



## A Brexit deal may yet emerge from the current confusion

by Charles Grant

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**Despite the brouhaha over the Internal Market Bill, both the British government and the EU still want to clinch a deal, and that remains a plausible outcome.**

Many observers of the Brexit saga assumed that Boris Johnson's Internal Market Bill was intended to wreck the talks on the future relationship. The bill includes clauses that would enable his government to override parts of the Withdrawal Agreement that it recently negotiated with the EU. It is true that the trade negotiations have been bogged down and that the bill makes it somewhat harder for the UK and the EU to reach an accord before the transition period expires at year-end. But although the outcome of the current talks is far from certain, Britain could still leave with a free trade agreement (FTA).

### **The case for pessimism**

The Internal Market Bill has shocked the EU. It is not unprecedented for a country to breach international law. But it may be unprecedented for a government to negotiate a treaty, proclaim the result as a triumph during a general election campaign, but then – less than a year after signing the document – unveil legislation designed to scrap parts of it. Many EU leaders, even in countries traditionally close to the UK, are fed up with Johnson's antics. They ask how they can continue to negotiate with a government whose signature cannot be trusted. Goodwill among the EU-27 towards the British government is at an all-time low.

Faced with a chorus of opposition from Conservative backbenchers and peers, as well as the legal profession, Johnson has made a partial retreat, conceding that Parliament would have to approve the use of the bill's contentious powers. He also says the bill should be seen as an insurance policy that would only be used if the FTA talks failed. But these concessions do not remove the problem, as far as the EU is concerned: the bill still allows the UK to breach the Withdrawal Agreement.

The bill does not seek to eliminate the customs border in the Irish Sea that Johnson agreed to last October – merely to weaken aspects of it. Nevertheless the bill has led to fears in Dublin and elsewhere that Johnson may ultimately seek to scrap that entire border. After all, last winter he several times proclaimed that there would be no controls on goods crossing the Irish Sea. The reason why this matters

so much to the Irish government is that without a sea border there would have to be infrastructure between the north and the south of Ireland, so that the EU can police its single market and customs union. The 27 and the EU institutions follow the Irish government (and many people in Northern Ireland) in believing that the return of such a hard border must be avoided at all costs, lest it provoke a revival of republican terrorism. Northern Ireland's Democratic Unionist Party (DUP), and the right wing of the Tory Party, have never accepted this argument and would rather have a border on the island than in the sea.

The prime minister's dislike of the Withdrawal Agreement is heart-felt. That treaty contradicted the pledge that he had earlier given to the DUP that he would never allow a border in the Irish Sea. Johnson's government has focused on specific problems in its criticism of the Withdrawal Agreement: the requirement that goods going from Northern Ireland to Great Britain carry 'exit summary declarations' (which concern safety and security checks); the criteria by which goods entering Northern Ireland are considered to be at risk of ending up in the EU and should thus be subject to tariffs; and the danger that Northern Ireland's obligation to follow EU state aid rules could end up ensnaring companies based in Great Britain in those rules.

One other potential problem has irked Johnson in recent weeks: apparently one Commission official said that unless the UK provided the EU with its proposed post-Brexit sanitary and phytosanitary regime (so-called SPS rules), for approval, it could not list the UK as a country authorised to export products of animal origin to the EU, in which case its farm exports would be blocked. The British government, which has so far failed to say what SPS regime it plans to apply, worries that this EU threat could even apply to food and animals travelling from Great Britain to Northern Ireland – which led to rhetorical claims by Johnson that the EU was threatening to blockade Northern Ireland, seeking to break up the UK and negotiating in bad faith.

The first and third of those issues, the exit summary declarations and state aid regime, are dealt with in the Internal Market Bill by provisions allowing the government to over-ride the Withdrawal Agreement. The government promises to tackle the second, the tariffs on goods going east-west, through a clause in a future finance bill. As for the fourth point, on the 'food blockade', the Internal Market Bill says nothing; that argument only emerged as a justification for the bill after it was published.

There are certainly people at the heart of the British government who are relaxed about the prospect of a no-deal Brexit, such as Dominic Cummings, Johnson's chief adviser, and Oliver Lewis, another 10 Downing St adviser and veteran of the Vote Leave campaign. That pair, together with David Frost, the chief Brexit negotiator, were behind the attack on the Withdrawal Agreement. Apparently Frost wants a deal – but only on his terms; he is said to believe that the EU will compromise if the UK takes a sufficiently robust line. Many cabinet ministers are keener on a deal, but they are seldom consulted on Brexit policy, which is driven by No 10.

There seem to be few dissenting voices in that building; those that might have taken a different line, like Mark Sedwill, cabinet secretary until a few weeks ago, have been pushed out. The risk for policy-makers in No 10 is that they operate in a bubble of like-minded people who tend to agree with each other on the big issues. This can lead to problems: apparently No 10 was surprised by the strength of American hostility to the Internal Market Bill. Joe Biden and Nancy Pelosi have spoken out strongly against it, and Mick Mulvaney (Donald Trump's Northern Ireland envoy) more gently, on the grounds that the bill may damage the Good Friday Agreement. Biden and Pelosi were among those emphasising that the US

would not agree to an FTA with the UK unless it altered the Internal Market Bill. No 10 would not have been surprised if it had listened to British diplomats.

Another reason for pessimism is that, even if the problems with the Withdrawal Agreement could be sorted out, the two sides remain far apart in their talks on the future relationship. On state aid, in particular, it is hard to see how the two sides can meet in the middle. The EU wants the UK to establish a state aid regime with an independent regulator that is compatible with its own system. But the UK has simply undertaken to respect the relatively loose World Trade Organisation rules on state aid, which are limited to goods – and promised that it will unveil a more detailed regime next year.

Apparently Cummings wants the government to be free to pump money into hi-tech companies, and fears that any EU-compatible system could limit its freedom to do so. Yet EU officials report that the UK has requested no special ‘carve out’ from state aid rules for tech companies, which it might have done if these companies were such a big concern. EU officials get the impression that the government is ideologically opposed to any constraint on its freedom to subsidise. Another factor may be the worry of some in government that they will need to prop up the manufacturers that are likely to suffer from the combination of COVID-19 and the end of the Brexit transition period.

A final argument that bolsters the case for no deal is the nature of the European Union. It is a slow-moving, cumbersome beast that cannot pirouette quickly. Its governments are happy to have handed the task of running the Brexit negotiations to Michel Barnier, who works under the mandate that they set. As the British have discovered over the past four years, attempts to negotiate with individual governments always fail, because the 27 know that their strength lies in unity. The governments worry that if they become directly involved in the talks, divisions are more likely to emerge. But the EU’s understandable desire for unity makes it harder for its thinking to evolve or to become more flexible.

None of that means that national leaders will not become involved at some point, when they judge the Frost-Barnier process to have become stuck. Occasionally the EU can move quickly, as it did after then Irish Taoiseach Leo Varadkar and Johnson went for a walk in Cheshire last October, and agreed on a Withdrawal Agreement involving a sea border. It may be that progress this autumn requires a similar one-on-one meeting between Johnson and an EU leader. But it is not evident who the appropriate leader would be. Johnson’s conduct and rhetoric have not won him many friends in EU capitals, including in Berlin.

In any case, EU officials point to the flaws in that analogy: a year ago there was just one outstanding issue that needed fixing in the Withdrawal Agreement, the Irish border. When Varadkar sought to solve that problem he was well-placed to speak for the whole EU. But in the current trade talks the two sides are far apart on a range of issues, and quite a few governments take a keen interest in difficult subjects such as the level playing field or fish.

### **The case for optimism**

So there are many reasons why the talks may fail. Yet the main counter-argument – according to those who talk to him – is that Johnson would like a deal. If that is the case, however, what was the purpose of his attack on the Withdrawal Agreement? The answer, perhaps, is that he wanted to raise the cost of no deal for the EU (it would lose the Withdrawal Agreement as well as suffering from no FTA); that his move assuaged some of his guilt over the betrayal of the DUP when he accepted a border between Great

Britain and Northern Ireland; and that he wanted to do something that would grab the attention of the EU heads of state and government, and provoke them to become involved. He certainly succeeded in grabbing their attention.

If Johnson and his team had wanted to torpedo the negotiations, they would surely have focused on issues that directly threatened the EU's single market and customs union, for example by rejecting the need for checks on food entering Northern Ireland from Great Britain; or they could have refused to pay the money owed to the EU. Instead, the contentious clauses of the Internal Market Bill picked on specific commitments that affect Great Britain but make little impact on the EU itself – namely exit summary declarations and the state aid rules in Northern Ireland that could affect Great Britain. The negative EU reaction has been driven less by the substance of the bill and more by the shock that the UK would so quickly threaten to undermine a freshly-inked treaty.

With goodwill on both sides, the Joint Committee that is supposed to tackle any problems in the Withdrawal Agreement should be able to fix the issues that worry Johnson – and thus preclude the need for the contentious clauses in the Internal Market Bill – without altering the essentials of the agreement.

Exit summary declarations are not fundamental to the integrity of the EU's single market, and the two customs authorities could work together to minimise the need for them or their intrusiveness. The EU excuses Switzerland and Norway from having to submit these declarations, so why not Northern Ireland too? As for the trickier issue of goods going east-west, the Joint Committee could agree on a list of items at risk of ending up in the EU, which should therefore be subject to tariffs. On state aid, the EU should be able to provide assurances that while it is concerned about subsidies in Northern Ireland, it has no particular desire to use the powers that it gains from the Withdrawal Agreement to 'reach back' into England – which will be covered by whatever state aid rules come out of the trade talks. And on SPS, the UK will simply have to say what rules it plans to apply, so that the EU can approve them and grant Britain third country status, thus facilitating the import of British animals and food into the EU.

As for the future relationship, most of the gaps between the two sides are bridgeable. There has already been some modest progress on the politically difficult issue of fish. On the 'level playing field' for social and environmental standards, the UK could agree not to lower its levels, and the EU could reserve the right to withdraw FTA concessions if the UK did.

But state aid will be the hardest nut to crack. Both sides will have to compromise. Cummings will need to be persuaded that the UK should adopt a regime that is comparable to the EU's, with an independent regulator. The EU will need to accept that this will differ from its own regime and that it will be notified after the event rather than before. The EU would retain the right to withdraw concessions, and re-impose tariffs, if British industry was found to have used state subsidies to gain an unfair competitive advantage.

The EU is a machine for making deals and will do what it can to facilitate an agreement. Its leaders will not let their annoyance and frustration with the UK stand in the way of efforts to unlock a deal. The Commission may well take the UK to the European Court of Justice over the Internal Market Bill's breach of the Withdrawal Agreement, but it will keep talking. It will be creative in offering the UK 'off-ramps' – ways of climbing down that are not humiliating and that could enable Johnson to proclaim that he has achieved victories.

The final reason for thinking that there may be a deal is that the domestic political pressure on Johnson to achieve a negotiated Brexit will grow. Even if there is a deal, a certain amount of chaos at ports is likely – some of the government's new IT systems for managing borders will probably not be ready in time. But if there is no deal the chaos will be worse, because there will be more controls on goods going from the UK to the EU, and less of the goodwill that could help to ameliorate the checks. There may be daunting queues of lorries, and shortages of food and medicines. There are already question marks over the government's competence, because of the way it has handled COVID-19 and the school exams fiasco. Johnson would of course try to blame the EU for any border problems, but Labour would exploit them ruthlessly in making its case that the government was incompetent.

As my colleague Sam Lowe has written, the absence of an FTA would mean that [some sectors of the British economy, including vehicle production and livestock, faced painful tariffs](#). And an acrimonious Brexit would reduce the chances of the EU recognising British data privacy rules as 'adequate'. That would make data flows across the Channel harder – potentially creating all sorts of problem for businesses. Similarly, the EU could refuse to recognise UK financial services rules as 'equivalent' to its own, making it harder for British financial firms to operate in the EU.

British business leaders are very nervous about the consequences of no deal. They have said rather little this year, for fear that attempts to influence the government would be counter-productive. But they will start to make a noise in the coming weeks, if no deal seems a likely outcome.

People in No 10 may not care much about such noises, but many Conservative MPs do. Some of them, including cabinet ministers, are horrified by the prospect of no deal. They have said very little, not wanting to upset powerful figures in No 10. But, as with the business leaders, there may come a point at which senior Conservatives feel they have to speak out in what they consider to be the national interest.

The background to all this may well include a worsening of the coronavirus pandemic, with all that that implies for the economy. Some Conservatives believe that, the worse the pandemic, the greater the pressure on the government to get a deal with the EU. A failure to do so would lead to even more acute economic misery, and some people would blame the government.

No deal would certainly make an impact on Scotland, where support for independence has grown during 2020. Michael Gove, the cabinet office minister responsible for no deal preparations, is particularly concerned about the Scottish question. A no-deal Brexit is highly likely to boost support for the Scottish National Party in the elections due in May 2021, and thus make it harder for London to resist demands for another independence referendum.

For all these reasons, the pressures on Johnson to show sufficient flexibility to clinch a deal will be enormous. But choreographing the final phases of the negotiation will be extremely difficult, requiring several bargains and a minimal restoration of trust. Both sides would have to commit to sorting out UK concerns about the Withdrawal Agreement in the Joint Committee. The UK would have to agree to remove the offending clauses of the Internal Market Bill, if and when an FTA was in place. And in the talks on an FTA, both sides would have to compromise on state aid and fish.

The EU may well need to find someone to play the role that Varadkar played last October, in steering Johnson towards a deal. Now that Emmanuel Macron has surely given up on his efforts to bring Vladimir

Putin in from the cold, perhaps he should turn his attention to Johnson; the pair are said to get on quite well, and Macron is a great persuader. The fact that France has been among the hardest of the 27 on issues such as fish and state aid could make it easier for Macron to lead the EU into a compromise.

Johnson's approach to politics has always been driven by an irrepressible optimism and the expectation that, somehow, he will come through the next election, referendum, negotiation or crisis as victorious. Hitherto he has been a lucky politician. Of late he has looked a little haggard – but if his optimism encourages flexibility he may yet be able to proclaim a deal on Brexit as a triumph.

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