comprehensive and balanced security partnership respecting the sovereignty of the UK, a useful assertion but no guarantee or lock. PD79 includes in this area the field of Defence.

There is a critical flaw in the operation of this. In the May Deal, PD90 meant that the UK was expected to support ambitious close and lasting cooperation on external action, including in Defence. This was further developed in WA129.3, where the UK is bound by a duty of sincere cooperation in international affairs during the transition period. The implications of this duty we explore elsewhere, but in this instance there is a level of significance since it circumscribes the ability of the UK to operate as an independent state in areas where a common policy has been set out.

Fortunately, there are a couple of safeguards. The number of areas in which this limitation operates is not universal, even if the remit has expanded immensely over the last decade. Secondly, WA129.6 permits the UK to sit on its hands where it declares a vital and stated reason of policy is in play, meaning that the UK is not coerced into action in these areas even if it is constrained into inaction. One might add to this PD92, which underscores how there is to be foreign affairs cooperation only where interests align, in a flexible manner, and with emphasis on international organisations as well. Most significant of all is, once again, the issue of the timetable. The constraint element only lasts until this section of the treaty is replaced, and this is set to happen under a separate schedule. WA127.2 allows for CFSP/CSDP terms to stop earlier if an agreement is reached here before the main treaty arrangements are sorted; this was already in the May Deal. WA127.4 blocks further enhanced cooperation continuing beyond the CSDP transition. Again, this is the same text as per May, but the meaning shifts with the accelerated timetable, and discourages Whitehall from signing up to projects on the potential that 'interim' UK engagement could last significantly beyond 2020.

Correspondingly, while this subordinated relationship is a bad set up, it is only intended to be of fleeting duration lasting several months, for which the weak safeguard provides some measure of protection from abuse.

A clear advance meanwhile comes in WA129.4, declaring that during the transition period the UK can sign treaties that will later come into force. Brexiteers stated that under international law the UK already had that right, a stance however that the UK Government's legal service most regrettably failed to assert. The new text now clarifies the situation and finally instructs British negotiators looking at post-Brexit global links to get on with their jobs.

Another of the concerns quite rightly raised of the May Deal has been in the threat to NATO, less by the text but rather by the lack of grip of UK officials who over the past three years have been continuing to associate with policies pushing EU integration. PD93, covering bounded cooperation, provides for the same as the May deal, namely "appropriate dialogue, consultation, coordination, exchange of information and cooperation mechanisms. It should also allow for secondment of experts where appropriate and in the Parties' mutual interest."

However, there is a critical new section that has been inserted into the text. PD99, covering the arrangements authorising only a limited and case by case involvement in CSDP missions and ops, adds a **new caveat** on the terms of any Framework Participation Agreement. The text runs,

> *Such an agreement would be without prejudice to the decision-making autonomy of the Union or the sovereignty of the United Kingdom, and the United Kingdom will maintain the right to determine how it would respond to any invitation or option to participate in operations or missions.*

This assertion provides direction not simply to the EU side but also to UK civil servants on the limits of UK engagement, and is greatly to be welcomed. It recontextualises otherwise unchanged paragraphs elsewhere. WA129.7 has been kept in from the May original, which means the UK stops being a framework supplier for EU Battle Groups, which is a useful obstruction to excessive integration at formation level. WA127.7 still allows the UK to participate is CSDP operations as a third country, but of note the principle already applies for example to the sovereignty-minded Swiss. PD101 is still in, allowing for a proportionate UK role over Command and Control, implying UK engagement cannot be taken for granted in any joint mission. PD133 keeps the May deal's exemptions for national security, which is another important caveat.

Defence industrial integration remains a concern. Lobbying by Veterans for Britain was almost certainly behind the insertion into the May Deal of a clause asserting that the UK and EU27 had separate Defence industries, a statement that obstructed the Commission in the future from eyeing the UK Defence sector as a target in EDTIB[12], which aims to rationalise national build capabilities (and thus act as a spurt for further Defence integration across the board). PD102 still retains the original uncertainty over the level and format of collaboration though. An administrative arrangement will be made to allow the UK to collaborate with EDA projects, a concern given that the entity lies at the heart of the EU's future Defence structures.[13] Any cooperation on PESCO would be on a case by case and exceptional basis but has not been circumscribed beyond that. None of the wording in these sections has changed, so excessively close affiliation with the European Defence Agency remains a strategic risk. Everything rests on what bilateral agreements civil servants feel empowered to sign up to from the remaining ambiguity.

This risk applies similarly to intelligence sharing. There has been no change in PD103 which states that there will be only voluntary sharing of intelligence – to say otherwise would though be an

[12] The European Defence Technological and Industrial Base.

[13] There is an inherent risk from any EDA participation beyond the posting of just a couple of liaison officers, whose function should be to spot projects of potential interest and shift them into the more multinational structures of (non-EU) OCCAR.

increase on current cooperation. But there is also no change on the May wording that "While the Parties will produce intelligence products autonomously, such intelligence exchange should contribute to a shared understanding of Europe's security environment." Arguably, this generates expectations of levels of future cooperation that have not been sufficiently locked down: consider similarly the contradictions in the wording that "parties should exchange intelligence on a timely and voluntary basis as appropriate", contrasting a measure of obligation in the verb with the caveats that follow. There is some shuffle room in these sentences in either direction.

In short, the addition of two new elements to the CSDP wording – on treaty rights and in PD99 – have significantly improved the text locally. However, everything will depend on how much ministers grip civil servants, and whether Parliamentarians demand oversight of bilateral UK-EU agreements as they develop. The closer the UK stays to the EU's developing structures and ambitions, the greater the risk will be to the existence of NATO, the retention of UK freedom of movement, enduring independent UK capabilities, and the UK's privileged association with the Five Eyes intelligence community in which it is the only European participant.

Consequently, the Boris Deal provides a functioning stop gap, but only if the end state is to generate a separate pillar structure for CSDP**. Delivering this is a prerequisite for safeguarding the UK from the EU's security and defence ambitions and risks.** The model is the draft text already crafted by Professor Gwythian Prins, Sir Richard Dearlove, and Field Marshal the Lord Guthrie.[14]

The European Arrest Warrant

WA185 states that the UK's hands are bound over the EAW. It can only suspend the application of the EAW as a reciprocal act in response to another state doing so (beyond not applying it through the challenges already in the text), and only then with that initiating state.

This was in the May Deal and has not been removed. As it applies during the transition and that is now less likely to drag on, it is however much less of a concern, though it should act as a prompt to address longstanding concerns in the old JHA pillar more comprehensively.

Fisheries

The failure to strengthen the wording in the texts has greatly alarmed fisheries campaigners.

Under WA130, the UK is subject to EU control over the running of the CFP, most egregiously over the annual allocation of Total Allowable Catch. The UK loses even its marginal share of the vote when these negotiations take place. The text is mitigated by the need to maintain relative stability, so that the UK's share of quota increases if the overall share does; this though is a poor safeguard if the fear is over the total quota set.

[14] https://briefingsforbrexit.com/treaty-between-the-uk-and-northern-ireland-and-the-european-union-for-defence/

However, in practice this particular fear has been overtaken by events. The target for resolving the future shape of UK-EU fisheries arrangements is mid-2020, meaning it falls short of the scheduled date for the next quota allocation in late 2020.

Notably, one May Deal clause has been removed. This stated,

> *with a view to allowing the United Kingdom to prepare its future membership in relevant international fora, the Union may exceptionally invite the United Kingdom to attend, as part of the Union's delegation, international consultations and negotiations referred to in paragraph 1 of this Article, to the extent allowed for Member States and permitted by the specific forum.*

This is now covered by two separate elements we have referred to earlier; the principle of loyal cooperation/sitting on hands, but also the assertion of the right of the UK to independently negotiate its post-transition status. In practice, the transitional arrangements leave UK fisheries briefly exposed internationally, but at risk of punitive response by UK negotiators from 2021 if decisions are taken spitefully in such fora.

The PD text itself remains the same, and this is stated as a concern by fisheries campaigners. PD71 does expressly acknowledge that the UK will become an independent coastal state, a direct reference to the significant default rights that the UK acquires. Conversely, it also states that some form of UK-EU cooperation is expected to follow

> *to ensure fishing at sustainable levels, promote resource conservation, and foster a clean, healthy and productive marine environment*

The juxtapositioning is problematic in that it generates a level of ambiguity. PD72 states that the EU and UK will cooperate, not just bilaterally but in international fora and with other states. This may suggest the unwelcome possibility of a new CFP, but alternatively it also simply allows for normal international discussions to take place. PD73 which follows, however, puts the talks within the context of an overall economic partnership, with a new fisheries agreement that covers both access to waters and quota shares. The reference to the latter may be another concern if the EU is expecting to keep a generous chunk of UK catch. But again, it might conversely be the UK side accepting that some continental trawlermen have genuine grandfather rights stretching back before EEC accession.

If the UK baseline is to stick to the default set out international law (which is a huge win for the UK), but negotiate down to allowing those continental fishermen to continue to fish if their ancestors have done (responsibly – avoiding cetacean bycatch and using smaller vessels only), then that would be an acceptable negotiating compromise for Whitehall to pursue. It ought to be mirrored so that the value of catch caught by EU fishermen in UK waters is reciprocated in turn. The Commission has an established track record in providing financial compensation in return for the privilege of fisheries access in any event – and indeed of finding its fleet being expelled from foreign waters for abusing it.

The question is though whether this appropriately hard line stance is what the UK negotiators will pursue. PD74 retains the original May Deal target of a settlement by 1 July. Ironically, with the accelerated Boris timetable, this may now work against the UK fishermen's favour, since there is an increased risk of possible attempts at linkage on the EU side for exaggerated concessions over fisheries in return for something within the main deal. That is particularly at risk if an extension is being sought at precisely that time. This linkage would be unacceptable, and that point should be made clear now.

UK fishermen are right to be concerned about the prospect of Whitehall selling them out. The process began even before the UK joined the EEC, with a settlement so bad it has twice been a critical factor in encouraging the Norwegians to vote against in a referendum.

The UK's approach now must be robust;

- Ministers should deploy a tough negotiating stance based on minimum concessions - grandfather rights, small vessels, and ecologically sensitive techniques.
- However, any such specific concessions will be dependent on equivalence of access based on value, and the UK retaining export rights into the EU market by avoiding unnecessary new EU TBTs (one should note in any case the shortage of alternative suppliers for EU consumers).
- UK fishermen's interests should take priority in managing stocks.
- The UK would pledge not challenge on competition grounds the Commission choosing to compensate EU fishermen who lose out – but the UK taxpayer would not compensate them from losing an abusive privilege.
- The UK Government should identify that fish processing opportunities will arise in some towns that would particularly benefit from regeneration.
- The Government should prepare for protests by vested interests in the continental fishing industry, and make known its intent to deter law breaking by robust policing and legal action.[15]

In short, UK fishermen are right to be concerned about how this will play out, particularly given they have been mistreated by successive British Governments. **The Boris Deal does not fix the gap in the May arrangements by providing the necessary guarantees; but it also does not close down the possibility of a robust policy either.** Everything will depend on who is the key negotiator.

Money

The Boris Deal does not remedy any of the failings inherent in the May Deal over finances. Diplomatically, it was probably impossible to deliver any, as the May negotiators had conceded the points with calamitous ease and speed. The negotiating strength that arose from the prospect of withholding ongoing UK payments into the EU budget decreased exponentially the closer one came to the end of the 2014-2020 planning cycle, rendering the threat undeployable by the time of the

[15] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/by_neptune.pdf

Boris talks, and once conceded any attempt to reopen it will have been seen by the Commission side on their side as unnegotiable.

The main saving grace is that the unlikelihood of an extension beyond 2020 limits the prospect of the annual membership bill being continued for any further period of time.

WA135 provides as before for continued UK payments into the EU budget to end 2020. Obviously this will endure for longer if an extension is agreed, though at least that is now not the default expectation.

Assets though are still abandoned. Having been a large economy and a net contributor, the UK share based on current contributions should be in the order of a tenth of EU assets – everything from the limousines through the wine cellar and one floor of the new Council building. More reasonably, the equivalent value of these billions of pounds of property should have been removed from the genuine liabilities that the UK has. The total range of these assets falls somewhere between €4bn to €15bn as UK share.[16]

UK liabilities also remain in their previously badly negotiated state. For instance, no account is made of the fact that the UK is underrepresented in the EU workforce by share of population: had this been equitably addressed, the UK would have assumed about half the pension liabilities it is currently taking on.

Under WA136.1, the UK is still subject to financial liabilities with respect to budgetary 'corrections'. This will include RAL, the 'off the books' ongoing liabilities. The scope for possible abuse on the EU side to redefine what this covers is a concern, and will depend on good faith.

Under WA118 and WA124, the timetable for repaying the European Investment Bank (EIB) loans suits the EU parties. WA150 sets out the terms for ongoing UK exposure. WA150.4 states that existing EIB liabilities will remain. The text suggests that, under WA150.5, this is supposed to be limited to current capital and would stand as a medium term liability, which suggests it would be in the order of about €3bn. The track record of the EU attempting to drag the EU into its Eurozone debt crises on the basis of questionable interpretations of what treaty law states cannot, however, be overlooked.[17] Nor can the track record of certain members of the Council seeking to undermine the competitiveness of the City. It is entirely plausible that an attempt could be made, in a moment of economic crisis, to once again tap into EIB funds to support regional bail outs. At this point, enduring UK liabilities however circumscribed will be challenged, with remaining funds potentially held hostage. More abrasively, even if this extra support is triggered, the original terms hold that under WA150.7 fresh UK support to the EU27 will still provide no benefit for the UK, as the loans will not lead to any interest accruing.

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[16] See https://bruegel.org/2017/02/the-uks-brexit-bill-could-eu-assets-partially-offset-liabilities/. We have long been attempting to get hold of a meaningful EU asset register: a UK version was published in 2007. €4bn covers the share of physical assets.

[17] In particular, the attempt to coerce the UK into the Greek (and other) bail outs under an article designed to facilitate mutual support following a natural disaster – which was partially successful and enough of a menace to push the UK Government to seek a treaty clarification notwithstanding the obvious textual abuse.

As a final insult, the true cost of these arrangements will remain a mystery. Under WA140.5, the UK taxpayer will not know until 2029 what the end bill will be. Under WA150.8 the actual UK liability remains classified. None of this inspires confidence in the bill arising from a botched May negotiation which has proved impossible to fix. Boris's win is that at least from finally being outside the EU, a tough government could choose to respond to any EU bucket appeal with two fingers.

Northern Ireland

The most fundamental change to the May deal arises from the shift over Northern Ireland. These have not been welcomed by Unionist politicians, but do nevertheless improve the text. Originally, Northern Ireland would remain locked into a special status until both negotiating sides agreed on a new format, effectively giving the EU a veto on Ulster leaving its customs and regulatory union. This changes with the new text, so that consent rests within Northern Ireland. Moreover, the balance of presumption shifts away from automatically extending the local transition period, and it locks in an end date.

The Protocol, which supplies the text for the Northern Ireland transitional period, sets out the duration in A18. It lasts 4 years, and another 4 if extended. A Special Majority Mechanism is introduced to ensure there is significant bi-partisan buy in to any extension (a 60% total level of support, plus 40% of each community). Also attached to the text is a unilateral declaration from the UK on how the Consent Mechanism will work. There is to be a vote by Northern Irish representatives to endorse the terms, rather than a vote in order to suspend them. The default is therefore reversed. If the Assembly is in abeyance, an alternative mechanism is to be used.[18]

A notable but hitherto overlooked change emerges when one reviews the suspension clause, to be found in A16 and also Annex 7 on p 422. This now includes an improved trigger and oversight process, with a 3 monthly review and a joint committee review process. PD134 develops this into a proper temporary safeguards measure;

> *The future relationship should address the possibility for a Party to activate temporary safeguard measures that would otherwise be in breach of its commitments in case of circumstances of significant economic, societal or environmental difficulties. This should be subject to strict conditions and include the right for the other Party to rebalancing measures. The proportionality of measures taken will be subject to independent arbitration.*

This contrasts strikingly with the text as it stood in the original May Deal **which risked becoming a 'Rioters Charter'.** Article 18 and Annex 10 of the original protocol allowed either party to take "appropriate measures" in the event of "serious economic, societal or environmental difficulties liable to persist". The limits for doing so were only vaguely set out, and would lead only to consultations. There was an obvious risk that in the absence of any mechanism for Northern Ireland

[18] Perhaps a Northern Ireland Grand Committee is envisaged, sitting outside of Parliament to allow Republicans to attend.

to unilaterally withdraw from the transitional arrangement, discontent might grow amongst unionists, and frustration in turn lead to violence. The original clause could have encouraged street violence as an excuse to exit the Northern Ireland arrangements by an available back door. We explored the problem in a paper, whose concerns appear from these changes to have been specifically noted, as this danger has been removed.[19]

That does not mean that there are no issues remaining with the May draft, arising from Ulster having a complex dual position straddling the diverging EU and UK systems. A result of this can be seen in the requirements that have been kept from the original over testing issues. Item 36 asserts that animal feed testing needs to be done in EU state where it is intended for EU export. Item 37 and Item 43 also require it over animal testing. This adds an administrative burden. It is of course possible, logical and even probable, that UK-based testers will be considered as competent to certify for EU standards - just as they are considered qualified to certify today. That will need to await a reciprocal agreement first though, and it is more than a hint of poor will on the Commission's part that the process has not already been generally accepted in principal.

Cyprus (Sovereign Base Areas)

The Boris Deal fails to remedy a failing in the May Deal. Point 4 of the text has not been removed. This confirms a contested legal claim that the SBA authorities have a duty to process illegal immigrants, rather than the Cypriot ones. It states,

> *Any applicant for asylum who first entered the island of Cyprus from outside the Union by one of the Sovereign Base Areas shall be taken back or readmitted to the Sovereign Base Areas at the request of the Member State in whose territory the applicant is present.*
>
> *The Republic of Cyprus shall continue to cooperate with the United Kingdom with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in the Sovereign Base Areas, bearing in mind humanitarian considerations and in compliance with the relevant Sovereign Base Area Administration legislation.*

The potential effect from this is to encourage illegal migrants seeking to reach Cyprus by sea to aim specifically for the SBAs in the hope that they can then claim asylum in the UK. If so, this in turn would be likely to increase the number the Cypriot authorities have to deal with, encouraged to make the attempt but who land by mistake elsewhere. It would also in turn increase the number of fatalities in transit.

[19] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/the_rioters_charter.pdf

Loose Ends

There are several other areas of ambiguities still remaining from the original May text.

In PD23, there is still an uncertain level of UK association with Euroquangos that keeps a risk of excessive levels of alignment and regulation. The text ambiguously states that,

> *The Parties will also explore the possibility of cooperation of United Kingdom authorities with Union agencies such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), and the European Aviation Safety Agency (EASA).*

Conversely, in PD32 we do still see a good regulation clause. This was a positive aspect in the May original, providing the possibility of a route to deregulation and equivalence. The text states that "There should also be provisions on the development and adoption of domestic regulation that reflect good regulatory practices." However, while this is extremely promising in allowing for the possibility of mutual recognition rather than full regulatory alignment, the text albeit permissive remains shallow and no clarification has been added to tie it in closer to the end objective of an FTA.

PD34 meanwhile has been retained from the May Deal which leaves the route open to the mutual recognition of professional qualifications, but also to the problem of enduring protectionist caveats. Arrangements should be "appropriate", and operating in areas "where in the Parties' mutual interest."

Arguably, the unchanged text of PD64 keeps open a risk of the EU claiming a right of priority access to UK North Sea reserves. The text only states,

> *The Parties should cooperate to support the delivery of cost efficient, clean and secure supplies of electricity and gas, based on competitive markets and non-discriminatory access to networks.*

The risk should not be overstated and does not arise directly from permissions in the text, but rather through habit and form. Undoubtedly any such demand at a time of crisis where it went beyond contractual obligations would receive short shrift from an independent UK. Nevertheless, the Commission's ambition here is longstanding, and now extends across a considerable range of policy issues.[20] It is entirely plausible that Commission negotiators will yet seek to introduce a deeper commitment from the UK to form part of the EU's Energy Union, which would contain some restrictions on the UK, starting with how it operates its domestic energy market. The wider implications of these merit consideration in their own right, for instance with respect to the geopolitical implications arising from the energy dependency towards the EU's own suppliers (particularly Russia and North Africa).

[20] Actioned both through and in spite of the treaties. The Commission first attempted to exert its interest through the Single Market in the 1990s; shifted to Security issues in the following decade; then shifted again to get a foothold on North Sea rigs (a familiar abuse of the treaty intent) through operational Health and Safety. It has had less success through environmental bids (rig disposal, spillage leaks, carbon capture of used wells) but laid down a clear marker through encompassing all of these into a comprehensive Common Maritime Policy.

Meanwhile, no change to the text in PD105 leaves commitments to the EU's Space programme vague. The parties are to "consider appropriate arrangements for cooperation on space", which may or may not mean the UK losing its share of billions in investment to the Galileo. The UK does remain committed to some measure of cooperation with the EU's satellite intelligence centre, but then they cooperate with non-state players anyway and rely on commercial satellites (also meaning their value-added is limited).

PD112 is another element kept from the May original. This involves the possibility of UK participation in the EU's civil protection mechanism. The problem here is that it duplicates existing UN structures.[21] In turn, this risks setting a precedent that may encourage negotiators to seek a similar participating state format in other CFSP elements, something that Whitehall should be dissuaded from. We recall here again the abuse of the natural disaster clause at the time of the Eurozone crisis.

Additionally, Annex IV (pp 483 onwards) still keeps the original uncertain timeframe and variable application for the UK and EU parties to access databases. This ambiguity might be constructive and may prove beneficial to both sides, so we withhold judgement on this element.

Conclusion

The May Deal was a disaster; the result of a squandered mandate, inept direction, and unambitious negotiators who learned nothing from the Cameron talks. Attempting to salvage anything from it in only a matter of weeks was a challenge.

The resulting texts are heavily flawed and contain a number of elements that should never have been allowed into the original text in the first place. But some of the largest failings have been mitigated, and many of the remainder are time-bound by a transitional period that has a much greater chance of being concluded without too much damage being done.

This means that the Boris Deal is indeed better than May Deal – or to put it another way, the Bo Deal is better than a bad deal.

But what it generates is merely opportunity, not certainty of a good end state. A successful FTA is massively dependent now on the robustness of the negotiators. In some areas, particularly over fisheries and CSDP, the UK has a strong default hand. But their fortunes still lie subject to Whitehall planners who have long been hostile to reform.

We conclude by recalling another treaty aspect that has, absurdly, been absent from these talks. Article 8 of the Lisbon Treaty still today contains the Good Neighbour Clause.[22] That means there is

[21] https://www.unisdr.org/europe
[22] Article 8

an express treaty authority permitting the EU's negotiators to be ambitious towards its near neighbour, rather than try to compress it into a backdoor union.

That is the approach that needs to be followed. That is the format that could deliver, within the timetable, an ambitious FTA - and with it, a lasting settlement as befits genuine friends.

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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.

About the Author

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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.

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