

THE BREXIT WITHDRAWAL AGREEMENT

A FIRST ANALYSIS

BRIEFING

II

Marley Morris
and **Tom Kibasi**

November 2018

ABOUT IPPR

IPPR, the Institute for Public Policy Research, is the UK's leading progressive think tank. We are an independent charitable organisation with our main offices in London. IPPR North, IPPR's dedicated think tank for the North of England, operates out of offices in Manchester and Newcastle, and IPPR Scotland, our dedicated think tank for Scotland, is based in Edinburgh.

Our purpose is to conduct and promote research into, and the education of the public in, the economic, social and political sciences, science and technology, the voluntary sector and social enterprise, public services, and industry and commerce.

IPPR
14 Buckingham Street
London
WC2N 6DF
T: +44 (0)20 7470 6100
E: info@ippr.org
www.ippr.org
Registered charity no: 800065 (England and Wales),
SC046557 (Scotland)

This paper was first published in November 2018. © IPPR 2018

The contents and opinions expressed in this paper are those of the authors' only.

The progressive policy think tank

CONTENTS

1. Introduction	3
2. Withdrawal agreement	4
Irish backstop: UK-EU customs union and Northern Ireland specific provisions.....	4
Transition.....	6
EU citizens' rights	6
Financial settlement	6
Separation provisions.....	6
Governance	7
Political declaration: Future relationship.....	7
3. Concluding assessment	9
References	10

ABOUT THE AUTHORS

Marley Morris is a senior research fellow at IPPR.

Tom Kibasi is the director of IPPR.

Download

This document is available to download as a free PDF and in other formats at:

<http://www.ippr.org/research/publications/brexit-withdrawal-agreement>

Citation

If you are using this document in your own writing, our preferred citation is:

Morris M and Kibasi T (2018) *The Brexit withdrawal agreement: A first analysis*, IPPR.

<http://www.ippr.org/research/publications/brexit-withdrawal-agreement>

Permission to share

This document is published under a creative commons licence:

Attribution-NonCommercial-NoDerivs 2.0 UK

<http://creativecommons.org/licenses/by-nc-nd/2.0/uk/>

For commercial use, please contact info@ippr.org



1. INTRODUCTION

After nearly two years of negotiations, the government has published the withdrawal agreement (WA) between the UK and the EU, as well as an outline of the political declaration on the future relationship after Brexit. This analysis provides a first assessment of the texts and the implications for the future of UK-EU trade.

While the withdrawal agreement runs to nearly 600 pages, the outline political declaration is just seven pages in total, with only three pages of high-level bullet points on the future economic partnership. Crucially, however, the text makes clear that the withdrawal agreement provides the basis on which the future partnership will be built. It is therefore more than a 'divorce settlement' but less than a 'deal'.

Perhaps the single most important conclusion from the texts is that uncertainty will persist. The Brexit process will continue well into the 2020s, and the final destination remains unclear. The lack of certainty about the UK's future trading arrangements is likely to continue to damage investment in the economy. The very poor growth forecasts of 1.4 to 1.6 per cent announced at the recent Budget were based on a 'good' deal and are likely to be optimistic (HM Government 2018).

The withdrawal agreement does not represent what has been described as 'soft Brexit'. The bare-bones customs union will not deliver frictionless trade as non-tariff barriers (such as sanitary and phytosanitary and product regulation checks) will be introduced even if rules of origin checks and tariffs are unnecessary. The measures for the level-playing field are strong on regulating state aid but significantly weaker for labour market regulation and environmental protection.

At the time of publication, political events are moving rapidly. This briefing assesses the substance of the withdrawal agreement but not its likelihood of parliamentary success. It is unclear how various interest groups will respond: if judged against the chaos of 'no deal' then they may support it. If it is compared to membership or to a 'soft Brexit' then they may not.

2.

WITHDRAWAL AGREEMENT

The withdrawal agreement is the legal text managing the UK's exit from the EU. In contrast with the political declaration on the framework for the future UK-EU relationship, the withdrawal agreement is legally binding. For the most part, the withdrawal agreement covers issues relating to the UK and the EU's separation, rather than the future relationship, but in a number of areas the terms of separation have important implications for how the EU and the UK will trade and cooperate together in future.

The withdrawal agreement addresses the three priority areas initially outlined by the EU at the start of the negotiations: avoiding a hard border between Northern Ireland and the Republic of Ireland, protecting UK and EU citizens' rights, and agreeing the financial sum owed by the UK upon exit. It also covers the 21-month transition period, as well as some other elements of withdrawal. We discuss each component in turn.

IRISH BACKSTOP: UK-EU CUSTOMS UNION AND NORTHERN IRELAND SPECIFIC PROVISIONS

The 'Irish backstop' is the most contentious area of the withdrawal agreement. It is designed to avoid a hard border on the island of Ireland under all circumstances. While the UK and EU envisage that the future relationship could independently resolve the question of the Irish border, the backstop is designed to be used "unless and until" an alternative solution guaranteeing a soft border can be found (WA Prot Art 1(4)). It also contains a review mechanism that ends the application of the backstop if both parties jointly agree it is no longer necessary (WA Prot Art 20).

The backstop comprises two core components: a UK-wide customs union with the EU and a Northern Ireland-only arrangement that keeps Northern Ireland in the EU's VAT area and single market for goods. It is, therefore, a 'heavy duty' backstop.

UK-EU customs union

A UK-wide customs union is embedded into the backstop. The customs union prevents all tariffs or quantitative limits between the UK and the EU, covering both industrial and agricultural goods (but excluding fishery and aquaculture products) (WA Prot Art 6). This is designed to prevent a customs border down the Irish Sea – a key red line of the UK government and their partners in the Democratic Unionist Party.

However, it is important to recognise that the agreement is for a 'bare-bones' customs union; such an agreement is not designed to cover the entirety of the future economic relationship between the UK and the EU, because it does not cover a range of areas, including services trade, labour mobility, public procurement, and other areas of economic cooperation. Moreover, a customs union alone does not provide for 'frictionless trade' between the UK and the EU. While it removes tariffs and quantitative restrictions, and removes the need for proof of origin, it does not address a range of other non-tariff barriers, including security and safety controls at the border (eg sanitary and phytosanitary checks), financial controls (eg VAT checks), and market surveillance checks (eg product regulation checks) (European Commission

2018a). This is particularly important in heavily regulated sectors such as motor vehicles, pharmaceuticals, and chemicals, where significant barriers would emerge in a 'bare-bones' customs union scenario.

The customs union will, however, restrict the UK's trade policy choices, as it will require alignment with relevant parts of the EU's commercial policy – in particular, tariffs applied to imports from third countries and rules of origin (WA Prot Anx 2 Art 3). This does not prevent an independent trade policy, but it does severely constrain its policymaking in this field.

Level playing field commitments

The customs union outlined in the Irish backstop is underpinned by certain 'level playing field' commitments. These commitments are designed to ensure that neither party gains an unfair competitive advantage over the other. It applies to a limited number of 'horizontal' policy areas, including state aid, taxation, environmental protections, and social and labour rights.

There are stringent level playing field requirements with respect to state aid to undertakings. The level playing field requires the UK to maintain current EU state aid rules (WA Prot Anx 4 Art 7(1)). It also requires the UK to set up or maintain an 'independent authority' to oversee state aid rules (WA Prot Anx 4 Art 9). This role – in effect replacing the current role of the European Commission vis-à-vis state aid – will presumably be handed to the UK's Competition and Markets Authority. The independent authority is expected to cooperate closely with the European Commission, and must consult the Commission ahead of all decisions and take account of the Commission's opinion (WA Prot Anx 4 Art 10(4)).

On the other hand, the level playing field requirements for environmental and labour standards are weaker. The backstop requires both parties to sign up to non-regression clauses on environmental and labour standards (WA Prot Anx 4 Art 2 & 4). These clauses are designed to prevent either party from lowering protections below current levels. While these clauses are notably stronger than is typical in free trade agreements, they do not require the UK to follow the EU environmental and social acquis in full and do allow for some degree of divergence. Neither do they require the UK to update environmental or labour legislation over time in line with EU developments. If the EU were to raise its standards, there would be no requirement for the UK to follow suit, meaning worker rights could diverge over time. Finally, the governance arrangements are much weaker than the status quo: the non-regression clauses are enforced primarily at the domestic level. Formal arbitration proceedings can apply with respect to enforcement, but these are state-to-state procedures that tend to be ineffective in fully protecting rights (WA Prot Anx 4 Art 2 & Art 4) (see also Morris 2018). A non-regression clause of this type is therefore not sufficient to maintain current protections in full.

Northern Ireland-only provisions

Alongside the UK-wide customs union and level playing field commitments, there are also specific provisions of the backstop applying only to Northern Ireland. These provisions would see Northern Ireland in effect remain in the VAT area and the single market with respect to goods. Northern Ireland would continue to be subject to a large part of the EU acquis, including environmental, agriculture, energy, and VAT and excise legislation (WA Prot Art 8-11 & Anx 5-7). Crucially, the areas relating to EU law would be overseen by the European Commission and subject to the European Court of Justice (WA Prot Art 14(4)).

Despite the UK-wide customs union, the backstop therefore still retains a special status for Northern Ireland. The relationship between Great Britain and the EU

is based on a common customs territory, but the relationship between Northern Ireland and the EU is critically linked to the single market. In order to address concerns about a border down the Irish Sea, the withdrawal agreement highlights efforts to minimise barriers to trade between Northern Ireland and Great Britain, and clarifies that the backstop should not prevent unfettered market access for goods moving from Northern Ireland to Great Britain (WA Prot Art 7). But this does not change the core reality that Northern Ireland will be subject to different provisions to the rest of the UK after Brexit, should the backstop come into effect.

TRANSITION

The withdrawal agreement ensures that the UK will continue to follow EU law for a time-limited transition period after Brexit (WA Art 127). The UK will continue to be subject to the vast majority of the EU acquis, and so will in effect continue to be treated as a member state, with the exception that it will no longer participate in decision-making within the EU's institutions. The transition period is set to end on 31 December 2020, but it allows for the possibility of extension to an unspecified date (WA Art 132).

This article provides a different route to the backstop for avoiding a hard border on the island of Ireland, if no alternative agreement for maintaining a soft border is found by July 2020. Rather than activating the backstop, the government might simply extend the transition period. Given the amount to be agreed in the short period ahead, it seems more likely than not that the transition period would be extended for at least two years.

EU CITIZENS' RIGHTS

The withdrawal agreement secures the rights of EU citizens currently living in the UK and the rights of UK citizens currently living in the EU. It guarantees the right of residence, the right to equal treatment, the right to employment, and social security rights, among others. It also protects the rights of family members of EU citizens. The agreement outlines guidelines for the process of issuing residence documentation to prove the entitlement of rights, partly in order to ensure it is not too onerous on citizens (WA Art 18). While the agreement provides continuity for a number of rights, there are some limitations – for instance, the agreement does not guarantee onward movement rights (the right to freely move to other EU member states) for UK citizens currently living in the EU.

FINANCIAL SETTLEMENT

The financial settlement settles the UK's accounts before it withdraws from the EU. It provides for a mechanism for calculating the amount the UK owes the EU, based on its outstanding commitments and its share of liabilities and assets. It also ensures that the UK will continue to contribute to and participate in the EU's budget during the transition period.

SEPARATION PROVISIONS

The agreement also includes a number of further separation provisions. This largely involves arrangements for providing continuity for a range of ongoing activities between the UK and the EU, including ongoing customs procedures, ongoing VAT and excise duty matters, ongoing police and judicial cooperation, ongoing public procurement procedures, and ongoing court proceedings.

GOVERNANCE

There are two key aspects of the governance of the withdrawal agreement: supervision and dispute resolution.

First, a joint UK-EU committee will be responsible for supervising the implementation and application of the withdrawal agreement (WA Art 164). The committee will operate on the basis of mutual consent. It will work alongside a number of specialised committees, including a committee on citizens' rights, a committee on the financial settlement, and a committee on the Northern Ireland backstop (WA Art 165).

In addition, with respect to the protection of EU citizens' rights, the UK is required to set up an independent monitoring authority to supervise the arrangement (WA Art 159). The independent monitoring authority is designed to have powers equivalent to the European Commission with respect to citizens' rights. It would be able to conduct inquiries into alleged breaches of the agreement, receive complaints from EU citizens and their family members, and where necessary bring cases before the domestic courts.

Second, the withdrawal agreement outlines a mechanism for settling disputes. At first, both parties should try to settle disputes through consultations; if this proves ineffective, then after three months either party can request the formation of an arbitration panel. The ruling of the arbitration panel is binding; if either party does not comply, this can trigger sanctions, such as the payment of lump sums or penalty payments, or in more serious cases of non-compliance, the suspension of obligations (WA Art 178). Where the matter relates to the interpretation of area of EU law, the arbitration panel must request the Court of Justice of the European Union to decide the ruling instead (WA Art 174). This mirrors the adjudication process contained within the EU-Ukraine Association agreement (Journal of the European Union 2014).

POLITICAL DECLARATION: FUTURE RELATIONSHIP

Accompanying the withdrawal agreement is an outline of political declaration on the framework for the future relationship between the EU and the UK. The political declaration will not be binding and it will be possible to change it after the withdrawal agreement is signed and ratified.

There is, though, a formal 'link' between the withdrawal agreement – which is legally binding – and the accompanying political declaration. This link ensures that the EU and the UK will use their best endeavours to expeditiously negotiate such an agreement in good faith if the withdrawal agreement is finalised (WA Art 184). Nevertheless, it will still be possible for the UK to alter its own red lines and therefore change the scope of the future partnership during the transition period. This is important because the forthcoming political declaration is likely to be 'minimalist' – in that it will set out a free trade agreement along the lines of CETA, the EU-Canada deal – and so, if the government were to change its red lines, it could renegotiate a more ambitious agreement at a later stage.

In its current form, the published outline of the political declaration on the future relationship is somewhat vague and ambiguous (PD 2018). However, there are some emerging themes.

- The overarching framework of the future relationship is a free trade agreement, on the same model as CETA (the EU-Canada agreement). This provides the baseline for the negotiations and so all proposals should be understood in this context. Where the declaration describes its aim as 'ambitious' it should be understood that is compared to a standard free trade agreement, not EU membership.
- The future relationship includes ambitious provisions for trade in goods, including zero tariffs and quantitative restrictions, and deep customs and regulatory cooperation. There is also an implication that alignment of legislation could ease trade in goods. However, there is no

suggestion that the Chequers proposal of a 'common rulebook' could deliver frictionless trade. Under these plans, we should therefore expect significant new non-tariff barriers in goods, particularly in heavily regulated sectors such as chemicals and pharmaceuticals.

- The future relationship indicates that there will be significant barriers to trade in services between the UK and the EU. UK firms will only have EU market access under host state rules and will lose the benefits of single market treatment. For instance, in the case of financial services, UK-based firms will lose their financial services 'passport'. The declaration notes that both parties will endeavour to introduce equivalence assessments, covering certain financial services, as fast as possible after UK withdrawal. However, equivalence does not cover all financial service products and is less stable than passporting, since the Commission has the power to remove equivalence status at short notice.
- The provisions on labour mobility clearly only refer to short-term stays and temporary movement for business purposes; they do not cover longer term migration or settlement and do not in any way resemble current free movement arrangements.
- There are 'level playing field' provisions that cover similar scope to those contained in the Irish backstop (but which could potentially be expanded further).
- The provisions on law enforcement and judicial cooperation are ambitious in scope, but are inherently limited by the UK's red lines; the scale of cooperation will necessarily depend on how flexible the UK is in a number of contentious areas, such as the role of the Court of Justice of the European Union and the possibility of alignment of rules to EU legislation.

3.

CONCLUDING ASSESSMENT

The withdrawal agreement and outline political declaration suggests a slight softening of the UK's position in a number of areas, but the UK and the EU are still headed for a far more distant economic relationship than the status quo. This is not a soft Brexit. Despite claims that the UK risks becoming subject to EU rules without any say, much of the agreement maintains regulatory autonomy, at the cost of frictionless market access. Yet the same cannot be said of trade policy, where the UK will remain in a single customs territory for the transition and potentially beyond.

The future relationship points towards a free trade agreement, which, while ambitious compared to other similar agreements, is inherently constrained and radically different to the current single market arrangements that come with membership of the EU. While the backstop outlines a joint customs territory covering the UK and the EU, in reality this is a 'bare-bones' customs union that will do little to address non-tariff barriers in goods. There will therefore be new costs imposed on businesses and likely disruption to cross-border supply chains.

The one area where the backstop does point towards close integration is with respect to Northern Ireland, which will in effect remain part of the EU's single market in goods; but this comes at the cost of regulatory divergence within the UK and a border down the Irish Sea.

The withdrawal agreement and political declaration comprise a wide-ranging deal, but they should not be interpreted as representing a pivot to a soft Brexit. The trajectory of the UK is still towards an economic rupture with the EU, which may prove costly in investment, jobs and living standards.

REFERENCES

- European Commission (2018a) *Slides on customs controls*. https://ec.europa.eu/commission/publications/slide-customs-controls_en
- European Commission (2018b) Draft Agreement on the on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018 [WA]. https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en
- European Commission (2018c) Outline of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom [PD]. https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en
- HM Government (2018) Policy Paper: Budget 2018. <https://www.gov.uk/government/publications/budget-2018-documents/budget-2018>
- Journal of the European Union (2014) 'Association between the European Union and its Member States, of the one part, and Ukraine, of the other part' *Journal of the European Union* Section 3, Article 322.2 https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf
- Morris M (2018) *A level playing field for workers: The future of employment rights post-Brexit*, IPPR. <http://www.ippr.org/research/publications/a-level-playing-field-for-workers>

Institute for Public Policy Research

The image features a solid blue background with several large, overlapping orange shapes. These shapes include a large curved area in the top right, a rectangular block in the middle left, and a curved area in the bottom left. The overall composition is minimalist and modern.

GET IN TOUCH

For more information about the Institute for Public Policy Research, please go to www.ippr.org

You can also call us on +44 (0)20 7470 6100, e-mail info@ippr.org or tweet us @ippr

Institute for Public Policy Research

Registered Charity no. 800065 (England & Wales), SC046557 (Scotland), Company no, 2292601 (England & Wales)

The progressive policy think tank