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POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH
THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

POLICY PAPER

NO. 10 (185), NOVEMBER 2020 © PISM

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The Need to See the Wood Despite the Trees: The High Stakes of the EU-UK Talks on Their Future Relations

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With just six weeks before the Brexit transition period expires on 31 December 2020, a framework for a trade deal between the UK and EU is far from certain. The United Kingdom is the world's sixth largest economy, and the prospect of it leaving the EU single market and customs union without any agreement increases the economic and security risks for Europe. But there is still an option for at least a basic "barebones" free trade agreement, which should be explored to enable an orderly transition to a new EU-UK relationship and its future upgrading.

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More than four years after the 2016 EU membership referendum, the UK and the EU remain far from agreeing the terms and scope of their future relations. Between March 2019 and October 2019, they managed to negotiate the Withdrawal Agreement (WA), an international treaty concerning consequences of the “divorce” and creating a basic mechanism regulating the only direct land border between the UK and EU, on the island of Ireland. This left all other policy areas, which were outlined in the non-binding Political Declaration, to be subject to the talks on a Future-Relations Agreement (FRA). The resulting negotiations have been taking place in the 11-month transition period which has also allowed governments, businesses and citizens to prepare for the new rules of cooperation. In this

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period, relations between the EU and the UK have remained largely unchanged, despite Britain losing its institutional representation in the Union institutions when it formally left on 31 January. However, expiry of the transition on 31 December 2020 without an operational FRA would fundamentally change mutual relations affecting trade between the EU and the UK, which is worth some €700 billion, including the EU’s €90 billion surplus. While

trade would be governed by the basic system of WTO rules, there are no comparable off-the-shelf solutions for other areas of cooperation (such as data exchange, judicial cooperation, foreign affairs and security policy).

The mandates adopted by the EU and the UK for the FRA talks in February and March 2020 stipulated the differences in their approaches to negotiations. They were particularly visible in the fields of fisheries, a level-playing field (LPF)¹, and governance.² The policy differences have persisted, and became aggravated in July by the British rejection of extension of the transition period despite the COVID-19 pandemic. There is a chance that the pressure of time and the risk of an avoidable economic shock, exacerbating the one caused by COVID-19, will push political leaders on both sides to compromise. A successful outcome depends, however, on accepting realistic aims and careful management of expectations.

Political Dynamics of the EU-UK Negotiations

The present situation is a product of several years of negotiations marked by miscalculations on both sides. Key errors by the UK resulted from inconsistencies in making and presenting to the British public the necessary strategic choices and their costs. Meanwhile, some EU Member States and institutions wanted to punish the UK for Brexit and hoped that the 2016 referendum verdict would be reversed.³ On the positive note, the EU demonstrated an unexpected level of unity in facing the British negotiators, while the UK finally managed to produce a clear Brexit strategy. Unfortunately, both sides coming to terms with the UK’s exit from the Union required a British domestic crisis and a change of prime minister, Eurosceptics’ triumph in the December 2019 UK general election, and the renegotiation of terms in the autumn of 2019.

The WA, originally signed in November 2018 by Theresa May and European Commission President Jean-Claude Juncker, focused on the financial settlement, protection of acquired rights of EU and UK citizens, and the border on the island of Ireland. The last issue posed a significant challenge in that it had to reconcile three contradictory goals (the “trilemma”): the integrity of the single market, no visible land border between Ireland and Northern Ireland (NI), and no internal UK border (between NI

¹ Broadly understood as competition policy, including technical, sanitary, and environmental standards, labour law, professional qualifications and public aid for business

² The legal structure of the treaty, the mechanism of its implementation, and reprisals for breaking it by either side.

³ See François Hollande: “Il faut qu’il y ait un prix, une menace, un risque” (J.-Ch. Ploquin, “Dans le sillage de Jacques Delors, Hollande, Valls et Juncker enterrent l’Europe fédérale,” *Paris Planète*, 8 November 2016).

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and the rest of the UK). The solution was to predetermine talks on future relations to a considerable degree.

May's preferred solution to the "trilemma" was to keep the whole of the UK in a "comprehensive customs partnership" with the EU (i.e., a combination of the customs union and the single market for goods), which would allow land and maritime borders with Ireland to remain open, but would fundamentally limit the UK's independence in trade and industrial policies. This mechanism, commonly known as a "backstop," became the principal obstacle to British ratification of the WA in early 2019. The original Political Declaration of November 2018 foresaw close links between the EU and the UK, not just in economy, but also in police and judicial cooperation, foreign affairs, defence and security matters. However, in February to March 2019, May failed to convince EU leaders to amend the WA by time-limiting the "backstop," which in turn accelerated her downfall and Boris Johnson's rise to power (May to July 2019).

In September and October 2019, Johnson pushed for a renegotiation, which was granted by the EU. In the new versions of the WA and the Political Declaration, he opted for the UK in its entirety leaving the EU customs union and single market. The "trilemma" was resolved by Northern Ireland effectively remaining part of the single market for goods (including VAT, sanitary and phytosanitary rules, and customs procedures), and gaining unique status as an overlapping part of two separate sovereign customs territories: the UK's and the EU's.

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The EU's failure to renegotiate the WA with May was inconsistent (as it later did just that with Johnson) and a miscalculation (as the new British prime minister adopted a far more Eurosceptic stance). The lost opportunity of anchoring the standards of an FRA in the original WA and Political Declaration in March 2019 illustrates an unintended consequence of EU's decision of May 2017,⁴ to divide talks strictly between matters concerning the UK's exit and those connected to future relations. While this strengthened the EU's negotiation leverage in 2017 to 2019, it has ever since undermined the EU's demand that the FRA is bound to follow the Political Declaration on close partnership. This became crucial when, in the December 2019 general election, the Conservative party won a landslide victory and Johnson gained legitimacy for his prioritisation of British freedom to act as it saw fit over close ties with the EU.

Legal and Political Sticking Points

Since the "divorce" settlement, the negotiations have become increasingly acrimonious due to a combination of political drama played by British and European leaders and some constitutional, legal and institutional issues.

The WA was drafted with a fair degree of constructive ambiguity, particularly in the reference to the "trilemma." It also provided for a dispute resolution mechanism based on the EU-UK Joint Committee

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empowered to interpret the treaty. Nonetheless, its drafting almost immediately led to fundamentally divergent interpretations by the EU and UK, for example in respect of an Irish maritime border. The EU's position has been that the WA provides for an effective two-way maritime customs border between Northern Ireland and the rest of the UK,

which would be subsequently made less visible and burdensome for businesses ("de-dramatised") by streamlined procedures and customs reimbursements. The UK, however, saw a one-way (mainland UK to NI) maritime border, with EU customs duties imposed only on goods either officially destined for

⁴ EC, *Negotiating directives for Article 50 negotiations*, 22 May 2017, <https://ec.europa.eu>.

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the Republic of Ireland/EU, or at a clear risk of crossing the land border illegally (“at-risk goods”).⁵ Since both positions have legitimate grounds in the WA text, political settlement in the Joint Committee seems to be necessary here.

Unfortunately, despite the fact that the WA implementation and the FRA talks formally constitute two separate processes, both sides have attempted to use the former to gain political leverage in the latter. For example, the EU became less cooperative on the list of “at-risk goods” sold from NI to the rest of the UK. Meanwhile, the UK has refused to grant the EU the right to technical representation in Belfast for the purposes of implementing the Union Customs Code.⁶

These skirmishes led, in mid-September, to one of the two most significant crises in the negotiations on future relations negotiations (the other being the mid-October [British walk-out from negotiations](#)). The Johnson government has consistently opted for a distanced relation with the EU. This in turn led to a situation in which a feasible agreement required from the EU more difficult compromises than originally anticipated, including WA implementation. The UK’s perception of the EU’s initial lack of responsiveness in matters of an Irish maritime border led to unilateral action by the British. On 15 September, Johnson’s government introduced into the House of Commons the UK Internal Market Bill (UKIMB). Should it become law, it would unilaterally give UK ministers power to define “at-risk goods” and narrow the scope of the EU’s oversight of the Union’s level-playing field provisions applicable in Northern Ireland.⁷ This, from the EU perspective, constituted a serious breach of treaty, hence the subsequent infringement procedure initiated by the European Commission. There are two possible solutions to this problem. One is for both sides to push forward with legislative and legal procedures, which will result in a long-lasting legal conflict and political escalation. The other is to reach, in the Joint Committee (co-chaired by Maroš Šefčovič and Michael Gove), political and legal agreement on the contested subject, making the controversial UKIMB provisions redundant, so they would be withdrawn from the bill.

Finally, the UKIMB demonstrated the fundamental constitutional gap between the EU and the UK. On the UK side, treaty law does not constitute an integral part of its domestic legal system, nor does it take precedence over it (hence the UK domestic case for the UKIMB).⁸ When a prime minister has a parliamentary majority, there is also a clear political and legal chain of command. This contrasts with the EU process-based approach and complex decision-making structure. In the light of Article 218 TEU,⁹ the EU institutional leaders officially heading the FRA negotiations (including the presidents of the European Commission and the European Council) are effectively agents of heads of state and government, who decide the priorities and the outcome of talks. The assumption prevailing in the EU, that a treaty should be the key to stable future relations with the UK, disregards the nature of the British constitution. In fact, since there is no UK constitutional mechanism to legally entrench any treaty, the most feasible way to protect the Union’s interests is to help Johnson make them part of British political consensus. The acceptance of this fact would greatly increase chances to bridge the gap between the sides.

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⁵ P. Biskup, *The Long-Term Implications of Brexit for Northern Ireland*, op. cit. EC, *Technical note on the implementation of the Protocol on Ireland / Northern Ireland*, 30 April 2020, <https://ec.europa.eu/>. Cabinet Office, *The UK’s approach to the Northern Ireland Protocol*, 20 May 2020, www.gov.uk.

⁶ J. Crisp, “EU can resolve Brexit row to prevent no deal,” *The Daily Telegraph*, 14 September 2020. J. Crisp, “UK rejects EU demand for Northern Irish office to police Brexit deal,” *The Daily Telegraph*, 2 April 2020.

⁷ *United Kingdom Internal Market Bill 2019-21*, <https://services.parliament.uk/Bills>.

⁸ See Section 38, *EU (Withdrawal Agreement) Act 2020*, containing the clause on the supremacy of UK law while providing for the WA’s ratification by the UK (www.legislation.gov.uk).

⁹ *Consolidated version of the Treaty on European Union*, Official Journal C 326, 26.10.2012, pp. 1-390, <https://eur-lex.europa.eu>.

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Dire Straits to Navigate

In the process of forging a feasible deal, the EU and the UK face a number of obstacles and challenges, as demonstrated by the high level of incompatibility of their respective negotiation mandates.¹⁰

For the EU, the most fundamental challenge has been to sustain its unity on future relations with the UK. The unity demonstrated during the “divorce” talks has been a product of their relatively narrow scope and confluence of Member States’ interests, which resulted in the uncontroversial nature of

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those negotiations within the EU. The most contentious issue of the Irish border was politically dominated by a single state, which simplified the search for a political settlement between the EU and the UK through the initial negotiations between the UK and Ireland.¹¹ Finally, the EU’s unity has

never really been challenged by the British, due to policy choices (under May) and domestic crisis (early in Johnson’s premiership). The present situation, however, is in many respects the opposite: the negotiations cover multiple fields, with considerable differences in Member States’ stakes in them. This has fundamentally raised the threshold for intra-EU agreement on the mandate.¹² Johnson was ready to test the Union’s strength by [walking out from the negotiations](#) (effectively putting a no-FRA scenario on the table), and resumed them only upon gaining important EU procedural concessions (opening work on the draft treaty, breaking with the principle of parallel progress in all areas, and intensifying negotiations in the 24/7 mode, all of which were originally seen as EU leverage).¹³

For the UK, the most important challenges are connected to working out its new national consensus after Brexit. The [political crisis of 2019](#) resulted in a general election [victory for dedicated Leavers](#) and rebalanced the model of exit from the EU towards national sovereignty at the expense of close relations with the Union and its single market. However, the Conservative Party’s electoral majority has a relatively narrow geographical and social basis, which does not reflect the preferences and interests of Scotland and Northern Ireland as well as of metropolitan areas in England and Wales. A considerable part of the UKIMB’s domestic critique reflected dispute between the centre and the devolved administrations on how to distribute powers repatriated from the EU after 1 January. Similarly, the UK discourse on new trade deals¹⁴ reflects domestic debates on the level of ambitions in green transformation, animal welfare and food standards, as well as on the prominence of the Asia-Pacific region vs. ties with the EU and the U.S. as sources of future UK economic growth. The British dilemmas also concern the relative position of the UK between the EU and the U.S. in the face of President-elect Joe Biden’s pressure on the UK to act in consonance with EU.

Challenges shared by the EU and the UK focus particularly on the impact of the COVID-19 pandemic. In the short-term perspective, COVID-19 has been a distractor, occupying the attention of all national and EU-institution leaders. The long-term COVID-19 challenge results from the record-high public debt in the UK and many EU countries, including Italy and France.

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¹⁰ EUCO, *Text of the negotiating directives for a new partnership with the United Kingdom*, 25 February 2020, www.consilium.europa.eu. Office of the Prime Minister, *The Future Relationship with the EU*, CP211, February 2020, www.gov.uk.

¹¹ A. Mikhailova et al., “Varadkar says deal can be done by October 31 after crunch talks with Johnson,” *The Telegraph*, 10 October 2019.

¹² Compare: EC, *Proposal for negotiating directives for a new partnership with the United Kingdom*, 3 February 2020, <https://ec.europa.eu> and EUCO, *Text of the negotiating directives for a new partnership with the United Kingdom*, 25 February 2020, www.consilium.europa.eu.

¹³ Office of the Prime Minister, *Organising principles for further negotiations with the EU*, 21 October 2020, www.gov.uk.

¹⁴ Includes agreements that have been concluded (Japan) and are being negotiated ones (Canada, Australia, New Zealand and the United States).

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Both sides have also been increasingly exposed to the negative interplay between the economic shock of the pandemic, lack of FRA after 1 January, and their consequences for other policy areas. For instance, if the combined COVID-19 and Brexit disruptions force the UK and the EU to invest heavily in changing their supply chains, this could lead to permanent loss of position by EU businesses on the UK's market, thus reducing the Union's positive balance of trade (for example, EU agri-foods rely heavily on an FRA to stay competitive on the British market).

One of the most under-reported cases of this interplay is the financial sustainability of the UK's present engagement in NATO's collective defence mission. Importantly, the UK is a member of a very small group of allies having at their disposal powerful armed forces, the political will to use them, the logistical capacity to deploy them, and reliable interoperability with U.S. forces, not mentioning its own nuclear deterrent. However, the UK has been reducing its military spending since the end of the Cold War, and remains under domestic pressure to make further savings. Since its contribution to the Alliance is still above NATO's aim of 2% of GDP, there has been scope for cuts without breaching international commitments.¹⁵ Thus, the smaller the UK budgetary revenue base, the greater will be the pressure on defence cuts. This, when combined with ambitious naval and aerial modernisation programmes, has been creating pressure on the UK's land warfare capabilities, which are crucial for the defence of NATO's Eastern Flank. Moreover, this pressure is likely to be strengthened by redirection of resources to cyber, AI, and drone technologies.

Finally, the pandemic fundamentally changed the value of the level-playing field in the negotiations since their opening in March. COVID-19 forced the UK, as well as EU Member States and institutions, to introduce generous subsidies, bailouts and furloughs, initially on a mostly unilateral basis. In the EU, irregularities were eventually legalised or transferred to the Union level (such as the Recovery Plan for Europe).

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This, however, exposed tension (if not opposition) between the EU's internal practices and the far-reaching demand of dynamic alignment on state aid from the UK (which would require Britain to adopt EU LPF changes in domestic law). While the UK has been among the most frugal subsidisers in Europe since the 1980s, it is not guaranteed that its historical record will continue. Recent publicly discussed plans on subsidising British national

champions in big data and digital industries have only increased EU determination to include in an FRA legal guarantees providing for fair competition. Unfortunately, the pandemic experience promoted an opposing reassessment by British politicians and society of the need to preserve the freedom of action in public aid for the sake of crisis management and the levelling-up agenda.

The Road Towards a Feasible Agreement

Since the beginning of the FRA talks, there has also been an identifiable path to a stable long-term agreement that could still be implemented. A successful solution needs, however, to reflect the following basic logic.

In the short and mid-term perspectives the UK and the EU will remain their respective most important economic partners.

First, despite inevitable long-term divergence of the UK from the EU, in the short and mid-term perspectives they will remain their respective most important economic partners.¹⁶ Consequently, the EU and the UK can hardly afford a "no-FRA" scenario, especially if triggered by a dispute over fisheries. This contentious sector represents just a fraction of a single percentage point of GDP for either the EU or UK, and has relatively limited employment, not to mention limited sustainability due to diminishing stocks. On the

¹⁵ NATO, *Defence Expenditure of NATO Countries (2013-2019)*, PR/CP(2019)123, 29 November 2019, <https://www.nato.int>.

¹⁶ EC, *Trade Agreements: Geography and trade intensity*, UKTF(2020)13, 19 February 2020, <https://ec.europa.eu>.

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one hand, control of UK fishing waters constitutes a powerful symbol of British sovereignty and is a potent argument for Johnson against Scottish separatism. Moreover, while UK catchment quota expansion seems sustainable on this country's scale, it would not for the continent. On the other hand, the EU's real problem is not the lack of access to UK waters, but overfishing in its own. The Union's real challenge is thus to turn EU fishing communities into aquaculture and maritime preservation powerhouses.

Second, a feasible deal needs to reflect the reality of the UK having left the single market and customs union for good on 31 January. The 2019 landslide election victory made it imperative for Johnson to exclude them as reference frameworks for future relations. Accordingly, the UK has already repatriated powers from the EU's Common Trade and Fisheries policies by concluding a free-trade deal with Japan and a fisheries agreement with Norway. Hence, a feasible FRA must be anchored in common reference points (such as the Paris Climate Accord and the European Convention of Human Rights), and in effective governance mechanism (e.g., punitive tariffs in response to excessive public aid) rather than in expanding the single market and customs union regulations onto the post-Brexit UK.

Consequently, this allows for only a very basic free trade agreement between the EU and the UK. It could waive tariffs and quotas, but not allow for the far-reaching, permanent alignment of standards and regulations. On positive side, while the standards and regulations create the most effective barriers to modern trade, the British ones, inherited from 48 years of EU membership, will effectively remain identical with the Union's for a considerable time, thus reducing disruption to trade. However, feasible FRA would not provide for automatic recognition of professional qualifications, certification of goods or substantial liberalisation of trade in services. In the long-term, when compared with the single market and customs union-based trade, such a feasible FRA will not be significantly different from the WTO rules (meaning no-FRA). Naturally, maintaining mutual tariff and quota-free access to the partner's market is highly desirable. Nonetheless, such an FRA would remain an exercise in the orderly dismantling the cooperation framework erected since the 1970s.

Moreover, an FRA would create the continued legal basis for such diverse fields of cooperation as transport, energy, law enforcement and judicial cooperation in criminal matters, defence and security data exchange, and mobility of persons. Only half of the 12 negotiation areas defined by the European Commission can be classified as purely economic, and the great majority of them have no pre-established rules, in contrast to the WTO's basic system of trade law.

Third, a barebones deal needs to be recognised as the first step in a multi-stage process. By the European Commission and European Council's own admission, an FRA is the precondition for a holistic

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approach to the future relations between the UK and the EU. Hence, the Union's demand that an FRA be a framework treaty with the single governance system to be extended to all future supplementary deals. As political tensions in the EU and the UK diminish over time, such an FRA would allow construction of a network of additional sectoral agreements in the fields of mutual interest, especially where the

greatest interdependence occurs. They include, for instance, research and technology (such as the UK's participation in the Horizon and Galileo programmes), foreign policy (including sanctions) and data exchange. Importantly, Johnson's negative assessment of the EU's reaction to May's original offer on security and defence cooperation led to the exclusion of this field from the present negotiations.

Conclusions

The last weeks of 2020 offer the final chance for the EU and the UK to conclude an agreement on future relations and avoid unnecessary rupture and acrimony in this strategic relationship. The task consists not only of signing a treaty, but also ratifying it on time, which will pose procedural challenges to the

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EU given its complex decision-making process. Failure would be costly and compounded by the pandemic.

However, there has always existed a clear path to a feasible deal. The UKIMB problem, resulting from the intertwining of the “divorce” implementation with the FRA negotiations, needs to be resolved within the Joint Committee rather than via judicial procedure, to avoid further escalation. In that context, the most feasible way to protect future agreements between the EU and the UK, and to safeguard the Union’s interests, is to help make them a part of British domestic consensus.

This is particularly important for Poland, one of the countries most affected by the outcome of the talks. The UK remains Poland’s third biggest export market, with the volume of trade in goods and services standing at PLN 120 billion (and PLN 40 billion surplus).¹⁷ Given the high share of agri-foods and transport services among Polish exports, the cost of a “no-FRA” scenario would be considerable due to the combination of high tariffs (approx. 30%),¹⁸ border delays and the expiry of cabotage rights, which enable both an important export service and affordable transport of many goods from Poland to the UK.

It is not in Poland’s interests to accelerate or to complicate the process due to the dispute over a minor policy field.

It is only natural that, in the long term, the UK’s trade, security, foreign policy and defence strategies will evolve in parallel to its new global strategy. In that time-frame, the redefinition of the UK’s involvement in common defence will put pressure on Poland to be more self-reliant as a NATO member, while the trade links will be redirected to other markets within and outside the EU. However, it is not in Poland’s interests to accelerate or to complicate this process due to the dispute over a minor policy field.

¹⁷ P. Biskup, “Wielka Brytania,” *Rocznik Polskiej Polityki zagranicznej 2019*, PISM, 2020.

¹⁸ DIT, *UK tariffs from 1 January 2021*, 19 May 2020, www.gov.uk.