The Red Cell

First Takes:

Immediate Impressions of the Brexit Treaty

December 2020

The Preamble

Though they are airily aspirational and contextual, the recitals that start a treaty do get referenced as legal justification, especially on the EU side (as per the 'ever-closer union' ambition) and so can cause problems. Putting references to human rights and climate change in the opening paragraph as "essential elements" is therefore a risk if there are any gaps in the main text that might be tested as justifications for EU interventions or complaints.

Transparency in investment may be an opening for Commission engagement on UK OCT banking, though requiring that the policy operates to the benefit of all stakeholders does set a limit to any constraints the Commission may seek to impose.

Some areas (para 7) are tentatively listed as permitting a level of 'ethical protectionism'. The 'public morals' interest in allowing is not unusual but can be elastic. Cultural diversity basically refers to Paris throwing money and quotas at audiovisual to fight English. Safety is problematic when associated with the Precautionary Principle.

General Provisions

COMPROV 1 (p9) surely intentionally echoes the Good Neighbour Clause (Art 8 TEU), which was a win from the Lisbon Treaty as it accepted that there were alternative models to being in the EU. This then is the concept's first outing; a clearer association with the Article would provide a fixed legal basis for the EU to further pursue relations in a settled bilateral way and would be a very important road sign for future years turning away from assumptions of the UK rejoining, which would sour relations.

COMPROV2: The default for future bilaterals will be to add them to this as a single deal. Thus no Swiss-style arrangement will develop unless it is specifically agreed to develop in that way. As the Swiss have found, bundling them together is risky, because ending any one section of the text that is not working properly then risks other sections or the whole lot collapsing. A Whitehall call that ought to be made now must be to just accept this default, but to always seek to separate them out by generating new treaties. This is especially so with respect to any competences that stopped being national ones after Maastricht, in particular Defence since much of the JHA material is already covered in this treaty.

COMPROV 3: Good Faith Clause. This was of course an issue a few weeks back over introducing a notwithstanding clause to the NI protocol. The problem is if the Commission side maliciously pursue loopholes, and the UK finds its attempts to do likewise in response are blocked by UK courts.

COMPROV13 is a statement of safeguard, so there is clarity about the limits of what is quite obviously the UK having to pursue EU law by default. This is a useful statement adding a reference point of a firewall.

COMPROV16 looks like it is designed to stop third party challenges under the treaty intended merely to disrupt. Though the concept is not unusual in EU treaties, it will help constrain challenges by the vexatious on anti-Brexit political grounds; such disruptions are no longer in the EU's negotiating interest either.

Institutional Framework

INST1 (p10) sets up a Partnership Council. The first thing to note is always the name and the accompanying symbology. “Partnership” as a word gets used in FTAs and below; Ukraine has an Association Council. For the concept, one might consider look at EU-Armenia Partnership Council, where participants discussed EU-Armenia relations, the implementation of the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA), as well as issues in the region.

Functionally, it looks like an intergovernmental bilateral mechanism, operating not dissimilarly from how the EU-Korea top level oversight meetings function, with diarised senior meetings to oil the FTA. ANNEX INST (p410) reveals a positive - the secretariat of the Partnership Council will be based on two officials - ie it will be an intergovernmental format and not a major entity sucking power to itself.

The critical question is how many lower committees will be set up; meeting how often; under which ministers; with what oversight by MPs. This is the area of real concern.

INST2 reveals that there are 19 such committees (plus 4 working groups), meaning that there will be a lot of backroom activity going on in Brussels. In itself this is not surprising: that's why EFTA has an office there, because of the EU’s own comitology system and the huge amount of decisions that get made early on in the drafting within Commission structures.

This cannot be stressed enough: MPs will need to grip this flow diagram and ensure they have clear oversight. There are many risks if they don't, but considerable opportunities if they do. It's critical to tackle this now at the outset. Groundwork has been done reviewing this and it is recommended that MPs reflect on the processes involved, set out in the paper below.[1]

As INST4 (p15) states, decisions made in these committees, although by joint unanimity, are binding. Parliament needs to avoid delegating its responsibilities here, in particular by not allowing this to operate by Statutory Instrument, and by requiring direct sign off – and then not in committee but on the floor of the House. It needs to also ensure far greater transparency than comitology presently entails, so business groups can get quick sight. All that may mean a Parliamentary Reserve mechanism operating through the Recommendations system.

INST5 formalises a Partnership Assembly for MPs and MEPs. This is not a practical substitute for the above. Additionally, a minority of Rejoiners could pack it and provide false impressions on the EU side, harming functional relations; it needs to be representative. The format needs to be far nearer to how things work for recruiting to PACE - an issue of system balance for the whips and the Speaker to resolve. Obviously delegations should operate separately from and In tandem with direct oversight by relevant committees.

INST 6-8 look problematic. The EU loves 'civil society', because it oils the motor of integration by commending action and criticising inaction, thereby demanding more powers and money for the institutions. During the Convention, David Heathcoat-Amory called it "Brussels talking to Brussels".

Institutionally this has become incorporated in the Great Wastes of Space that are the EU Committee of the Regions and the Economic and Social Committee, costing a couple of hundred millions each year to operate. No such fixed and standing bodies should be allowed to develop. MPs

[1] http://theredcell.co.uk/uploads/9/6/4/0/96409902/brexits_red_tape_challenge.pdf

should establish the UK side's format in a more informal and ad hoc way, and operationally focus on sharing information rather than it becoming a focal point for lobbies to add red tape.

The Forum in particular risks becoming an expensive and polarising talking shop. The rule must be to keep it very small, on the scale of a ministerial advisory group.

Trade in Goods

GOODS7.2(d) (p20) establishes that normal customs fees are waived except for exceptional control measures, including higher risk. It may be worth MPs locking down the definition of this threshold in the context of the EU's Precautionary Principle.

GOODS11: on the import/export monopoly, it appears from Reservation 1c on p719 that items with security or defence implications are exempted, though this might be verified. A test example might be shipment from a sole trusted supplier if a company subsidiary is involved. Similarly, it is perhaps worth checking that such an exemption exists for material not locally resourced within the Cyprus Sovereign Base Areas.

GOODS17 on trade sanctions (anti-dumping) operates at a lower pace than the Commission seemed to be pressing for. It also follows the WTO principle of a penalty set at equivalent value, and a sort of *ne bis in idem* protection. There's also a public interest check first. These are positives.

GOODS18 refers to two classified documents (meaning that they are commercially or trade sensitive) so it'll be up to an MP in the right committee to reflect on them.

GOODS19: disputes over customs enforcement are finite (6 months max) and limited to the product area. This deters escalation. These elements collectively seem to follow good WTO practice.

GOODS.21 is in a controversial area. The Italians and Greeks tried to push a clause on the Elgin Marbles into the EU's negotiating mandate. It is not sure what the Italian objective was, though if focused on ensuring maximum legal protection in relation to stolen artefacts taken by tombaroli this was unnecessary as HMG has been pushing this policy area in recent years. In any event, the Elgin Marbles are excluded from this text as the cut off is 1993, regardless of one's take on the legal standing of the Ottoman firman. It is probable that some issues will (continue to) arise in relation to property from North Cyprus down the line.

Rules of Origin

ORIG.5.2 is very important element of the fisheries deal. This is wedged into a slightly unexpected spot under Rules of Origin (ROO). The economic link test for a fishing vessel to qualify as UK is 50% UK national owned; OR with a head office/workplace here and 50% UK owned by a UK company. Note that as with the quota gains this is not a 100% win, even if it is a major improvement. It might be compared with what was being sought within the EU under the Merchant Shipping Act 1988 provisions that led to the Factortame cases – that objective was in fact set higher at 75%.[2] The figures cited as wins in this area may unfortunately prove to have been overestimated.

ORIG.23 seems to be provisions designed to be Amazon and postal gift friendly. That still leaves the 'William Shatner VAT issue' for HMRC to revisit, where the celebrity announced an intent to drop

[2] Background here: https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/factor-1.htm

exporting into the UK market on the basis of the UK's new VAT admin rules. It is perhaps likely that the end result though will be a UK store buying stock and becoming a de facto distributor.

ORIG.31: Note that this Chapter and its annexes can be subsequently changed by the Partnership Council (not the committees, so there should be more direct Parliamentary oversight). This is possibly significant as it means that quota hopping can be renegotiated subsequently without collapsing the treaties, though without any guarantee of reform.

Sanitary and phytosanitary measures (p41)

SPS.3.4: WTO terms expressly take precedence over any definitions a treaty committee may come up with over phytosanitary. This is a good caveat to see declared.

SPS.5 provides a stated commitment not to hide behind SPS rules to obstruct trade. This is another basic and assumed principle, but it is always useful to see it being spelled out within the text: a lot of the text seems to be aimed at pre-empting the dirty tricks departments of some protectionist member states.

SPS.6+. Certification provisions for animals (including electronic) - since pet passports aren't covered later in the text, there is precedent here to generate a subsequent bolt-on agreement covering it.

SPS.8 generates what amounts to a trusted supplier scheme where there is otherwise a food health scare going on. Conversely this also sets a future precedent for running varied (ie lower) border inspection rates. This is of extended relevance in SPS.9 and zones, most famously in exemptions permitted to NI cattle during BSE.

SPS.11 means officials can conduct spot checks on the other. It is unclear whether this might lead to brave EU officials turning up on a farm or trawler rather than just checking computers at DEFRA.

SPS16 covers animal welfare, an area listed for cooperation. It is unclear from this in the context of the recitals whether the UK could apply tariffs based on welfare conditions, especially if the UK diverges to higher standards and with it higher costs in response to a Compassion in World Farming campaign or simply to acknowledge different UK approaches. This uncertainty extends to whether it might be able to generate a new 'UK compassionate farming' label, thus allowing a useful supplier rebrand for the global market.

SPS17 relates to co-operation on antimicrobial resistance. This is a critical area but of such slow movement it was being pushed by Sir Richard Body in the mid 1990s! The UK is perhaps more likely to unilaterally act and then face an EU trade backlash, for example over antibiotics for poultry.

Technical barriers to trade (p53)

The WTO's list of TBTs/NTBs runs to around 40 pages long so let's just pick out a few salient points here.

TBT.4 requires regulators to carry out impact assessments. The red tape box for many years has been a Commission box ticking exercise. A possible gain here is that a direct comparison now has to be made with the effect from international standards. It is not entirely impossible, projecting forward from this, that less regulation-embracing Member States and Commissioners might now embrace this. A second order effect may emerge from this internally, especially as para 6 demands a

case be made for heavier rules. This might – might – provide an opportunity for a new anti-red tape faction within the Berlaymont.

TBT.5 appears to be an attempt to push Commission officials and quangonauts into the international regulatory system, such as UNECE, far more.[3]

TBT.6. involves a push here for letting trade association accreditors play a greater role. Exactly what this means in practice with the UKTA and conformity testing as of 2021 requires separate analysis, but may over the medium term open new doors to equivalence

There will be kick back but it would be astonishing if this did prove to be the UK's parting gift to the EU. Better lawmaking, less red tape, less protectionism.

TBT.8 doesn't address the NI labelling issue, still requiring EU-compatible labels for goods arriving from GB to be legal. However it does allow for ad hoc relabelling in approved places in NI once goods arrive, and so generates an administrative solution of sorts.

Customs and trade facilitation (p61)

CUSTMS7. Risk management operates along the straightforward EU-Singapore FTA principle of checks happening according to the level of perceived risk .

Services and Investment (p74)

Overall, the Services section seems like an average FTA, enabling activity up to a point. It is worth remembering that of the so-called 'Four Freedoms', it's the area that was least pursued by the EU (the UK wanted it; the Germans and French wanted focus on Goods which was to their economic advantage.)

SERVIN 5.13 sets the groundwork for future mutual recognition of qualifications - basically a low hurdle unless anyone is protectionist in a given profession.

SERVIN5.23.5 seems to imply a 'reasonable cost' cap on roaming charges (if so, footnote 26 seems to imply they would be factored into the basic contract fee - so, as per today). But SERVIN.5.36 more explicitly pushes transparency and says no fixed rates. There might be a possible contradiction here.

SERVIN5.33 allows the EU to pursue its internet restrictions (eg *droit de l'oubli*, or oversight obligations on social media providers) but does not require the UK to.

Intellectual Property (p125)

IP.12 (p129): Authors' rights will run for 70 years after their death. For broadcasts and performers, it is 50 years after first transmission. That's a minimum: both sides (ie probably the EU) may extend them.

[3] Anyone wanting to dig into the importance of this might review this paper, with a foreword by Sir John Redwood: http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/life_of_laws.pdf

The issue of Artists' Resale Rights is more infamous. IP.13 unfortunately does not revoke this: it becomes "defined as an inalienable right, which cannot be waived, even in advance". UK auction firms will not be happy. However, from the text the UK could elect to set a token rate in law, say 0.1%.

Public procurement (p148)

Public Procurement seems to be focusing on the WTO GPA approach: it doesn't look like the UK will have to tender via EU portals (where it has done so disproportionately more than most other EU countries that played less by the rules).

Defence procurement needs separate consideration later. There are safeguards: LPF 2.2 (p180) and EXC.4.6.i (p220) over the Level Playing Field, and Reservation Ic. (p719) more generally. However, there is the risk that working committees sign the UK up to research programmes where there is PESCO crossover and as of December such crossover is now happening. This becomes an issue because there was originally a specific firewall in the WA/PD that stated that UK and EU Defence indsutries needed to be considered sepearte entities; that is important because the stated objective with PESCO is to rationalise EU27 industries and capacities in a process of ever-closer union authorised by treaty to lead to a Common Defence.

SMEs (p153)

The fact that the treaty includes a section on SMEs might be a useful reference tool to challenge red tape during the audits referenced above. A cost-benefit aspect that has been largely missed has been consideration of the red tape burden on SMEs that do not trade much or at all with the EU. This element must now be heavily cited in any vfm audits.

Energy pp156

The clauses seem to be based on ensuring continental companies don't get frozen out of the internal UK distribution sector. They also have the slight feel of being nervously worded on the issues of pricing cartels and on renewable subsidies, which suggest that these are areas to watch the Commission over.

ENER.10 requires exploring: who (or which country) precisely do people have in mind when talking about reducing monopoly status for energy distributors?

The security of supply sections in ENER17 appear to step back from the Commission's ambitions in direct involvement, with its implications for UK North Sea platforms and EEZ Sovereignty. There is however to be a Specialised Committee on Energy whose remit (p168) includes areas the Commission might sneak back into these fields; this will be a long term 'one to watch'.

The UK reaffirms (p169) its National Energy and Climate Plan green targets, and the Commission its counterpart. Note these are not locked in for either party. The UK will likely adhere. EU27 ambitions let alone likely compliance are already known to be, to put it generously, mixed. This is, though, a point to remember down the line when people talk about the UK breaking international rules and the EU sticking to them.

ENER.22 includes an interesting insert: support for any green energy must be a verifiable sustainable and quantifiable greenhouse gas win, so there should be no green elephants. Opportunities correspondingly exist here for rigorous challenges of effects of ecopolicy (for example no sudden swings into subsidising rapeseed).

ENER.23 creates a new North Seas Energy Forum. Alarm bells start flashing here. This should only develop if Norway comes on board, and thus it becomes intergovernmentally tripartite (x4 if with the Faroes).

ENER.24 covers offshore Health and Safety, the area where the Commission had succeeded in getting onto rigs policy by the back door. That seems now to have been shut down.

Note that this whole section only lasts until 2026, but it can be rolled on. Any surprise in it need only be transitional. Reference to it ending separately from the fisheries run down implies it is conceptually part of a wider EEZ reclaim timeframe.

Transparency and Good Regulatory Practises (p172)

The inclusion of this section provides an opportunity here to flag up a missed opportunity: fixing the cases of the UK's neglected whistleblowers (detailed in the footnote)[4]. This also allows ministers to introduce checks and balances to avoid repeating the same backroom mistakes over oversight.

Any MP inclined to debate the transparency clauses (which are a good thing) ought first understand exactly how EU laws are made, since most of the critical work is done in the dark before anyone elected can alter them.

GRP.7 sets the terms for transparency in proposals. Public consultation should also however be considered in the framework of a professional Brussels lobby of vast scale. Oversight systems get staffed by people self-nominating from within the Brussels bubble, largely via internet pages very few people outside the system are aware of.

The extent to which this treaty works will depend considerably on GRP.8: Impact assessment (p177). An early test will be to contrast UK and EU RIAs. These should be published. A good idea would be a running tally on a dedicated http://gov.uk page, with links for submissions

GRP.9: Retrospective evaluation will be the exciting office, allowing the big wins to come from cutting red tape. Its where the EU failed with its deregulation task force, doing silly things like claiming a win for removing documents still referring to East Germany. Our big wins from Brexit happen if this team is made up of high fliers, supported by a staff delegated by business groups, combing over all the bad laws they complained about from over the past 30 years but which were "out of scope" through EU membership.[5] The existence of this clause for the EU might also be a prompt for bold MEPs to revisit "doing less and doing it better" - what should have happened with the Laeken Mandate and could still happen through imminent Convention II. It very probably won't, but the opportunity is there.

Article GRP.12: Regulatory cooperation (p178) is an extremely important aspect, and a double edged sword. **Correspondingly this is an article every single parliamentarian should become familiar with**.

[4] http://theredcell.co.uk/uploads/9/6/4/0/96409902/unfinished_business.pdf
[5] http://theredcell.co.uk/uploads/9/6/4/0/96409902/brexits_red_tape_challenge.pdf

It is not dissimilar to the old rubber articles 94, 95 and 308, which allowed for cooperation in areas where no legal basis existed in the treaties so long as everyone agreed – the principle was the need to complete the Single Market in case there were any unexpected hitches. The positive side is that it might operate as a catch all for UK-EU cooperation wherever needed. It is easily terminatable, no obligations or bureaucracy or costs, but a quick fix cover for sorting any admin bumps on areas where there is already cooperation ongoing. That makes for a very permissive, elastic framework to fill gaps. MEPs might take umbrage if overused but it may well be helpful during the years of change.

But this comes at a cost, since there are no real boundaries to how far this cooperation might go. Oversight would become harder for MPs. Unless a new system of oversight is created, it depends on how well civil servants negotiating in another country are gripped by a range of ministers. There is considerable scope for 'backdoor acquis' to invisibly accrete here. That might well generate some popular wins, like sorting out a replacement for EHIC; but as we saw with Defence Procurement there is a lot resting on civil servants not chasing their own personal pet projects. This needs to be run under a formal system, with mandates, review, accountability, and oversight. It should be pointed out that the system that supports these hidden structures is far more fragile than current EU ones, and in its present shape any excesses could be swept back by a robust minister or Government. Given MAGP, budget plans, other forms of long term commitments and additional treaty texts, this should not however be taken as the enduring state of affairs without good oversight.

Level Playing Field (p179)

The bad news is that an LPF is in the treaty: it is not just about exporting goods abroad that meet safety standards as per normal FTAs. The text divides this into three aspects: the economic, the social, and the environmental; and "preventing distortions of trade or investment". Current levels of standards basically stay.[6]

However, the text also says, "the purpose of this Title is not to harmonise the standards." This dichotomy is solved by what we might call the Rule of Perception (see below).

LPF1.2: member states get to sort out how they sustain their standards by themselves. Less good news is that the Precautionary Principle is endorsed. The very bad news is that under the dispute system, it looks like the Commission can trigger it and there's no obvious serious recourse the UK has. The UK might conceivably identify a trade good that might be subjected to a notionally precautionary ban in response, but that would be in more obvious bad faith and subject to separate appeal. This is most certainly an area MPs need to explore. It may very well be there's a hidden clause somewhere that sets up a distinct arbitration system - but that's not immediately obvious. And the Commission has form in exploiting treaty loopholes - ask John Major.

LPF2.2: Of note it looks like the UK can run a Northern development scheme breaching competition law, so long as it is open about it. Options on subsidies (3.4, plus WTO constraints) are more limited.

[6] LPF is basically about selective negotiated protectionism, supposedly on moral grounds but often involving selfish interests. A short history on its corruption within the Single Market can be found here: https://globalvisionuk.com/muddy-fields/

LPF2.4 is somewhat casual with using the words "cooperation" and "coordination", so MPs might usefully determine what is meant by this section using both terms when the former is less dangerous.

LPF3.4.13 allows for the EU to heavily subsidise TENs and emerging IT, where there is "large" cross-border activity. It looks like the UK conceded this point in the negotiations, which was reported as something the EU side tried to bounce (the suspicion instead is that it was ineptitude and a failure to recognise the treaty standing of its own budget). In any event, the subsidy involved runs to EUR 30.6 billion for transport, EUR 8.7 billion for energy and EUR 3 billion for digital networks for 2021-7. No equivalent UK subsidy seems to have been permitted. We might not want to throw state money around but the EU is allowed to do so. During the € crisis, the EU used these budget lines to redirect billions into hard hit areas not for development but to cushion the economic effects. This especially becomes an area of concern if the Commission as expected starts to throw very large amounts of public money to subsidise emerging tech.

LPF3.5 (p187) retains the excuse for rolling bail out subsidies for continental state airlines.

LPF3.8: There is a consultation and review process to challenge unfair subsidies. 3.10 seeks to explicitly constrain matters so no consideration is needed by the UK tribunal at all of input from the CJEU. Presumably in a case reviewed within the UK's jurisdiction, the WA provisions relating to possible initial clarification of EU law by the EU side (undertaken by the CJEU) still apply if the EU side were uncertain before they challenged, but that would be all.

Taxation (LPF5, p199) appears to be set at OECD/global standards rather than locking UK rates into EU ambitions. The EU's ambitions for VAT harmonisation seems to be excluded from the treaty, meaning the UK is essentially free it seems to modify its rates: a concession perhaps made easier by recognising the state of the UK's deficit. It also seems helpfully to be exempted from dispute resolution. If there are no hidden obligations elsewhere, this means a negotiating win - assuming we ever see a Government get to use it.

LPF6.2: The UK can basically change its Social Chapter legislation so long as it doesn't in a manner affecting trade or investment. This allows for "reasonable discretion" ... up to a point. Therein lies the fudge and an uncertain threshold for cutting LPF red tape, and reviewing every piece of legislation whose reform Whitehall til now has considered "out of scope". The arrangement allows correcting some of the obvious red tape and even save businesses real money – but only up to the point where someone on the continent spots the UK getting an advantage and complains. This makes for a very wispy margin of gain.

LPF7.2: the LPF aspects on the environment mirror the above. There is non-regression in principle, but you can pursue some margins of flexibility so long as there is no visible trade/investment diversion. This is clearly the LPF-wide compromise. It is ambiguous, requires guts to pursue, but could still generate some fair medium term wins. Even any losses would embarrass the EU side as it forces them to estimate how much its own red tape costs its businesses.

A constraint remains the current carbon targets, though the UK is somewhat ahead of the EU27 in pushing policy (for good and bad). There is an urge but not an obligation to link UK and EU systems in the future, an offer which is best avoided.

LPF7.4 posits the Precautionary Principle into environmental policy planning. This includes preventative action. This might open up an option for unchallengeable (see above) Commission protectionism. The risk merits reflection, for instance over whether subsidy for a British factory

ostensibly near protected newts might see tariffs mooted by the Commission; or UK exports hit whose production might, conceivably, have environmental impact. These tresholds need clarification. Given the panel system I suspect the environmental LPF should only be a major issue if the Precautionary Principle is called upon.

LPF8.3 raises Labour laws, which are fine if (as here) they can be set by Parliament to correct costly mistakes. Notably the UK obligation is to the 1961 CoE Social Charter and not the more socially-ambitious 1996 one (which is also more fluid).[7] So it's another win on this point. The emphasis is on the UK following common sense standards as expressed in global treaties rather than the EU's uncosted social contract experiments that lose it competitiveness. There does not appear to be a limit to the UK's options to roll back the Social Chapter. We can anticipate the point was made that HMG has politically pledged to retain current standards, and the No Deal competitive incentive to do so quickly has gone. So this generates a win over time through debate, buy-in, and reform.

We note in passing that a number of elements emerging relate to issues such as "Trade and Forests". These quite happily often stand alone as bilaterals and are not contentious, but have been bundled into the main text. These are what would have made up the dozens of "impossible" mini-deals that would have been the bodyguard of No Deal.

LPF9 starts to get to the issue of the selection of dispute panellists. The first set of names was already released by HMG, for the Arbitration Panel, around 15 DEC. The risk is that the qualifications set for membership of any such panel bring inbuilt bias towards EU systems; the process is one that MPs might consider (for an example of what happens if you pick wobbly panellists, consider what happened with the resolution of the Oregon Boundary Dispute in 1845: selection should not be done casually).

LPF9.4 (p215) is the EU retaliation clause if the UK decides to make a change in the LPF areas that does bring competitive advantage. Proving that will be a dispute in itself: "based on reliable evidence and not merely on conjecture or remote possibility". The Commission can introduce penalties, though they are importantly required to be "proportionate". It then goes to very speedy arbitration.

Overall on the LPF, it is very unfortunate that these checks have been included as the price for zero tariffs. It limits the appetite of HMG to reform LPF red tape costs above a threshold. But it doesn't prevent them; it limits any Commission penalty; and there is a panel (with some small prospect of the UK in turn being able to apply a penalty back).

Of particular significance, from 2025 onwards (LPF 9.4.4) there will be scope to renegotiate the Trade section of this treaty as well as any other bits anyone wants to revisit. That could include fish, meaning that the UK need not collapse the treaty to take back full control of its EEZ waters but instead has a route to reopen negotiations. The EU side would then add whatever other aspects it wanted to renegotiate as the price for that concession.

Keir Starmer's pledge to revisit the treaty before he had even seen it was accidentally then a deliverable pledge. It still leaves him channelling Harold Wilson and undeclared on what he wants to fix.

If the renegotiations stall to the dissatisfaction of either party, any part of the treaty currently on the table can then be repudiated. If Trade falls then Road Transport (ie cabotage) automatically does as well and possibly aviation goes with it. The temptation may be to limit the scope of renegotiations as

[7] The differences are explained here: http://worldlii.org/int/other/treaties/COETSER/1996/4.html

a result. But if anyone is unhappy with part or all of the text and does want to completely revisit the last four years, the opportunity is there. But a lot of preparatory wok would need to be done in the meantime. That includes working out what pledges need to be made in the next General Election.

Air transport (p221+)

The Aviation terms allow for flights between the UK and EU, plus third country inwards and onwards, and obviously also transit. This includes air freight. The wording is opaque but there are provisions to allow cross-ticketing with subsidiaries. Further expert review is required on whether a multiple-designated (coded) plane could simply be rebadged on landing for a follow-on internal flight under a different service provider/flight number. If so, this would be a negotiating win.

AIRTRN.9 encourages further review of liberalisation so there may be further developments here in any event.

Road transport (p246)

This section looks like a significant win. Operators from the UK may undertake up to two laden journeys from one Member State to another, before returning to the territory of the United Kingdom. This is providing they don't leave the EU – in particular that means passing through Switzerland. Alternatively, they can do one follow on delivery within that Member State, within a week. NI hauliers can do two runs within the RoI.

Coaches (Article X+2 - !) can operate internationally but not start and finish in another country. They can pick up or drop off people en route incidentally. (Policing that may generate some issues.)

Short stay visas (p260)

VSTV.1: If the UK introduces a visa system for any EU country, it introduces them for all, except IRL. The intent is clearly to trigger reciprocation, and thus seek to deter. An official statement is needed here to clarify what HMG intent is, and what the assessed impact is on migration figures in either case.

Fisheries (p261)

FISH.2.3 asserts the Precautionary Principle as part of fisheries policy. Given the truly abysmal EU track record in managing stock, this is possibly the one area where this might on occasion be welcome as a reference point (FISH.3.1b) – though given rulings on permitted preservatives at sea that should not be taken as a given.

FISH.4.1: The UK does get to decide management practice in its EEZ, so long as the rules apply to everyone, and (inferred) it's a system that can distribute percentile shares. So, reforms are now possible unilaterally.

Looking at the FISH stock annexes, it is however very difficult to assess the level of UK win. There are very mixed results, showing some gains in Scottish cod, Irish herring, North Sea hake, Channel sprat (pp893+) but not whatever immediate 2021 gains may have been awarded to the UK – if any. It is

possible that this may have been behind the confusion over the figures when subsequently discussed amongst the EU27. It does not help given the disparate size of the overall TAC not to have the tonnage or value, since obviously a percentile of catch increase with in some species will have a great more value and weight than with another. But it does seem that the figures fall significantly short of what might have been achieved.[8] The ballpark figure being used by the Cabinet Office seems to be up from 50% catch to 65%, compared with Norway's 80%. Nor is it clear to what extent the quota hopping reform is factored in. So significant data is needed here – at present it looks like a gain but one that falls very short of opportunity.

We can separately anticipate five years of arguments as EU countries try to argue to increase overall permitted catch as their individual shares go down, to retain their current landing size. This provides scope for increased ecological damage unless the negotiations are gripped.

FISH.8.4 (p266) unfortunately retains access for EU boats currently operating in UK 6 and 12 nm limit. This should have been limited to genuine historic access only.

This all makes FISH.17 (p273) important, as it covers termination. However, triggering this also kills the Trade, Transport, and possibly Aviation agreements as well.

In sum, there appear to be five options for further change on fisheries terms. These range from the rather optimistic to the nuclear.

(i) Terminate the fisheries agreement under FISH.17 (p273), also collapsing parts of the treaty relating to Trade, Transport, and possibly Aviation
(ii) Include fisheries as part of the LPF/trade rebalancing through LPF.9.4.4 (p216), to be traded off against something else, at incidental risk of collapsing parts of the treaty if talks go really badly
(iii) Just negotiating better arrangements on quota hoppers though the regular meetings of principals at the Partnership Council, via ORIG.31(p41)
(iv) Withdrawing from the whole of Part 2 of the Treaty under Article OTH.10 (p281), which means most of the trade elements
(v) Withdrawing from the whole of the treaty under Article FINPROV.8 (p405)

The fisheries arrangement gets reviewed every four years. Realistically, that will be just about bartering TAC shares – we anticipate no hopes for change there.

This section needs serious digging into by MPs. It looks like a partial success only, and more locked in than anyone is currently admitting - but it also has a couple of windows that no one is yet daring peering through.

Law enforcement and judicial cooperation

It is perhaps symbolic to start by noting that the term JHA has been avoided from the outset.

It was claimed (for example by Denis MacShane) the UK is stuck with HRA98. On review, LAW.GEN.3 seemingly does not prevent the UK from reinterpreting how it gives effect to the Convention, nor create an obligation to do so by a law rather than through effective courts. Certainly there seems to

[8] This is without even addressing some issues such as whether the 'historic access' figures by some MS are in fact significantly fabricated

be no reason why the UK could not repeal HRA98 and replace it with a Charter of Rights and Responsibilities. Notably the text here does not here directly reference the Strasbourg Court.

LAW.GEN.5 looks odd but it is probably just the treaty mechanism for dealing with the Danish JHA opt out.

The various data exchange terms over fingerprints and VRNs and similar seem straightforward. The EUROPOL et al terms (pp 302 onwards) appear to be pretty much what Eurosceptics have been calling for: liaison-level only with this proto-FBI.[9]

LAW.EUROJUST.66 (p309) needs keeping an eye on. The UK will unilaterally decide what powers the EU's Liaison Prosecutor and his assistants will have inside the UK. Parliament should get to debate this in due course.

Title VII (pp312+) provides for honouring national arrest warrants, but not the EAW (the formats look suspiciously similar but there appear to be more UK safeguards with this multilateral system). They can be issued for crimes that have possible tariffs of a year or more, or sentences passed of four months, and where the crime is also considered to be one locally. There are specific reasonable grounds for refusing to honour one, and a list of very serious crimes that override these. LAW.SURR.82 states a "political offence" is no defence against extradition; this is potentially relevant to NI where extraditing terrorists has too often been difficult, but it is also now a win for Madrid and a request for an exiled Catalan politician might be embarrassing.

Someone facing an extradition request is entitled to a judicial hearing first (LAW.SURR.92, p322). The judicial authority may request more info from the issuer before making a decision, all to be done in a timely manner.

All told the extradition clauses seem to do the job. There might be obscure difficulties with specifics, for example if someone is surrendered by the UK under an AW and there is also an EAW separately sent to the issuing state (LAW.SURR.106) but the preconditions clause could cover that.

The reader will delighted to learn that under TITLE VIII: MUTUAL ASSISTANCE it looks like fines for going down a badly-signposted bus lane or parking will now follow you back from your holiday.

Health Security (p362)

HS.1 allows for data access on health security. Frankly multilateral cooperation should be focused through the WHO European offices in Copenhagen as the default anyway, but the access might be handy.

Cyber Security (p363)

Cyber Cooperation is permitted, but this should not be allowed to otherwise distract from developing capability ongoing through NATO and specific close security partners.

[9] qv here for an informed view: https://veteransforbritain.uk/the-implications-of-brexit-on-the-uks-national-security-and-counter-terrorism-capabilities/

Participation In Union Programmes (p365)

From the outset this excludes the UK from regional and social aid. But in any event, the UK always had a terrible rate of financial return from EU funds in those areas - about half due share.

So what can the UK participate in? Well, it's listed in Protocol I. Problem is, Protocol I hasn't been written yet. Some serious questions due from MPs here - especially as the list will be agreed by one of those working committees, which can also amend it at will.

This takes us back to the Parliamentary oversight problem.

It's not even clear if the UK will participate as per normal international standards of *juste retour*, ie getting out as much as it pays in. The EU doesn't like the principle; I can see it being quietly surrendered in committee.

It's also quite possible they might sign back up to ERASMUS+. The problem with that programme is the context of the '+' that goes with the university places – a copmplex and developed programme of EU support for academia in general, which is openly designed as part of the EU's strategic PR planning.[10]

If you thought EIB liabilities were sorted in the WA, think again. UNPRO.2.3 (p372) adds new liabilities if the UK engages in programmes covered by the EIB that lose money. Note separately that under the existing terms of the EIB repayment, the UK does not get back any profits - just extra bills from risk.

This area is a critical element and carries the prospect of growing financial obligations, themselves generating increased lock-in, and also bearing associated obligations since engagement requires buying into the programme objectives. This needs immediate gripping by ministers and select committees. MPs ought to demand any programme affiliation demands a vote – and is not not shunted through by an SI.

It's not just one committee's work. UNPRO.6 (p381) suggests possible planned back door affiliation to GALILEO. Notably (UNPRO.8) there are already budgetary commitments, which will incentivise civil servants to sign up to programmes. Membership fees rise from 0.5% baseline now up to 3% in 2026. (It would be nice to know what the 0.5% budget commitment in cash terms already is, since Parliament will imminently be signing it off).

The problem of civil servants on the committees is correspondingly one of power to expand their competences and power to push budgets into political projects, all operating beyond the democratic horizon. A prudent precaution might be to ensure that no-one who has worked at Brussels before is allowed on them.

[10] Background: http://theredcell.co.uk/uploads/9/6/4/0/96409902/research_interests_with_covers_10.pdf

Reservations (pp535).

Though these might look at first sight like victories for protectionists across the various EU member states, these are very reminiscent of the many exemptions listed in the leaked TTIP text (Bulgarian aerial photographers, French travel agents and the like).

The UK's own reservations are listed on pp632+ and 717+ if anyone is interested in our own 'protectionism'

Annexes

Drivers hours rules are set out under Appendix ROAD.B.1.2 (p838). This obviously prevents the UK from seeking 'competitive advantage' by changing these. Happily, 3(c) now removes the application for military drivers, where it has been an admin burden. This has been a longstanding grievance and is a win.

Pity the person in ANNEX LAW-6 (p999) request for paperwork whose box has been ticked showing they committed 1202 00 High Treason. Some of these merit challenging, eg 0605 00 Unintentional environmental offences; 0905 00 Insults, slander, defamation, contempt; 1205 00 Insult of the State, Nation or State symbols; 2400 00 Offences against military obligations (draft dodging);

Overview

Ultimately we need to consider three things. What the treaty has done. What is has failed to correct. And its failings.

The text has the real feel of a top end FTA, which often slapped away the Commission when it encroached.

But then there are the problems.

It doesn't address for example the NI Protocol problems. Except how to stick new labels on when the jam jars get there. Not too much of a win.

The deal on fish seems to have been oversold. There are some quota gains but it looks like the big hope is on gripping quota hoppers; and the deal isn't as good as what we hoped back with Factortame. More of a concern is what happens at the end of fish transition, and while there is scope to make further wins via five routes, there is a price to be paid for each and it is not at all clear there is political will or interest in pursuing them. The PR here has been mismanaged by the press team. Given the UNCLOS default generates much bigger wins, 10DS needs to say what it got back in return for some pretty obvious concessions. There are some real wins across the text, for example over hauliers, and some limited but real prospects to row back on red tape and certainly to stop sticking on more. But the difficult call needs to be explained and owned.

The other critical aspect is on oversight. It takes us back to this paper on regulatory reform - and happily there is a HoC committee looking into such matters right now.[11] The civil servants operating in joint fora will have the power to build up the treaty, sign up to a range of programmes, and clearly intend to pay increasing amounts into the EU budget.

[11] http://theredcell.co.uk/uploads/9/6/4/0/96409902/brexits_red_tape_challenge.pdf

Admittedly these may include items that win universal acclaim, like an EHIC II system. But we must not replace the murky decisions of comitology with a clone. The UK did not vote to "take back control" to leave MPs just as far away from the decision making process as they ever were.

Some reforms over process can fix such treaty gaps unilaterally, and must now be identified before MPs meet on Wednesday. They also need clear commitments over areas that are still uncertain, such as the ambiguities that have resurfaced over Whitehall’s ambitions over EU Defence procurement. Others such as fisheries will linger on, and continue to generate debate over narrowing windows for change. Therein lies the great loss in what was otherwise in so many areas a successful treaty.

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