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Brexit: state of play

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The Brexit negotiations have entered their second year. Barely twelve months remain before the United Kingdom will depart from the European Union. The British government wants to leave the single market and the Customs Union and escape the jurisdiction of the European Court of Justice. The UK's red lines are clear and are leading the negotiations towards a free-trade agreement of the kind the EU has with Canada, possibly with a number of additional elements (also known as a 'Canada-plus' deal).

Despite the results achieved so far – agreements on 'Phase 1' withdrawal issues and a transition period after March 2019 – the prospects for reaching a final agreement remain uncertain. This uncertainty is linked mainly to domestic political conditions in the UK.

Discussions between the EU and the UK on the future relationship started this week. Below are five key issues that will dominate negotiations in the months ahead:

The British want special treatment, but the EU27 are reluctant

One of the main challenges is that London is seeking special status as a third country. For instance, although it will formally cease to be a member, the UK wants to continue

to play a role in European Union agencies, such as those covering aviation and chemicals. In cooperation on foreign and security policy the UK seeks a better deal than the EU has with other third countries like Norway or Turkey. The UK wants to be involved in decision-making on EU military operations to which it contributes. Though many in Europe would welcome such close, continued cooperation, the EU will want to avoid setting precedents or discriminating against existing partners. Norway, for instance, would feel aggrieved if the UK were to get qualitatively better terms for its contribution to EU security and defence policy than it has. In judicial cooperation – an area where continued EU-UK cooperation is highly desirable – Denmark (an EU member but with opt-outs on judicial and police cooperation) will be vigilant to ensure that the UK, as a non-EU-state, is not offered better terms in areas such as access to databases of suspected criminals or terrorists, or the European Arrest Warrant. Moreover, on trade, the European Union is bound by its own equivalence regimes and the Most Favoured Nation (MFN) clauses included in its bilateral agreements with third countries and cannot simply grant the UK special terms in an EU-UK agreement.

Politicians in Westminster and the British media interpret the EU's rigid stance as 'punishing' the British. But for the EU27 the principle is clear. Brexit is ultimately about striking a balance between rights

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and obligations: a non-EU member cannot be granted better terms than an EU member-state. The scope for a special deal with the UK is therefore limited. The question is whether an important and proud country such as the UK will resign to this.

No solution for the Irish border (yet)

Despite an agreement in principle in December, the Irish border question remains the thorniest issue in the negotiations. Prime Minister Theresa May wants no customs border down the Irish Sea and no hard border between Ireland and Northern Ireland. But the UK also wants to leave the Customs Union and the European single market. These three demands are irreconcilable. May will have to make a U-turn on one of them if an agreement is to be reached by March 2019.

Theresa May has said she wants 'a customs partnership' with the EU. There are no details at this stage, but it is not impossible that she will make a U-turn on a UK-EU customs union. However, that would not remove the need for checks on the Northern Irish/Irish border: food and environmental standards, among other things, will have to be monitored, as will rules of origin. Northern Ireland will therefore have to remain aligned with some single market rules. An EU-UK customs union would also impinge on Britain's ability to have its own sovereign trade policy; a politically sensitive point for the pro-Brexit wing of the Conservative party.

But an EU-UK customs union would obviate the need for most, if not all, checks and improve the politics between Dublin and London, and so would be welcome. As it stands, the draft withdrawal agreement includes a 'fallback option' whereby Northern Ireland would continue to comply with the relevant rules of the EU internal market and customs union, if no alternative solution is found to prevent a hard border. Prime Minister May has already ruled out this

possibility. Besides, she will unlikely receive sufficient backing for such a backstop from the Conservatives, but also from the DUP – on whose support her governing majority depends. The negotiations may yet break down on this point.

A crucial vote in the British parliament

The Brexit agreement must be in place by October if it is to pass through the British and European parliaments before the 29 March 2019 deadline. So just five months remain. May has promised the UK parliament a 'meaningful vote' on the exit deal. It remains unclear what this means. Most analysts however, judge it almost inconceivable that Theresa May will stay on as Prime Minister should she lose this crucial vote in the House of Commons. A government crisis cannot be ruled out.

The UK parliament is split: there is no majority for either a hard or a soft Brexit. Nor is there a majority to reverse the referendum result. Theresa May will need to deploy the utmost political skill to steer an exit deal through parliament. Her strategy may be to delay a vote until the last possible moment. That would put parliament on the spot. This is a very risky strategy, as there would then be no meaningful vote due to the lack of time to renegotiate an alternative. The choice presented to the UK parliament would be one between the exit agreement and the great unknown. May is also counting on Conservative 'Remainers' supporting her because the alternative may lead to fresh elections.

A great deal of uncertainty also remains about the consequences – both legal and procedural – of the UK parliament voting down an exit agreement. Could the negotiations be halted? Would more time be allowed? Would the negotiations restart? So as to manage expectations in London, European member states or the European Commission should offer their perspective on what the implications might be.

The transition agreement will (probably) not be long enough

A transition phase has been agreed, but it remains virtual. In line with the principle that 'nothing is agreed until everything is agreed', a transition phase will only start if there is an exit deal. In a no-deal scenario, therefore, there will be no transition phase.

The exit agreement will include a political declaration on future trade relations. This will set out principles but no details. Consequently, on 29 March 2019 there will still be no clarity about the future trade relationship with the UK. The technical negotiations will only start once the UK has formally left the EU. The discussion on a customs union, for example, or British participation in the single market, or parts of it, will therefore continue during the transition phase, with all the attendant consequences for Dutch business.

The trade agreements with Singapore and Japan were completed this week. The agreement with Japan took six years. The agreement with Singapore took eight years. Trade agreements take time. The Brexit transition phase is due to last for only 21 months. Besides, an EU-UK trade agreement will be the first of its kind, since it concerns the separation, not the integration, of two economies. The discussions will remain highly complex and politically sensitive. Serious consideration must be given to the fact that by 31 December 2020 no new agreement will be in place, let alone that it will have been ratified. The question is instead whether it is legally and politically possible to extend the transition phase. Any extension of the transition phase would also require a new agreement on any financial payments from the UK to the EU.

Level playing field is crucial

In the discussions on a future trade relationship, one area of key concern for the Netherlands is guaranteeing a 'level playing field' with the UK. The Netherlands wants no new barriers to trade with the UK, but at the same time it also wants to prevent British businesses from being able to compete unfairly. The combination of the European single market and the Customs Union was the best of both worlds: the market was open and everyone applied the same rules. After Brexit the UK could diverge from environmental, labour or climate standards and thereby gain a competitive advantage. The same applies to corporation tax, state aid and procurement policy. The issue of the governance structure of a new trade agreement is key, and requires particular scrutiny from the Dutch parliament.

Conclusion

A crisis in British politics cannot be ruled out between now and March 2019. And so the possibility of a no-deal (cliff-edge) scenario remains. Also, the EU27 must guard against overconfidence. To make a deal possible, some believe that Theresa May will ultimately give way on her earlier red lines. After all, she has done so on several occasions in the past year. The deadline is approaching and Prime Minister May will soon have to make stark choices. But uncertainty, particularly with regard to British politics, means that when it comes to the Brexit talks past results are no guarantee for the future.

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