It’s not over yet (and probably never will be)

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And so the New Year emerges with a deal on the table between the UK and the EU. The talk is now of Brexit being “done” with the EU-27 leaders agreeing unanimously on its passage and Parliament in the UK having voted resoundingly to approve the agreement (with Sir Keir Starmer’s Labour party having been whipped by its leadership into supporting the agreement).

Well might Boris Johnson then claim that the issue of the UK’s relationship with the EU has been settled and “put to bed for a generation”[1] and that Brexit truly has been ‘done’. But of course, the UK’s relationship with the EU has *not* been settled and the nature of the trade agreement reached leaves many glaring gaps. On this one can disagree in three key facets.

First, in terms of a legal process, on the EU side, for the agreement to pass into law, it must of course be approved by the European Parliament. Given the last minute nature of the agreement, scrutiny and ratification of the deal by the EU parliament will have to wait until February or March. Whilst it is unlikely that the deal will be rejected by MEPs, it can only be provisionally applied until their assent is obtained.

Second, the deal itself contains a number of provisions that have served to “kick the can” down the road as it were, but with the effect that in a number of years, certain areas will need to be renegotiated or reviewed.

The most obvious example here is fishing, whereby the trade agreement commits both parties to a five-and-a-half year transition period (including the right of incumbent EU vessels to continue fishing between 6 to 12 miles off the UK coast) before a transfer of EU quota to the UK takes place. Furthermore, the agreement also commits both parties to a four year cycle of reviews, with the aim of “*considering whether arrangements, including in relation to access to waters, can*

be further codified and strengthened" (UK-EU Draft Trade Agreement, Article FISH.18: Review Clause).[2]

More generally, in terms of governance of the agreement, the EU concern over a level playing field and avoiding the potential for "unfair competition" by the UK had been a major stumbling block in the negotiations that could have scuppered the whole agreement. As such, the text of the agreement is vouched in terms of "fair competition" and "sustainable development", with the achievement of climate neutrality by 2050 from both parties.

However, there is some ambiguity over the final wording of the commitment to regulatory alignment, as stated on page 179 of the draft agreement:[3]

"*The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development.* ***However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title***" (emphasis added).

Whilst the EU had sought a lockstep mechanism to ensure dynamic regulatory alignment, the UK fought for a looser mechanism. Ultimately, the parties have agreed that the terms of trade should be reviewed at most every four years in order to assess whether the agreement still maintains an appropriate balance between protecting against unfair competition and facilitating trade and investment. An earlier review is possible in the event that substantial remedial measures have been taken due to a policy of one side having a significant impact on competition due to labour standards, state aid provisions or environmental standards, amongst others.

However, a basic commitment to non-regression (with the upholding of the Precautionary Principle for areas such as agriculture and the environment in the draft agreement particularly noteworthy[4]) would appear to suggest that the UK's room to manoeuvre for regulatory divergence is limited, as for example, the section on labour and social

standards (page 200 of the draft agreement)[5] would attest. Nevertheless, it is noteworthy that this only affects areas that *directly* impact trade and investment, suggesting somewhat greater scope to diverge from previous EU norms than had hitherto been the case.

The agreement is quite explicit in terms of upholding existing labour standards in place in the UK (as at the end of the transition period) for the areas of: fundamental rights at work; occupational health and safety standards; fair working conditions and employment standards; information and consultation rights at company level, and; restructuring of undertakings. And furthermore that

"***each Party shall have in place and maintain a system for effective domestic enforcement and, in particular, an effective system of labour inspections*** *in accordance with its international commitments relating to working conditions and the protection of workers; ensure that administrative and judicial proceedings are available that allow public authorities and individuals with standing to bring timely actions against violations of the labour law and social standards; and provide for appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions*" (pp. 200-01, emphasis added).

Should a dispute arise between the UK and EU, then the invocation of a resolution procedure would refer the matter to an independent arbitration panel (UK-EU Draft Trade Agreement, Article INST.15: Establishment of an arbitration tribunal), consisting of three persons with requisite expertise in law and international trade, selected (or drawn by lots) from approved lists from both sides (ibid. Article INST.16: Requirements for arbitrators). That such an opaque mechanism should have been agreed by both sides was allegedly due solely to the UK's insistence to exclude the European Court of Justice from any arbitration role over disputes.

Third, and perhaps foremost, the deal can be considered as representing an unstable equilibrium (to use the parlance of economics), as in essentially being a free trade agreement (FTA) that commits both parties to a zero-tariff, zero-quota trade regime in the movement of goods (with some notable exceptions such as seed potatoes[6]), to all intents and purposes, it excludes the 80% or so of

the UK economy that is comprised of services, and leaves open key issues in areas such as the nature of data transfer between the UK and EU and also the degree of equivalence for financial services (though at present these are both unilaterally within the remit of the EU to determine).

Thus, my preliminary assessment from examining certain aspects of the draft trade agreement is that the UK, despite the noises emanating from Whitehall (and the support of the hard Brexit European Research Group of MPs, whose vote in favour of the trade agreement appears based on the dubious notion that a "robust" UK Government could disregard commitments to a level playing field) will largely remain in the regulatory orbit of the EU.

However, with aspects of the agreement still be fully operationalised and how it will operate in practice still to be seen, it is clear that discussions will go on and on. It's not over yet.

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[1] https://www.euractiv.com/section/uk-europe/news/uks-eu-question-is-settled-johnson-says-as-new-trade-pact-agreed/

[2] Although this in itself is hardly unreasonable – as external factors impinging on aspects of an agreement could change, both parties would require scope to review aspects of an agreement on a periodic basis. However, it does point to the obvious fact that trade agreements are not set in stone, but can be renegotiated over time, as Donald Trump demonstrated in renegotiating the North American Free Trade Agreement (NAFTA) in 2018 to US advantage (see https://www.nytimes.com/2018/10/01/business/trump-nafta-usmca-differences.html).

[3] TITLE XI: LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION AND SUSTAINABLE DEVELOPMENT. Article 1.1: Principles and objectives.

[4] Sic. "*in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for*

preventing a Party from adopting appropriate measures to prevent such damage". Page 180, Article 1.2: Right to regulate, precautionary approach and scientific and technical information.

[5] Page 200, Chapter six: Labour and social standards

[6] https://www.potatonewstoday.com/2020/12/24/post-brexit-eu-trade-deal-worries-mount-as-british-seed-potatoes-are-excluded/ . What is noteworthy here is that the EU ban on the export of seed potatoes was based on the premise mentioned by the UK DEFRA that "there is no agreement for GB to be dynamically aligned with EU rules" (see https://www.bbc.co.uk/news/business-55433319), reiterating that the nature of regulatory alignment could be problematic going forwards. Suffice to say, that the seed potato industry is over-represented in Scotland will play into the hands of the Scottish National Party (SNP) in fuelling further support for Scottish independence from the UK.