



CRUNCH TIME? THE EU TAKES STOCK OF BREXIT AT THE JUNE EUROPEAN COUNCIL

EU leaders met on 28-29 June 2018 at a time of growing divisions across Europe. A migration crisis reinvigorated by the election of a populist government in Italy, an incipient trade war with the US, and weakening transatlantic co-operation in NATO, all left time short to discuss Brexit. The Council was apparently, however, not obviously impressed by the current state of the Brexit negotiations. With the clock ticking, all eyes are now on the October Council as a final hurdle – or last chance saloon – before a no deal Brexit becomes increasingly inevitable.

WHAT WAS AGREED?

The EU Council, in its EU27 setting, welcomed the progress made on "part" of the legal terms of the withdrawal agreement, but expressed concern that important aspects of the withdrawal agreement, including its territorial application to Gibraltar, have yet to be agreed.

Member States agreed that work on preparation of a political declaration on the framework for the future relationship must be accelerated. The Council stated that this "requires further clarity as well as realistic and workable proposals from the UK as regards its position on the future relationship". The Council hinted that matters would be easier if the UK's position were to "evolve" in the direction of the principles already laid down by the Council and reconfirmed at this meeting. The Council ended by renewing calls for EU institutions and member states to step up their work on preparedness "for all outcomes".

WHAT WAS NOT AGREED?

The publication of the draft EU/UK withdrawal agreement on 19 March 2018 left a number of unanswered questions. Amongst them was the scope of the so-called "backstop" for Northern Ireland – a contingency arrangement first set out in the Joint Report of December 2017, which allowed the overall negotiations to proceed to Phase II. The UK agreed that "in the absence of agreed solutions, the UK will maintain full alignment with those rules of the Internal Market and the Customs Union".

The backstop agreement was translated into the EU's proposal for a "Common Regulatory Area" in respect of Northern Ireland and the EU, which was included in the Commission's proposed draft withdrawal agreement.

Key issues

- No substantial agreements on Brexit were reached at the European Council held on 28 and 29 June.
- The Irish border backstop solution remains a sticking point, with both the UK and EU insisting that each other's proposals are unworkable.
- The European Council will next meet in October, which may be the last opportunity to finalise the withdrawal agreement in time for ratification, before the UK exits on 29 March 2019.

Prime Minister Theresa May dismissed this proposal and stated that the Government would not accept any solution that threatened the integrity of the UK. The UK subsequently published a counterproposal in its technical note on a Temporary Customs Arrangement, which would keep the entire UK - not just Northern Ireland - inside a Customs Union until 2021. This proposal was met with scepticism from the EU, not least because it would not avoid the need for regulatory checks on goods crossing the Irish border and did not respect the EU's red line of single market integrity.

Despite the efforts made by the British and Irish governments in the run up to the summit, including bilateral discussions at the British-Irish Council meeting in Guernsey, agreement remains out of reach as to what border arrangements should form the backstop contingency for the withdrawal agreement. The Council expressed "its concern that no substantial progress has yet been achieved". We can expect this issue to take centre stage as we approach the next European Council in October.

The UK's red line of an end to the jurisdiction of the Court of Justice of the European Union over the UK, save to the extent that the UK seeks continued access to EU bodies and agencies on an ad hoc basis, has prevented agreement being reached on the governance of the withdrawal agreement. The EU maintains that the withdrawal agreement should be subject to CJEU jurisdiction. Agreement on dispute settlement will continue to be a sticking point, as neither the EU nor the UK appears willing to compromise.

The UK's desired political declaration, on the scope and content of the future relationship agreement (or agreements), also appears out of reach for now. It is likely that if and when the withdrawal agreement is finalised in October (or later), a declaration of sorts will be made by the parties as to the broad structure of any future relationship. How detailed this will be remains to be seen.

NEXT STEPS - HOW LATE IS TOO LATE?

The European Council will next meet on 18 October 2018. In the run up to that meeting a mammoth diplomatic effort will be required in order to reach agreement on outstanding withdrawal issues. The UK will also seek a declaration of principle on the scope and content of the future relationship and trade agreement, alongside the final withdrawal agreement text.

Germany's Brexit envoy Peter Ptasek has stated that, given the current lack of agreement, the October Council will "have to solve all problems – withdrawal, Northern Ireland, governance and the future - in one go" and that the odds of success "are still unclear".

Meanwhile, the UK's publicly divided Cabinet is meeting on 6 July at Chequers, the Prime Minister's country retreat, to resolve outstanding disagreements within Theresa May's Government, and the Prime Minister hopes to publish a White Paper later in July on its aspirations for the UK's future relationship with the EU. This will attempt to settle debates within the Conservative Party so that focus can turn to securing progress with the EU.

Both the UK and the EU have continually reiterated that "nothing is agreed until everything is agreed" (though the Council's conclusions also demand that "all commitments undertaken so far are respected in full"). As such, there remains a material risk of a no deal Brexit in March 2019 unless and until all aspects of the withdrawal agreement are agreed. Even if this is achieved, the EU and the UK also face having to agree outline terms of a future relationship

"In light of the state of play presented by the Union negotiator, the European Council welcomes the further progress made on parts of the legal text of the Withdrawal Agreement. The European Council takes note, however, that other important aspects still need to be agreed..."

European Council, 29 June 2018

within an exceptionally short space of time, with high expectations on what this will achieve.

The withdrawal agreement, if reached, must be ratified by both the European Parliament and the UK Parliament before the UK leaves the EU on 29 March 2019. Concessions made by the UK Government to its own backbenchers in the European Union (Withdrawal) Act 2018 enable them to vote on any final deal, and require the withdrawal agreement to be accompanied by a framework for the future relationship, in order for the withdrawal agreement to be ratified.

This raises the possibility that even if the parties reach a deal in October, the deal may be voted down in the UK, and this would leave the European Council on 13-14 December 2018 to find a last-minute compromise. After that, there are fewer options. The parties might continue to negotiate with a view to agreement and ratification in a compressed process in the first months of 2019. The parties might agree an extension to the two year deadline to allow conclusion of negotiations (which of itself would require a unanimous decision of the EU27). The negotiations might switch to agreement on a 'bare bones' exit deal – the minimum necessary to reduce disruption. Or the UK might leave the EU without any agreement at all with all the confusion and disruption that this implies.

For now, all eyes turn to October, as governments on all sides of the English Channel and Irish Sea hope for a renewed push for agreement, and growing numbers of businesses begin to implement their contingency planning.

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