

Belgian Luxembourg Chamber of Commerce in Ireland

Will Brexit Happen? by Dr Peter Brennan

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Introduction

The commentary to date on Brexit has focused on the politics, the likely outcome of the negotiations and the consequences of the new arrangements.

There has been limited analysis of the negotiation processes that will give effect to Brexit. This is the topic that I would like to focus on this evening.

There are many barriers to be overcome before the Withdrawal Agreement, which will provide for the UK's departure from the EU and European Atomic Energy Community (Euratom) treaties and the New Relationship Treaty(ies), which will outline the terms of the future relationship between the UK and the EU, are respectively approved and ratified by the UK Houses of Parliament, the European Parliament, the EU-27 and (perhaps) eleven regional assemblies.

Before I talk about ratification ramifications, it might be helpful to explain what will be in the Withdrawal Agreement that is the subject of on-going negotiations between the European Commission (on behalf of the EU-27) and the UK Government.

Withdrawal Agreement

The main aim of this Agreement is to ensure an orderly withdrawal of the UK, its overseas countries and territories and Gibraltar from the EU and its Treaties and Protocols, and from the European Atomic Energy Community.

The backdrop is that the UK's EU membership and the application of all EU legislation in the UK ends automatically at midnight on 30 March 2019 regardless of the outcome of the negotiations on the Agreement.

The Agreement will cover the following issues that pertain to the exclusive competence of the EU.

1. The UK's future economic and security relationships with the EU.
2. Transitional arrangements over a defined period before this new relationship takes effect.
3. The UK's contribution to the EU budget in respect of legacy issues, for example, its share of funds approved but not drawn down, staff pensions payments and the specific costs related to the withdrawal process. A schedule of payments will be agreed.
4. The status and rights of UK and EU citizens and their families, including residence rights and, importantly, the mutual recognition of professional qualifications.
5. The Common Travel Area.
6. Migration controls.
7. The status of the EU institutions in the UK.
8. The status of UK officials currently employed by the EU institutions.
9. Euratom issues, including the transfer of UK nuclear material and waste held in other Member States.
10. The situation of goods and services placed on the market before the withdrawal date.
11. Arrangements relating to judicial cooperation proceedings in civil, commercial and criminal matters governed by Union law which are ongoing on the withdrawal date, and ongoing infringements and Court of Justice cases involving the UK, for example as regards State aid.
12. The effective enforcement of the commitments under the Agreement by a Joint Committee that will include the role of the Court of Justice of the European Union and a dispute settlement mechanism.

What is striking about this list of legal and procedural issues is that none of them – apart from setting a date for the end of a transitional period and perhaps an outline of what the new economic relationship will cover - relate to the topics that are direct and immediate interest to business.

Crucial issues to business will, in the main, be negotiated after the Withdrawal Agreement is approved.

State of Play

I read Prime Minister's May's Florence speech with an open mind and came to the conclusion that nothing of substance was said to advance the negotiations to a stage where significant progress was recorded.

PM May confirmed what UK business had been pressing for; the need to have a transitional arrangement should the UK leave the EU on 30 March 2019.

She also confirmed the obvious in relation to the UK's contribution to the EU budget. For as long as the UK remains a member it will continue to pay its agreed contribution. What happens in relation to legacy liabilities is still very unclear.

We know what the UK does not want; no Single Market; no Customs Union; no EEA arrangement; and no deal based on the EU-Canada or EU-Turkey treaties.

Nobody – even the Conservative Party – has an idea about the likely content of New Relationship Treaty that may follow once the Withdrawal Agreement is approved.

The UK may well have tabled 14 position papers but it is hard to distill substance from the rhetoric. The UK wants a new economic relationship but has yet to define what this means in practice. The UK also wants a new relationship on security. Again, the details are a bit sketchy.

Despite another speech that was primarily aimed at a domestic audience, the reality is that the negotiations have not yet got to first base and are a long way from agreement on a first draft of the Withdrawal Agreement. The Brexit talks are going nowhere fast. They have not reached a stage of critical momentum.

That said, although nobody has admitted it, I would be very surprised if the text of the draft Agreement is not on Michel Barnier's desk.

There is much evidence that the UK is not at all prepared for the post-withdrawal negotiations. For example, some 15 months after the referendum result it may surprise you that the House of Lords only begins an enquiry next week on the proposed transitional arrangements.

It is no wonder that many commentators, outside the UK of course, believe that a two-year transitional arrangement is totally unrealistic.

European Parliament

What happens when the negotiations on the Withdrawal Agreement end as they inevitably will?

The first challenge is to secure the consent of the European Parliament to the outcome of the talks. MEPs will want to ensure that the draft Agreement reflects the (April 2017) resolution that set out the Parliament's priorities and red line issues.

MEPs will be fully briefed about the negotiations at critical junctures so the outcome will not go 'cold' to the European Parliament for a final decision, probably in December of next year. The UK's and other countries' MEPs will be asked to vote by simple majority to approve or reject the draft Withdrawal Agreement.

The European Parliament's right to withhold consent to the Withdrawal Agreement gives it political leverage to influence the outcome and effectively makes it a veto player.

Recent remarks made by the Parliament's lead negotiator, Guy Verhofstadt, that he would protect Ireland's interests are laudable and well-intentioned - but meaningless as MEPs have no direct involvement in the negotiations.

European Council

Once Parliament's consent is forthcoming the European Council - the Heads of State and Government - will be asked to approve the outcome of the negotiations on the Withdrawal Agreement.

A 'super qualified majority' vote (QMV) is required by the EU-27 to approve the Withdrawal Agreement. What this means in practice is that at least 20 of the 27 Member States must approve the terms of the Treaty: 72 per cent of the participating Member States comprising 65 per cent of their population.

It is impossible to assess at this early stage if the EU-27 will remain unanimous in their approach to the outcome of the negotiations on the Withdrawal Agreement.

Once the Agreement is signed off by the European Council, the UK Government will be asked to approve it.

It is important to point out that according to legal advices, the Withdrawal Agreement does **not** have to be ratified by national parliaments.

Ireland's Vote

Ireland has, as we know, a keen interest in the outcome of the negotiations.

As a member of the European Council, the Government's express approval will be sought if there are changes to the EU's current (May 2017) negotiating mandate on the Withdrawal Agreement and at the time the negotiations on the draft Agreement are concluded.

Ireland could oppose the Treaty at the level of the European Council because, for example, some of the Government's red line issues were not adequately resolved, but could not prevent the EU's overall approval to the Agreement.

A vote opposing the Agreement may be symbolic given the QMV requirement, but may be politically necessary for public opinion on both sides of the border.

UK Government

Bear in mind that only 156 out of 650 MPs declared that they supported leaving the EU before the June 2016 referendum.

Under the Constitutional Reform and Governance Act 2010 (Part 2), both Houses of Parliament are required to consider the draft Withdrawal Agreement.

Parliament cannot change the terms of the Agreement, nor can Parliament change the date of withdrawal.

During a period of 21 sitting days both Houses have the opportunity to pass a resolution that the Agreement should or should not be approved. If the House of Lords votes against the Agreement (and the House of Commons supports the motion) this will delay the process by some weeks but will not prevent the UK Government from approving the Agreement. However, if either the Commons or the Lords votes against the Agreement, the UK Government cannot immediately approve the Agreement, but must instead lay a statement giving the reasons why it wants to proceed with approval. If the House of Commons subsequently votes against the Withdrawal Agreement, it cannot be implemented by the UK.

What could influence the vote?

There are many issues that may influence the views of MEPs.

For example, a bad deal that the Treasury or the Bank of England found clearly inimical to the economy's viability could sway some Remainers; Sinn Fein casting their first votes in Westminster (they have seven swing votes in Westminster); strong opposition from the Devolved Administrations; a series of company re-locations or postponed investment plans directly linked to the uncertainty of Brexit; a swing in the public mood at constituency level; and some Conservative MPs ignoring the Party's whip.

In short, quite a few variables.

In a scenario that the House of Parliament does not support the Withdrawal Agreement, the UK will leave the EU on 30 March 2019 unless the UK Government requests the European Council (as is allowed under Article 50) to extend the deadline and that, by unanimity, such approval is forthcoming.

As the Conservative Party would be opposed to such a course of action a general election would result with the UK's EU membership in a legal and political vacuum.

I will not speculate if the EU-27 would have the appetite at that stage to allow the UK to rejoin the EU.

Withdrawal Agreement - Court of Justice

Another not unimportant variable in the political geometry is the response of the Court of Justice of the European Union.

As the Withdrawal Agreement is an international agreement it is subject to judicial review by the Court. For example, on foot of an application to a Court in the EU-28, the Court of Justice could be requested to deliver an opinion on the draft Agreement's compatibility with EU law (Article 218(11) TFEU).

Should such a hearing proceed would the date of withdrawal have to be postponed?

The Repeal Bill

The Repeal Bill (formally known as the European Union (Withdrawal) Bill) will, once enacted, repeal the European Communities Act 1972 to provide on the UK's exit that UK law will assume supremacy over EU law.

In parallel to the negotiations on the Withdrawal Agreement, the UK's politicians (and the devolved administrations) will spend a significant amount of time over the coming 12 months reviewing policy area by policy area the 12,000 EU Directives, Regulations and Decisions that will be converted in whole or in part into UK domestic legislation to take account of the Withdrawal Agreement and the UK's new relationship with the EU.

In many cases, justified requests for transitional arrangements will have to be submitted and subsequently be negotiated, for example, in the areas of air transport, customs, transit of goods, standards, energy security, food safety, competition policy, veterinary requirements, consumer labeling and the list goes on.

MPs and members of the Lords will therefore have Brexit and little else to the forefront of their deliberations over the next year.

The challenge of screening 12,000 legal instruments within a year or so is an almost impossible task. More so as the Repeal Act has not yet been enacted.

New Relationship Treaty

The ratification requirement for the New Relationship Treaty is quite different.

Any Treaty changes or international agreements (such as free trade agreements) that might be necessary as a consequence of the Withdrawal Agreement have to be ratified by the EU-27 (in accordance with Article 48 TEU) and a unanimous decision is needed.

Any one Member State can veto such a Treaty.

Fast forward to 2020 (or thereabouts) when the negotiations on the draft New Relationship Treaty (or Treaties) are concluded on the basis of a negotiating brief approved at the outset by Council; an initial mandate is expected to be approved by the end of this year.

It is a working assumption that the scope of the Treaty will cover those policy areas, including trade, where the UK (as a third country) wants to have transitional arrangements as provided for in the Withdrawal Agreement.

Significant detail will need to be included as to how precisely the new economic and security relationships that the UK envisages will work; an agenda that goes far beyond trade or customs facilitation.

If the New Relationship Treaty is not structured as a pure trade deal (where the EU has full competence) as it may include, for example, provisions on air transport, education, dispute resolution, security, judicial cooperation, services and energy, then the draft Treaty will be termed what is called a 'mixed agreement' and must be ratified and approved by all of the 27 Member States and by eleven regional chambers.

Another option is that a series of Treaties will have to be negotiated covered unique areas such as security and defence.

The likelihood of even one of these 38 national and regional parliaments vetoing the New Relationship Treaty and the consequence of such a decision has not been considered as a scenario in current risk assessments.

For instance, would the Dáil vote for a post-Brexit deal that introduced a hard border and did not adequately protect the Irish or Northern Ireland economies by way of compensation measures?

If the New Relationship Treaty is blocked at the last minute after the Withdrawal Agreement has been approved with a pre-determined withdrawal date, then legal, economic and social Armageddon would result in the UK, in Ireland and across the EU. Any business involving the UK that is rules based will grind to a rapid halt.

In practical terms, a vetoed New Relationship Treaty would leave the UK incapable of importing or exporting or functioning as a modern economy.

The alternative - a WTO-type agreement (a limited free trade /tariff deal) - would (according to the WTO Director General) take many more years to conclude. The UK's press gives the false impression that an EU exit would seamlessly allow WTO rules to apply.

This scenario suggests that a Treaty dealing with trade and customs only should be negotiated in the first instance in order to avoid potential ratification complications.

The Court of Justice has ruled on aspects of such Treaties in the past as is evidenced by its ruling (16 May 2017) on the EU-Singapore Trade Agreement. This ruling actually expanded the issues where the EU has sole competence and (again) clarified where competence is shared with Member States.

A scenario that the Court of Justice of the European Union may also conduct a judicial review of the New Relationship Treaty(ies) should also be factored into the political equation.

All this assumes that the newly elected European Parliament (with no UK MEPs present) is also willing to give its consent to the New Relationship Treaties.

Why is nobody talking about the consequences of these potential scenarios that pose serious risks for business?

Why is nobody talking about the option of Ireland, or indeed Belgium, Luxembourg or the Netherlands for that matter, blocking Brexit given that all the governments know only a bad outcome will result?

Northern Ireland

An added complication is the Good Friday Agreement (GFA) that is based on the parties' shared interest in membership of the EU.

If the Withdrawal Agreement and/or the New Relationship Treaty require changes to be made to the GFA, for example as regards its under-pinning at EU level, a cross-border referendum may have to be held some years hence.

While such a referendum might well be about technical adjustments to the GFA, in the event of a bad outcome to the Brexit negotiations there may be political pressure to extend the scope of the referendum to allow a vote on Northern Ireland becoming a full EU Member State (as was envisaged by the European Council's decision of 29 April 2017), perhaps as part of a wider two-state federal-type political solution on the island of Ireland (as was envisaged in the (1984) New Ireland Forum Report).

Another scenario being talked about is that Northern Ireland remains in the Customs Union and that migration controls take place at its ports and airports.

Securing 'cohesion' status for Northern Ireland as part of the Withdrawal Agreement might also be part of the mix; what better way to demonstrate Northern Ireland's 'special status'.

Given this scenario, a discussion is now urgently needed on the implications of such a development. To this end, detailed consideration of the KLC Consulting report (November 2015) on modeling Irish unification might be a useful starting point.

Conclusion

The UK has created a problem that it does not know how to solve. As Chris Jones in a recent article in the 'Irish Times' said: 'Brexit has become a problem without a solution.'

Worst still, the EU can only offer options the UK has rejected.

The political institutions, communities and businesses on the island of Ireland are actively considering the potential risks and consequences associated with various outcomes and scenarios for Brexit.

The speculation industry is in over-drive.

The net question is not whether a hard or soft Brexit will be the outcome, but will Brexit - as put to the UK electorate - happen at all?

Tony Blair reckons there is a 30% chance that Brexit will not happen.

Given what I have just been talking about, I would put the likelihood of Brexit not happening at least 40%.

In my opinion, to secure a smooth exit, and no 'cliffs', the UK will need to have the two-year period allowed under Article 50 extended and the length of the transitional period should be at least four years for the more sensitive issues such as free trade with supporting customs arrangements. What this adds up to is that the UK may not fully leave the EU until 2024.

I will conclude by quoting what Danny McCoy, the CEO of IBEC, said at a briefing last week: *Wherever the UK is going we are going there as well.*

I for one was not aware that the Irish business community is talking about Ireland's post-Brexit relationship with the EU in such terms.

Dr Peter Brennan is Managing Director of EPS Consulting and a co-founder of the Public Policy Advisors Network.