Using EU law to improve the Brexit deal along the lines requested by the UK Parliament

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The UK Parliament has rejected the negotiated withdrawal deal comprising a legally binding Withdrawal Agreement and a Political Declaration on future relations and has mandated the Government to seek an alternative to the most contested element – the Protocol on Ireland/Northern Ireland, commonly referred to as the backstop.

We have previously commented in the View from Brussels on how WTO arguments could be used in the negotiations to secure improvements in the text of the Withdrawal Agreement or the Political Declaration. The WTO provides a basic level of trade liberalisation and there is no need to accept such a level of trade freedom as a concession. The negotiations should have as their objective an enhanced level of trade liberalisation. We have also previously observed how many of the positions advanced by the EU as the consequences of a no-deal Brexit (partly to strengthen its own negotiating position) could be contested as inconsistent with the EU's WTO obligations.

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In this View from Brussels we discuss how EU law could be used by the UK to improve the Withdrawal Agreement and Political Declaration along the lines recently requested by the UK Parliament.

1. Making the backstop terminable

As already stated in a previous View from Brussels, the backstop exposes a major inconsistency in the position of the EU which has argued that Article 50 only allows the conclusion of an agreement that deals with separation issues, not agreements setting out a future relationship. The most that can be done, the EU has argued, is to include in the Withdrawal Agreement transition provisions towards a framework for a future relationship that could at best be defined in a political declaration of intent. The proper legal bases for an agreement on the future relationship, it argued, were other provisions of the Treaties and, in addition, formal negotiations on such agreements could, as a legal matter, only commence once the United Kingdom had become a third country. It is for this reason that separation issues were prioritised and had to be settled before discussion on the framework for a future relationship could start (leading to the December 2017 statement of sufficient progress).

The backstop as it has finally emerged is not however a transitional measure. It starts to apply only once the transition period has expired and has no end date. It applies "unless and until" an alternative is agreed, as is of course the case for any international agreement. At the very least, the backstop should, in order to qualify as transitional, be terminable unilaterally by a party on notice.

Accordingly, on the basis of the EU's own view of what is legally allowed under Article 50 and on the basis of which the negotiations proceeded, the backstop in its present from is illegal as a matter of EU law. The Attorney-General of the UK came to a similar conclusion in paragraph 17 of his advice to the government of 13 November 2018. It could also be argued that the backstop is inconsistent with the aim of the Treaty on the European Union to promote peace (expressed in its Article 3) since it is inconsistent with the institutional provisions of the Belfast/Good Friday Agreement and therefore undermines it.

EU law provides for a specific procedure for ensuring the legality of an envisaged international agreement before it is concluded. The procedure is set out in Article 218(11) TFEU and is regularly used, most recently to contest the investment protection provisions of CETA. A request for such an opinion from the European Court of Justice could be made by the UK while it is a Member State. In view of the fact that the Court dealt with the rather more difficult request for a preliminary ruling in Wightman in two months, it may even be possible to obtain an opinion before 29 March 2019. The Court has always striven to provide an opinion under Article 218(11) before the relevant agreement is concluded and the EU has in any event always consented, as a matter of sincere cooperation, to delay where necessary the conclusion of the agreement until the opinion is delivered.

If the Court confirms the existence of an inconsistency between the envisaged Withdrawal Agreement and EU law, either the Withdrawal Agreement or the Treaty would have to be amended to remove the inconsistency. It would not in fact be difficult to render the backstop consistent with Article 50. It would suffice to move the whole Protocol to the Political Declaration (where it more properly belongs) as a model that the parties could decide to implement after the end of transition period if nothing better is developed in the meantime. Alternatively, it can be given an expiry date made terminable so that it qualifies as a transition measure.

Of course, it may not even be necessary for the Court to render an opinion of this matter. The EU attaches great importance to its respect for the law and often argues that politically desirable concessions cannot be made because they would conflict with the Treaties. So it should also be able to accept that its politically convenient position that the backstop must be included in the Withdrawal Agreement and cannot be terminable cannot be maintained in the face of a demonstrated legal inconsistency with the Treaties.

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