Briefing Paper by Dr Peter Brennan

May: 'may or ......maybe' and Ireland's Three Referendums

The UK Prime Minister Ms Teresa May has finally set out her wish for a clean EU exit and this will should come as no surprise: it reflects UK political realty. Nor should the Irish Government and the business community be too shocked at the UK's decision to seek a new strategic partnership with the EU - a 'bespoke' trade deal for goods and services based on customs rules - as such an arrangement will allow the UK to negotiate bilateral trade deals with third countries.

Now that we have a clearer line of sight in relation the UK's political intentions about Brexit, the business community can begin to assess not just the impact of Brexit but whether the EU-UK Treaties have, in fact, any chance of being ratified by the Member States.

Taking account of previous decisions of the Supreme Court in Ireland, a working assumption must be made that whatever legal agreements result from Brexit negotiations will have to be put to a referendum in Ireland.

Given the UK's declared mandate, the Exit Treaty should not take more than two years to negotiate. In fact, as the European Parliament elections take place in May/June 2019, many Member States will want a deal done several months before that date. The negotiations should be relatively straightforward as the UK does not wish to have the EU acquis applying within its jurisdiction; the House of Commons will pick and chose what EU Directives/Regulations may apply in the future in the UK including Northern Ireland. A clean break will probably result in a short Treaty which will deal primarily with legacy issues (such as the transfer of the EU bodies located in the UK; the status of UK citizens working in the EU institutions; and the UK's EU budget net liabilities), as well as the limits of the respective reciprocal rights of EU and UK citizens, border controls, and the practical operation of the Common Travel Area.

One of the most contentious issues will be the transitional arrangements that will apply between the date of the UK's EU exit (probably in 2020 but this will be impacted by the European Elections so could conceivably be sooner, particularly if the Treaty is concluded as envisaged above) and the entry into force of the Strategic Relationship Treaty. The UK's requirements will be based on the results of a series of sector impact studies that are nearing completion. Ireland's (and the EU's) negotiating stance should be informed by similar evidence-based analysis. Many questions remain open. For example, for how long will the reciprocal passporting of financial service be permitted; when will CAP payments stop; will the UK be excluded from the single energy market; and when will the UK disentangle its EU emissions trading arrangements?

The UK will also have to be given legal authority (by way of Treaty derogation) to negotiate its bilateral trade agreements with third countries during this interregnum.

The UK's Parliament will decide on the terms of the Exit Treaty and later in relation to the Strategic Relationship Treaty. It is assumed that HM Treasury will prepare a full impact assessment of the outcome of the negotiations. The UK Prime Minister dodged a question about the consequences if her own Parliament rejected one or both Treaties. In the wider European context the Exit Treaty must be approved at EU level by a qualified majority vote of the EU-27 i.e. by 55% of the participating members of the Council, comprising at least 65% of the population of these States. The reality is that if Ireland, Poland and seven small to medium sized countries decided to vote against the Exit Treaty they could not collectively block its ratification.

The Strategic Relationship Treaty - assuming it is an international treaty dealing with issues of shared competency - is, however, quite a different matter as its ratification may require a unanimous decision (common accord) by the EU-27 and possibly - depending on its scope - the consent of the European Parliament and perhaps that of some regional parliaments. The UK can therefore expect the negotiations on this Treaty to be much tougher as the EU may not be mindful to give de facto single market access privileges for goods and services outside an appropriate EU legislative framework and without a UK contribution to the EU budget (which Ms. May has again rejected). For instance, as the EU does not allow its closest European neighbours (Switzerland and Norway) financial service passporting rights it is unrealistic to assume that the UK will get such a competitive advantage.

If a short and sharp negotiation on the Exit Treaty becomes the highest priority it will take four years, perhaps longer, to negotiate a Strategic Relationship Treaty given that the UK wishes to have free trade in goods with the flexibility to impose tariffs on some imports; trade governed by EU customs union rules, but with no recourse to the EU courts in the event of disputes; full reciprocal trade in services, without any EU standards or rules applying; and the option of becoming a tax haven at the same time, while ignoring WTO rules on subsidies. You must admire the UK's level of ambition for a post-Brexit deal.

If this Treaty results in a major disruption to the Irish economy; a potential of deterioration of the Exchequer's position; and the introduction of UK tariffs on some sensitive Irish agri-food products, will the Irish electorate vote 'Yes'? Unlikely. And there are many other Member States that are not as sympathetic to the UK as we are; those countries that will have their citizens banned from the UK (in preference to Commonwealth citizens) may not be inclined to ratify a Treaty that runs contrary to the principles of the single market.

In fairly short order, the UK will need to have a Plan B as the spokes will almost inevitably fall off their proposed 'Bespoke' Treaty. As a limited WTO-type trade deal could be ratified by Qualified Majority Voting expect this solution to become the EU-UK's default position; the least worst option for all parties.

On the basis of her statement at Lancaster House, my feeling is that the UK may secure a deal on an Exit Treaty but fractious and bitter politics over many a long year will prevent the UK from attaining a Strategic Relationship Treaty that reflects Ms. May's political objectives. Years of significant uncertainty will take its toll on UK investors and businesses, financial service companies, exporters and importers, and UK citizens operating businesses across the EU on the basis of EU recognised professional qualifications.

A basic premise of the 1999 Good Friday Agreement, an international treaty recognised by the Vienna Convention (of the law of Treaties), was that the relationships between the Northern Ireland Administration and the Irish and UK Governments should be developed as 'partners' within the European Union. The Exit Treaty may therefore require the Good Friday Agreement to be amended and in such an event changes will have to be ratified by a referendum on both sides to the border. If it becomes clear during the early negotiations on the Exit and the New Relationship Treaties that the economy of Northern Ireland is being put at risk by the UK Government - or not protected to secure the status quo - the current majority in Northern Ireland that voted in favour of 'Remain' may grow. In such a scenario, the option of Northern Ireland remaining in the EU as part of a federal Ireland would have to be considered; the same political model that united East and West Germany. How would the Irish electorate vote if such a proposition was put to a referendum? Could a united federal Ireland be a long-term indirect result of Brexit?

Ms. May is going to have to provide leadership during the course of the most contentious, fraught and politically important negotiations affecting these islands for many generations. Expect a very bumpy ride not least because the Conservative Party is not associated with the main political groups at European level; she has few allies at the negotiating table.

A final observation: the major beneficiaries of the Lancaster House statement are the UK's former colonies whose citizens it appears will not have to comply with EU immigration controls; whose investors will benefit from the UK's tax haven status; and whose goods will benefit from UK tariff preference.