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# Brexit: a New Agreement and further Uncertainties

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On 17th October the European Council approved the new version of the withdrawal agreement that it had concluded with the UK just a few hours earlier. Nearly one year after having given the go-ahead on 25th November 2018, the heads of State and government opened the way for an orderly Brexit on 31st October and the rapid launch of negotiations over the future relationship between the Union and the UK.

The ratification of the agreement and the effective implementation of the UK's exit of the Union more than three years after the referendum and after 2 and a half years of negotiations, still depends however on the vote by the British Parliament, which has already rejected the agreement concluded in 2018 three times.

On 19th October during an extraordinary session the House of Commons did not vote on the agreement, but forced Prime Minister Boris Johnson to ask for a further delay from the Union. Whilst continuing the ratification process the Europeans have given themselves a "few days" to assess the situation and to decide whether to postpone Brexit or not.

In the meantime, both in London and Brussels, the agreement concluded on 17th October between the British government and the European negotiators led by Michel Barnier, lays down the foundations for the implementation of the effective withdrawal of the UK from the EU as well as the relationship that the Europeans and British will try to build in the future.

## A – A RENEGOTIATED AGREEMENT TO AVOID A "NO-DEAL"

Given the threats made by Boris Johnson, appointed Prime Minister on 24th July last by Conservative Party members, to exit the Union on 31st October, with or without an agreement, the European accepted the re-examination

the most controversial part of the withdrawal agreement - the "backstop" on the Irish border.

The agreement concluded on 17th October is a modification of the general agreement over the UK's withdrawal from the EU, signed in November 2018. Two specific chapters have been revised: on the one hand, there is the [protocol](#) governing Ireland and Northern Ireland, which is part of the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland's from the European Atomic Energy Community" - the international treaty that organises the divorce between the Union and the UK; on the other hand, the "[Political Declaration](#)" establishes the framework of future relations between the EU and the UK which supports the withdrawal agreement and sets the main guidelines for the future negotiation.

The new measures do not modify the agreement's general balance in the strict sense of the term, since only the protocol governing Ireland has been re-examined. The measures regarding citizens' rights and financial regulations, which, with the Irish border, were the two main points in the negotiation launched in 2017, were not re-discussed.

### 1. Common concession for a new agreement

#### *Northern Ireland, in and out*

One of the EU's three main goals was to maintain an open border between the British province of Northern Ireland and the Republic of Ireland. This obligation, acknowledged by the UK, resulted from the Peace Agreement of 1998, the so-called Good Friday Agreement, which re-established peace in Northern Ireland.

According to the agreement concluded on 17th October Northern Ireland will leave the European Customs Union after Brexit with the rest of the UK and will be part of a

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new British customs territory. In virtue of this it will be included in the UK's free-trade agreements that the latter will conclude with third countries.

This is the main difference with the backstop, provided for in the initial withdrawal agreement, which planned that if no alternative solution were to be found to prevent a "hard border" on the island of Ireland, all of the UK would remain in the European Customs Union. This *status quo*, would have prevented the UK from having its own trade policy and was one of the main reasons for the triple rejection of the agreement by the House of Commons in the spring of 2019.

Northern Ireland's exit from the Custom's Union is the main concession made by the Europeans, who deem that the upkeep of Ulster in the community area was the best guarantee to maintain an open border and to guarantee the integrity of the European Single Market.

However to attenuate the destabilising nature of exiting the Customs Union, Ulster will remain aligned with the EU's single market rules regarding goods, veterinary and phytosanitary controls, agricultural products and State aid.

Similarly, although Northern Ireland will be out of the Customs Union, it will continue to follow the EU's customs code as far as goods entering its territory will be concerned. European excise duties will be applicable on products that arrive in Northern Ireland from third countries but also on those arriving from Great Britain and which are "*at risk of subsequently being moved into the Union*". British excise duties will apply to goods from third countries and which are only destined for the Northern Irish market. No duties will apply to goods from the rest of the UK which are only designed for Northern Ireland.

Checks at the points of entry will be operated by the British customs authorities in cooperation with European officials, who will be able to request specific inspections. And the procedures will be covered by the jurisdiction of the European Court of Justice.

### ***A Border in the Irish Sea***

The alignment of Northern Ireland with European rules is the main concession made by Boris Johnson, since it

involves customs checks at the ports and airports of Northern Ireland, including on British goods. It is therefore a kind of "*border in the Irish Sea*", which Theresa May and Johnson himself rejected in March 2018 when the EU proposed a backstop that kept Northern Ireland in the Customs Union. It was also because of this rejection that the EU accepted that the whole of the UK should remain in the Customs Union, thereby precipitating the rejection of the withdrawal agreement.

Checks will also be necessary between Great Britain and Northern Ireland from a tax point of view. In terms of the revised protocol, VAT will be levied by the UK in Northern Ireland, according to rules to be established by the British authorities. However, European VAT rules will apply to goods, so that checks on the border will not have to be made and to protect the integrity of the single market. Moreover, exemptions and reduced rates in force in Ireland will also apply to Ulster, to guarantee a level playing field between the two parts of the island.

### ***The "backstop" turns into the "frontstop"***

The new protocol will apply automatically at the end of the transition period following the UK's departure – planned in December 2020, with one possible postponement of one or two years. This is the second major difference with the backstop set out in 2018, which would have entered into force as a "solution of last resort" in the event of no alternative mechanism being found before the end of the transition period.

The very principle of the backstop is now null and void since the alternative solution that would have prevented it has been found. This allows B. Johnson to claim the end of the "backstop" which he, the radical Brexiters and the Unionists of Northern Ireland deemed unacceptable.

In return the Europeans have the guarantee that neither the open border in Ireland nor the integrity of the Single Market will be threatened by Brexit; they can also be certain about the future regime on the island, whatever the shape or form of the future economic relations between the UK and the EU. A situation that the British have named by analogy, the "frontstop".

Since Boris Johnson has dismissed having future economic relations as close as those envisaged by Theresa May, the “backstop”, which implied the upkeep of all of the UK in the Customs Union, was increasingly difficult to establish. By accepting the [dual membership of Northern Ireland](#), both in and out of the Customs Union, the Europeans and Ireland in particular, have introduced a less hypothetical and more sustainable mechanism.

### **Conditional continuity**

The Europeans have however had to make a second major concession: the durability of the solution now to be introduced will depend on the Assembly of Northern Ireland. Four years after its entry into force, the protocol will have to gain the consent of the majority of the Northern Irish MLAs (Members of the Legislative Assembly).

If a simple majority of the Assembly consents, the protocol will be extended by 4 years. If consent is given by a cross-community majority – a simple majority of those voting including a 60% majority of unionists and 40% nationalists – the protocol will be extended by 8 years.

The protocol will be submitted to vote at the end of each extension. In the event of rejection, it will cease to apply two years later and would be replaced by a new mechanism, which itself would have to respect the peace agreement of 1998.

The issue of consent was raised by the Democratic Unionist Party (DUP), which is against any solution that differentiates Northern Ireland from the rest of the UK and is asking for the right to veto.

The reason why the Europeans accepted this procedure, which rules out all veto rights, is because the new protocol is designed to be automatic and permanent, whilst the backstop would only have been introduced if there had been no alternative solution – or at least until one had been found. “*So it makes sense to ensure consent,*” explained Michel Barnier[1].

For the Europeans this also means a gamble on the future, in the hope that the Northern Irish, 55.8% of whom voted to remain in the EU during the referendum

on 23rd June 2016, will want to continue to enjoy peace and an open economy across the whole of the Ireland.

## **2. The redefined future relation**

### ***The path of free-trade***

The political declaration that goes together with the withdrawal agreement covers all areas that comprised the UK’s membership of the EU and for which new arrangements will have to be made before the end of the transition period, planned for December 2020.

The revision made to the document on 17th October notes the British government’s decision to seek an economic partnership in the future via a comprehensive, balanced free-trade agreement with the European Union, rather than a close economic association including a “*single customs territory*” as planned in the text agreed in 2018.

The new declaration maintains the goal approved in 2018 to “*ensure no tariffs, fees, charges or quantitative restrictions across all sectors*”. In the absence of a single customs territory, it notes that this will mean amongst others “*appropriate and modern rules*” and “*ambitious customs arrangements*”.

### ***Against Singapore-on-Thames***

The political declaration 2018 maintained that “*the future relationship must ensure open and fair competition*” and that the parties should “*consider the precise nature*” of their commitments.

Since Theresa May had decided that her country would leave the single market and the jurisdiction of the Court of Justice – even before the launch of negotiations – the Europeans aimed to prevent what some have called “*a Singapore-on-Thames*” i.e. a UK where deregulation would lead to a regulatory and tax divergence with the Union and, as a result, a distortion of competition.

The rejection of the agreement negotiated with Theresa May and the will of some “Brexiteers” - sometimes communicated by Boris Johnson - to leave the EU without an agreement and therefore without any commitments in

[1] Michel Barnier, Press conference, 17th October 2019, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_6125](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_6125)

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this area, increased European fears and led to warnings being issued.

*"The withdrawal of the UK will lead to the birth of a competitor, alongside China and the US. Europe has to show what it can do,"* warned German Chancellor [Angela Merkel](#).

Via the re-opening of the political declaration, the European achieved a strengthening of Britain's commitments in terms of fair conditions in comparison to the text concluded in 2018.

The new declaration stresses that *"the United Kingdom's geographical proximity and economic interdependency"* require *"robust commitments"* on both sides to maintain fair conditions. Hence *"the level of ambition of our future free-trade agreement will be proportional to the level and quality of the rules of the economic game between us."*

To do this the UK will have to *"uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of State aid, competition, social and employment standards, environment, climate change and relevant tax matters"*.

The amended declaration insists on the fact that both sides will have to *"maintain a robust and comprehensive framework for competition and State aid control that prevents undue distortion of trade and competition"* and to fight against *"harmful tax practices"*.

### 3. Questions pending

#### Definition Work

Although the new protocol allows for a Brexit with an agreement after many postponements and weeks of uncertainty, it does not settle all of the issues raised by the problem of Northern Ireland.

Two goals regarding Ireland have guided the Europeans in negotiations since 2017: maintaining an open border to protect the 1998 peace agreement and to guarantee the integrity of the single market. The agreement concluded meets the first goal, since customs checks

will be made at the entrances to the province and not on the border.

The integrity of the single market is protected in the protocol by the regulatory alignment of Northern Ireland with the EU, particularly regarding goods and sanitary controls and via the province's dual membership to the future British customs area and the European customs code.

But whilst the protocol distinguishes between imported goods, which are destined to remain in Northern Ireland, and those which *"may be then introduced into the Union"*, the definition of these goods still has to be established. A joint committee comprising EU and UK representatives will be responsible for doing this, in parallel, since it will have to define which goods that are not likely to enter the EU by the end of the transition period. The criteria will, amongst others, take on board the nature and value of the goods, the nature of movement and the incentives not to declare the latter.

The definition work, which is vital to limit the dangers of breaching the integrity of the single market, will be undertaken at the same time as the negotiations over the future free-trade agreement and may be exposed to disruption due to the problems encountered during those talks.

The way controls will be undertaken by the British authorities and the cooperation of the latter with the European authorities will have to be defined precisely, similarly the way possible disputes over the functioning and the results of controls might be settled.

The smooth functioning and therefore the continuity of the compromise found by the Europeans and British will depend on this future work. Despite the inherent risks to the complex mechanisms that will have to be introduced, the protocol is in line with a logic of reduction and management of those risks, compared on the one hand to the economic disruption and political risks caused by a "no deal" and the at least partial closure of the border, and on the other the real weight of the economy on the border which only represents around 1% of trade within the European single market.

## B. BREXIT STILL ON HOLD

### 1. British dead ends and hypotheses

The motion prepared by the British government for the approval of the withdrawal agreement and the political declaration was not adopted or rejected by the House of Commons on 19th October. The vote on the motion was postponed after the adoption of an [amendment](#) – made by Conservative MP Oliver Letwin – which stipulates that Parliament “withholds approval unless and until implementing legislation is passed.”

The adoption of this amendment forced Boris Johnson to implement the [Benn Act](#), adopted by the Parliament in September, which stipulated that the Prime Minister had to ask the EU for an extension until 31st January, if on 19th October Parliament had not approved the withdrawal agreement.

Boris Johnson, who maintained that he preferred “to die in a ditch” rather than ask for an extension was forced to do so, but without assuming responsibility for it. In the evening of 19th October he sent 3 letters to Donald Tusk, the President of the European Council. In the [first](#), which he did not sign, there was also a photocopy of the Benn Act; he explained that since Parliament had adopted the Benn Act he “was writing to inform the European Council that the UK is seeking a further extension.” In the [second](#), Boris Johnson deemed that a further postponement of Brexit would “have a corrosive impact” on the UK and would “damage” British and European interests, as well as relations between London and the EU, but he did not explicitly ask the Europeans to reject the extension. The third letter comes from the British Permanent Representative at the EU, which makes the request for an extension.

The situation opens the path to many possibilities.

#### **Scenario 1: rapid ratification**

The simplest and most immediate is that the House of Commons adopts legislation to effect the exit of the Union quickly so that the Europeans do not have to decide on the request for an extension and that the

European Parliament ratifies the withdrawal agreement as fast as possible.

This scenario privileged by Boris Johnson and to a large extent by the Europeans is being blocked however by the political reality in the UK, and more precisely in Parliament.

The Conservative Party only has 288 seats of a possible 650 – a deficit of 38 in terms of a majority. Labour has 245 MPs, the Scottish National Party (SNP), 35, the Lib-Dems 19 and the Democratic Unionist Party (DUP) 10. Apart from a group of 35 independent MPs, mainly comprising dissident or expelled Conservatives, several small parties make up the [House of Commons](#).

To achieve a vote in support of the withdrawal agreement, Boris Johnson needs the votes of all of the Conservative MPs, including those who have been expelled from the party, ten or so Labour MPs and some independents. His main argument is that three years after the referendum, Parliament must “get Brexit done” to settle the political crisis and to address the country’s social problems.

As demonstrated in the three attempts at ratification by Theresa May, that of Boris Johnson on 19th October, as well as the bid by the Prime Minister to suspend Parliament in September, British MPs can easily “take control” of the parliamentary and political agenda.

The House of Commons is riddled with multiple lines of fracture, between the government and the opposition and even within these two groups themselves.

The Conservative Party is divided between supporters of Brexit and a small majority of opponents to it – of which Oliver Letwin, the author of the amendment adopted on 19th October is part: amongst the supporters of Brexit, there are major subtleties regarding their view of the content of the agreements concluded with the EU and the nature of future relations with the Union, as it is laid out in the political declaration.

The Labour Party is also divided, between opponents to Brexit, supporters of an exit from the EU for ideological reasons or because their electorate support it, and ambivalent MPs like the party’s leader, Jeremy Corbyn.

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With the Lib-Dems and the Scottish National Party opposing Brexit, Labour could thwart the government's projects however.

The debates and votes planned regarding the implementation of Brexit will therefore witness bids to delay, modify its content, cancel it or force the organisation of a second referendum. The Europeans will have to take this hypothesis on board when they come to decide on a possible extension.

### **Scenario 2: elections**

Boris Johnson might try to call for new legislative elections in order to modify the balance of power in his favour in Parliament.

To do this, in virtue of the Fixed-Term Parliaments Act of 2011, the Prime Minister must win a 2/3 majority of the House of Commons. On 4th September MPs caused the failure of a first bid, during a vote in which 288 MPs did not take part. The new deadlock over Brexit and the guarantee, in the event of an extension, that a no deal Brexit will not occur before the elections might this time convince the opposition to accept new elections.

A snap election might be triggered by a vote of no confidence by a simple majority in the House of Commons. The motion might be launched by the opposition, but also by the government itself to circumvent the 2/3 majority. In the event of a vote of no confidence, the House has 14 days to achieve an alternative majority that can support a Prime Minister. In the event of failure, elections are organised within a 7-week time span after the vote of no confidence.

New elections might swing in favour of Boris Johnson who is credited with a lead in the polls. [According to a YouGov poll dated 15th October](#), the Tories have 35% of the voting intentions, against 22% for Labour, 18% for the LibDems and 11% for the Brexit Party.

The nature of the political system in Britain in which MPs are elected according to a single one-round majority list, makes it difficult however to forecast seats and leaves room for uncertainty about the size of the majority that

Mr Johnson might win and therefore his ability to force through the ratification of a withdrawal agreement.

### **Scenario 3: a second referendum**

The revocation of article 50 of the Treaty on European Union, the procedure to exit the EU, is an unlikely hypothesis at this stage without there being a political majority or one within the population.

The last scenario and the most problematic is therefore a vote by MPs to organise another referendum on Brexit. A motion in this sense was rejected 292 to 280 votes in April 2019. But without an election to achieve a clear majority, a direct vote by the British would be the last resort in a bid to try and end the political deadlock.

Polls indicated that British opinion is still ambivalent.

A [poll average](#) undertaken between 25th September and 18th October show that 52% of those interviewed (against 48%) would now vote to remain in the EU. It is the exact opposite of the result of the referendum on 23rd June 2019. The most recent poll, undertaken after the conclusion of the agreement, shows however extremely tight voting intentions with 49% to remain and 46% to leave and 4% who are undecided.

According to a YouGov survey dated 15th October 47% of those interviewed believe that Brexit is a bad thing, against 42% who believe it is good. On 5th December 2018, just after the signature of the first withdrawal agreement by Theresa May, the ratio was 49% to 38%.

More than three years after the 2016 referendum, and even though the consequences of the exit of the Union have been debated during the entire negotiation period and debates in Parliament, a new call for a vote is a risk for both sides and would provide for further uncertainty over the country's future.

## **2. European expectations and patience**

Faced with further political uncertainty after the vote in the House of Commons and a further request for extension requested on 19th October, the Europeans have given



themselves a few days to establish their strategy, to prepare for the different scenarios, whilst consolidating their priorities and method.

### ***The dilemma of the extension***

Brexit should have taken place on 29th March 2019, two years after the triggering of article 50 by the UK. The heads of State and government have twice delayed the UK's exit from the Union. On 21st March 2019, eight days before the initial date, they suggested a postponement until 12th April, if Theresa May did not achieve the ratification of the agreement approved on 25th November 2018. On 10th April without ratification, they agreed to extend the deadline to 31st October.

The second extension caused discussions in Europe. Whilst some countries, particularly Germany, were prepared to grant a long extension to the British to allow them time to resolve the political situation, other countries, like [France](#), advocated a shorter delay to force the British to decide and to limit both political and economic uncertainty.

The new request for an extension requested on 19th October raises the question again. Because, despite a new Prime Minister and a revised agreement, it is still proving just as difficult to find a majority in the British Parliament to ratify the withdrawal agreement, as well as to proceed to new elections.

It seems highly unlikely that the Europeans will reject the principle of an extension, but setting its duration is proving more difficult. The Benn Act stipulates that the government must ask for an extension until 31st January 2020, but the European Council is sovereign in terms of setting the date. It will do so according to the political situation and outlook in the UK, it will have to decide between the "*long termers*" who want to allow the British another chance and the "*short-termers*" who want the Union to focus on its future.

The decision is being made more difficult due to Boris Johnson's wish not to delay Brexit. Although the debates in the British Parliament make it impossible to achieve ratification in the short term, the Europeans will have

to juggle, despite themselves, between two powers – the legislative, which is asking for an extension, and the executive which is refusing to do this.

### ***Prepared but vulnerable to a "no-deal"***

The alternative to an extension of article 50 is a "*no deal Brexit*" on 31st October. The Europeans still assert that this outcome would not be their choice, but they are preparing for it.

Since 2017, in parallel with negotiations over the UK's withdrawal the European Commission and its Member States have been preparing for a possible "*no deal*" which would render the legal environment of trade between the EU and the UK null and void from one day to the next.

With this in mind the Union has adopted 19 legislative texts and the [European Commission](#) has presented 63 non-legislative acts and 100 communications for the States, citizens and businesses. The measures planned aim, as a priority, to guarantee the continuity of transport and trade, as well as ensuring formalities on the borders and citizens' rights. They will also palliate the absence of rules in specific areas such as fishing rights, the continuity of the budget and financial services.

The [Member States](#) have legislated and introduced measures to inform citizens and businesses to encourage them and to help the latter to take steps if much of their business is undertaken in the UK.

The real impact of a no deal Brexit and its direct and indirect cost is still difficult to assess because the factors and stakeholders involved are too numerous, with problems and degrees of exposure that are too varied for it to be possible to simulate and anticipate the situation with certainty.

According to the [OECD](#), the GDP would dip by around 0.5% short term in the euro zone and also in the Union.

In France, a [report by the Senate](#) establishes the cost of a no deal Brexit at 7.7 billion € per year. In Germany, [IFO](#) estimates the negative impact of a no deal Brexit at 0.4% of the GDP on the country's economy, the biggest in

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Europe, over the year to come. [In the Netherlands, the government](#) has deemed the losses incurred by a no-deal Brexit at 1.2% of the GDP, i.e. 10 billion € by 2030.

To attenuate impact the Commission has also proposed using the EU's Solidarity Fund and the European Globalisation Adjustment Fund to a total of 780 million €.

### **Long term goals**

Since the referendum in 2016 and even more since the start of negotiations in 2017 the Europeans have made it their main goal, underpinning their method and objectives – to remain united and to “act as one”[2]. Unity has been maintained despite Britain's attempts to divide the Member States and to circumvent the negotiator in chief Michel Barnier. This remains the base of the European position, whatever development in the situation and the possible differences that arise with each new extension.

Unity has evolved and manifested itself in the way the Union has organised the negotiations since the beginning – via the sequencing of discussions into two phases (divorce and future relation), the definition of three clear goals (citizens' rights, financial regulation and Irish border) and a working method closely involving the Commission, the Parliament and the Member State, which has not prevented flexibility in finding an agreement with the UK.

The Europeans who, [maintained in April](#) that the agreement concluded with Theresa May would not be re-opened accepted to do so in order to settle the issue of the Irish border. They did so out of pragmatism, to prevent a no deal and because the situation had changed.

Whether the date of Brexit is delayed or not, and whether it takes place with or without an agreement, the European Union must now prepare negotiations on the future relationship, which will be more complicated and much longer.

The amended political declaration has remained almost unchanged in terms of the points agreed in 2018. There are questions for which a close cooperation with the British will be vital: defence, intelligence, the fight to counter terrorism, the management of personal data, the fight to counter climate change.

For the Europeans matters will hinge on being able to maintain their unity in the future negotiations and their firm stance regarding the goals they want to achieve.

The proposal made by Ursula von der Leyen, to give the [negotiation to Michel Barnier](#), is a way of ensuring continuity. Likewise, the attribution of the trade portfolio to Irishman Phil Hogan in the next Commission is a message sent to the British that unity around the “small” Member States will also be maintained.

In the upcoming negotiation, as in the one that is just ending, the Union will possibly have to show its capacity for vision and strategic patience.

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[2] *Brexit, lessons in negotiation for the European Union*, European Issue n°494, Robert Schuman Foundation, 26th November 2018  
<https://www.robert-schuman.eu/fr/questions-d-europe/0494-brexit-les-lecons-de-la-negotiation-pour-l-union-europeenne>  
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