
Reversing over the cliff edge?

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BACKGROUND

Having your cake?

Almost a year after the referendum, Brexit negotiations finally got under way in June 2017, after the UK had notified the European Union (EU) of its intention to leave under Article 50 of the EU Treaty on 29 March. Article 50 specifies a fixed negotiation period of two years after notification, which can only be extended by unanimity among the EU27. But despite the ticking clock, progress has been slow. While the EU27 quickly agreed on its guidelines and a clear negotiating position (reputed to have been waved through in minutes), with a strong mandate for Chief Negotiator Michel Barnier, the UK's position has been uncertain and in flux.

The UK's initial position seemed to indicate a 'clean' (or hard) withdrawal from the EU, widely interpreted as an exit from the Single Market and the Customs Union, with full control over immigration and no role for EU law or the European Court of Justice (ECJ). But at the same time, the debate in the UK emphasised retaining the benefits of the Single Market, albeit without the obligations. This approach was epitomised by a quote from the UK's Foreign Secretary Boris Johnson as "having your cake and eating it too".

Reality bites

From an EU perspective, this was always an unlikely, and undesirable, proposition. The EU noted from the start that being in the Single Market or having access to its benefits comes with obligations. These include financial obligations, a role for the ECJ and free movement of people, all of which are hard to swallow for the current UK government.

The EU has also made it clear that negotiations about its long-term relationship with the UK could only start after the exit arrangements have been agreed in principle; this so-called sequencing being non-negotiable. In any case, the initial negotiations for an exit deal only aim to outline the future framework for EU-UK cooperation, rather than defining this relationship in detail.

To agree on a withdrawal agreement implies finding a solution for (i) keeping the Northern Ireland border open, a tricky proposition if Northern Ireland ends up outside the Customs Union, (ii) meeting the UK's financial obligations, a hotly disputed topic between the two sides, and (iii) how the citizens' rights of EU citizens living in the UK can be guaranteed post Brexit. The European Council is now waiting for a signal from Michel Barnier that sufficient progress has been made before negotiations move onto the long-term trade relationship, but the date is now drifting as the talks are not advancing.

It has also become increasingly clear that it will be necessary to agree to some form of transition, as it will prove impossible to reach conclusions on the future relationship between the EU and UK in such a short timescale, i.e. before March 2019. Some on the UK side have stipulated that such a transition could be a continuation of negotiations, a lengthy implementation period to make a gradual exit or even an indefinite state in which the UK would potentially stay in the EU in anything but name. None of these options are on the table. For the EU27, transition simply means a continuation of all current arrangements for a limited period, but without the political rights members enjoy. This is difficult to accept for Brexiteers in the UK, including the more than 40 Eurosceptic Conservative MPs that have outright rejected such a transition in a letter to the Government written in early September.

Presuming the withdrawal agreement can be agreed upon, there are now basically two scenarios for the long-term relationship between the UK and EU: either a variant of the current Norway deal (in essence, membership without voting rights), which has the advantage of broadly being off-the-shelf, or of the Canada deal; a negotiated trade deal, economically inferior to full Single Market membership and hard to negotiate as it would require item-by-item decision-making on maintaining or disentangling EU-UK economic relations, with the individual national interests of the EU27 taking centre stage. Independent of the potential outcome, the UK government's basic dilemma has not changed: the better economically a scenario is, the less politically acceptable it is. In fact, it is a political non-starter for the hardliners of the Conservative Party who will not want to compromise on such red lines as money, ECJ involvement or free movement of people. In the eyes of many Brexiteers, any such compromise implies a loss of sovereignty and control.

STATE OF PLAY

From Bruges to Florence?

It is in this context that Prime Minister Theresa May, weakened by the general election result that did not produce a majority for her and her Brexit approach, will hold a major speech on Brexit on 22 September in Florence. It will be followed by the Conservative Party Conference from 1 to 4 October, a forum that tends to demand strident 'Britain First' rhetoric from the party leader, alongside a clear commitment to keep the party together.

So, what might the Prime Minister say? She might be tempted to play both sides: a softer approach in her initial speech and a harder tone at the Party Conference. This is a political gamble that could leave all sides dissatisfied. Some have speculated that she might announce an official withdrawal from the European Economic Area (EEA). But it is unlikely to satisfy proponents of either a hard or a soft Brexit, being too weak for one side and too deterministic about the future for the other. Yet she can hardly claim progress in the EU withdrawal negotiations. Such a statement would be immediately rebuked by the EU27. If she signals that a transition is in the cards, it would expose her to the risk of a revolt from her Eurosceptic party members.

She could, of course, continue to reiterate some of the government's 'having-your-cake-and-eating-it-too' approach, signalling a hard Brexit – outside the Single Market and the Customs Union with strong migration controls – and no compromise on the withdrawal conditions, including a rejection of the EU's sequencing approach, while at the same time professing that there will be a transition agreement, that the Northern Ireland border will remain open and that the UK will continue to benefit from access to the Single Market.

From cake politics to a soft landing?

Satisfying the proponents of a soft Brexit will be tricky for her but they have become stronger, gaining ground after Theresa May failed to get an endorsement for her Brexit stance from the electorate in the general election, which she herself had called. Increasingly, there have been voices demanding an exit from Brexit. The election results even triggered hopes among some that the Brexit decision could be reversed if the fragile government fell. Yet, a large majority within both Conservative and Labour parties still believe that the result of the referendum must be honoured. As a result, she is very unlikely to reverse the decision to leave but could declare that she has heard the voices of business and soft Brexit proponents, and acknowledge that a transition post-Brexit and a softening on the red lines is necessary.

This would be in line with the temporary shift in the public debate after the general election. The most strident ideology-driven Brexiteers received less airtime. At the same time, the more pragmatic (or opportunistic) Conservatives had become notably softer, arguing that a transition, a financial payment to the EU, the sequencing, and a role for the ECJ are all potentially acceptable.

But this would not go down well at the party conference and for a weak Prime Minister it might mean losing her job. Soft Brexit implies accepting unpalatable withdrawal conditions: a financial payment set by the EU, second class membership for the transition period (all the obligations, no voting rights), no independent UK trade deals, continued influence of EU law on the UK, as well as continued budgetary obligations and free movement of people. For many Conservatives, this negates the whole purpose of Brexit, so they are unlikely to accept such a radical shift in position.

The only way this could potentially be sold is by demonstrating that the EU27 are willing to compromise on their red lines too. Arguably, this could have been the reason behind the recent change in negotiating tactics, with the UK starting to produce its own position papers on a range of issues, signalling room for compromise on some, if not all issues, but demanding EU27 concessions as well, for example on sequencing. The hope might have been that the EU would match this new approach, thus defusing some of the most difficult dossiers in the negotiation, by accepting, for example, a reduced financial obligation of the UK, linking it directly to trade arrangements.

But the EU did not budge. Not only because of the direct interests concerned (money and own citizens) but also because the negotiation process was not up for debate, having been set by the EU27 and previously accepted by the UK. In addition, the papers simply did not go far enough in the direction of the EU27 position, leading to the effective rejection of the UK positions and approach by the EU27, as well as a re-emphasis on the withdrawal conditions and the unity of the 27.

This leaves the Prime Minister in an unenviable position. There is no majority in parliament for any type of Brexit, soft or hard. But an exit from Brexit is also unlikely and would lead to the Conservatives losing power and, most likely, the party splitting up. The Prime Minister can continue to try to muddle through but time will run out. And without significant progress in the negotiations, can she hold on to power as costs mount?

PROSPECTS

Back to the cliff edge

Because of the current impasse and the rejection of the UK approach by the EU27, another change of stance is emerging in the UK. Government ministers have apparently reneged on previously accepted positions, for example on budgetary obligations. Boris Johnson has re-affirmed his leadership ambitions by emphasising hard line Brexit positions. Direct attacks on the Commission, especially Michel Barnier and Commission President Jean-Claude Juncker, have increased and are mirrored in the Eurosceptic press. Even though no member state would ever accept it, British pundits now claim that it would be best to cut out the Commission from the negotiations, stating that Germany and even France would be willing to cut a deal, behind the back of their negotiator. The negotiations have effectively ground to a halt, with no prospect of substantive progress in October, as was previously hoped. The rhetoric of 'no deal' has re-emerged prominently and many claim that falling back to WTO rules might be preferable to accepting the EU's "dictate".

This is patently untrue. No deal would maximise economic harm, and would result in a complete and chaotic collapse of economic and political relations with the EU, without enabling the UK to compensate for this internationally. Its standing as a trustworthy partner would be irreversibly damaged. However, politically, a no deal scenario seems to be an attractive option from the perspective of many in the Conservative Party. It means rejecting the unpalatable EU conditions, looking strong and delivering a full Brexit. Blame would be shifted to the intransigent Europeans. At present, they claim that a strong stance will force the Europeans to concede in the end, with Germany backing a deal to save its car industry, despite contrary statements from the German government and German industry. A breakdown in the negotiations satisfies the Brexiteers in the party, while Remainers probably have to accept such a *fait accompli*, and it might safeguard Theresa May's job for a period of time. Despite Labour and the rest of the opposition claiming that the Conservative Party's approach has failed, there is little they can do unless the government loses its majority.

So, the Prime Minister might be tempted to go into the Florence speech and her party conference guns blazing, stating that the UK will not accept the EU27's conditions and process, possibly disguised as a compromise offer which could never be accepted by the EU27. Florence might have been chosen as President Juncker gave an uncompromising speech there in the run-up to the general election. In any case, it would not be the first time that a Conservative Party leader chooses to go to a European location to deliver a 'no compromise' speech – Margaret Thatcher's Bruges speech is still legendary, especially in the Conservative Party. She might even go as far as suspending the talks until those intransigent European bureaucrats realise that full trade negotiations without pre-conditions are in their own interest. Any negative impact of such a step would be blamed on the EU. The Prime Minister would invoke a wartime spirit of national unity, urging Britons to come together and withstand this attack on British sovereignty.

This can backfire. If those parts of her party that tend towards a soft Brexit are willing to vote with the opposition, it could bring down the government. This could lead to a complete reversal in the UK's approach to the Brexit negotiations if there is a change towards a government committed to a soft Brexit or even a reversal of Brexit. But this is a high hurdle, as it would rely on rebels within the Conservative Party who would need to force a new general election, which they themselves would be likely to lose.

Temporary reversal or permanent breakdown?

The suspension of talks would be a significant setback to achieve a deal before the end of the negotiation period. At the very least, it would cost further time in a process that is already critically short and thus increase the chance that the UK simply ends up with no deal at all. Even if there were a significant change in the UK's Brexit approach, the UK would still struggle to show the rest of the EU that it was now a convinced European, able to make sustainable commitments.

The whole Brexit process has already led to a breakdown of trust, including a realisation that the UK's doctrine of Westminster supremacy implies that any deal or accepted obligation might well be reversed by a future parliamentary majority. This could lead to an extensive use of guillotine clauses, whereby if one condition is not fulfilled, all other arrangements are immediately null and void. But this makes it difficult for the UK because it implies a role for the Commission and ECJ, which would need to receive an oversight function to determine when the UK would be in breach of its commitments.

Forward defence

No deal starts to look increasingly likely. Even if Theresa May does not suspend talks now, the dilemma she is facing will persist. There is still hope that the UK's stance will change, which should not be abandoned, but this does not imply that the approach of the EU27 needs fundamental adjustments. Only if the UK sees what the cliff edge implies, may the EU27 witness a reasonable reorientation of the UK.

But, given that a no deal scenario imposes a huge cost not only on the UK but also on the rest of the EU, albeit relatively less significant, the EU27 must do what it can to minimise harm. It is, however, far from clear how the EU can prevent this from happening. What the EU should not do is attempt to deflect this scenario by making significant concessions. Not only would the long-term cost, in terms of the Union's cohesion, be unacceptable, it would not work: any concession would lead to demands of further concessions to keep UK voters happy.

But there are three steps the EU could take to facilitate the negotiations, pre-empt the blame game and prepare for the worst.

First, to ease the negotiations, the EU should break with the principle that the UK must come up with the solutions as it has created the problem. The UK, because of its internal divisions, is no longer able to come up with coherent positions. The EU should help the UK by fully defining the different scenarios and options: the content of a withdrawal agreement, the nature of a transition period, the options for the final relationship – a trade deal vs. staying in the Single Market and Customs Union. Essentially, the EU27 should set out how off-the-shelf solutions like the EEA could be adapted to the UK. With these details on the table, it should become clearer for the UK what the trade-offs are and it would ensure that the options, if approved by the UK, are implementable. The EU has little to lose as it holds the stronger cards in the negotiations and there can be no suggestion of the EU giving up on its basic principles.

Second, at the same time, the EU should protect itself from the blame game. The most effective way is to make a grand gesture: to unilaterally guarantee the rights of UK citizens currently residing in the EU. This would show that the European Union is not willing to put political interests over the well-being of citizens, not using them as pawns in the negotiating game. It would be a clever tactical move, but even more importantly, it would demonstrate that the EU is defined by its principles and not driven by beggar-thy-neighbour considerations.

Finally, the EU must prepare for the worst-case scenario. No deal is economically nonsensical but politically possible, maybe even likely for some. There must be contingency planning to minimise the impact on the EU27 if the UK chooses to throw itself over the cliff edge. It is better to be prepared for an eventuality that does not happen than to end up unprepared and be dragged down by the UK. This would entail looking at how to deal with assets and liabilities, what legal mechanisms in private, European and international law would be available and how the EU would diplomatically engage with third countries and international organisations.

For domestic reasons in the UK, the no deal scenario will remain on the table. It may not come to that: the economic costs are enormous and there are numerous negative political implications, including a potential split-up of the UK. But it would not be the first time that a country that has run into a domestic impasse has used international conflict to deflect from shortcomings at home.

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The views expressed in this Policy Brief are the sole responsibility of the author.

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