

*Miklós Somai**

Brexit Negotiations: Interests, Red Lines, and Stumbling Blocks

Abstract

Brexit will officially fall on 29 March 2019 at midnight, Brussels time, and will undoubtedly represent a milestone in the history of European integration: after long years of deepening and enlarging, this is the first time a sovereign member state will leave the EU. This article is a humble effort to provide an overview of Brexit, by identifying the interests and red lines of the EU and the UK, as well as pointing to the key elements of negotiations, as they are known at the time of writing, the end of May 2018. For the research primary and secondary sources have been analysed, and historical methodology has been combined with the critical analysis method to understand the background of the process and point to its main stumbling blocks. The paper concludes that despite apparent rigidities and deadlocks, mutual trust and goodwill, as well as time constraint and practical considerations, may help overcome divides and find technically workable solutions.

Key words: Brexit, Disintegration, EU, UK, Withdrawal Negotiations

Introduction

Although the referendum on the United Kingdom's EU membership, which took place on 23rd June 2016, had only advisory status (i.e. not legally binding), its result is taken most seriously by the main political parties of the UK. They do so not only because there was a clear difference (both percentage-wise and in absolute terms) between Leave and Remain

* **Miklós Somai** – Hungarian Academy of Sciences, e-mail: somai.miklos@krtk.mta.hu, ORCID: 0000-0003-2768-5751.

voters, but also for the considerable support within the electorate for the UK's withdrawal from the European Union (see: Table 1).

Table 1. Comparison of referendums concerning real support for winners

			Votes (absolute numbers)	Percentage A/B (victory)	Percentage A/C (real sup- port)
United Kingdom EU membership (Brexit) Referen- dum (2016)	A	“Leave” votes	17 410 742	51.9%	37.4%
	B	Valid votes	33 551 983		
	C	Registered voters	46 500 001		
Norwegian EU membership ref- erendum (1994)	A	“No” votes	1 516 803	52.2%	46.4%
	B	Valid votes	2 906 750		
	C	Registered voters	3 266 064		
French presi- dential election (2017) first round	A	Votes for Macron	8 656 346	24.0%	18.2%
	B	Valid votes	36 054 394		
	C	Registered voters	47 582 183		
French legislative election (2017) first round	A	REM + MoDem	7 323 496	32.2%	15.4%
	B	Valid votes	22 654 164		
	C	Registered voters	47 570 988		
French legislative election (2017) second round	A	REM + MoDem	8 926 901	49.1%	18.9 %
	B	Valid votes	18 176 066		
	C	Registered voters	47 293 103		

Source: Statistics Norway; The Electoral Commission; French Government.

Even if the “Leave” side received somewhat weaker support than the “No” side had had in a similar vote on EU membership in Norway – held more than 20 years earlier and enjoying an extremely high turnout (89%) – it received much stronger support than for example Emmanuel Macron did in the first round of the presidential election or his presidential majority (his party, the REM¹ and the party of his partners, named MoDem²) did in either round of the legislative election, all held in France in 2017. Therefore, the robust support behind Brexit makes a second vote highly unlikely, at least in the short run, in the same manner as the opportunity

¹ La République En Marche is the ruling political party in France, sometimes called by its old name En Marche (EM), matching the initials of its own founder, Emmanuel Macron.

² Le Mouvement Démocrate secured an agreement with REM in the 2017 legislative election after his founder and leader (François Bayrou) endorsed the candidacy of Macron to be president of France a couple of months earlier.

for Scotland to keep her membership in the European Union if Britain leaves.³

Speculations about the future started well before the referendum, and the momentum continues to this day. Most papers concentrate on Britain's economy without knowing anything about the nature of the future relationship between the EU and the UK, and most of them predict lower growth due to Brexit. There are, however, a few think tanks (e.g. Economists for Free Trade) expecting GDP to be higher in 15 years than if the country remained in the EU. They assert that escaping from the EU would boost economic growth and raise living standards across Britain, especially for the poorest.⁴ Many fewer papers deal with the EU's future,⁵ and even fewer try to propose a new form of cooperation – as Pisani-Ferry et al.⁶ do so, suggesting a so-called continental partnership – which could also serve as a model for Europe's relations with other partners like the EEA countries,⁷ Switzerland, Turkey or Ukraine.⁸

By departing from the facts and, more generally, from what can be known about the Brexit process this late May 2018, this article first gives a short overview of the main interests and red lines for both of the nego-

³ As there are worries in more than one EU member state (e.g. in France or Spain) about secessionist trends, it is unlikely that any of them would encourage or agree to the precedent of swift accession of a successor state to the EU in case the United Kingdom disintegrates.

⁴ R. Bootle, J. Jessop, G. Lyons, P. Minford, *Alternative Brexit Economic Analysis*, 2018, p. 16, <https://www.economistsforfreetrade.com/publication/> (21.05.2018).

⁵ For example, some deal with the agri-food sector, to which Brexit may cause harm in two ways: through limiting the budget available for the CAP (common agricultural policy) – with reductions amounting up to EUR 1 billion a year e.g. for Poland – and through a deterioration in terms of mutual trade, with a potential breakdown of the Polish exports of agri-food products to the UK (K. Kosior, Ł. Ambroziak, *Brexit-Potential Implications for the Polish Food Sector*, in: *The Common Agricultural Policy of the European Union-the present and the future. EU Member States point of view*, eds. M. Wigier, A. Kowalski, Warsaw 2018, p. 159).

⁶ J. Pisani-Ferry, N. Röttgen, A. Sapir, P. Tucker, G.B. Wolff, *Europe after Brexit: A proposal for a continental partnership*, vol. 25, Brussels, Bruegel 2016, <https://ces.fas.harvard.edu/uploads/files/Reports-Articles/Europe-after-Brexit.pdf> (23.05.2018).

⁷ Norway, Iceland, Liechtenstein.

⁸ The proposed continental partnership (CP) would be less deep than EU membership but mean a clearly closer relationship than a free trade agreement. The UK would fully participate in goods, services and capital mobility, some temporary labour mobility, also in a new CP system of inter-governmental decision making and enforcement – while the ultimate formal authority would remain with the EU. The UK would continue to contribute to the common budget and co-operate with the EU-27 on such issues as foreign policy, security and possibly defence (J. Pisani-Ferry, N. Röttgen, A. Sapir, P. Tucker, G.B. Wolff, op. cit., pp. 1, 3, 6).

tiating parties (i.e. the European Commission and the UK Government), and then explores the key elements of the negotiations, focusing on the main stumbling blocks in the way of achieving an orderly withdrawal of the UK from the European Union.

Interests & Red Lines

Let us first go through the main conflicts of interest which may arise in the context of Brexit. There is one between labour and capital, although they obviously have common interests too, such as the success of the enterprises. Businesses are basically interested in keeping costs at the lowest possible level. For them, it has been a blessing to have all these people arriving first from the Commonwealth countries, then from Eastern and Southern Europe, willing to work for less than natives. Not that immigrant workers are more efficient or frugal than natives, but for most of them, to work in the UK means a relatively short period, whereas for natives it is a whole life long. Immigrants only come and live to work. They work hard, do not participate in strikes, try to gain and save as much as they can, and send a fair portion of their salary back home. With Brexit and a regulated immigration policy, pay levels will certainly have to increase, which is in the interest of native workers.⁹

There is another conflict of interest between the enterprises according to their size. Big businesses are likely to be involved in international trade; for them the free access to the European single market is of utmost importance. But there are a myriad of micro, small and medium-sized businesses in the United Kingdom – most of them without any major in-

⁹ Interestingly enough, part of the problem has recently been resolved. During the run-up to the referendum, Brexit campaigners argued that free movement was undermining British workers in e.g. construction and food processing, with some firms importing cheap workers from Poland and Romania. In case of ‘posted workers’, despite obligations for employers to pay these workers the minimum wage of the importing country, legal loopholes allowed undercutting the local workforce, e.g. by deducting from wages travel and accommodation expenses. Finally, in May 2018 – and not independently from what could be learnt from the lessons of the Brexit campaign – the EU has addressed the issue. In future, employers of ‘posted workers’ will be obliged to offer equal pay, the same allowances, and reimbursement for travel and accommodation costs as soon as from the start of the posting. J. Kirton-Darling, A. Jongerius, *The EU has just passed a law that could end the problems with free movement which led to Brexit in the first place*, “Independent”, 30 May 2018, <https://www.independent.co.uk/voices/eu-brex-it-uk-labour-laws-migrant-workers-a8375836.html> (2.08.2018); BBC, *EU tightens law on foreign temporary workers*. *BBC News* 29 May 2018, <https://www.bbc.co.uk/news/world-europe-44293265> (2.08.2018).

ternational relationships – that employ more people than the big ones.¹⁰ Despite having relatively weak international embeddedness, SMEs still must observe EU standards. For them, complying with regulation is more expensive than for larger firms. This is so not only because they have to spread their costs – in most cases consisting of fixed components which are the same for large and small firms – against lower turnover, but also because they are generally price takers and find it difficult to pass the incurred costs onto their customers.¹¹ For SMEs, there would certainly be some benefit from Brexit by getting rid of most of these regulations.

A third type of conflict of interest exists between the UK Parliament and the devolved administrations (those of Scotland, Wales, and Northern Ireland). The current devolution settlements were created in the context of the country's EU membership. Consequently, the devolved legislatures only have legislative competence in the devolved areas – such as agriculture and fisheries, environment and some transport issues – as long as the rules created by them are compatible with EU law.¹² So, even though they have been devolved, the responsibility for these policy areas has in practice been excised largely at EU level for the last couple of decades. The point is that upon Brexit whereby certain competences will be repatriated from the EU, if there are no changes to the devolution settlements, responsibility will fall automatically to the devolved jurisdictions. This could potentially lead to regulatory divergence, and thus – by altering the competitive neutrality – could undermine the integrity of the UK's

¹⁰ According to data from 2016, 99.9% of UK private companies belong to the small and medium-sized (SMEs) category. They together account for 47% of all private sector turnover (GBP 1,800 billion) and 60% of jobs (15.7 million people) [*UK Small Business Statistics – Business Population Estimates for the UK and Regions in 2016*, The Federation of Small Businesses, <https://www.fsb.org.uk/media-centre/small-business-statistics> (30.05.2018)]. While there are plenty of reasons behind the Brexit, one cannot exclude that the special attention which has, for decades, been paid to big companies, and the fact that economic policy, laws and regulations have been tailored for them, were also playing a role. Meanwhile, a growing proportion of smaller companies feel completely let down by the incumbent government.

¹¹ EU regulatory cost to business in Britain was estimated at EUR 99.89 billion for the period of 1998-2008, i.e. a yearly EUR 9.1 billion. T. Ambler, F. Chittenden, A. Bashir, *Counting the Cost of EU Regulation to Business*, Brussels 2009, p. 19; F. Chittenden, T. Ambler, *A question of perspective: Impact Assessment and the perceived costs and benefits of new regulations for SMEs*, “Environment and Planning C: Government and Policy”, no. 33(1)/2015, pp. 9–24.

¹² UK Government, *The United Kingdom's exit from and new partnership with the European Union* (White Paper), February 2017, HM Government CM9417.

internal market.¹³ On the other side, of course, also the British government has a huge responsibility not to take advantage of the situation of having the authority to deal with international relations, including negotiations with the EU, and – on the pretext of “technical constraints,” e.g. maintaining common standards and ensuring stability and certainty for business – re-centralize too much decision-making power to Westminster. The impact of Brexit on UK’s devolution settlements is incontestably one of the most (technically) complex (and politically sensitive) elements of the whole withdrawal process.¹⁴

Finally, there are conflicting interests between the UK and the EU-27. Normally, there should not be any major problems, as they are supposed to serve the interests of the people they represent. Therefore, they should focus on protecting jobs and businesses, which could be best achieved by maintaining the closest possible economic relationship with each other. Apparently, this is only the goal of the UK,¹⁵ while the EU – fearing that a Brexit not deterrent enough to stop other member states from reconsidering their own situation could lead to total disintegration – is adamant the UK cannot maintain as good a relationship with the EU-27 as it has as a member.¹⁶

With this, we have arrived to the question of red lines. The EU-27’s most important red line for Brexit is related to the dogma¹⁷ of the indi-

¹³ UK Parliament, *Brexit: devolution*. European Union Committee, 4th Report of Session 2017-19 – published 19 July 2017, HL (House of Lords) Paper 9.

¹⁴ As England’s fellow-nations usually have a greater share of EU’s agricultural funds than their share in UK’s population, it would be a most critical step towards creating a climate of trust if the existing population-based method of allocation of funding to the devolved (the so-called ‘Barnett formula’) were replaced with a more appropriate needs-based funding arrangement. Only in such a way could the devolved be compensated for the loss of EU funding, caused by Brexit in the long-term. [Under the Barnett Formula, devolved governments in Scotland, Wales and Northern Ireland receive a population-based proportion of changes in planned UK government spending on comparable services, either in England, or in England and Wales together, or in Great Britain, as it is appropriate. House of Commons Library, *The Barnett formula: a quick guide*, June 27, 2017 <https://commonslibrary.parliament.uk/parliament-and-elections/devolution/the-barnett-formula-a-quick-guide/> (1.05.2018).

¹⁵ As it is stated in the Brexit White Paper “*The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU...*” (UK Government, *The United Kingdom’s exit from and new..., op. cit.*).

¹⁶ „A non-member of the Union ... cannot have the same rights and enjoy the same benefits as a member”. Consilium, *European Council (Art. 50) guidelines for Brexit negotiations*, 29 April 2017, p. 3, <http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf> (25.02.2018).

¹⁷ The four freedoms can be each other’s substitutes – e.g. free movement of goods and persons, as the quantity of work embodied in imports have circa the same effect on local wages than when those products are produced by immigrant workers [W.

visibility of the four freedoms, which sums up in the notorious notion of “no cherry picking”.¹⁸ In the British government’s opinion, every trade arrangement is cherry-picking in the sense that it contains varying market access depending on the respective interests of the countries involved. The EU itself is taking a tailored approach, for example, to the fisheries sector in relation to which “the Commission has been clear that no precedents exist for the sort of access it wants from the UK” (May 2018).¹⁹ As for the UK’s red lines, they arise from the desire of gaining back control over laws (ending the jurisdiction of the European Court of Justice), borders (ending free immigration of workers from the EU), money (ending excessive net contribution to the common budget), and trade (being able to conduct a fully independent external trade policy, and forge agreements with non-EU countries).

Kohler, G. Müller, *Brexit, the four freedoms and the indivisibility dogma*, LSE Brexit, 2017, <http://eprints.lse.ac.uk/86187/1/brexit-2017-11-27-brexit-the-four-freedoms-and-the-indivisibility.pdf> (23.02.2018)]. The notion of ‘four freedoms’ does not appear in the Treaties, but the promotion of free movement of persons, capital, goods and services is already mentioned in the Treaty of Rome (Article 3) as the very essence of the integration. So, the logic of the four freedoms is not based on economic but political reasoning [W. Münchau, *Europe’s four freedoms are its very essence*, “Financial Times”, November 12, 2017, <https://www.ft.com/content/49dc02dc-c637-11e7-a1d2-6786f39ef675> (28.12.2017)]. As a matter of fact, after more than 25 years since Maastricht, those four freedoms (particularly the one of services) are not yet fully achieved. In the relationship of the EU with Switzerland, there is free movement of people (to a very high degree), but there is no freedom of services as banks cannot provide services to each other’s customers. Is it sacrilege to ask for the opposite, like Britons do, seeking freedom of services but controlled labour inflow? P. Carrel, *Indivisible or flexible? Brexit battle looms over EU freedoms*, Reuters, November 7, 2016, <https://www.reuters.com/article/us-britain-eu-freedoms-analysis/indivisible-or-flexible-brexit-battle-looms-over-eu-freedoms-idUSKBN1320MS?il=0> (25.05.2018).

¹⁸ “... the four freedoms of the Single Market are indivisible and ... there can be no ‘cherry picking’.” Consilium, *European Council (Art. 50)...*, op. cit., p. 3.

¹⁹ It is to be noted here that, in 2015, EU vessels caught more than 6 times more in tonnage and 4 times more in value in UK waters than UK vessels caught in EU-27 waters [UK Government, *Government response to House of Lords EU Energy and Environment Sub-Committee Report into the future of fisheries in the light of the vote to leave the EU*, 2017, p. 1, <http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Gvt-Response.pdf> (1.06.2018)] What makes this issue more complex is that the evolution of the fishing industry led to specialisation, so that EU countries fish for different species in each other’s waters. As, from fishing gears to processing factories, it would take decades to reverse this process, it seems unlikely the UK could reasonably deny access to its waters to the EU-27 even if its plan for a non-painful withdrawal from the EU were to fail. House of Lords, *Brexit: fisheries*. European Union Committee 8th Report of Session 2016-17, 17 December 2016, HL Paper 78, pp. 38–39.

There is an issue, concerning the land border between Northern Ireland and the Republic of Ireland – which is very important for both negotiating parties in that they have repeatedly expressed their commitment to supporting and upholding the Peace Process and the Belfast (or Good Friday) Agreement, and particularly avoiding a hard border with a physical infrastructure or any related checks and controls – in relation to which there are red lines on both sides. The essence of these red lines is that any solutions at the Irish border will have to respect both the integrity of the Union legal order (EU-27's red line²⁰), and the constitutional integrity of the United Kingdom.²¹

Key Elements of the Negotiations

Withdrawal negotiations between the EU and the UK formally started on 19th June 2017 and Brexit will officially fall at midnight, Brussels time, on 29th March 2019. This paper cannot cover the whole exit process – for an (almost) complete chronology, see Consilium online – but will focus instead on some key elements, stumbling blocks and milestones of the negotiations. One of the main stumbling blocks in the way of achieving an orderly withdrawal of the UK from the EU is related to the fact that the two most important treaties – one of which is vital to the one party, while the other is to the counterparty – cannot be completed simultaneously, but only in succession. This problem's origins lie in the difference in the interpretation of Article 50.²² In the Commission's understanding, first the exit agreement should be concluded and only after the UK has become a third country to the EU will it be possible for the parties to finalise their deal on the framework of their future cooperation.²³

Although this so-called 'phased approach' has never been the British Government's view – as, in their reading, it is not possible to have a prop-

²⁰ European Council, *European Council (Art. 50) guidelines for Brexit negotiations*, 2017, p. 6, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/> (29.05.2018).

²¹ The issue of the Irish border will be further discussed in more detail in the next chapter [the UK's red line – D. Davis, *The progress of the UK's negotiations on EU withdrawal*. Exiting the European Union Committee, 25 April 2018, 10:03, <https://www.parliamentlive.tv/Event/Index/08a8fed4-919d-4cb5-94ec-c9c0fecf60f0> (2.06.2018)].

²² Paragraph 2 of Article 50 says: "...the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, **taking account** of the framework for its future relationship with the Union" (The Lisbon Treaty).

²³ European Council, *European Council (Art. 50)...*, op. cit., p. 4.

er withdrawal treaty negotiation unless they know where they are going²⁴ – London did not shy away from discussing the main issues in an order which corresponded to the EU guidelines.²⁵ But the problem remains, and towards end 2018 or early 2019 – when the UK Parliament will have to vote on the exit deal – MPs will face two documents:

- the withdrawal agreement, which will be a treaty setting out the terms of the UK's withdrawal from the EU, including the financial settlement,²⁶ and once ratified, having the force of international law, on the one hand;
- and a mere political declaration, setting out the terms of the EU-UK future partnership which will not be legally binding, on the other hand.

Even if both sides are interested in having the political declaration to be substantive enough – about e.g. the details of the future free trade agreement, mutual recognition of standards, or rules of origin – it will be difficult for the UK government to explain to MPs what the country will have got by the declaration.²⁷

Certainty is important not only for MPs (before they vote), but also for businesses all over Europe. The single biggest risk to them posed by Brexit comes from the uncertainty about whether and to what extent they could retain access to each other's markets. They need two pieces of information: what the UK's future relationship with the EU will look like, and what the bridge arrangement will be between leaving and getting to that relationship. In the absence of clarity, firms may pre-empt uncertainty by restructuring or relocating based on a worst-case scenario. In this respect, it was an important step towards clarity when, following the December 2017 European Council decision²⁸ to move to the second phase of Brexit

²⁴ I. Rogers, European Scrutiny Committee, Oral evidence: EU-UK Relations in Preparation for Brexit. HC 791, Wednesday 1 February 2017, Witness: Sir Ivan Rogers KCMG, former Perm. Repr. to the EU, 10:27, <http://parliamentlive.tv/Event/Index/0d6145fa-5329-426d-8300-8eda8f215184> (27.05.2018).

²⁵ Accordingly, the first rounds of negotiation followed the agenda proposed by the Commission, dealing with the permeability of the UK's land border with Ireland, the acquired rights of EU citizens in Britain and British citizens in EU-27, the disentanglement of the UK from the EU budget and its financial liabilities, and other separation issues (like Euratom, goods placed on the market, on-going Union procedures, judicial cooperation in civil and criminal matters, and the relocation of EU banking and medicines agencies originally headquartered in the UK). Consilium, *Brexit*, <http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/> (3.06.2018).

²⁶ The exit bill, or the sum of money the UK will have to pay on leaving, is estimated to be between £35 billion and £39 billion (D. Davis, op. cit., 10:06).

²⁷ *Ibidem*.

²⁸ The decision was based on the progress achieved in key areas of negotiations (i.e. citizens' rights, Irish border, exit bill) and reflected in the so-called Joint Report

negotiations, the issue of a transition period has appeared on the negotiation agenda.

As it was in both parties' interests, a settlement was quickly drawn up on transition and presented to the public as part of the Draft Withdrawal Agreement (DWA) of 19 March 2018, the so-called coloured version²⁹ which is the biggest milestone of the negotiations to date. During the transition period, lasting from Brexit day in March 2019 to the end of 2020, almost nothing will change – e.g. the Britons remaining in both the single market and customs union, hence under the jurisdiction of the European Court of Justice – but the UK will no longer take part in the decision-making of the EU institutions, save when invited to do so. Although, the UK obtained some concessions for the transition period – like the possibility to negotiate, sign and ratify international agreements with non-EU countries; being treated as a member state for the purposes of international agreements concluded by the EU; and abstaining from European foreign policy measures it would have vetoed as a member – it had to, in exchange, soften its position on fisheries catch issues (by agreeing to delay the renegotiation of fishing quotas until 2020),³⁰ and immigration (by postponing the specified date – by which EU citizens can exercise their free movement rights – from Brexit day to the end of transition).³¹

(JR) of 8th December 2017. In JR, both parties agreed upon principles about how to protect rights of their citizens residing on each other's territory, how to avoid a hard border between Northern Ireland and Ireland, and how to calculate the value of the financial settlement. As for the latter element, its essence is that the UK will participate in the common budget in 2019 and 2020 (so, matching the end of the current Multiannual Financial Framework) as if it remained in the EU. London has agreed to pay its share of EU's outstanding liabilities incurred before end 2020, as well as of EU's contingent liabilities as established at the date of withdrawal. The UK's 'share' will be calculated based on the UK's percentage share of member states' total contributions to the common budget in the period of 2014–2020. European Commission, *Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU*, 2017, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf (7.06.2018).

²⁹ The rows of the DWA have been highlighted with different colours depending on whether there is agreement on the text (green), the policy objectives (yellow) or none of them (white).

³⁰ The fact that they will have to wait until 2020 to assume full control over the British waters caused great disappointment in coastal fishing communities which had massively voted for Brexit even in Scotland.

³¹ European Commission (2018). *Draft Agreement on the withdrawal of the UK from the EU (coloured version)*, 16–19 March 2018, https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (8.06.2018).

With the DWA, the negotiators have achieved significant progress towards finalising an exit treaty. Several chapters, like rules on the transition period, citizens' rights or the financial settlement are already completely, or almost completely agreed upon.³² Other issues, like some of the separation provisions (e.g. pending criminal and police proceedings, pending ECJ cases and administrative proceedings, and first of all data protection³³), general rules on dispute settlement and the most important element of Irish border issues (i.e. free movement of goods) are still waiting to be resolved. As the latter problem seems to be the single largest risk factor to derailment of the Brexit negotiations (i.e. timely conclusion of the withdrawal agreement), it needs to be treated separately.

Customs controls were first introduced at the land border between Northern Ireland and Ireland in 1923 and maintained until the establishment of the European single market in 1992. During the 'Troubles' (ethno-nationalist conflict in Northern Ireland lasting from 1969 to 1998), the border was manned by substantial military presence (including "watch-towers") and a number of roads were blocked by security forces. Today, this is an invisible and open border, as following the conclusion of the Belfast (Good Friday) Agreement in 1998, all military security installations and other physical infrastructure were removed.³⁴ Apart facilitating cross-border trade, the importance of this open border lies in that it is a symbol of the success of the peace process, and something supporting

³² There are some exceptions. E.g. on voting rights (i.e. the right to vote in local elections) the UK still have to agree with member states bilaterally, while on onward movement (i.e. the ability to continue to move freely across the member states after Brexit) with the EU (D. Davis, op. cit., 9:43). As for the financial settlement, a dilemma still exists: the prospects of the UK being able to negotiate its future relationship with the EU without having to contribute significantly to the common budget would imply a violation of the principle whereby poorer members have over average access to EU funds in exchange for opening up their markets to companies of the more developed. But, for the British, having to contribute to the EU budget as before would be the same as betraying one of the main tenets behind Brexit referendum: taking back control of their money.

³³ "Both parties want the GDPR rulebook to apply in the UK without considering as yet an equivalent UK law to be applied in Europe. In a worst case scenario (if this problem is not resolved) "new clauses dealing with third country transfers would need to be added into every contract between an EU and UK entity where data is processed". KPMG, *Draft agreement on UK withdrawal from EU and transition*, 2018, <https://assets.kpmg.com/content/dam/kpmg/ie/pdf/2018/03/ie-brexit-withdrawal-agreement-eu.pdf> (9.06.2018).

³⁴ UK Government, *Northern Ireland and Ireland – Position Paper 16 August 2017*, p. 12, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf (10.06.2018).

the normalisation of relations between Protestant and Catholic communities in both Northern Ireland and across the border.³⁵

Having all the above as well as the related sensitivities in mind, it is no wonder discussion about the Irish border issue seems extremely emotional and exaggerated. First, control of people is not an issue here, as there is no need for immigration controls thanks to the historic CTA (Common Travel Area, an arrangement between the UK and Ireland relating to the movement of persons) recognised in EU law (Protocol 20, TFEU).³⁶ So, the issue is primarily about the trade border.³⁷

Second, since most of the necessary trading formalities are conducted electronically, 95 per cent of goods pass the border without any checks there. Only animals and animal products must, in theory, pass through specific entry points where veterinary checks can be done, which would be made redundant either by maintaining the current mutual recognition of accreditations and inspection regimes (which exists between member states), or agreeing on it in an FTA (free trade agreement).³⁸

An ambitious and comprehensive (zero-tariff) FTA, incorporating a chapter on a highly streamlined customs arrangement (known as “maximum facilitation” or MaxFac), has always been option “A” for the UK government.³⁹ There are many examples of how this sort of system could work, e.g. such as Authorised Economic Operator scheme or new form of electronic documentation. The technology (e.g. electronic/bar code tag-

³⁵ T. Durrant, A. Stojanovic, *The Irish border after Brexit*, IfG Insight June 2018, p. 4, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/irish-border-after-brexit-final.pdf> (10.06.2018).

³⁶ Instead of being ensured at the border, migration control can be performed via checks in workplaces, banks, universities and on landlords, as is currently done for non-EU citizens. S. Peers, *The Day the Unicorns Cried: the deal on phase 1 of the Brexit talks*, 2017, <http://eulawanalysis.blogspot.com/2017/12/the-day-unicorns-cried-deal-on-phase-1.html> (10.06.2018)..

³⁷ S. Singham, *How to fix the Irish border problem*, 2018, <https://capx.co/how-to-fix-the-irish-border-problem/> (11.06.2018).

³⁸ Even in the absence of a full FTA, a bilateral border arrangement can be agreed based on the exception to the MFN (most-favoured-nation) principle (described in GATT XXIV/3) concerning frontier traffic in a frontier zone of 10–15 km on each side of the border. K. Hydert, *Exceptions in Favour of Frontier Traffic, Customs Unions, Free Trade Areas and Discrimination*, in: *Equality of Treatment and Trade Discrimination in International Law*, Dordrecht 1968, p. 98.

³⁹ Option 'B' would be the so-called new customs partnership whereby the UK would apply EU's customs regime to imports from third countries destined for the EU market. As this option, mentioned in both the JR and the DWA, would require sophisticated tracking technology and/or a costly tariff repayment system, is now considered a non-starter. J. Jessop, *The case for 'MaxFac*, 2018, <https://iea.org.uk/wp-content/uploads/2018/05/BU-Briefing-on-MaxFac-2.pdf> (11.06.2018)

ging, number-plate recognition, secure smartphone apps, GPS tagging) for all aspects of monitoring this process remotely already exists for larger traders (and can certainly be developed for smaller local traders), but it would require close cooperation between the customs services of the two countries.⁴⁰

In the absence of agreed solutions, both the JR and the DWA foresees a third option (option “C” or a “backstop agreement”) which would compel the UK (in respect of Northern Ireland) to maintain full alignment with EU’s internal market and customs union. But that scenario will be unlikely to come true.⁴¹ Especially, because the wording of the DWA (“The territory of Northern Ireland... shall be considered to be part of the customs territory of the Union”), would be unacceptable for any UK government – as it would effectively start a process of breaking up the United Kingdom.⁴²

Many argue that the best solution would be option “A”.⁴³ At the other extreme, remaining in some form of customs union, or – having in mind the relatively limited economic significance of the Irish border⁴⁴ – seeing its entire customs arrangements constrained by the supposed needs of this border, would prevent the UK from achieving regulatory autonomy and pursuing an independent trade policy.⁴⁵ Although MaxFac would not eliminate trade frictions completely, and even some additional customs costs and some others, related to rules of origin, would be incurred, gains coming from trade liberalisation (i.e. the ability to lower barrier to trade with third countries and reduce market distortions at home) would exceed the costs.⁴⁶

Conclusion

Brexit negotiations seem to be proceeding at a slower pace recently, as talks are more and more concentrated on the hottest issues. Although

⁴⁰ S. Singham, *op. cit.*

⁴¹ “It is currently difficult to see how the ‘fall-back’ option will work in practice” (KPMG, *Draft agreement on UK...*, *op. cit.*).

⁴² D. Davis, *op. cit.*, 10:03.

⁴³ Even the European Council confirmed its readiness to work towards an ambitious and wide-ranging FTA; European Council, *EU Council (Art. 50) guidelines on the framework for the future EU-UK relationship*, 23 March 2018, p. 3, <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf> (12.06.2018).

⁴⁴ For both Northern Ireland’s and Ireland’s economies, intra-Irish trade is marginal compared to sales going to mainland Great Britain. S. Singham, *op. cit.*

⁴⁵ D. Blake, *How bright are the prospects for UK trade and prosperity post-Brexit?*, London 2018, p. 56.

⁴⁶ J. Jessop, *op. cit.*

most of the remaining problems can only be solved by ditching some of the EU's or UK's redlines, it seems, from a neutral observer's perspective, to be quite possible to find technically workable solutions. Obviously, this would require mutual trust and goodwill, and that negotiating parties cease to stick to their perceived political interests. As for the latter, let us hope that time constraints and practical considerations will help overcome them. Let us finish with a recent evidence given by DExEU minister David Davis before a parliamentary select committee: “[...] in all of this negotiation... when we get into the detail and work through detail it tends to unblock things rather than block things [...]”⁴⁷

References

- Ambler T., Chittenden F., Bashir A., *Counting the Cost of EU Regulation to Business*, Eurochambres, Brussels 2009.
- BBC (2018). *EU tightens law on foreign temporary workers*. BBC News, 29 May 2018, <https://www.bbc.co.uk/news/world-europe-44293265>.
- Blake D., *How bright are the prospects for UK trade and prosperity post-Brexit?*, University of London, London 2018.
- Bootle R., Jessop J., Lyons G., Minford P., *Alternative Brexit Economic Analysis*, 2018, <https://www.economistsforfreetrade.com/publication/Brexit>, http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/Brexit_devolution, European Union Committee, 4th Report of Session 2017-19 – published 19 July 2017, HL (House of Lords) Paper 9.
- Brexit: fisheries*, European Union Committee 8th Report of Session 2016-17, 17 December 2016, HL Paper 78.
- Carrel P., *Indivisible or flexible? Brexit battle looms over EU freedoms*, Reuters, November 7, 2016, <https://www.reuters.com/article/us-britain-eu-freedoms-analysis/indivisible-or-flexible-brexit-battle-looms-over-eu-freedoms-idUSKBN1320MS?il=0>.
- Chittenden F., Ambler T., *A question of perspective: Impact Assessment and the perceived costs and benefits of new regulations for SMEs*, “Environment and Planning C: Government and Policy”, vol. 33(1)/2015, <https://doi.org/10.1068/c12211b>.
- Davis D., *The progress of the UK's negotiations on EU withdrawal*. Exiting the European Union Committee, 25 April 2018, 9:15-10:54, <https://www.parliamentlive.tv/Event/Index/08a8fed4-919d-4cb5-94ec-c9c0fecf60f0>.

⁴⁷ D. Davis, op. cit., 10:11/12.

- Draft Agreement on the withdrawal of the UK from the EU (coloured version)* 16–19 March 2018, https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.
- Draft agreement on UK withdrawal from EU and transition*, <https://assets.kpmg.com/content/dam/kpmg/ie/pdf/2018/03/ie-brexit-withdrawal-agreement-eu.pdf>.
- Durrant T., Stojanovic A., *The Irish border after Brexit*, “IfG Insight” June 2018, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/irish-border-after-brexit-final.pdf>.
- EU Council (Art. 50) guidelines on the framework for the future EU-UK relationship*, 23 March 2018, <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines>.
- European Council (Art. 50) guidelines for Brexit negotiations*, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>.
- European Council (Art. 50) guidelines for Brexit negotiations*, 29 April 2017, <http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>.
- Exceptions in Favour of Frontier Traffic, Customs Unions, Free Trade Areas and Discrimination*, in: *Equality of Treatment and Trade Discrimination in International Law*, Springer, Dordrecht 1969.
- Folkeavstemningen om EU (opphort), 1994 – Resultat am folkeavstemningen om EU (Norwegian European Union membership referendum – Results)*, <https://www.ssb.no/euvalg>.
- Government response to House of Lords EU Energy and Environment Subcommittee Report into the future of fisheries in the light of the vote to leave the EU*, <http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Gvt-Response.pdf>.
- Jessop J., *The case for “MaxFac”*, <https://iea.org.uk/wp-content/uploads/2018/05/BU-Briefing-on-MaxFac-2.pdf>.
- Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK’s orderly withdrawal from the EU*, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.
- Kirton-Darling J., Jongerius A., *The EU has just passed a law that could end the problems with free movement which led to Brexit in the first place, “Independent”*, 30 May 2018, <https://www.independent.co.uk/voices/eu-brexit-uk-labour-laws-migrant-workers-a8375836.html>.
- Kohler W., Müller G., *Brexit, the four freedoms and the indivisibility dogma*, LSE Brexit, <http://eprints.lse.ac.uk/86187/1/brexit-2017-11-27-brexit-the-four-freedoms-and-the-indivisibility.pdf>.

- Kosior K., Ambroziak Ł., *Brexit-Potential Implications for the Polish Food Sector*, in: *The Common Agricultural Policy of the European Union-the present and the future. EU Member States point of view*, eds. M. Wigi-er, A. Kowalski, Institute of Agricultural and Food Economics National Research Institute, Warsaw 2018, <https://doi.org/10.30858/pw/9788376587431.13>.
- May T., *Theresa May's Brexit speech: full text* – on the UK's future economic partnership with the EU (Mansion House speech) *The Spectator* 2 March 2018, <https://blogs.spectator.co.uk/2018/03/theresa-mays-our-future-partnership-speech-in-full/>.
- Münchau W., *Europe's four freedoms are its very essence*, "Financial Times", November 12, 2017, <https://www.ft.com/content/49dc02dc-c637-11e7-a1d2-6786f39ef675>.
- Northern Ireland and Ireland* – Position Paper 16 August 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf.
- Peers S., *The Day the Unicorns Cried: the deal on phase 1 of the Brexit talks*, <http://eulawanalysis.blogspot.com/2017/12/the-day-unicorns-cried-deal-on-phase-1.html>.
- Pisani-Ferry J. et al., *Europe after Brexit: A proposal for a continental partnership* (Vol. 25), Brussels: Bruegel, <https://ces.fas.harvard.edu/uploads/files/Reports-Articles/Europe-after-Brexit.pdf>.
- Résultats des élections législatives (1er et 2nd tour) et de celle présidentielle (1er tour)*, <https://www.gouvernement.fr/search/site/%C3%A9lections>.
- Rogers I., *European Scrutiny Committee, Oral evidence: EU-UK Relations in Preparation for Brexit*, HC 791, Wednesday 1 February 2017, Witness: Sir Ivan Rogers KCMG, former Perm. Repr. to the EU, <http://parliamentlive.tv/Event/Index/0d6145fa-5329-426d-8300-8eda8f215184>.
- Singham S., *How to fix the Irish border problem*, <https://capx.co/how-to-fix-the-irish-border-problem/>.
- The Barnett formula: a quick guide*, June 27, 2017, <https://commonslibrary.parliament.uk/parliament-and-elections/devolution/the-barnett-formula-a-quick-guide/>.
- The United Kingdom's exit from and new partnership with the European Union* (White Paper), February 2017, HM Government CM 9417.
- UK Small Business Statistics – Business Population Estimates for the UK and Regions in 2016*, The Federation of Small Businesses, <https://www.fsb.org.uk/media-centre/small-business-statistics>.