

THE VIEW FROM BRUSSELS - COMMENTS ON VARIOUS "PLANS B"

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Legal Briefings - By **Eric White**

The negotiated withdrawal deal comprising a legally binding Withdrawal Agreement and a Political Declaration on future relations is facing significant opposition in the UK and is now unlikely to be submitted for parliamentary approval before January. The situation is confused and expressions of despair are being heard in Brussels as well as in the UK. We do not seek in the View from Brussels to make predictions about a largely unpredictable process. There are many other sources of predictions. Instead we think that there is value in a brief legal commentary on the various alternative ways forward in the event that the negotiated withdrawal deal is rejected. The alternatives that are being discussed are:

- Seeking a renegotiation of the withdrawal deal
- Delaying the date of Brexit
- Revocation of the notice to withdraw
- Withdrawal without an agreement
- EEA membership

SEEKING A RENEGOTIATION OF THE WITHDRAWAL DEAL

The UK Prime Minister is currently seeking what are variously described as "changes", "tweaks" and "clarifications" of the withdrawal deal. Attention is focussed on the backstop and obtaining some assurance that the EU will seek to avoid it and does not want it to be permanent. One might have thought that the EU could easily offer an option for the UK to terminate the backstop unilaterally. The UK will in any event not be able to terminate the backstop without having first agreed a new trade relationship with the EU that avoids a hard border in Ireland (at least until some kind of border can be introduced without putting peace at risk). Preserving peace in Ireland is a UK obligation under the 1998 Belfast/Good Friday Agreement, not the EU's. The only danger that the EU would run in dropping the need for EU consent to termination is that the UK could terminate without a successor agreement and in doing so both introduce the need for a hard border in Northern Ireland and fall back on a WTO trade regime. In view of the effort that the UK has put in to avoid these consequences this would seem highly unlikely.

However, the EU is making it abundantly clear that it considers the deal on the table to be the best and the only one available and will not renegotiate. Such statements are necessary and understandable. However, there are precedents for negotiations being reopened. The President of the Commission has, after all, also said that, with the British, you always need to negotiate three times. Indeed, an agreement only exists when it is concluded and this one has not been concluded yet. So, again, no predictions.

It is however difficult to see what alternative agreement could be negotiated in the time available before the legal guillotine falls on 29 March 2019, especially considering the complexity of the issues and the lack of consensus in the UK as to what kind of future relationship it would like.

EXTENSION OF THE DEADLINE

Article 50 expressly allows a postponement of withdrawal by unanimous decision of the remaining Member States with the agreement of the withdrawing Member State. Such a postponement, which could be agreed at any time before 29 March 2019, could allow time for a renegotiation.

However, since a postponement requires unanimous consent, it would seem likely that it would only be granted for good reasons and in the expectation of a better result that would prevail in the absence of a postponement.

It is generally considered that a short postponement for the purposes of finding a political solution in the UK, for example, through a general election or a second referendum would be treated sympathetically. The problem for the EU will be the European Parliament elections in May 2019. No-one wants the exiting UK to participate and no-one wants Brexit to dominate the campaign.

REVOCATION OF THE NOTICE TO WITHDRAW

Article 50 is silent on the question of whether a notice of intention to withdraw from the EU can be revoked. The UK government had argued in [Miller](#) that the notice cannot be withdrawn but the House of Lords itself merely accepted the contention as undisputed and so did not confirm it.

The question was referred to the Court of Justice by means of a request for a preliminary ruling of in Case C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union*.

The Court of Justice has given the answer in a [judgment](#) delivered in record time (less than ten weeks): unilateral withdrawal is possible at any time until a withdrawal agreement enters into force or, in the absence of such an agreement, the two year period (or any agreed extension to this period) expires.

The Court, following its Advocate-General, justified this position by emphasising that the objectives of Article 50 TEU were to enshrine the sovereign right of a Member State to withdraw from the EU and establish a procedure for orderly withdrawal. The strictly unilateral nature of the notification of an intention to withdraw (subject only to following its constitutional requirements) implies, according to the Court, a similar unilateral right to withdraw the notification. This interpretation is supported, again according to the judgment of the Court, by the purpose of the treaties of achieving "ever closer union among the peoples of Europe" and "eliminating the barriers that divide Europe" as well as the negotiating history of the provision which evidenced a rejection of the possibility to expel a Member State (which would be the effect of denying the possibility of unilateral revocation where the Member State democratically reverses its intention to withdraw).

In so deciding, the Court has rejected the interpretation advanced by the Commission and the Council who argued, by analogy with the provision for extension of the two year period, that revocation required the unanimous consent of all the other Member States. This position was motivated by the fear that the withdrawing Member State could use the possibility of revocation to improve its negotiating position (possibly by revoking its intention to withdraw and resubmitting it). The Advocate General had proposed to deal with this possibility of abuse with a proviso that the revocation must be in good faith. The Court did not refer to this aspect of its Advocate General's opinion and leaves the issue of good faith open, emphasising only the need for democratic legitimacy of the revocation and that it must be "unequivocal and unconditional, that is to say that the purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end".

The Court has therefore clarified the existence of a further option for the UK to remain in the EU by democratically expressing its will to do so. For further analysis of the judgment see [here](#).

WITHDRAWAL WITHOUT AN AGREEMENT

Withdrawal without an agreement is not an option that is desired by either side, although it could happen by default. Accordingly, both parties have been preparing for it.

The exact nature of “no-deal” is much discussed. Under this scenario, the UK would revert to “WTO terms” under which most third countries trade with the EU. It is not so much the unfavourable nature of those terms that would be painful for both sides. Indeed, the UK could legitimately hope that in view of the close alignment of UK and EU regulations, its exports might be treated more leniently. The WTO requires trade barriers to be no more restrictive than necessary to achieve their objective, so it may not, for example, be justified for the EU to refuse to recognise the day after Brexit certification that it accepted the day before Brexit (see [here](#)). Rather, it is disruption to existing trade flows and investments in the event of such a sudden change in the condition of trade that will arise in the event of “no-deal” that they seek to avoid.

EEA MEMBERSHIP

It has been argued that a convenient fall-back option for the UK would be the “Norway option”. It is suggested that the UK could maintain its membership of the European Economic Area (EEA) Agreement and benefit from the same conditions of access to the single market as Norway. Sometimes, adjustments are proposed, such as limitations on the free movement of persons (the EEA incorporates all the four freedoms of the EU treaties) and even the addition of a temporary customs union to deal with the Irish border problem.

This is legally the most problematic of all the alternatives.

First, the EU and the UK have both taken the view that UK’s participation in the EEA will automatically cease on Brexit day, as under all the EU’s other trade agreements (see [here](#)). The provisions in the Withdrawal Agreement dealing with the transition period would require the UK to continue to respect the provisions of these agreements along with the rest of EU law and the third countries party to the EEA would be asked to continue to treat the UK as if it were a Member State of the EU. Reversing this legal view in the event of a “no deal” Brexit would have consequences for many other agreements and would be incoherent leading to many legal disputes with third countries.

Second, joining the EEA as a “non-EU State” is not straightforward. The EEA Agreement allows this only for countries who are members of the European Free trade Agreement (EFTA) and joining EFTA would require a referendum to be held in Switzerland and possibly elsewhere.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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