

BRIEFING BY THE BREXIT CIVIL SOCIETY ALLIANCE: THE WITHDRAWAL AGREEMENT AND POLITICAL DECLARATION

Written by Victor Anderson, freelance researcher/consultant.

INTRODUCTION

Three documents play a key part in the Brexit withdrawal process. Two have just been published – the withdrawal agreement and the political declaration – and these are what the House of Commons will be voting on in the “meaningful vote” in December. However it is the third document which is the most important: the agreement which will set out the future relationship between the UK and the EU. This has not yet been published and formal negotiations about it will not even begin until after the UK has left the EU. In that sense it is misleading to talk about these first two documents as “the deal” – they are an agreement about the withdrawal process and transitional arrangements, and a statement of aims and intentions about the future deal, but they are not the future deal itself.

There is also an important difference in the status of the two documents which have already been published. The agreement about the withdrawal and transition is a draft treaty which will become legally binding when and if it is agreed. The political declaration, on the other hand, is simply a joint statement about what the UK and EU hope will emerge from their talks about the future deal. That future deal will be legally binding, but this political declaration is not.

If the withdrawal and transition agreement gets agreed, then the UK Government will bring forward a Withdrawal Agreement Bill, which will be taken through Parliament to provide for the UK part of the implementation of the agreement. If all goes smoothly from the Government’s point of view, the Commons will vote for the agreement in mid-December and the Bill will be published soon after, before Christmas, and then debated and voted on in the New Year, becoming law well before “exit day” on March 29. Currently it looks like the process will be far from smooth and the agreement may be renegotiated or added to in some way.


This briefing will focus, however, on what is in the current agreement and the declaration, and the implications for civil society organisations.

WITHDRAWAL AGREEMENT OVERVIEW

- There will be a transition period, running up to the end of 2020 and possibly extended to the end of 2022.
- EU law will continue to apply in the UK throughout the transition period.
- The UK will have no representation within the EU's institutions during this period: no MEPs, no ministers or heads of government in EU meetings, and no Commissioner. This is the formal position but there is speculation that because of the size of the UK economy, there would still be informal consultations but how far this would go is currently unknown.
- The UK accepts that it still has financial obligations towards the EU (e.g. for staff pensions and for economic development schemes it signed up to) and it will pay up for these. A formula rather than a definite sum has been agreed, but it is estimated to be around £39b.
- The UK will be able to negotiate and agree new trade arrangements outside of the EU during this period, but it will not be able to implement them until the transition ends.
- When there are disputes about the implementation or interpretation of the agreement, a joint process will operate, which on the EU side will include a role for the European Court of Justice.
- UK and EU both recognise that the land border between Northern Ireland the Republic of Ireland creates particular problems and have therefore agreed that special arrangements will apply - although in fact these have major implications not only for Northern Ireland but also for the future UK/EU relationship as a whole.

NORTHERN IRELAND, THE BACKSTOP AND THE LEVEL PLAYING FIELD

Many political and economic factors have combined to make the Irish aspect of Brexit particularly difficult. The withdrawal agreement keeps trade arrangements as they are for the length of the transition period. After it ends there will be future arrangements which remain to be sorted out and therefore the withdrawal agreement provides for a backstop which will come into force at the end of the transition if nothing else has been agreed in the meantime to make it unnecessary.



The backstop is that there will be a “single customs territory” covering both the EU and the whole of the UK, effectively keeping the UK in the customs union for goods, but with stricter enforcement rules on the Irish border than for Great Britain.

The agreement provides for a joint process to decide on the timing of ending the backstop. This cannot be determined unilaterally, because then it wouldn't be a backstop. It is therefore possible that the UK might have to stay in the single customs territory even if neither its Government nor Parliament wanted it to do that.


The “level playing field” provisions in the Northern Irish Protocol (i.e. the backstop) to the agreement are even more wide-ranging in their implications for the whole of the UK. The UK and the EU will ensure a level playing field for competition in trade, meaning that they will apply measures to prevent Northern Ireland and the rest of the UK from undercutting EU standards, thereby cutting costs and selling goods and services “unfairly”. This provision covers company taxation, state aid and competition policy, labour regulations, public health and environmental protection. In many respects, this effectively keeps the UK in the EU single market, although it does not require the UK to keep up with any future raising of EU standards.

The “level playing field” in turn has implications for what future UK legislation will say – not only in the Withdrawal Agreement Bill, but also the Trade Bill, Agriculture Bill, and future Environment Bill. These will all have to include measures to maintain and enforce equivalents of EU standards (though not necessarily identical regulations) within the UK. This will mean, for example, a much stronger environment “watchdog” than the Government envisaged in its recent consultation document. While there is a risk of some divergence in standards because the withdrawal agreement does not require the UK to follow EU standards in full, it could also be interpreted as requiring amendments to the Trade and Agriculture Bills to prevent imports of lower-standard meat. There will also consequently be implications for what can be agreed to in future trade deals outside the EU, for example between the UK and the USA.

These parts of the agreement are strange in the sense that they come close in some respects to saying that the UK will stay in the customs union and single market whilst at the same time the wording is also consistent with the UK Government's “red lines” of refusing to remain in either. Inevitably this has meant the wording has had to be complex and that it is capable of being presented in very different ways.

CITIZENS' RIGHTS

The withdrawal agreement also returns to the issue of the rights of EU citizens in the UK and UK citizens in the EU. This amounts to 5 million people. Despite many calls to resolve this question early in the Brexit negotiation process, there is still



uncertainty, compounded by the Windrush generation experience, unfortunate Government rhetoric (e.g. May's recent talk of EU citizens "jumping the queue"), and a significant change in Home Office rules introduced in August.

The agreement gives EU citizens living in the UK the possibility of the right to apply for permanent residence after five years through the 'settled status' scheme – but with the new Home Office rules (conflicting with Government assurances given in June), there is a definite bias towards requiring documented evidence of 5 years of continuous paid work, disadvantaging people with interrupted or precarious work records, including women taking time to look after children or older relatives. This bias means the continuing uncertainty for many EU citizens living in the UK will be prolonged.


Article 159 of the Withdrawal Agreement also requires the UK to establish an independent monitoring authority, which will conduct inquiries into alleged breaches of the agreement on citizens' rights, with the opportunity for EU citizens and their family members to submit complaints. The independent monitoring authority will have equivalent powers to the European Commission and the authority will also have the right to bring legal action before a court or tribunal in the UK.

POLITICAL DECLARATION

The political declaration that goes along with the withdrawal agreement sets out the UK/EU agreed aims that both hope to reach in the deal on their future relationship, including the arrangements for international trade. In line with what was agreed near the start of the Brexit negotiations, the declaration has been published before Brexit and the deal it points towards will come afterwards. Trade negotiations can take several years, and so the future agreement may be a long way off. Parliament will have to sign off Brexit (if it does) without knowing the details of that agreement, and may simply choose to be guided by what is in the political declaration.

It will be important for MPs to bear in mind that the declaration is a consensus document, in which any votes within the EU side would have been determined by Qualified Majority Voting, whereas the future agreement will be subject to veto by any EU member state. The future agreement will be legally enforceable, but the political declaration is not.

What this has led to is a declaration that is vague and simply aspirational in places, whilst being relatively definite in others. The future trade relationship is going to be "as close as possible". The two sides "will use their best endeavours to conclude and ratify their new fisheries agreement by 1 July 2020." There is to be a "broad, comprehensive and balanced security partnership." The UK is committed to the European Convention on Human Rights, although arrangements for enforcing this appear to have been weakened. Unspecified principles will be drawn up whereby the UK can participate in scientific



co-operation and overseas development projects along with EU member states, and in or with the European Investment Bank, the European Medicines Agency, the European Chemicals Agency, the carbon Emissions Trading System and Euratom.

There is going to be a customs arrangement which will “build and improve on the single customs territory provided for in the Withdrawal Agreement”, implying that the Irish backstop will develop from being only a backstop to being the general basis for future trade. The “level playing field” for trade is also mentioned again (para 22 and more strongly in para 79). However in para 28 this issue appears left unresolved, with this non-committal statement: “the extent of the UK’s commitments in customs and regulatory co-operation, including with regard to alignment of rules, would then be taken into account in the application of related checks and controls, considering this as a factor in reducing risk.” Basically this means that the closer the UK sticks to the single market, the easier the EU will make it to trade with them.

MOVING TOWARDS THE MAIN DEAL

The declaration considers arrangements for moving towards a full-scale future deal but it provides very little detail of these arrangements.


Para 125 simply says: “The future relationship should include dialogue between the Parties [UK and EU] at summit, ministerial and technical level, as well as at parliamentary level. The Parties should encourage civil society dialogue.”

Para 128 says: “The Parties support the establishment of a dialogue between the European Parliament and the Parliament of the United Kingdom, where they see fit, in order for the legislatures to share views and expertise on issues related to the future relationship.”

There is to be a Joint Committee responsible for implementing and developing arrangements, and arbitrating on any disputes. Where EU law is involved, the EU will look to the European Court of Justice for interpretation. It will be able to establish specialised sub-committees, and with a “high-level conference” every 6 months.

The main deal on future arrangements will be decided through a process which gives all 27 remaining EU member states a veto. Some countries have already used discussion of the political declaration to give notice of issues they intend to raise in this new process in which their own bargaining power will be stronger. Spain wishes to return to the long dispute with the UK concerning sovereignty over Gibraltar. France is taking a tough line over access to UK waters for fishing.

There will also be a problem about timing. Given the length of time legally binding trade negotiations can take, the new arrangements may not be agreed by the end of the transition period provided for in the withdrawal agreement, even if it is extended by 2 years to the end of 2022. There would then be a question of extending the transition period still further (with the UK continuing to be



governed by EU laws and rules despite losing its say in the EU's institutions), or a new period of "transition out of the transition" - or again facing the possibility of a 'No Deal' Brexit.

ABOUT THE BREXIT CIVIL SOCIETY ALLIANCE

The Brexit Civil Society Alliance is made up of over 80 organisations from across the UK and includes voices from health, human rights, the environment, consumer and workers' rights, equality, food, farming and trade. We want to make sure that civil society organisations understand the process and what is entailed as we leave the EU and are able to best advocate and articulate their interests in the Brexit process.

The Brexit Civil Society Alliance is guided by a broad set of principles, which are:

- **Open and accountable lawmaking:** Legislating for Brexit must respect the democratic processes, including the devolved nature of the UK constitution. There must be clear limits and safeguards on executive power. There must be robust parliamentary scrutiny at all levels with appropriate levels of transparency and debate.
- **A high standards UK, with rights, standards and funding to underpin them maintained:** Leaving the EU should not mean weaker standards, fewer rights or loss of funding. A UK framework for common standards must be mutually agreed between the four administrations to enable cross-border working and internal common market
- **Leaving the EU should not create a governance gap:** EU institutions have a role in monitoring, oversight and ensuring compliance with the law as well as setting regulations. Where governance arrangements are changed as a result of leaving the EU, there must be clear powers and procedures for ensuring the law is properly implemented and enforced on an ongoing basis.

Read more on our website: www.brexitcivilsocietyalliance.org