

The Brexit deal: What does it all mean?

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Background

- *“Our policy is having our cake and eating it”* (Boris Johnson to The Sun, 30 September 2016)



Background

- UK intends to leave the customs union and the single market (June 2017)
- 19 June 2017: Negotiations open
 - COM negotiating on EU's behalf
 - Phase I: "divorce settlement"; Phase II: discussions on future relationship can begin
 - Aim: "*Orderly withdrawal*" from the EU
 - Priority to 3 issues: (1) Citizens' rights; (2) IRL/NI; (3) financial settlement
- No passing to Phase II unless "*sufficient progress*" made in Phase I negotiations (Eur Council Guidelines April 2017)
- D-Day: 29 March 2019 (Article 50 TEU)

Background

- 4 December 2017: Anticipated agreement between EU and UK stalls due to DUP objection
 - Special economic status for NI unacceptable (possibility of NI being subject to EU rules and diverging from the rest of the UK)
 - Varadkar: "*There is no question of us trying to exploit Brexit to move towards Irish unity without consent.*"

Key elements of the deal (1)

NI/IRL Issues

- EU identifies 3 “unique” issues to IRL:
 - Peace process protection/Good Friday Agreement
 - Common Travel Area
 - Geography and the “hard border” concern
- GFA to be protected in “*all its parts*”
- EU: NI issue of “*utmost importance*” (remains distinct strand of negotiations)

Key elements of the deal (1)

NI/IRL Issues

- Border:
- UK wants to achieve the goal of avoiding a hard border via the “*overall EU-UK relationship*” (trade deal)
- In the event of no deal being reached: “*Full alignment*” with certain EU rules to ensure no hard border in NI (the “Backstop”)
 - “*In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the [Good Friday] agreement*”
- AND “*no new regulatory barriers*” between UK and NI unless NI Executive and Assembly agree that “*distinct arrangements are appropriate*” for NI
 - UK must ensure “*the same unfettered access*” for NI business to UK (Joint Report par 50)

Key elements of the deal (1)

NI/IRL Issues

- Common Travel Area
 - UK “*confirms and accepts the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland’s obligations under Union law, in particular with respect to free movement for EU citizens*” (Joint Report para 54)
 - Mirrors Protocol no 20 TFEU
- Northern Irish people entitled to be recognised as UK or Irish citizens or both (Joint Report par 52)
 - Those recognised as Irish citizens will continue to enjoy rights as EU citizens
- May: 6 “*commitments*” to NI (...NI as “*integral part of*” UK; “no hard border”; NI will leave the EU customs union and single market; and will not be subject to the CJEU)

Key elements of the deal (2)

Citizens’ Rights

- Citizens’ Rights (“*first priority*” of negotiations: EU)
 - Only applies to EU citizens who legally reside in the UK (and vice versa) by 29 March 2019
 - EU citizens living in the UK at that date will:
 - Be able to claim permanent residency (“*special*”/ “*settled*”) status through “*transparent, smooth and streamlined*” procedures (NB: EP concerns)
 - Directive 2004/38 conditions apply
 - “*Same safeguards*” applicable to restrictions as exists in EU law
 - Have reunification rights in respect of family members (query future spouses/partners) and will have equal access to social security, health care, education and employment (relevant EU Regulations continue to apply)
 - Including children born after exit date, unless sole custody to non-covered spouse
 - Have recognition of their qualifications grandfathered into UK law

Key elements of the deal (2)

Citizens' Rights

- Governance
 - UK commitment to primary legislation, but no UK position paper
 - Citizens “*should*” be able to rely directly on their rights
 - No removal pending decision on application, unless the application is fraudulent or abusive
- For litigation brought within 8 years post-Brexit (29 March 2027):
 - In areas relating to the “*application or interpretation of [EU citizens' rights], UK courts shall have due regard to the decisions of the CJEU*” post-Brexit
 - Agreement should establish “*a mechanism*” for UK courts to refer cases about EU citizens to the CJEU
 - COM and “*independent national authority*” in UK to monitor (? Right to bring proceedings in case of breach)
 - See lengthy technical report

Key elements of the deal (3)

Financial arrangements

- Budget
 - UK committed to pay into UK budget for the years 2019 and 2020 “as if it had remained” in the EU
 - UK to “*contribute its share of the financing*” for any EU liabilities incurred before end of 2020 and falling due thereafter (“*reste à liquider*” eg European Investment Bank, European Central Bank, European Development Fund...)
 - UK continues to benefit from payments from EU budget until the end of budget period in 2020
 - No numbers (estimates between €40bn - €60bn)
 - Gradual reimbursement of UK’s paid-in capital at the EIB, ECB

Key elements of the deal (4)

Selected other issues

- Goods “*placed on the market*” under EU law prior to withdrawal may stay in free circulation within the UK and the EU (no need for re-labelling or other modification)
- BUT
 - EU intends to apply EU import rules on all animal-derived products from withdrawal date
 - Conflict over who supervises
- EU conflict of laws rules apply where, before withdrawal date:
 - Contract has been concluded
 - Event causing damage has occurred
 - Legal proceedings have been instituted (jurisdiction)
 - Judgment has been handed down (recognition)

Key elements of the deal (4)

Selected other issues

- CJEU
 - Remains competent for UK procedures with UK as applicant or defendant, or UK preliminary references, registered at the CJEU at date of withdrawal
 - These proceedings continue to binding judgment
 - Disagreement where
 - Facts arose prior to withdrawal
 - Enforceability
 - Intervention of UK before CJEU

Reactions

- Varadkar (8 December 2017):
 - *“The strongest political commitment that exist in this document is the commitment that there will be no hard border...They are politically bullet-proof. They're cast iron.”*
- Coveney
 - Clear now that there will be no need for customs checks between North and South after Brexit
- UK Justice Minister Dominic Raab
 - *“You can call it strategic ambiguity...we have agreed principles, but ...the details still need to be ironed out [in respect of NI] which can't be dealt with properly...outside the context of the broader negotiations on customs and trade”*
- Michael Gove
 - Theresa May has “won”

Deciphering the deal (1) NI/IRL issues

- The preferred solution: a trade deal...

Deciphering the deal (1) NI/IRL issues

- The “Backstop” solution
 - *“Full alignment” with “those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the [Good Friday] agreement”*
- Deliberate ambiguity in essential terms
- Free movement of persons and the CTA
 - CTA will operate *“without affecting”* Ireland’s EU obligations
 - CTA is not presently contained in discrete treaty between the UK and Ireland. Will such a treaty be necessary?

Deciphering the deal (1) NI/IRL issues

- Unresolved conundrums:
 - **(a) How can the UK leave the customs union & single market, while still avoiding a hard border in Ireland?**
 - Resolution of this issue is *“irrespective of the nature of any future agreement”* between EU and UK (Joint Report par 46)
 - How can there be *“full alignment”* on the island of Ireland WITHOUT the UK having to mimic EU rules, and without CJEU jurisdiction?
 - Role of NI bodies in par 50 central
 - Not in relation to all internal market rules?
 - **(b) How will NI people with Irish citizenship retain EU citizens’ rights without retaining EU citizenship law in some form in NI?**

Deciphering the deal (1) NI/IRL issues

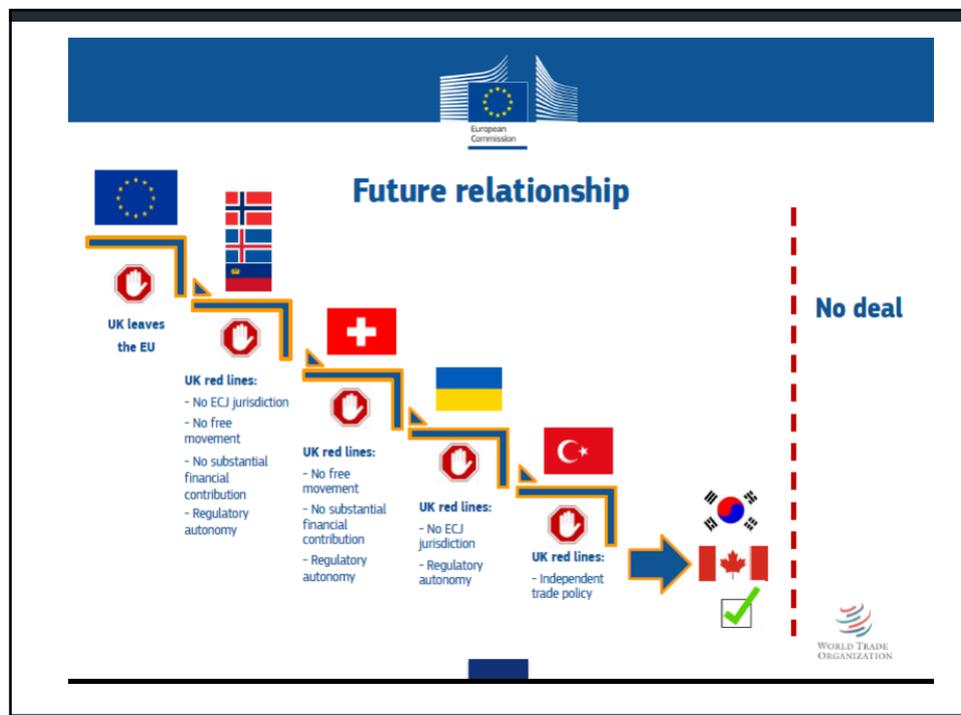
- COM:
 - *“...the common understanding provides that the United Kingdom aims to achieve [protection of North-South cooperation] and the avoidance of a hard border through the overall EU-United Kingdom relationship. This intention seems hard to reconcile with the United Kingdom’s communicated decision to leave the internal market and the Customs Union”*
- Tony Blair: NI deal was an agreement to postpone the deal
- Varadkar: *“As we get into the detail more and more, the British people will understand why it makes sense that we have very similar or almost identical rules and regulations.”*

Deciphering the deal (1) NI/IRL issues

- **(c) How can the Good Friday Agreement be left unaffected? Human rights concerns**
 - GFA provides for inter alia NI HR Commission, Irish HR Commission, ECHR incorporation, Joint HR Committee, principle of consent
 - UK government: EU Charter *“reflects and reaffirms a range of rights and principles which originate and find protection through a range of other sources”* (Right-by-Right analysis)
 - NI HRC:
 - GFA requires “equivalent standards of protection” of rights & equality
 - *“We are concerned that the removal of the Charter from UK law will affect the substantive rights that individuals in Northern Ireland, and in other parts of the UK, already benefit from”*
 - Recommends incorporating the EU Charter into UK legislation AND retaining HR jurisdiction of CJEU in relation to NI

Deciphering the deal (2) The “preferred solution”?

- Options
 - (a) The EEA / EFTA model
 - Excluded if UK wants out of customs union and single market
 - (b) Bespoke deal
 - But how might it look?
 - “New generation” FTAs – eg Singapore, Canada...
 - Davis: seeking a “Canada plus plus plus”
 - Swiss-style model?
 - 100+ “bilaterals”; 20 joint committees: partial integration into internal market
 - Incl eg Schengen, Dublin, EEA, Erasmus, financial contributions...
 - Swiss must accept relevant EU legislation in these areas
 - Member of EFTA but also concludes own FTAs at times (Japan, China)
- Macron: Bespoke solution possible if UK accepts “preconditions” including that there will be no full access to single market unless UK pays into EU budget and accepts its rules



Deciphering the deal (2) The “preferred solution”?

- EU: “Significant divergences” remain
- EU Governance paper January 2018
 - Dispute settlement procedure may not bind EU to interpretation of EU law or interpret provisions in substance identical to EU law; must not affect CJEU case-law, or rule on demarcation of competences
 - CJEU rulings must remain binding
- Judicial or political dispute settlement?
- Withdrawal vs Future Relations agreements

Deciphering the deal (2) The “preferred solution”?

- Political options
 - Eg CETA Joint Committee – Supervises implementation/application; can adopt interpretation of CETA
 - Eg Ukraine Association Council – May amend Annexes; May make recommendations
 - Eg EEA Joint Committee – reviews CJEU case-law to preserve homogeneity; May amend Annexes; if unable to resolve EU-EEA dispute, can submit EU law question to CJEU

Deciphering the deal (2) The “preferred solution”?

- Judicial solutions/Arbitration
 - CETA
 - Classical international law mechanism – no CJEU involvement
 - Special Investment Court System for investment disputes
 - Ukraine – arbitration panel must refer to CJEU if question of EU law arises
 - EFTA Court (homogeneity) + EFTA Surveillance Authority – multilateral context
 - “EEA docking”
 - UK would not be subject to entire EEA acquis
 - UK member at ESA/EFTA Court for UK cases
 - EU proposes to Switzerland, 2013
 - January 2018: new Swiss solution proposed by EU – 3 person arbitration panel with disputes referred to CJEU

Deciphering the deal (3) Legal status of the deal?

- “Joint report” issued on 8 December; “*agreement in principle*” reached on the “*package as a whole*”
 - “*Nothing is agreed until everything is agreed*”, but “*full details*” to be reflected in Withdrawal agreement
- Deal as a “*common understanding*” (EU) with certain commitments firmer than others
- Joint Report agreed by the UK “*on the condition of an overall agreement*” under Article 50 TEU to withdraw “*taking into account the framework for the future relationship, including an agreement as early as possible in 2018 on transitional arrangements*” (par 96)

Next steps

- 15 December 2017: European Council guidelines for Phase 2 of negotiations
 - 3 issues: UK's transitional relationship; Framework of future relationship between EU/UK; Unresolved Phase I issues (incl IRL/NI and citizens' rights)
 - Foresees transitional period of "around two years" to cover the "whole of the EU acquis" – continue to accept CJEU jurisdiction, 4 freedoms, membership of customs union and CCP. UK would be bound by EU legislation without any role in its passing, and would continue to pay into EU budget
 - Negotiations can progress only if all commitments in Phase I, including Irish border commitments, are respected in full and translated into legal terms as quickly as possible
- European Council 22 – 23 March 2018
 - Transitional arrangements (UK could begin negotiating trade deal in transitional period)
 - COM papers: Aviation, Fisheries
 - UK efforts to secure special deal on financial services ("passporting")
- Withdrawal Agreement: To be concluded on EU side by the Council following COM proposal & EP consent

Conclusion

- December deal leaves vital issues (deliberately) unresolved
- Possible pathways in sight but
 - Most likely compromises on the preferred solution risk being extremely complex (EEA docking...)
 - Swiss example as a warning
 - "Backstop" solution politically controversial and - *prima facie* - legally contradictory?
 - "Nothing is agreed until everything is agreed"