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Photo: Andrew Cowan © Scottish Parliamentary Corporate Body
UK PROPOSALS: BACKSTOP & FUTURE RELATIONSHIP

UK publishes backstop proposals

On 2 October, the UK Government published new proposals intended to replace the Protocol on Ireland/Northern Ireland within the Withdrawal Agreement. The UK Government published a letter from the Prime Minister and an explanatory note of the proposals.

The Institute for Government has published an ‘explainer’ describing what the proposal says and means.

The Prime Minister’s letter describes the proposals as:

…”a reasonable compromise: the broad landing zone in which I believe a deal can begin to take shape.

The publication of these proposals was preceded by a speech by the Prime Minister in his capacity as Leader of the Conservative Party at the Conservative Party conference in Manchester.

The European Commission confirmed a draft legal text had also been submitted to it. Despite opposition calls for it to be published, this legal text is not publicly available.

A different future relationship?

The Prime Minister’s letter on backstop proposals also signalled a change in UK Government policy on the nature of the future relationship it seeks with the EU following Brexit:

…”the backstop acted as a bridge to a proposed future relationship with the EU in which the UK would be closely integrated with EU customs arrangements and would align with EU law in many areas. That proposed future relationship is not the goal of the current UK Government. The Government intends that the future relationship should be based on a Free Trade Agreement in which the UK takes control of its own regulatory affairs and trade policy. In these circumstances the proposed “backstop” is a bridge to nowhere, and a new way forward must be found.

Jill Rutter, senior research fellow at the UK in a Changing Europe, argues that:

[The Johnson government is] looking for a loose free trade agreement – not the sort of close relationship to the customs union and the single market (in goods at least) that Theresa May proposed at Chequers.

PM’s statement on the backstop & future relationship

On 3 October, the Prime Minister gave a statement to the House of Commons describing the UK Government’s proposals for a new Protocol on Ireland/Northern Ireland:
...we propose the potential creation of a regulatory zone on the island of Ireland covering all goods, including agri-food. For as long as it exists, this zone would eliminate all regulatory checks for trade in goods between Ireland and Northern Ireland.

...unlike the so-called backstop, such a regulatory zone would be sustained with the consent of the people of Northern Ireland, as expressed through the Assembly and Executive. They will give their consent during the transition period as a condition for these arrangements entering into force. Thereafter, the Assembly will vote again every four years - and if consent were withheld, these arrangements would then lapse after one year.

...at the end of the transition period, the UK should leave the EU Customs Union whole and entire restoring sovereign control over our trade policy and opening the way for free trade deals with all our friends around the world… So, under the proposals in this new Protocol, Northern Ireland will be fully part of the UK customs territory not the EU Customs Union.

But there will be no need for checks – or any infrastructure – at or near the border between Ireland and Northern Ireland. Indeed, I have already given a guarantee that the UK government will never conduct checks at the border and we believe that the EU should do the same, so there is absolute clarity on that point.

Instead under this new Protocol all customs checks between Northern Ireland and Ireland would take place either electronically or in the small number of cases where physical checks would be necessary, they would happen at traders’ premises or other points in the supply chain. We have put forward a method for achieving this based on improving and simplifying existing rules, trusting certain traders and strengthening our co-operation with Ireland in a spirit of friendship and sensitivity to the particular circumstances. So while these proposals will mean changes from the situation that prevails today in Ireland and Northern Ireland it is their driving purpose to minimise any disruption.

And in order to support the transition further we propose a New Deal for Northern Ireland that will boost economic growth and competitiveness and set in train new infrastructure, particularly with a cross-border focus.

The Prime Minister then confirmed the UK Government’s intention to re-negotiate the Political Declaration:

Mr Speaker, the previous Withdrawal Agreement and Political Declaration would have permanently anchored the United Kingdom within the orbit of EU regulation and customs arrangements. And an indefinite so-called backstop provided a bridge to that vision of the future. This Government has a different vision – basing our future relationship with our European neighbours on a Free Trade Agreement and allowing the UK to take back control of our trade policy and our regulations. And we propose to amend the Political Declaration to reflect this ambition.
Initial reaction from the European Union

Following a phone call between the Prime Minister and European Commission President Jean-Claude Junker on 2 October, the European Commission issued a statement which welcomed the UK’s proposals on regulatory alignment but also highlighted “problematic points” with the backstop:

- President Juncker welcomed Prime Minister Johnson’s determination to advance the talks ahead of the October European Council and make progress towards a deal. He acknowledged the positive advances, notably with regards to the full regulatory alignment for all goods and the control of goods entering Northern Ireland from Great Britain. However, the President also noted that there are still some problematic points that will need further work in the coming days, notably with regards to the governance of the backstop. The delicate balance struck by the Good Friday Agreement must be preserved. Another concern that needs to be addressed are the substantive customs rules. He also stressed that we must have a legally operational solution that meets all the objectives of the backstop: preventing a hard border, preserving North-South cooperation and the all-island economy, and protecting the EU's Single Market and Ireland's place in it.

- President Juncker confirmed to Prime Minister Johnson that the Commission will now examine the legal text objectively, and in light of our well-known criteria.

The EU wants a deal. We remain united and ready to work 24/7 to make this happen – as we have been for over three years now.

Following a phone call between the Taoiseach, Leo Varadkar, and the Prime Minister on 2 October, the Irish Government issued a statement indicating that the proposals do not meet the objectives of the backstop but that the proposals would be studied in further detail:

- The Taoiseach said the proposals do not fully meet the agreed objectives of the backstop. However, he indicated that he would study them in further detail, and would consult with the EU institutions, including the Task Force and our EU partners.

On October 3, the Brexit Steering Group of MEPs coordinating the European Parliament’s approach to Brexit issued a statement stating that it:

- does not find these last minute proposals of the UK government of 2 October, in their current form, represent a basis for an agreement to which the European Parliament could give consent.

The Group’s statement covered concerns in three areas: the form of controls and checks in and around the border; that operation of the proposals would only be worked out in detail after agreement; and the form of consent being offered to the Northern Irish Assembly. The European Parliament must give consent to the ratification of any Withdrawal Agreement.
Initial reaction from the Scottish Government

At First Minister’s Questions on 3 October, the First Minister said:

The proposals that were published by the United Kingdom Government yesterday do not look, at this stage, like they will be acceptable to the European Union. The proposals also seem to break all the promises that were made to Ireland at the start of the Brexit process. Aside from all that, the proposals would take Scotland out of the European Union, out of the single market and out of the customs union, all against our will, and they suggest a much looser relationship with the EU—a much harder Brexit—even than that proposed by Theresa May.

I will be quite clear, as I have been crystal clear in the past, that I will not support something like that, because Scotland does not support that.

The First Minister had previously tweeted:

Nicola Sturgeon
@NicolaSturgeon

Hard to see how the UK government Brexit ‘proposals’ fly. And hard to escape conclusion that they’re designed to fail. For Scotland, the fundamental point remains - these proposals would take us out of the EU, single market and customs union against our will. That’s unacceptable.

4:11 PM · Oct 2, 2019 · Twitter for iPhone

NEGOTIATIONS ON THE UK’S PROPOSALS

Since the UK Government published its proposals on 2 October, technical-level talks have continued between UK and EU officials as well as political level talks between the UK, EU, Irish Government and others. A selection of information on these talks is outlined below.

Michel Barnier statement: 9 October

On 9 October at the European Parliament, the EU’s Chief Negotiator Michel Barnier confirmed that technical talks were on-going but that:

we are not – at the moment I am speaking to you – at the point of reaching an agreement.

In his statement, Michel Barnier outlined three issues the EU has regarding the UK’s proposals:

- border and checks on goods on the island of Ireland
- the need to find legally operational solutions
- the nature of consent from the Northern Irish institutions
and one issue related to the “looser” future relationship pursued by the UK Government:

we are faced with this request for a basic free trade deal, which runs the risk of regulatory competition, even fiscal, social or environmental dumping. We will not accept this.

PM and Taoiseach meeting: 10 October

On 10 October, the Prime Minister and the Taoiseach agreed a joint statement on Brexit negotiations that was widely-reported as a sign of significant progress towards agreement.

The joint statement, published by the Irish Government, described the discussion as “detailed and constructive" and that the parties “could see a pathway to a possible deal”. The full joint statement read:

The Taoiseach and Prime Minister have had a detailed and constructive discussion. Both continue to believe a deal is in everybody’s interest. They agreed that they could see a pathway to a possible deal.

Their discussions concentrated on the challenges of customs and consent. They also discussed the potential to strengthen bilateral relations, including on Northern Ireland.

They agreed to reflect further on their discussions and that officials would continue to engage intensively on them. Following their discussions, The Taoiseach will consult with the EU Task Force and the UK Brexit Secretary will meet Michel Barnier tomorrow morning.

Joint Ministerial Committee (EU Negotiations): 10 October

On 10 October, the JMC (EU Negotiations) met in St Andrews House, Edinburgh. The Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP attended for the Scottish Government.

The brief communiqué read:

The Committee discussed the UK’s exit from the EU, including developments on exit readiness and negotiations and the role of the devolved administrations in EU exit negotiations. The Committee also discussed domestic issues, including the joint work on common frameworks.

Chief negotiators’ meeting: 11 October

On 11 October, the UK Government’s Secretary of State for Exiting the EU, Steve Barclay MP and Michel Barnier met for a stocktake of the negotiations.

The EU’s formal statement following the meeting said that discussions will intensify:

This afternoon, Michel Barnier debriefed the EU27 Ambassadors. He will shortly inform the European Parliament's Brexit Steering Group. The EU and the UK
have agreed to intensify discussions over the coming days... The Commission will take stock with the European Parliament and Member States again on Monday in view of preparing the General Affairs Council (Article 50) on Tuesday morning.

Following the meeting, Steve Barclay tweeted:

🔗 Constructive meeting with @MichelBarnier today. Now intensifying discussions in a positive spirit so we can #GetBrexitDone

UK and European Commission statements: 13 October

Statements from the Prime Minister's spokesperson and the European Commission made on 13 October were both reported to "downplay" expectations of a deal ahead of the European Council on 17-18 October.

The BBC reported that:

🔗 A Downing Street spokesperson said: "The prime minister updated cabinet on the current progress being made in ongoing Brexit negotiations, reiterating that a pathway to a deal could be seen but that there is still a significant amount of work to get there and we must remain prepared to leave on 31 October."

The European Commission's formal statement on 13 October described the technical-level talks between the UK and EU over the weekend as "constructive"; but the statement also said:

🔗 A lot of work remains to be done. Discussions at technical level will continue tomorrow. Michel Barnier will brief EU27 Ministers at the General Affairs Council (Article 50) on Tuesday.

FUTURE RELATIONSHIP: ECONOMIC ANALYSIS

The Fraser of Allander Institute discussed the economic impact of the UK Government's proposals for the future relationship in a blogpost on 14 October. The blogpost points to the difference between what's in the current Political Declaration and the nature of the future relationship cited by the current Prime Minister:

🔗 Far from having a shared customs territory or close regulatory alignment, the UK Government's new proposal is for a much harder Brexit –

"The Government intends that the future relationship should be based on a Free Trade Agreement in which the UK takes control of its own regulatory affairs and trade policy." Letter from Boris Johnson to Jean-Claude Juncker, 2nd October 2019

So what might this mean for the Scottish economy?

Under such a scenario, the consequences for the Scottish economy are likely to be toward the higher end of the Brexit spectrum in terms of long-term negative impact on the economy.
Updated estimates from the UK in a Changing Europe think tank put GDP per capita some 6.4% lower than it otherwise would have been in the long-run (taken to be 10 years after EU Exit) compared to a situation where the UK remained in the EU. This compares to 4.9% lower under Theresa May’s deal and 8.1% under a ‘no deal’ scenario.

This figures are not dissimilar to our own modelling for Scotland. We estimate that a standard free trade arrangement – which the new UK Government plan is not a million miles away from – would lead to Scottish GDP being around 4% lower after 10 years compared to a scenario where Scotland and the UK remained in the EU. Under a ‘no deal’ the impact is -6%.

Of course, some will argue that such modelling does not take into account the possibility of new trade deals with 3rd countries and the opportunity for the UK to use its new ‘economic independence’ to set a more competitive regulatory and tariff regime.

This is of course, true.

It is also true that there are other wider macroeconomic factors determining where the UK economy will be in 10 years (so these estimates are not to say that the UK economy will be 6.4% smaller in 2029 than now, rather 6.4% smaller than it otherwise would have been).

But as we have argued before, hoping that life for the UK as a stand-alone trading nation will provide abundant opportunities for growth are likely to be misplaced.

UK PARLIAMENT: PROROGATION & QUEEN’S SPEECH

Prorogation of Parliament

On 8 October, the UK Parliament was prorogued. This ended the 2017-19 session with the next session beginning five days later on 14 October.

The UK Government had previously attempted to prorogue Parliament for five weeks, from 9 September to 14 October. As reported in SPICe Brexit Update #92, this was deemed illegal by the Supreme Court on 24 September and of no effect.

As a result of prorogation on 8 October, all Brexit related Bills introduced in the 2017-19 session but not completed have fallen. These were:

- Agriculture Bill 2017-19
- Fisheries Bill 2017-19
- Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19
- Trade Bill 2017-19
Queen’s Speech

UK Parliament resumed again on 14 October. The Queen’s Speech 2019 referred to securing Brexit by 31 October 2019 as “My Government’s priority”.

The first Bill referenced was a European Union (Withdrawal Agreement) Bill designed to implement any Withdrawal Agreement (if agreed) in UK domestic law. The Queen’s Speech then announced that five Brexit-related Bills would be introduced. These Bills cover the same five areas as the Bills that fell at prorogation:

- My Ministers will work to implement new regimes for fisheries, agriculture and trade, seizing the opportunities that arise from leaving the European Union [Fisheries Bill, Agriculture Bill and Trade Bill].

- An immigration bill, ending free movement, will lay the foundation for a fair, modern and global immigration system. My Government remains committed to ensuring that resident European citizens, who have built their lives in, and contributed so much to, the United Kingdom, have the right to remain. The bill will include measures that reinforce this commitment [Immigration and Social Security Co-ordination (EU Withdrawal) Bill].

- Steps will be taken to provide certainty, stability and new opportunities for the financial services and legal sectors [Financial Services Bill and Private International Law (Implementation of Agreements) Bill].

Further details of these Bills, including on territorial extent of the agriculture and fisheries bills, has been published by the UK Government in a “background briefing”.

Scottish legislative consent

The Scottish Government responded to the Queen’s Speech indicating that it will not, at present, lodge Legislative Consent Motions on Brexit-related Bills:

- ... the Scottish Government will continue to lodge legislative consent memorandums setting out its views on the substance of any such provision. But until we can be assured that the decisions of the Scottish Parliament will be respected, we will not lodge any legislative consent motions on Brexit-related provisions, except in the most exceptional of circumstances.

COURT OF SESSION RULINGS

The Court of Session is the highest civil court in Scotland. The Court has ruled on two Brexit-related petitions in October.

Court order preventing frustration of the Benn Act sought

A petition from Dale Vince OBE, Jolyon Maugham QC and Joanna Cherry QC MP was heard on 4 October in the Outer House. The petition sought a court order preventing the Prime Minister (and any Minister of the Crown) acting to undermine or frustrate the will of the UK Parliament as enacted in the European Union (Withdrawal) (No 2) Act 2019 (also known as the “Benn Act”).
The Benn Act was passed by the UK Parliament with the intention of avoiding the UK leaving the EU without a deal, or Parliament’s agreement to “no-deal”. The Act requires that on 19 October, if the UK Parliament has not

- approved an agreement between the UK and EU made under Article 50 TEU, or
- approved leaving the EU without a withdrawal agreement,

the Prime Minister must request an extension to the Article 50 process to 31 January 2020.

In answers lodged on behalf of the UK Government’s Advocate General for Scotland, the court was told that the Prime Minister is:

subject to the public law principle that he cannot frustrate its purpose or the purpose of its provisions. Thus he cannot act so as to prevent the letter requesting the specified extension in the Act from being sent.

On 7 October, Lord Pentland concluded that:

Having regard to the Prime Minister’s and the government’s unequivocal assurances before the court in the pleadings, in the note of argument and in oral submissions that they will comply with the 2019 Act, I am not persuaded that it is necessary for the court to grant the orders sought or any variant of them.

This petition was appealed to the Inner House and heard alongside a second petition seeking to invoke the nobile officium of the court.

**Nobile officium**

*Nobile officium* is a power of the court to give a remedy in two situations. First, where there is no legal rule adequately covering a given situation. Secondly, where there is a legal rule governing a situation, but its application would be unduly excessive, oppressive or burdensome.

The second petition sought that a letter in the form set out in the Benn Act be drawn up and signed by the clerk of court on behalf of the Prime Minister should the Prime Minister not have sent such a letter himself by 19 October.

On 9 October, the Inner House ruled that there was no basis for granting any of the orders sought by the petitioners in either process “at this stage”. However the Opinion stated:

If 19 October comes and goes without either of the two conditions in the 2019 Act having been satisfied and in the absence of the letter which the Prime Minister would then be required to send, the petitioners would be entitled to return to court and seek an order ordaining the PM to comply with the terms of the 2019 Act within a prescribed, and possibly very short, period. It is only once that period has expired without the order being obtempered that the court would consider authorising an official to sign the letter which the PM may have failed to do.

To facilitate this, the court kept the case live:
The court will… continue consideration of the reclaiming motion and the petition to the noble officium until Monday, 21 October, by which time the position ought to be significantly clearer.

WHAT NEXT?

The European Council, consisting of heads of state and government of EU Member States, is now formally scheduled to meet on 17 October in EU27 format to “discuss the state of play regarding Brexit”.

Ahead of this, Europe ministers from the EU27 will meet on 15 October to be “updated by the [European] Commission’s chief Brexit negotiator, Michel Barnier [and on that basis] prepare the October European Council (Article 50) meeting.”

UK Parliament is due to meet on 19 October. While no formal business has yet been set, the Benn Act (described above) requires the Prime Minister to request an extension to the Article 50 process if by 19 October 2019 the UK Parliament has not approved a withdrawal deal (or not approved leaving without a deal).

STEPS REQUIRED TO RATIFY ANY DEAL

Agreeing a “deal” between the UK and European Commission is not sufficient to avoid a no-deal scenario. The deal must be ratified.

The UK Government is currently negotiating with the European Commission over the text of the Withdrawal Agreement, in particular the Protocol on Ireland/Northern Ireland. In addition, the current text of the Political Declaration is expected to need changes to align with the UK Government’s policy on the future relationship.

If negotiations do produce agreed text for the Withdrawal Agreement and Political Declaration, the revised documents will need to be endorsed by EU heads of state and government in the form of the European Council.

Further steps are then needed in the UK before ratification:

- the European Union (Withdrawal) Act requires the Withdrawal Agreement and Political Declaration negotiated between to the EU and UK to be subject to a “meaningful vote” in the UK Parliament; and
- implementing legislation will be required to translate the deal’s provisions into domestic law – the so-called Withdrawal Agreement Bill will need to be passed.

Maddy Thimont Jack, Senior Researcher at the Institute for Government, identifies the second point as involving “big challenges” with “very little time”:

Johnson may be able to scrape together the numbers to pass the meaningful vote, but getting the Withdrawal Agreement Bill through the Houses of Parliament will require a stable majority which supports the government in multiple votes. The bill will need to pass second and third reading, as well as see off amendments tabled by the opposition and backbenchers. Previous parliamentary votes on EU-related legislation give an indication of the scale of
the challenge: there were 88 divisions during the passage of the legislation needed to implement the Treaty of Lisbon and 122 during the passage of the bill implementing the Maastricht Treaty.

MPs are yet to see a Withdrawal Agreement Bill, and the government risks losing support in the Commons once the legislation is published. For example, the bill will need to allow for EU law to continue to apply during transition. This is likely to upset some backbenchers: if the government relies on pro-no deal MPs for the meaningful vote, then it may need to look elsewhere for support if it is to get a bill through Parliament. Other MPs may table amendments to reflect some of the offers which Theresa May made on social and environmental protection, or which attempt to curb the government’s freedom in negotiating the long-term relationship with the EU.

Finally, the Withdrawal Agreement will also be subject to the provisions of the Constitutional Reform and Governance Act 2010 before the treaty can be ratified and enter into force. Section 20 requires a copy to be laid before the UK Parliament and provides for a period of 21 sitting days before ratification during which the UK Parliament may object. Section 22 allows the UK Government to disapply s20 in exceptional circumstances.

Procedures for ratification on the EU side are described by the European Parliamentary Research Service. Ratification involves both:

- consent from the European Parliament (the Brexit Steering Group of MEPs has coordinated the European Parliament’s approach to Brexit and will make a recommendation before any vote); and
- conclusion by the Council of the European Union by ‘super’ qualified majority (at least 72% of the participating Member States – 20 of the 27 – comprising at least 65% of their population), in accordance with Article 238(3)(b) Treaty on the Functioning of the European Union.

NO DEAL PREPARATIONS

UK and Scottish no-deal overview publications

On 8 October, both the Scottish and UK governments published overviews of their no-deal preparations:

- UK Government - No-Deal Readiness Report
- Scottish Government - Overview of ‘No Deal’ Preparations

Both these documents cover impacts, preparations and advice to third parties across a wide range of policy areas.

The Scottish Government’s publication also details actions it is demanding of the UK Government and was accompanied by:

- a document outlining Scottish civil contingency planning assumptions; and
In his Ministerial Statement on the same day, Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP stated:

The document that the Scottish Government has published today is the product of an extensive programme of work across Government and with our partners. The First Minister chairs weekly meetings of the ministerial group on EU exit readiness, which oversees cross-Government activity to prepare and improve readiness for leaving the EU. The Scottish Government is working extremely closely with its resilience partners at the national level and locally across Scotland. That includes work with Police Scotland and other partners through the activity of the multi-agency co-ordination centre. We have also been working closely with local government and the national health service, as well as providing advice and support to businesses, individuals and the third sector. If the UK leaves without a deal, more than 200 legislative instruments will be needed to ensure that the Scottish statute book is ready, and the vast majority of those are now in place.

A no-deal EU exit at this time of year would present additional challenges. There is an increased risk that, as a country, we would also need to address concurrent resilience events such as severe weather, which are more common at this time of year than they might have been in March, when a no-deal Brexit was previously a possibility.

However, it is important to be clear that no amount of preparation could ever make us ready, in any real sense, for the needless and significant impact of a no-deal outcome.

A Ministerial Statement from the Chancellor of the Duchy of Lancaster, Michael Gove MP accompanied the publication of the UK Government’s document.

Scottish Government bid for no-deal money

On 7 October, a Scottish Government letter to the Economy, Energy and Fair Work Committee outlined Scottish Government spending on no-deal preparations and provided a portfolio breakdown of the Scottish Government’s bid to the UK Government for additional resources:
How is the contingency fund bid for £52 million broken down by portfolio?

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<td>Communities and Local Government</td>
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Iain Thom  
SPICe Research  

About this publication

This regular paper produced by SPICe sets out developments in the UK’s negotiations to leave the European Union, the process for which formally begun following the Prime Minister's triggering of Article 50 on 29 March 2017.

The updates provide information on the UK Government’s approach to leaving the EU including the domestic legislation necessary to ensure a smooth transition in terms of the UK statute book, along with details of the positions of the Scottish Government and the other Devolved Administrations. The updates also provide information on developments within the EU with regard to the UK’s departure. Finally, the updates will provide information on the key issues likely to be at play during the negotiations and in developing the UK’s future relationship with the European Union.

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