

## Brexit: Stumbling over the backstop?

*Fabian Zuleeg*

Approaching the June European Summit, it is becoming clearer by the day that the UK is not ready yet to move forward substantively. But postponing critical decisions to October increases the risk of no deal despite the dire warnings of leaked Whitehall advice that it could mean shortages of food, fuel and medicine. Business investment is already being hit, and companies are demanding more clarity, especially on the future customs and trading arrangements.

Seen from Brussels, the future economic relationship between the EU and the UK is for later, once the negotiations on the long-term relationship start in earnest during the transition period. Now, the focus is on the Withdrawal Agreement, with the only reference to the long-term arrangements relegated to a separate political declaration, which will set a (more or less concrete) direction of travel for the subsequent talks. The EU27, led by Ireland, is currently much more concerned with ensuring that the UK delivers on its commitment to a frictionless border, without physical infrastructure, between the Republic of Ireland and Northern Ireland.

### *A way forward on the backstop?*

The EU27 is thus insisting on the 'backstop' that was agreed to in December, i.e. a fall-back option that implies that Northern Ireland remains effectively in the Customs Union and Single Market, even if the rest of the UK does not. But politically, this is the trickiest issue for Prime Minister May: in Westminster, she relies on the votes of the DUP, which adamantly opposes the backstop.

Consequently, the UK hopes to find a frictionless border solution for the country as a whole, which could remove the need for the backstop. The most straightforward solution - the UK remaining in the Customs Union and Single Market - would split the Conservative party. Brexiteers see this option as not delivering a clean exit from the EU. May could seek support from the opposition, but in the confrontational bipartisan British political system this is a perilous route to take.

After weeks of disagreement, May's Cabinet has finally backed a new compromise: the so-called 'UK customs backstop' implies the UK as a whole would temporarily stay in the Customs Union after 2020 if no deal on customs arrangements emerges beforehand. The government stated it remains confident that it can, with more time, reach an agreement with the EU that would make the 'EU backstop' obsolete. It argues that even if it were needed, it would only be for a matter of months.

### *There are two sides in a negotiation*

But this will not be acceptable to Brussels. While the UK's commitment to stay in the Customs Union until a solution is found is welcome, it does not remove the need for the EU backstop in the long run. With the full backing of the EU, Dublin is adamant that the Withdrawal Agreement must include a legally binding long-term guarantee. Future promises are not credible, and uncertain, untested and temporary arrangements are hardly enough.

A temporary extension of the Customs Union alone will not fly either since it would qualify as cherry picking. It is technically challenging to continue the transition of one part of the economic relationship while ending others. Besides, continued

membership of the Customs Union would not fully answer the challenges of the Northern Ireland border where regulatory alignment, i.e. Single Market issues, are equally important.

In light of the EU's rejection, Brexit secretary David Davis allegedly suggested a solution that would see Northern Ireland covered by a joint regime of UK and EU customs regulations, as well as a 10-mile-wide 'special economic zone' on the border. This proposal was immediately dismissed by Downing Street and by the DUP, threatening to withdraw support from Theresa May, as well as by the EU27, which simply see this suggestion as unworkable.

### ***Buying some time***

What could be the way out? To square the circle, both sides should aim for including the possibility of a time-bound extension of the transition period in the Withdrawal Agreement. It would be a tricky solution to implement given the intricate legal issues regarding the EU's relations with third countries and the question of the strength of the legal base for such an extension, i.e. how long the transition can possibly be under the auspices of Article 50. But continuing the full transition *status quo* for a year or less (which respects the UK stipulation that it will only be a matter of months) should be doable, thus postponing the cliff edge to the end of 2021.

Theresa May would still have to face down the DUP over the EU backstop but, in Westminster, soft Brexiteers on both sides would probably welcome such an extension. Albeit noting that this is not enough in the long term, business would also be supportive. Conservative Brexiteers would find an extension of the transition hard to swallow, but they might be swayed: the extension is only temporary, and it prevents the Conservatives from splitting up just now. And, after all, they are getting their ultimate goal: an exit of the UK in March 2019.

### ***Restarting the debate***

The government could spin such an extension as not being a done deal, arguing that it implies a future Westminster decision to continue the transition (and paying for it) only if no agreement on the long-term relationship is found. But this is precisely why it could be a turning point: it forces the UK political system to return to the question of its red lines in the middle of the transition.

At that point, negotiations with the EU are unlikely to be closer to providing a deep and comprehensive trade deal that looks positive to the UK. The upcoming talks will indeed revolve around distributing the costs of market disintegration across sectors, with no gains from increased trade to be had. Many tricky issues will remain potentially unresolved, from fisheries to financial services. Nor is there likely to be a resolution for the Northern Ireland border, bringing the EU backstop back into play.

If the UK government were forced to ask for an extension of the transition under such circumstances (signalling a willingness to continue to pay), it would need the backing of Westminster. At that moment, a challenge to the Brexiteers' red lines is likely. With Brexit delivered, many will question the need to sacrifice the economic *status quo* to a small number of Conservative Brexiteers, especially since the next General Election will start to be in people's minds. So, a relatively small provision in the Withdrawal Agreement now might be the trigger for a future change in political direction during the transition, making a soft Brexit (such as a Norway+ arrangement) much more likely.

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