

THE VIEW FROM BRUSSELS - CAN THE BACKSTOP BE RENEGOTIATED?

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Legal Briefings - By **Eric White, Consultant**

Both candidates to be leader of the Conservative Party, and therefore to be UK Prime Minister, have vowed to renegotiate the Withdrawal Agreement and in particular the Protocol on Ireland/Northern Ireland. Meanwhile in Brussels, the EU-27 (meeting in [Euro summit](#) format) has just reiterated, again, that “the Withdrawal Agreement is not open for renegotiation”.

In this View from Brussels we examine from a legal perspective how the parties can finally come to an agreement.

NOTHING IS AGREED UNTIL EVERYTHING IS AGREED

We start by stating the obvious. There is no Withdrawal Agreement. There is a negotiated draft text that has been agreed between the negotiators. It has not, however, been agreed by either of the parties (that is, neither by the United Kingdom nor formally by the European Union) as it remains to be ratified by both sides before it becomes an agreement. It has not even been signed by the parties. Such a text has no legal status. As the European Council [said itself](#) at the beginning of the negotiations “in accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately.”

As a legal matter, therefore, it is clear that although the negotiations are not currently “open” or ongoing, there is no reason why they should not be reopened in an effort to achieve a text to which both parties can commit themselves.

NEGOTIATIONS ARE OFTEN REOPENED, FORMALLY OR INFORMALLY

A negotiation process can never really be said to be over until an agreement is concluded. The negotiations for the Comprehensive Economic and Trade Agreement with Canada (“CETA”), for example, were said to have finished in 2014 but the text continued to be modified, notably in respect of investment protection, until signature on 30 October 2016, when it was further modified by being adopted together with a Joint Interpretative Instrument (“JII”) negotiated in *extremis* to satisfy the demands of Wallonia, which was refusing its consent. The role of the JII in modifying CETA is well illustrated by the fact that the Court of Justice relied on it extensively in its [opinion](#) on the compatibility of CETA with EU law.

Indeed, as pointed out in a previous [View from Brussels](#), the negotiated text of the Withdrawal Agreement has already been modified since the negotiations are said to have been closed. As a result of the delay in Brexit, the negotiators have agreed a [modification](#) to the Withdrawal Agreement to provide for its entry into force on the earliest of the extended Article 50(3) date or the first day of the month following receipt of the notifications of ratification by both parties. Once the parties are ready to conclude the Withdrawal Agreement, they will presumably have to change various other dates and in particular the end of the transition period and possibly the financial contributions for the extended period.

In addition, the parties have already negotiated an “[instrument](#)” that clarifies and explains how they understand their obligations and is expressly stated to have “legal force and a binding character”.

There is no reason therefore why the negotiated text cannot be further developed, clarified and even amended.

SUGGESTIONS FOR RESOLVING THE BACKSTOP ISSUE

The [Joint Report](#) of December 2017 (produced by the UK Government and the European Commission) set out three means of avoiding a hard border between Ireland and Northern Ireland. The preferred option of the UK at the time was to achieve this through the overall EU-UK relationship. Its first fallback was to propose specific solutions to address the unique circumstances of the island of Ireland and the second was to maintain full alignment with certain EU rules of the Internal Market and the Customs Union. The existing Protocol on Ireland/Northern Ireland follows what it calls the third scenario – that is maintaining alignment with EU rules – while recognising that this is not an optimum solution for either party and that alternative arrangements could be sought to avoid it.

There is no clarification, however, of what these alternative arrangements could be and this constitutes a gap in the Withdrawal Agreement that further negotiations could usefully seek to fill.

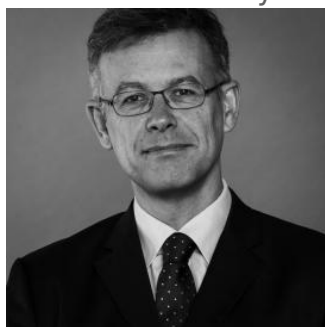
The UK government has set up a [Working Group](#) to examine what these alternative arrangements could be. It seems to be envisaged that the results of this work will only be available at the end of 2020 so as to allow the alternative arrangements to be implemented before the Protocol on Ireland/Northern Ireland enters into force. A British think-tank, Prosperity-UK, working with the Alternative Arrangements Commission (a UK Parliamentary Group), has, however, already produced an [interim report](#) analysing possible alternative arrangements. This envisages an additional protocol to the Withdrawal Agreement setting these out (Herbert Smith Freehills is providing technical input with regard to a model for such a protocol).

Fixing the alternative arrangements in the Withdrawal Agreement would be desirable since it would provide the UK with a legally effective assurance that these would be acceptable to the EU and avoid the existing Protocol on Ireland/Northern Ireland entering into force. At present, the text provides that the alternative arrangements would be contained in the future relationship and the EU has openly stated that it will use this as leverage to achieve a future relationship that meets its objectives. Indeed, once the conditions for alternative arrangements are clearly defined, there is no reason why any difference of opinion as to their fulfilment should not be subject to arbitration with a binding outcome before the end of the, possibly extended, transition period.

[Brexit hub](#)

KEY CONTACTS

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



**LODE VAN DEN
HENDE**
PARTNER, BRUSSELS

+32 2 518 1831
Lode.VanDenHende@hsf.com



ERIC WHITE
CONSULTANT,
BRUSSELS

+32 2 518 1826
eric.white@hsf.com

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