

Brexit:
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Introduction

The House of Commons has rejected the Withdrawal Treaty negotiated by Theresa May three times. Boris Johnson, the successful candidate in the 2019 Conservative leadership election committed himself to seeking either changes to the current Withdrawal Treaty, in particular removal of the Northern Ireland backstop, or a replacement for the Treaty, by 31 October (and to leaving without a deal if no agreement could be reached). In these circumstances, what is the scope for re-opening negotiations with the EU27? Both Michel Barnier, the EU's chief negotiator, and representatives of the other 27 Member States, have repeatedly said that there can be no renegotiation of the Withdrawal Treaty. Indeed, when the European Council extended the UK's departure date to 31 October, it specifically excluded any alteration to the Withdrawal Treaty, a decision which is legally binding and which the UK accepted.¹

On the other hand, it has been asserted that some national leaders would agree to further discussion of the arrangements for the Northern Ireland backstop. Such discussion might form part of broader renegotiation not of the Withdrawal Treaty but of the Political Declaration on the future partnership between the UK and the EU, which the EU has previously suggested could be altered if the UK clarifies its aims for such a relationship.

This paper considers what scope, if any, there is for re-opening negotiations between the UK and the EU27 on the UK's withdrawal. It examines the options available to the UK and the EU; looks at the domestic political aspects of such a re-opening of the negotiations; and identifies obstacles to the UK and the EU reaching agreement.

The current position

The Withdrawal Treaty

Article 50 of the Treaty on European Union provides for an agreement to be made between a departing Member State and the EU within two years of the departing state's notification of its intention to withdraw. Such an agreement is necessary because of the legal obligations the UK has as a Member State; because of its financial liabilities; to protect the rights of UK citizens living in the EU and EU citizens here; and to ensure that contracts and other legal agreements (e.g. European Arrest Warrants) remain valid after Brexit; and to

¹ *European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom extending the period under Article 50(3)TEU*, 2019 OJ L 80 I/1, Preamble, point 11

provide for a standstill transition period after exit. This agreement is legally separate from any agreement about the UK's relationship with the EU after Brexit even though there is a provision in Article 50 (2) for the withdrawal agreement to take "account of the framework for its future relationship with the Union".²

The Withdrawal Treaty (which the UK and the EU have agreed politically but not ratified) contains a transition period until the end of 2020 to avoid a sudden "cliff edge" for citizens and businesses and to give time for the UK and the EU to begin discussions on their long-term relationship.

The most controversial element of the Withdrawal Treaty is the insurance clause agreed by both parties to prevent a hard border between north and south in Ireland in the event that the EU and the UK cannot agree on a future relationship after Brexit by the end of the transition period. This "Northern Ireland backstop" was agreed to by the Government as necessary to meet UK obligations under the Good Friday/Belfast Agreement. It includes an acceptance by the UK of the need to maintain some parts of the EU Single Market and the customs union until such time as a new UK/EU agreement has been brought in to force, in order to ensure an open border.

It is important to note that the Withdrawal Treaty was agreed between the UK Government and the EU; it is not regarded by the EU as "Mrs May's deal", despite it often being referred to in those terms in the UK. As Commission President Jean-Claude Juncker put it recently:

This is not a treaty between Theresa May and Juncker, this is a treaty between the United Kingdom and European Union. It has to be respected by whoever is the next British prime minister.³

The Political Declaration

The Political Declaration is a statement of the intended scope of the future agreement between the UK and the EU. While legally separate from the Withdrawal Treaty, section 13 of the *European Union (Withdrawal) Act 2018* requires the Political Declaration to be subject to the approval of the House of Commons alongside the Withdrawal Treaty.⁴

The Political Declaration emphasises the shared values of the UK and the EU, for example in free and fair trade, the rule of law and the protection of workers, consumers and the environment.⁵

While the apparent scope is broad – from science, education and research to security, foreign policy and overseas development via extensive economic co-operation – the declaration is written in general terms. It does not answer any of the numerous questions that would have to be addressed before a legally binding agreement could be reached. For example: would the UK commit to upholding EU standards in products and services? What would be the extent of customs co-operation? Would the UK keep the VAT system? What role would there be for the European Court of Justice? The lack of clarity in the Political Declaration and its lack of legal force was a major reason why the Withdrawal Treaty was rejected by the House of Commons.

² *Consolidated Version of the Treaty on European Union*, 2012 OJ C 326/13, Article 50(2)

³ See 'Jean-Claude Juncker interview: As it happened', Florian Eder, *Politico*, 10 June 2019

⁴ See *European Union (Withdrawal) Act 2018*, c. 16, s. 13(1)(a)

⁵ See *Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom*, 2019 OJ C 66 I/185

The very general and ill-defined nature of the Political Declaration reflects the lack of agreement within the UK on what kind of future relationship we want with the EU. Should it be as close as that of Norway or Switzerland or as distant as that of Canada? Without agreement within the Government (and the Commons) on what exactly we want, no agreement can be negotiated.

Objections to the Withdrawal Treaty & the Political Declaration

The main objections that have been voiced to the existing Withdrawal Treaty are:

- the Northern Ireland backstop and the consequences its implementation would have for the UK in terms of the relationship with the EU, the implications for the Union (both the perceived threat to Northern Ireland's relationship with the rest of the UK and to that between Scotland and the UK) and for trade with non-EU countries;
- the absence of detail on the future relationship with the EU, as explained above;
- the £39 billion financial settlement, which meets the UK's existing financial obligations; critics both denounce the amount involved, and in some cases, the principle of paying anything at all to the EU.

In addition, some critics of the Withdrawal Treaty argue that Theresa May's whole approach was heading towards too close a future relationship with the EU when, they claim, the UK would benefit from moving further away from the EU in some ways, notably by leaving the customs union and by adopting different product regulations.

It is important to note that while a majority of MPs have rejected the Withdrawal Treaty, the opposition to it comes from groups with diametrically opposing views of the UK's relationship with the EU. For example, some MPs reject the Treaty because it heralds (as they see it) too close a relationship with the EU whilst others oppose it because they think the UK should have a closer relationship than Prime Minister May was seeking, for example allowing the UK to participate in a customs union.

Obstacles to re-opening the negotiations

There are considerable obstacles to re-opening the negotiations and reaching agreement by 31 October. They include:

- the lack of time; there are little more than 20 UK parliamentary days to the current appointed exit day of 31 October 2019; and in addition the European Parliament has not yet ratified the agreement;⁶
- the European Council decision of 22 March prohibiting the re-opening of the Withdrawal Treaty would have to be amended and that would require unanimity among the EU27;
- political constraints on the EU27 – they want to avoid concessions to the UK that would create a precedent that might tempt other Member States out of the door; and they have been consistent in supporting the Irish Government's position on the need to avoid border controls in Ireland;

⁶ Calculation based on suggested dates in 'Brexit: How the timetable could unfold to 31 October', Chris Morris, *BBC News*, 30 May 2019 (amended to take into account summer recess dates)

- but they don't want to punish the UK, nor do they want to be responsible for the chaos that they believe would result from a no deal Brexit – which points towards the possibility of a further extension of the deadline rather than renegotiation;
- the EU is also absorbed in its five-yearly cycle of senior appointments, when the presidents of the Commission and the European Council change, along with the remaining commissioners and the High Representative for foreign and security policy;⁷
- in the UK, the Government's room for manoeuvre is limited by the absence of an effective government majority in the Commons (or, indeed, the Lords);
- disagreements within the governing party itself and wider tensions within both the Conservative Party and the Labour Party that have so far made it impossible to reach agreement on what kind of relationship with the EU the UK should have in future;
- legal obstacles limiting the ability of the EU27 and the UK to adopt different ways of doing things because (for example) they would breach the General Agreement on Tariffs & Trade (GATT) or other international legal obligations such as the Good Friday/Belfast Agreement; there maybe workarounds in some cases but not all;
- political will – is there the political will to seek an alternative deal among the EU27, as well as in the EU's institutions? Does the UK Government, and importantly, parliament, have sufficient consensus that it can cut through the difficulties of the last three years and reach what inevitably will be a compromise?

Options for the UK Government

Changes to the Northern Ireland backstop

As many of the objections to the Withdrawal Treaty relate to the backstop, there has been much discussion about alternative approaches to safeguarding an open border after Brexit. The UK and the EU committed in March 2019 to a programme of work to examine technological solutions (designed to avoid customs checks at the border) and the UK Government has now established an advisory group to take this work forward.⁸ An Alternative Arrangements Commission has also been established by the Prosperity UK think tank to address the same issues.

In both cases the focus has been on trusted trader schemes and other methods of maintaining controls while avoiding the need for border posts and searches of vehicles. The UK and EU programme of work is intended to be completed by the end of the transition period but the EU has pointed out that there is no country in the world where such a solution operates at its borders.⁹ The Irish Government has also said that its own work to find technology-based solutions has not produced a workable solution.¹⁰

Another alternative that has been suggested is that the UK and the EU could apply a time limit to the duration of the backstop. But such an arrangement would negate the backstop as a viable policy; it is intended as an insurance policy if no other arrangements can be agreed, so a time limit would render it worthless.

⁷ See Dr Nick Wright & Dr John Paul Salter, 'The European Council's busy summer spells trouble for the Prime Minister', UK in a Changing Europe, 8 July 2019

⁸ See HM Government, 'Technical advisory group on alternative arrangements to the backstop established', 20 June 2019

⁹ Sabine Weygand quoted in 'Brexit backstop: Can technology solve the Irish border problem?', Tom Edgington, *BBC News*, 1 February 2019

¹⁰ 'No deal Brexit a political and economic threat, Ireland warns', Rory Carroll & Lisa O'Carroll, *The Guardian*, 9 July 2019

It has been argued that the UK and Ireland could retain free trade between each other despite the most favoured nation rule of the GATT by seeking a waiver under a provision in Article XXIV that allows for special arrangements on the border of “adjacent countries in order to facilitate frontier traffic” but this approach has far narrower uses elsewhere and it would not remove the need for customs, phytosanitary, animal health and other regulatory checks.¹¹

Some commentators have suggested that the UK could unilaterally invoke Article XXI of the GATT, which concerns exemptions from trade rules for reasons of national security. Article XXI (b) provides that a country cannot be prevented “from taking any action which it considers necessary for the protection of its essential security interests” are not defined in the agreement. In analogous international investment disputes, “national security” has been interpreted to mean “national emergency”.¹² This would only be workable if the EU also invoked Art. XXI and, in addition, it is not clear whether it would stand up to legal challenge.

The way the backstop has been drafted by the EU and the UK has been challenged by Professor Paul Bew (and others) as being in itself a violation of key principles in the Good Friday Agreement. These critics argue that it is a false argument to say that only the backstop can protect the Good Friday Agreement. Indeed, Professor Bew has written:

There is no mention of a frictionless border in the terms of the Good Friday Agreement; nor is the UK committed to preserving a frictionless border under its previous commitments in international law.¹³

But Professor Bew does not take account of the fact that the absence of references to this in the Belfast Agreement was because both parties (the UK and Ireland) were Member States of the EU and expected to remain so. If they had not been there would have had to have been explicit provisions on external trade to secure an open border.

The Government of Theresa May agreed with the proposition that without the special arrangements in the Withdrawal Treaty, the UK would not be in a position to fulfil its obligations under the Good Friday Agreement. Should the Government of Boris Johnson take a different position, then it will be open to legal and political challenge.

The 10 references to the border in the Good Friday Agreement are repeatedly associated with measures to ease cross-border co-operation and movement. As Professor Bew goes on to acknowledge, what he calls the “melting away of the hard border” has been an organic part of the peace process. It was written in the context of the UK and Ireland both being members of the EU (and therefore in a customs union with one another), as the frequent references to the EU attest, and in the context of the Common Travel Area, which removed the need for passport and other checks on UK and Irish citizens moving between the jurisdictions as long ago as 1922.

There are three other important factors that make replacing or changing the backstop difficult. The first is that Northern Ireland, unlike the UK as a whole, voted Remain in the 2016 referendum.

¹¹ The provision is in Art. XXIV (3)(a); see Chloé Papazian, *Trading Under World Trade Organisation Terms Only: Consequences for the Irish Border*, DCU Brexit Unit, Working Paper N. 10, October 2018, pp. 9-10

¹² Discussed in ‘Using GATT Security Exception for Brexit-Irish Border Issue: Is it Sensible or Fantasy?’, Bashar H. Malkawi, *International Economic Law & Policy Blog*, 21 December 2018

¹³ Lord Bew, *What do we want from the next Prime Minister? A series of policy ideas for new leadership: The Backstop*, Policy Exchange, 26 June 2019, p. 10

This makes the backstop especially sensitive. The second factor is the collapse of the power-sharing arrangements in Northern Ireland, with the devolved institutions currently in limbo. This adds to uncertainty around Brexit and removes a forum through which cross-community agreement might be reached on Brexit issues. The dependence of the current Government on the DUP's MPs in the Commons for its majority, adds an additional layer of complication.

Partial Withdrawal Treaty

Boris Johnson has repeatedly suggested that that he would “disaggregate” the Withdrawal Treaty and seek parliamentary approval for parts of it, excluding the backstop.¹⁴ In practice this is a re-writing of the Withdrawal Treaty and it could not be done without the EU's consent. It is not clear why Johnson thinks the EU would be likely to agree to such an arrangement, especially as it is usually associated with two other ideas: placing a time limit on the backstop or remitting it for later negotiation.

Temporary trade treaty with the EU

Johnson is one of a number of MPs to suggest that under Article XXIV (5) (b) of the GATT treaty it would be possible for the UK to enjoy its current tariff-free trading arrangement with the EU for up to 10 years after Brexit whilst we negotiate long-term trade arrangements. This is an interpretation of Art. XXIV which has been discussed over the last two years and is sometimes called a temporary or interim trade agreement or a waiver.

There are two flaws in this proposal. The first is that Art. XXIV provides no unilateral right for a country to adopt such an approach, it would require the EU's consent and it seems highly unlikely they would agree to such an arrangement. The second is that it also relies on the two sides adopting a plan and a schedule for the free trade agreement before 31 October 2019 but the EU has said it will not negotiate the future relationship with the UK until after it has left.¹⁵ As the Director-General of the World Trade Organisation has pointed out: “If there is no agreement, then Article XXIV would not apply, and the standard WTO terms would”. That would mean UK exports facing tariffs on entering the EU and vice versa.

It is also important to grasp that GATT covers only trade in goods and not in services; although the UK has a deficit in trade in goods with the EU, it has a surplus in trade in services. So even if such an arrangement could be reached with the EU it would only cover only a part of UK trade with the EU (goods) but exclude the trade in services.

Agree an outline future relationship with the EU

A further proposal is that the UK and the EU should agree on their future relationship before Brexit, so that only a short period would follow before permanent trading arrangements would come into force. But EU law prevents a UK-EU treaty before Brexit. It would be possible to expand the political declaration to include an outline of a future agreement but this approach would require agreement in the Conservative Party about what sort of future relationship the UK wants with the EU. It is hard to see how the splits in the Conservatives could be overcome in the time available (if at all) nor is it clear that there would be a majority for the Government's preferred solution in the Commons.

¹⁴ For example in a BBC interview; see ‘Boris Johnson calls for withdrawal agreement to be broken up’, Denis Staunton, *Irish Times*, 14 June 2019

¹⁵ This proposal has been considered by Full Fact; see Claire Milne, ‘Does WTO Article 24 allow us to have tariff-free trade with the EU?’, Full Fact, 15 March 2019

A related proposal from Johnson has been that the UK should withhold the £39 billion that Theresa May's Government agreed to pay over several years in settlement of the UK's existing financial liabilities to the EU. The purpose of this would be to get a better deal from the EU but given that the UK has already accepted that it has to meet its existing financial obligations, and that the EU would be likely to refuse to negotiate if the current undertaking was withdrawn, it is a tactic of questionable utility.

The one context in which the EU might be willing to re-open the Withdrawal Treaty is if the UK would move towards a closer long-term relationship with the EU (e.g. membership of the Single Market) or accept a Northern Ireland only backstop. Neither of these possibilities has been supported by the current Prime Minister.

No deal Brexit

The default legal position is that the UK will leave the EU on 31 October 2019, whether or not we have ratified the Withdrawal Treaty. The Senior Experts have published a detailed paper examining the damaging consequences of a no deal Brexit.¹⁶ Given that it is now being proposed as a policy option in the belief that it will make the EU agree to a better deal for the UK, it is worth summarising the main consequences:

- the UK would face a period of economic disruption unprecedented since the war; academic studies have suggested this could mean a severe downturn;¹⁷ how long disruption would last would depend on the willingness of the EU to assist the UK to mitigate its worst effects (e.g. by limiting or suspending border checks on British exports for a period); so far, the EU has indicated that it would take some short-term action of that kind in order to protect the EU's interests (mostly in aviation and road transport but not trade) and not those of the UK;
- economic disruption of this kind would have significant social consequences, for example because of potential shortage of vital medicines, the loss of employment as some companies went out of business and the impact of a likely rise in consumer prices;
- the downturn in the UK economy that would follow would create fiscal problems (highlighted by Philip Hammond on 2 July), which is why the May Government set aside £26 billion for such a situation; no one can predict whether that amount would be sufficient to cover the shortfall in tax revenues but the recent Office for Budget Responsibility report on fiscal risks suggested £30 billion a year was more likely and even that would depend on a "relatively benign" scenario;¹⁸
- the UK has been a consistent advocate of the rules-based international order since 1945; its unilateral withdrawal from a major treaty, despite three years of negotiation, would do serious damage to Britain's standing in the world;
- the absence of a UK-EU trade agreement would make it harder, not easier, for the UK to negotiate trade agreements with third countries as they would need to know what arrangements the UK would have with the EU before opening talks with us;

¹⁶ Senior European Experts, *What does a "no deal" Brexit mean?*, September 2018

¹⁷ National Institute for Economic and Social Research, 'Press Release: Prospects for the UK economy - August 2019 Review', 22 July 2019

¹⁸ Office for Budget Responsibility, *Fiscal risk report – July 2017*, 13 July 2019, p. 4, para 7

- there would be multiple legal challenges to the Government's actions, both at home and abroad, not least because a no deal Brexit would seriously disadvantage the interests of two million UK citizens living in the EU/EEA;
- the EU would refuse to open talks with the UK until it agreed to pay the £39 billion; should the UK continue to refuse to pay, it could face action in international courts for recovery of the money; it is also possible that not paying would be treated by some countries as a sovereign debt default (as the French government has hinted) and that could result in the UK's credit rating being down-graded.¹⁹

Supporters of a no deal Brexit often suggest that these sorts of impacts need not occur because the UK and the EU could agree to a range of measures to mitigate its effects – a “managed no deal”. But this assumes the EU would wish to respond and that the two parties could quickly get down to negotiations on a new trade agreement. If the UK withheld the £39 billion, the EU would be certain to make paying it a precondition of any trade talks, along with agreement to protect the rights of EU citizens and measures to avoid a hard border in Ireland.

The bottom line is that the EU buys about 44 per cent of the UK's exports but we only buy seven per cent of theirs. This makes a no deal Brexit a far bigger risk to the UK than the EU.

Conclusion

Re-opening the negotiations on the Withdrawal Treaty could well be rejected outright; and would, at best, be unlikely to yield more than cosmetic changes. The EU has repeatedly stated its unwillingness to re-open it, regards its terms as a consequence of UK red lines (excluding the Court, the Single Market and customs union) and is determined to remain united. There are no indications of any pressure on the Irish Government to back down over the backstop.

If the UK could agree internally on what it wants from its long-term relationship with the EU and parliament endorsed that, then there would be scope to expand the current Political Declaration. But this approach runs the risk of the debate in parliament once again getting bogged down; any new arrangements seem unlikely, in the EU's opinion, to avoid the necessity of the backstop.

Despite the objections of Johnson to further extensions of the deadline beyond 31 October, given the scale and complexity of the task facing the new prime minister, it is unlikely he will be able to finalise a new agreement with the EU by then; and that will pose the question whether Parliament can compel such a further extension and prevent exit without a deal.

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¹⁹ See 'Legal hazards but no default seen if Britain doesn't pay Brexit bill', Marc Jones, *Reuters*, 10 June 2019



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