

Government Rebuttal of the Spectator's 40 points

Spectator: Downing Street have since been in touch to put forward their own 40 rebuttals to those 40 horrors (we'll respond on Monday). No.10's points are in italics.

The supposed 'transition period' could last indefinitely or, more specifically, to an undefined date sometime this century ("up to 31 December 20XX", Art. 132). So while this Agreement covers what the government is calling Brexit, what we in fact get is: 'transition' + extension indefinitely (by however many years we are willing to pay for) + all of those extra years from the 'plus 8 years' articles.

Downing Street: Article 132 has a blank date because the date has not yet been agreed between the two sides. The date will represent a maximum length.

1. From the offset, we should note that this is an EU text, not a UK or international text. This has one source. The Brexit agreement is written in Brussels.

Downing Street: The draft Withdrawal Agreement (WA) is a text which has been negotiated between the EU and the UK. The WA constitutes international law for the UK because the UK is no longer bound by the EU treaties after March 2019.

2. May says her deal means the UK leaves the EU next March. The Withdrawal Agreement makes a mockery of this. "All references to Member States and competent authorities of Member States...shall be read as including the United Kingdom." (Art 6). Not quite what most people understand by Brexit. It goes on to spell out that the UK will be in the EU but without any MEPs, a commissioner or ECJ judges. We are effectively a Member State, but we are excused – or, more accurately, excluded – from attending summits. (Article 7)

Downing Street: Article 7 is simply a technical provision which enables the UK to be treated as a Member State for the purpose of EU law which is applied by the Agreement during the implementation period and the winding down phase. Without this provision, the orderly winding down of the application of EU law in the UK would not be possible.

3. The European Court of Justice is decreed to be our highest court, governing the entire Agreement – Art. 4. Stipulates that both citizens and resident companies can use it. Art 4.2 orders our courts to recognise this. "If the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties or under Part Four of this Agreement before the end of the transition period, the European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union". (Art. 87)

Downing Street: Article 4 does not provide for the jurisdiction of the ECJ in the UK. This is an agreement about winding down the application of EU law. It does not make sense for that law to have a different status in the UK while its effects are wound down. This would create inconsistency and legal uncertainty. Article 87 is about events which take place up to the end of transition. It is nothing to do with events after that.

4. The jurisdiction of the ECJ will last until eight years after the end of the transition period. (Article 158).

Downing Street: The 8 years has been agreed since December and refers only to issues on citizens' rights. Unlike now, references from the UK courts on citizens' rights will not be compulsory.

5. The UK will still be bound by any future changes to EU law in which it will have no say, not to mention having to comply with current law. (Article 6(2))

Downing Street: Article 6(1) provides that where Union law applies in the UK after exit, it is Union law as it stands at the end of the transition period, except where specifically agreed otherwise as in the implementation period. Article 6(2) is a narrow technical provision which covers only a handful of pieces of EU legislation. It does not provide for the dynamic alignment of EU law in the UK.

6. Any disputes under the Agreement will be decided by EU law only – one of the most dangerous provisions. (Article 168). This cuts the UK off from International Law, something we'd never do with any foreign body. Arbitration will be governed by the existing procedural rules of the EU law – this is not arbitration as we would commonly understand it (i.e. between two independent parties). (Article 174)

Downing Street: No. Disputes under the agreement are decided by an arbitration panel if they cannot be resolved within the Joint Committee. All that Article 168 does is be clear that the provisions of the agreement on dispute resolution are those agreed in the agreement and not other ones. The arbitration panel will apply EU or international law as is appropriate to the issue under dispute.

7. “UNDERLINING that this Agreement is founded on an overall balance of benefits, rights and obligations for the Union and the United Kingdom” No, it should be based upon the binding legal obligations upon the EU contained within Article 50. It is wrong to suggest otherwise.

Downing Street: This is simply referencing the fact that the agreement contains reciprocal rights and obligations. It has no effect whatsoever on the legal basis for the treaty.

8. The tampon tax clause: We obey EU laws on VAT, with no chance of losing the tampon tax even if we agree a better deal in December 2020 because we hereby agree to obey other EU VAT rules for **five years** after the transition period. Current EU rules prohibit zero-rated VAT on products (like tampons) that did not have such exemptions before the country joined the EU.

Downing Street: This is about payment of VAT on goods sold before the end of the transition period. It has absolutely no effect whatsoever on the VAT regime in the UK after the end of transition.

9. Several problems with the EU's definitions: “Union law” is too widely defined and “United Kingdom national” is defined by the Lisbon Treaty: we should given away our right to define our citizens. The “goods” and the term “services” we are promised the deal are not

defined – or, rather, will be defined however the EU wishes them to be. Thus far, this a non-defined term so far. This agreement fails to define it.

Downing Street: The definition of Union law is a specific provision tied to this agreement. The definition of “UK national” comes from the unilateral declaration made by the UK. Terms such as “goods” are defined by reference to EU law because Part Three of the Withdrawal Agreement are about the winding down of EU law..

10. The Mandelson Pension Clause: The UK must promise never to tax former EU officials based here – such as Peter Mandelson or Neil Kinnock – on their E.U. pensions, or tax any current Brussels bureaucrats on their salaries. The EU and its employees are to be immune to our tax laws. (Article 104)

Downing Street: This provision of the agreement respects rights which individuals have acquired during 40 years of membership of the EU. It would not be appropriate for these rights to be summarily removed.

11. Furthermore, the UK agrees not to prosecute EU employees who are, or who might be deemed in future, criminals (Art.101)

Downing Street: This is simply untrue.

12. The GDPR clause. The General Data Protection Regulation – the EU’s stupidest law ever? – is to be bound into UK law (Articles 71 to 73). There had been an expectation in some quarters that the UK could get out of it.

Downing Street: Union law on data will only apply to the data transferred to the UK from the EU before the end of the implementation period until an adequacy decision is granted. It does not apply to data transferred after the end of the Implementation Period.



13. The UK establishes a ‘Joint Committee’ with EU representatives to guarantee ‘the implementation and application of this Agreement’. This does not sound like a withdrawal agreement – if it was, why would it need to be subject to continued monitoring? (Article 164). This Joint Committee will have subcommittees with jurisdiction over: (a) citizens’ rights; (b) “other separation provisions”; (c) Ireland/Northern Ireland; (d) Sovereign Base Areas in Cyprus; (e) Gibraltar; and (f) financial provisions. (Article 165)

Downing Street: A Joint Committee is a perfectly normal oversight body in an international agreement. It exists in this instance to make some specific decisions, for instance on the wind down of the monitoring authority on citizens’ rights, and to resolve disputes.

14. The Lifetime clause: the agreement will last as long as the country's youngest baby lives. "the persons covered by this Part shall enjoy the rights provided for in the relevant Titles of this Part for their lifetime". (Article 39).

Downing Street: Article 39 is about the rights accorded to citizens, rights that both sides do not wish suddenly to expire, putting those citizens in a wholly uncertain legal situation. This applies for both UK nationals in the EU and EU citizens in the UK.

15. The UK is shut out of all EU networks and databases for security – yet no such provision exists to shut the EU out of ours. (Article 8)

Downing Street: That is because access to UK networks and databases is up to us.

16. The UK will be tied to EU foreign policy, "bound by the obligations stemming from the international agreements concluded by the Union" but unable to influence such decisions. (Article 124)

Downing Street: This is not about foreign policy. It is about all the international agreements we rely on to keep planes flying, trade with other countries etc. This provision is about the status of these agreements during the implementation period. It would be unnecessarily disruptive for them suddenly to cease to apply. Almost all the international agreements we will be bound by have been signed up to during our membership of the EU.

17. All EU citizens must be given permanent right of residence after five years – but what counts as residence? This will be decided by the EU, rather than UK rules. (Articles 15-16)

Downing Street: The Government has been clear that its first priority as part of securing a smooth and orderly exit from the EU was to provide certainty for EU citizens living in the UK, and UK nationals living in other EU countries. The residence rights apply equally to UK citizens in the EU. The definition of what constitutes residence is set out in EU rules that were agreed when we were a Member State.

18. Britain is granted the power to send a civil servant to Brussels to watch them pass stupid laws which will hurt our economy. (Article 34)

Downing Street: This is about ensuring we are aware of changes to specific provisions about the administration of social security in relation to UK and EU citizens who benefit from the citizens' rights part of the Agreement.

19. The UK agrees to spend taxpayers' money telling everyone how wonderful the agreement is. (Article 37)

Downing Street: This is about ensuring that citizens who want to understand their status under the agreement are given that information.

20. Art 40 defines Goods. It seems to include Services and Agriculture. We may come to discover that actually 'goods' means everything.

Downing Street: This is a separation provision dealing with the winding-down of EU law at the end of the implementation period for all goods (including agricultural products) but explicitly not services.

21. Articles 40-49 practically mandate the UK's ongoing membership of the Customs Union in all but name.

Downing Street: This is not correct. These are separation provisions which only deal with goods and customs movements that happen to be taking place at the end of the implementation period. Once these goods and customs movements have been completed, the articles have no application to future movements.

22. The UK will be charged to receive the data/information we need in order to comply with EU law. (Article 50)

Downing Street: We are paying for continued limited access to EU databases that we felt was beneficial to the UK to retain as we are winding down our cooperation.

23. The EU will continue to set rules for UK intellectual property law (Article 54 to 61)

Downing Street: No, they won't. EU trade marks, registered and unregistered Community designs and Community plant variety rights currently give protection throughout the EU with a single right. These rights will cease to be valid in the UK after the end of the implementation period. The UK will therefore grant national rights in place of existing EU rights so that right holders do not have any loss of rights or gap in protection in the UK.

24. The UK will effectively be bound by a non-disclosure agreement swearing us to secrecy regarding any EU developments we have paid to be part. This is not mutual. The EU is not bound by such measures. (Article 74)

Downing Street: The EU will continue to treat any UK data or information provided before we left the EU as if it were that of a member state as set out in Article 73. They are also bound by Union law, as defined at the end of the implementation period, to protect classified information from the UK.

25. The UK is bound by EU rules on procurement rules – which effectively forbids us from seeking better deals elsewhere. (Articles 75 to 78)

Downing Street: No, this is about procurement activity underway before the end of the implementation period. It has no impact whatsoever on future UK procurement arrangements.

26. We give up all rights to any data the EU made with our money (Art. 103)

Downing Street: No. This is about the protection of EU owned archives of information currently stored in the UK.

27. The EU decide capital projects (too broadly defined) the UK is liable for. (Art. 144)

Downing Street: This is a negotiated financial settlement. It covers the UK's financial commitments to the EU and the EU's financial commitments to the UK. The UK and the EU have reached agreement on the components of the settlement, the methodology for calculating the UK's share and the payment schedule.

28. The UK is bound by EU state aid laws until future agreement – even in the event of an agreement, this must wait four years to be valid. (Article 93)

Downing Street: No, this is not right. The new UK state aid regime will be in place from the end of the implementation period. This provision is about state aid granted under EU law before the end of the implementation period. It has absolutely nothing to do with state aid law applying in the UK afterwards.

29. Similar advantages and immunities are extended to all former MEPs and to former EU officials more generally. (Articles 106-116)

Downing Street: Again, it would not be right summarily to remove rights from individuals built up over 40 years of membership.

30. The UK is forbidden from revealing anything the EU told us or tells us about the finer points of deal and its operation. (Article 105).

Downing Street: No this is incorrect. This article is about the legal immunities which attach to EU documents located in the UK. Such provisions are very common in treaties with international organisations.

31. Any powers the UK parliament might have had to mitigate EU law are officially removed. (Article 128)

Downing Street: This is solely about the implementation period which is a standstill arrangement during which EU law will apply to the UK as if it were a Member State.

32. The UK shall be liable for any “outstanding commitments” after 2022 (Article 142(2) expressly mentions pensions, which gives us an idea as to who probably negotiated this). The amount owed will be calculated by the EU. (Articles 140-142)

Downing Street: The UK Government has said that it will pay a fair financial settlement as part of our withdrawal from the EU, which is substantially lower than the sums originally quoted. This includes residual liabilities such as pensions where the UK will contribute towards those pension rights accrued on or before 31 December 2020, but not after. The UK will not have to pay for liabilities that remaining Member States would not have to pay for.

33. The UK will be liable for future EU lending. As anyone familiar with the EU's financials knows, this is not good. (Article 143)

Downing Street: This is about a fair financial settlement as we leave the EU. The UK will not finance any commitments that do not require funding from Member States, and will receive a share of any financial benefits that would have fallen to it had it remained a Member State.

34. The UK will remain liable for capital projects approved by the European Investment Bank. (Article 150).

Downing Street: The UK Government has said that it will pay a fair financial settlement. This includes its share of liabilities as at the end of 2020, such as guarantees on EU and European Investment Bank (EIB) financial operations ensuring loans to businesses and projects in the UK are protected. The UK will not have to pay for liabilities that remaining Member States would not have to pay for. The UK will receive a share of funds that accrue to the EU budget from activities that were agreed during the period of membership.

35. The UK will remain a ‘party’ (i.e. cough up money) for the European Development Fund. (Articles 152-154)

Downing Street: The UK will continue to participate in the current European Development Fund (EDF), which covers the same period as the 2014-20 budget plan. The majority of the current EDF has already been committed and forms part of the UK’s overall commitment on Overseas Development Assistance, supporting low income countries. UK Overseas Territories will benefit from the current EDF until its closure, and from previous EDFs until their closure.

36. And the EU continues to calculate how much money the UK should pay it. So thank goodness Brussels does not have any accountancy issues.

Downing Street: This is a negotiated financial settlement. It covers the UK’s financial commitments to the EU and the EU’s financial commitments to the UK. The UK and the EU have reached agreement on the components of the settlement, the methodology for calculating the UK’s share and the payment schedule. The Government has negotiated arrangements to provide assurance on payments made under the financial settlement. This includes the right to appoint auditors working on the Government’s behalf to assure the implementation of the financial settlement.

37. The UK will remain bound (i.e coughing up money) to the European Union Emergency Trust Fund – which deals with irregular migration (i.e. refugees) and displaced persons heading to Europe. (Article 155)

Downing Street: The UK will honour commitments it has previously given for the EU Trust Funds and the Facility for Refugees in Turkey.

38. The agreement will be policed by ‘the Authority’ – a new UK-based body with ‘powers equivalent to those of the European Commission’. (Article 159)

Downing Street: No, this is just wrong. This is about the establishment of an independent authority to monitor the application of the citizens’ rights provisions. It is in place of the EU’s view which was that the European Commission should do this. It is only right that the UK government is held to account for how it implements the rights agreed here of citizens who came with the wholly legitimate expectation of being able to stay.

39. The EU admits, in Art. 184, that it is in breach of Article 50 of the Lisbon Treaty which oblige it to “conclude an agreement” of the terms of UK leaving the EU. We must now, it

seems, “negotiate expeditiously the agreements governing their future relationship.” And if the EU does not? We settle down to this Agreement.

Downing Street: No. Article 50 requires the EU to conclude an agreement setting out arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. “The framework for its future relationship” is what will be set out in the accompanying political declaration.

40. And, of course, the UK will agree to pay £40bn to receive all of these ‘privileges’.
(Article 138)

Downing Street: The Government has always been clear that any agreement on financial matters should represent a fair settlement of the UK’s rights and obligations as a departing Member State, in accordance with the law and in the spirit of the UK’s continuing partnership with the EU.