

EDITORIAL COMMENTS

Brexit into extra time . . . again

On 23 June 2016, the referendum in the UK resulted in a majority of 51.9 percent of votes cast being in favour of leaving the European Union. Today, almost three and a half years later, Brexit is still very much unfinished business. Three “Brexit-days” have come and gone by now. This time too, the process has gone down to the wire. On 17 October 2019, barely two weeks before the 31 October Brexit date agreed following the previous request for an extension, the text of a revised Withdrawal Agreement was agreed between the UK government and the EU-27. UK Prime Minister Boris Johnson was determined to get this “great new deal” and the necessary implementing legislation approved in time by the UK Parliament.¹ Even more so, the Prime Minister wanted to keep his promise of delivering Brexit by 31 October – leaving the Union without a deal, if need be. Twice, however, he snatched away Parliamentary defeat from the jaws of victory. The House of Commons refused to pronounce itself on the new Withdrawal Agreement without first having had the opportunity to scrutinize the implementing national legislation; and secondly, it constrained the Prime Minister into asking the European Council for an extension of the Article 50 TEU period, in compliance with the terms of the recently adopted European Union (Withdrawal) (No. 2) Act 2019, known as the Benn Act.² The House of Commons may remain as divided as ever over Brexit, but it is equally steadfast in its determination to avoid the scenario of a No Deal Brexit. And as this sentiment is shared by the leaders of the EU-27, the European Council honoured this request, approving a “flexextension” that could last until 31 January 2020, but which gives the UK the possibility to leave the Union sooner if the withdrawal agreement has been ratified by the UK and the

1. Prime Minister Boris Johnson on Twitter: “We’ve got a great new deal that takes back control – now parliament should get Brexit done on Saturday so we can move on to other priorities like the cost of living, the NHS, violent crime and our environment”, 17 Oct. 2019.

2. The Act (named for its parliamentary sponsor Hillary Benn) requires the UK Prime Minister to seek an extension to the Brexit withdrawal date if the House of Commons does not give its consent to either a withdrawal agreement or a “No Deal Brexit” by 19 Oct. 2019. It is available at: <www.legislation.gov.uk/ukpga/2019/26/enacted>.

European Parliament.³ This further delay is almost bound to trigger new twists and turns in what is more and more akin to an absurd theatre play ...

A major bone of contention: The backstop

It is not the first time the EU and the UK find themselves in this position. A draft Agreement on the Withdrawal of the UK from the EU was reached eleven months earlier, in November 2018.⁴ Former UK Prime Minister Theresa May put it as much as three (!) times to a vote for approval in the House of Commons, only to see it defeated on every occasion by a (large) majority of British Members of Parliament. The thorn in May's side was the notorious "backstop", a kind of insurance policy contained in the Protocol on Ireland and Northern Ireland attached to the Withdrawal Agreement, which would enable the border between Ireland and Northern Ireland to remain open after the UK's departure from the Union and pending other definite trade arrangements, in order to preserve peace on the island of Ireland and at the same time safeguard the integrity of the internal market.⁵ Under the backstop, if the UK and the EU did not reach an agreement on a future relationship by the end of the transitional period on 31 December 2020, there would be one single customs territory between the Union and the UK; and the Union Customs Code, which contains the provisions for releasing products into free circulation within the EU, would continue to apply to Northern Ireland.⁶ Northern Ireland would also remain aligned to a set of EU rules that are linked to the EU's internal market, such as legislation on goods, sanitary rules for veterinary controls, rules on agricultural production and marketing, VAT and excise on goods, and State aid rules. Furthermore, the backstop committed the EU and the UK to a level playing field based on open and fair competition and on the principle of non-regression from the current levels of protection under international and EU standards.⁷

3. "Prime Minister agrees to Brexit 'flexextension' until January 31", *Financial Times*, 28 Oct. 2019, available at: <www.ft.com>.

4. Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 14 Nov. 2018, available at: <ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf>.

5. Protocol on Ireland and Northern Ireland, p. 302 et seq. of the draft Withdrawal Agreement, see *supra*, note 4.

6. Art. 6(2) Protocol 2018.

7. See also European Commission, Fact sheet: Protocol on Ireland and Northern Ireland, 14 Nov. 2018, available at: <europa.eu/rapid/press-release_MEMO-18-6423_en.htm>.

The backstop, as its name suggests, was a fall-back option. In the Instrument relating to the Withdrawal Agreement, issued in March 2019, the UK and the EU explicitly recalled that the parties “do not wish the backstop solution to become applicable, that were it to do so it would represent a suboptimal trading arrangement for both sides, and that both parties are therefore determined to replace it with a subsequent agreement.”⁸ This reassurance was to no avail: opposition to the backstop remained fierce amongst Brexiteers, above all the so-called “European Research Group”. Especially problematic were the fact that it could theoretically last indefinitely and that the UK could not unilaterally denounce it.

Mainly because Prime Ministers May and Johnson needed to placate the extreme wing of the Conservative Party in order to reach a majority in Parliament, the backstop became the main bone of contention in the exit negotiations. This way, however, the UK Government manoeuvred itself in a position in which it was faced with an impossible dilemma: on the one hand, it wants to honour the 1998 Good Friday (Belfast) Agreement, which ended the period of Troubles and restored peace in Northern Ireland, and it thus remains committed to prevent the reintroduction of a hard border between the Republic of Ireland and Northern Ireland;⁹ on the other hand, it wants to leave the EU’s internal market and its Customs Union and regain full control over its trade policy. The problem is that when the UK leaves the Union, the border between the Republic and Northern Ireland automatically becomes an external EU customs border, requiring all goods crossing it to receive EU (or UK) customs clearance. The EU, for its part, has been reiterating that barring a viable alternative, the Withdrawal Agreement, including the backstop, was not renegotiable. For months, both parties dug themselves into entrenched positions. Meanwhile, the rhetoric hardened, illustrated by Prime Minister Johnson’s outburst he’d rather “be dead in a ditch than ask for a Brexit extension” and the blame game intensified, as no party really wanted to be held accountable for a failure of the exit talks.¹⁰

On 2 October, Prime Minister Johnson launched a set of fresh UK Government proposals for a new Withdrawal Agreement in a letter sent to

8. Instrument relating to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 11 March 2019, available at <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785157/2019-03-11_Instrument.pdf>.

9. The Belfast Agreement, also known as the Good Friday Agreement, 10 April 1998, available at <www.gov.uk/government/publications/the-belfast-agreement>.

10. “Editorial comments: When the music finally stops, who’ll be left holding the Brexit parcel?” 55 CML Rev.(2019) 611–622.

Commission President Juncker.¹¹ Probably he was spurred to this course of action by a number of factors: the passing of the Benn Act in early September, which obliges the Prime Minister to ask for a Brexit extension if the UK Parliament has not given its consent to either a withdrawal agreement or a No Deal Brexit by 19 October; and possibly also the leaking of a so-called “Yellowhammer” document, outlining the potentially disruptive and even outright disastrous consequences of a No Deal Brexit.¹² These proposals set out what Prime Minister Johnson believed to be “a fair and reasonable compromise”, “a broad landing zone in which . . . a deal can begin to take shape”. Concretely, the UK Government proposed a new Protocol on Ireland and Northern Ireland, removing the backstop from the Withdrawal Agreement. The backstop in essence always presupposed a close future relationship between the EU and the UK. While this might have been the goal of the previous UK government, Prime Minister Johnson made it unequivocally clear this is not the intention of the current Government. The future EU-UK relationship should instead be based on a free trade agreement, while the UK takes full control of its regulatory affairs and trade policy.

It was evident that these proposals would not be acceptable to the EU as they stood, but certain elements could provide the basis for further discussion, such as the creation of an all-island regulatory zone on the island of Ireland, covering all goods including agrifood, so that Northern Ireland would continue to align with EU regulation on goods, thus eliminating the need for regulatory checks on trade in goods between Northern Ireland and Ireland. The UK’s proposed new customs arrangements – customs processes to ensure compliance with EU and UK customs regimes would still take place, but this would be away from the border, on a decentralized basis, with paperwork conducted electronically and “only a very small number of physical checks at traders’ premises or other points of the supply chain”¹³ – were not deemed viable by the EU. Equally problematic was the proposal that the all-island regulatory zone for goods would be contingent on the approval of the Northern Ireland Assembly and Executive for its entry into force – also bearing in mind that the Assembly is in a period of suspension, after it

11. Letter from the Prime Minister to Jean-Claude Juncker, President of the European Commission, 2 Oct. 2019, available at: <www.gov.uk/government/publications/uk-proposals-for-a-new-protocol-on-irelandnorthern-ireland>.

12. Operation Yellowhammer, HMG Reasonable Worst Case Planning Assumptions as of 2 Aug. 2019, available at <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831199/20190802_Latest_Yellowhammer_Planning_assumptions_CD_L.pdf>.

13. Explanatory note on UK proposals for an amended Protocol on Ireland/Northern Ireland, 2 Oct. 2019, available at <www.gov.uk/government/publications/uk-proposals-for-a-new-protocol-on-irelandnorthern-ireland>.

collapsed in January 2017 – and furthermore temporary, as the Northern Ireland Institutions would have to endorse this arrangement every four years. This requirement would effectively give these Institutions the opportunity to unilaterally issue a veto, the use of which would cause the whole regulatory edifice to collapse.

The EU made it clear that it was not willing to replace the permanent nature and the certainty of the backstop with an untested system of customs controls that was furthermore entirely dependent on the consent of the Northern Irish political institutions. This rejection could have set the negotiations completely adrift; however, after a constructive bilateral meeting of the UK Prime Minister with his Irish counterpart, the EU-27 leaders tasked the European Commission's Chief Brexit negotiator Barnier with conducting "last chance" negotiations in an ultimate attempt to reach a compromise solution before the start of the 17–18 October European Council.

"Where there is a Will, there is a Deal"

In the morning of 17 October, after days of frantic negotiations, with all European leaders already heading for the European Council, and all hope for a positive outcome seemingly vanished, white smoke suddenly emerged from EU headquarters in Brussels. European Council President Tusk broke the news, twittering "Where there is a will, there is a #deal- we have one!", and adding that the new Withdrawal Agreement was testament to both parties' commitment to finding solutions.¹⁴ This last statement underscores reality. In the end, both the UK and the EU were willing to make significant concessions, thereby stretching or even crossing some of their so-called red lines.

As a preliminary remark, before zooming in on the most important changes in the revised EU-UK Withdrawal Agreement, it must be emphasized that approximately 95 percent of the text of the original November 2018 Withdrawal Agreement has remained unchanged (in particular the provisions on the Exit Bill, citizenship rights, the transition period, etc.). In essence, only the Protocol on Ireland and Northern Ireland and the Political Declaration on the future EU-UK trade relationship underwent changes. These changes have profound repercussions for the whole of the UK though.

Most importantly, Prime Minister Johnson ultimately agreed to having an EU customs border in the Irish Sea, in spite of all UK's previous claims that such a border would undermine the sovereignty and the territorial integrity of

14. Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement, 17 Oct. 2019, available at <ec.europa.eu/commission/publications/revise-protocol-ireland-and-northern-ireland-included-withdrawal-agreement_en>.

the UK, and his predecessor famously stating that “no UK Prime Minister would ever accept” such a solution. Legally speaking, after the transitional period, Northern Ireland will be part of the customs territory of the UK only.¹⁵ Importantly, there is thus nothing to prevent the UK from including Northern Ireland in the territorial scope of its future trade agreements with third countries.¹⁶ In practice, however, EU customs law remains applicable in Northern Ireland, and Northern Ireland must align with most EU regulation on goods.¹⁷ All goods brought into Northern Ireland, either from outside the Union or from another part of the UK, will be subject to EU customs duties when these goods “are considered to be at risk of subsequently being moved into the Union”.¹⁸ And goods are in principle considered to be at risk of subsequently being moved into the Union, unless (a) they will not be subject to commercial processing in Northern Ireland and (b) the Joint Committee¹⁹ decides that they are not.²⁰ Goods coming from another part of the UK which do not fall under these two categories, can enter Northern Ireland freely; goods brought into Northern Ireland from a third-country without there being a risk they will move to the Union, are subject to the UK customs tariff.

Allowing the customs border between the Republic of Ireland and the UK to be located in the ports and the airports of Northern Ireland, the UK honoured its self-proclaimed top priority in the discussions, respect for the Good Friday Agreement, paving the way for lasting peace and stability in Northern Ireland. It does so in a way, however, that entails a different treatment for Northern Ireland from the rest of the UK. This will be hard to accept for the unionist community in Northern Ireland and could prove costly in the Prime Minister’s attempts to get the revised Withdrawal Agreement through Parliament in Westminster, for which the votes of the Democratic Unionist Party may be essential.

15. Art. 4(1) Revised Protocol.

16. That is, to the extent that these agreements do not prejudice the application of the Northern Ireland/Ireland Protocol. See Art. 4(2) Revised Protocol.

17. Arts. 4–10 Revised Protocol: e.g. Arts. 4 and 5 deal with customs; Art. 7 with regulatory controls: regulations, assessments, registrations, certificates, approvals and authorizations.

18. Art. 5(1–2) Revised Protocol.

19. See Art. 164 Withdrawal Agreement. The governance of the Withdrawal Agreement is entrusted to a Joint Committee, composed of UK and EU representatives and co-chaired by the UK and the EU. The Joint Committee is responsible for the implementation and the application of the Withdrawal Agreement.

20. Art. 5(2) Revised Protocol. For the purposes of this paragraph, “processing” means any alteration of goods, any transformation of goods in any way, or any subjecting of goods to any operations other than for the purposes of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements.

Obviously, the instalment of a customs border in the Irish Sea will have important repercussions for Northern Ireland and also affect the rest of the UK. There is of course the abovementioned issue of customs controls on goods moving from any part of Great Britain to Northern Ireland, i.e. within the UK. This means two customs regimes will run simultaneously on UK territory. This will lead to extra costs and administrative burdens for businesses and consumers. The Revised Protocol provides the UK with the possibility to reimburse customs duties or compensate undertakings to offset the impact of these customs duties under circumstances, provided this does not amount to State aid.²¹ There is also the issue of who bears the responsibility for these customs controls. Previously, the EU had rigorously maintained that in order to protect the integrity of the internal market, the external border customs and regulatory checks on goods, *inter alia* with regard to issues such as food safety, could not be outsourced to a third country. In the end, however, the EU agreed to UK customs authorities bearing the primary responsibility for customs controls and regulatory checks on goods entering the EU internal market from Northern Ireland in the near future.²² Union representatives will have the right to be present during their activities and the Court of Justice will have jurisdiction in the event of disputes.²³ The entire solution is remarkable: it is by no means common practice for the UK to allow “foreign” (*in casu* EU) authorities to monitor UK customs officers; it is also unusual to require UK officers to apply foreign (EU) customs regulations, which have therefore force of law in the UK.²⁴ EU Chief negotiator Barnier commented on this issue by simply stating that unique situations require exceptional solutions.

Crucial in the search for a “fair and reasonable compromise” was the EU’s concession to revise the backstop. Contrary to what the UK Prime Minister claimed, however, it has not really been removed, it has simply been called something else. And furthermore, it has been turned into a semi-permanent feature of the Withdrawal Agreement. Until now, the backstop functioned as the ultimate insurance policy: barring a viable and ironclad alternative, it would enter into force after the end of the transitional period and remain untouched, until it was superseded by a new EU-UK trade agreement. Ultimately, when Prime Minister Johnson settled for a Brexit scenario in which Northern Ireland and the rest of the UK would both leave the EU Customs Union, but the EU’s external customs border would be located in the

21. Art. 5(6) Revised Protocol.

22. Art. 12(1) Revised Protocol.

23. Art. 12(2) Revised Protocol.

24. At the same time, it is worth mentioning that this is common EU law practice: in fields such as the European Arrest Warrant or the social security coordination regime.

Irish Sea, so that Northern Ireland would in practice remain under EU Customs law and align with most EU regulations on goods, he essentially returned to the original EU proposal of a Northern Ireland backstop only. In return, the EU conceded on the issue of democratic consent: it rejected a Stormont right of veto on the introduction of the new customs and regulatory arrangements, but agreed to a mechanism of democratic consent for their continued application. Four years after the entry into force of the new customs regime, the Northern Irish political institutions will have the opportunity to continue or abandon it. If they choose to end them, the customs arrangements will cease to apply two years later. In view of the possible repercussions such a decision would have on the Good Friday Agreement, i.e. in principle a hard border between Northern Ireland and Ireland would be reinstated, the Joint Committee will make recommendations to the UK and the Union on the measures to be taken.²⁵ Conversely, if the majority of the members of the Northern Irish Assembly, present and voting, votes to maintain the regime, its continuation will be extended for another four years; that period becomes eight years if the customs regime generates “cross-community support”.²⁶ Cross-community support means either “a majority of the Members of the Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or a weighted majority (60%) of the Members of the Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.”²⁷

Apart from the Protocol on Ireland and Northern Ireland, the only part of the Withdrawal Agreement that has been (slightly) revised is the Political Declaration setting out the framework for the future relationship between the EU and the UK.²⁸ The biggest change is to be found in paragraph 77, in which it is stated that the future relationship “must ensure open and fair competition, encompassing robust commitments to ensure a level playing field... These commitments should prevent distortions of trade and unfair competitive advantages.” To reach this goal, the common high standards in the fields of “State aid, competition, social and employment standards, environment, climate changes and relevant tax matters” should be upheld. It is interesting to observe that the level playing field provisions, which originally formed part of the legally binding backstop, have now ended up in the non-legally binding Political Declaration. On paper, this may appear only a small change, but in practice it could have significant consequences for the UK in terms of what

25. Art. 18(4) Revised Protocol.

26. Art. 18(5) Revised Protocol.

27. Art. 18(6) Revised Protocol.

28. Revised Political Declaration, 17 Oct. 2019, available at <ec.europa.eu/commission/publications/revised-political-declaration_en>.

Brexit means. This particular move is grist to the mill of the Government's critics who fear the UK will endeavour to undercut EU workers' rights or environmental regulations and turn into a fierce competitor at the EU's doorstep, as a kind of Singapore-on-the-Thames. To contain this risk from the EU side, paragraph 77 of the Political Declaration goes on to state that the "precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties." It is probably also a good thing that Article 184 of the Withdrawal Agreement, which states that the Union and the UK shall "use their best endeavours, in good faith and in full respect of their respective legal orders," to negotiate expeditiously the agreements governing their future relationship, has remained unaltered.

The revised Withdrawal Agreement was endorsed unanimously by the leaders of the EU-27 at the European Council Summit on the afternoon of 17 October. The speed with which this decision was taken is surprising and significant at the same time. Clearly, the European Commission negotiators under Barnier had built up a strong atmosphere of trust over the last years. The EU-27 continuously maintained a united front. In all likelihood, the Irish Taoiseach Varadkar played a major part, convincing his EU counterparts that Ireland could live with the terms of the new arrangement. It probably also says a great deal about the Brexit fatigue in the EU, and the desire to get it over with, now that a new agreement has been found and the risk of a No Deal Brexit seemingly averted, so that attention can be focused on other issues, such as the multi-annual financial framework. The UK Prime Minister thus had to be given the opportunity, from the EU side, to complete all legal, administrative and technical formalities to be ready for Brexit on 31 October. Despite this breakthrough, the atmosphere in the European Council was far from buoyant. Most leaders remained cautious, all too aware that they had been in this position before; and limped on two thoughts, relief that a solution had been found, but also sadness to see a long-standing partner leave. The Irish Prime Minister probably summed up feelings best when he stated that "there will always be a place at the EU table for the UK."

House of Cards in the House of Commons

But of course, the deal wasn't done yet. After all the drama in Brussels, the Brexit circus immediately travelled back to London, supposedly for the big final act in Westminster on 19 October, where the House of Commons was supposed to support the Withdrawal Agreement in a so-called meaningful

vote.²⁹ All was set for a “Grand Event”, with the Commons convening on a Saturday for the first time in 37 years – the previous occasion being that of the Falklands War. The big question was whether the Withdrawal Agreement would generate enough support this time. This was far from certain. Prime Minister Johnson is the leader of a Conservative minority government. The Northern Irish Democratic Unionist Party, which had supported the government since 2017 on matters of mutual concern, had already expressed its disagreement with the deal. Labour leader Corbyn had rejected the deal, dismissing it as even worse than the previous one.

In the end, however, the totally unexpected happened. The Withdrawal Agreement was not even put to a vote. The House of Commons backed the so-called Letwin amendment, which was tabled to exclude the possibility of a No Deal Brexit in the event the UK implementing legislation would not be passed in time; the House therefore withheld approval of the Withdrawal Agreement until this implementing legislation has been passed.³⁰ As a result, the Prime Minister had no option but to ask the European Council for a further extension of the Article 50 TEU deadline. He did, but showed his disapproval by not signing the letter. Moreover, he *did* sign and send an accompanying letter, in which he clearly indicated he did not want further delay and vowed to get Brexit done by 31 October. Three days later, however, he had to surrender to the inevitable, when Parliament, after having first given its backing to the Withdrawal Agreement Bill, subsequently refused to be rushed into an – unrealistically short – three-day timeline to examine and approve it. Brexit will go into extra time . . . again. With the new Brexit date provisionally set on 31 January 2020, and the risk of a No Deal Brexit averted at least until then, the way to Parliamentary elections in December – and to who knows what afterwards – is now open . . .

An afterthought or two

If anything, the story-so-far shows how important avoiding a No Deal Brexit is, both to the UK Parliament and to the EU. This is something about the withdrawal process which the Article 50 TEU drafters perhaps did not appreciate strongly enough, in their desire to make sure a Member State could not be trapped into remaining against its will. It also shows the delicate balance in the whole process between the departing Member State’s and the

29. At the time of writing, it is not anticipated that the EU Parliament, which also still needs to approve the Withdrawal Agreement, will pose problems in this respect.

30. For more background and explanation, consult: <www.instituteforgovernment.org.uk/explainers/parliament-meaningful-vote-brexit>.

EU's constitutional requirements, a balance that remains crucial also after the Article 50 notification.³¹

More specifically, a lot has been said about the new Withdrawal Agreement; but this is of course not the end; at best, it constitutes the end of the beginning. The UK and the EU still have to start negotiating the future (trade) relationship. In principle, these negotiations are supposed to be concluded by the end of the transition period on 31 December 2020. It may be looking too much into the future, but given the time it has already taken to reach a deal on a Withdrawal Agreement – and that is meant to be the easy part – it is perhaps a suggestion to start thinking about extending the transition period already,³² as it seems highly unlikely that a free trade agreement or any other arrangement can be concluded by the end of next year.

31. For more background, see the 2018 Special Issue of *CML Rev.* on Brexit; in particular Hillion, “Withdrawal under Article 50: An integration-friendly process”, 55 *CML Rev.* (2018) Special Issue 29–56.

32. This possibility is envisaged in Art. 132 Withdrawal Agreement. Note that the official UK Government position, at least for now, is that it will not seek an extension of the transition period.