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What is the scope for re-opening the negotiations with the EU?

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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 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.

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.

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;
- 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 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

The 10 references to the border in the Good Friday Agreement are repeatedly associated with measures to ease cross-border co-operation and movement. long

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. 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.

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.

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.

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 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);

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
- 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;
- 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;
- along with agreement to protect the rights of EU citizens and measures to avoid a hard border in Ireland.

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.
