

PEOPLE'S VOTE CAMPAIGN

OUTCOME OF NEGOTIATIONS ON THE EU - UK WITHDRAWAL AGREEMENT

OPINION

12 March 2019

EXECUTIVE SUMMARY

1. The Government and the EU have announced a package of measures relating to the Northern Ireland backstop in the EU Withdrawal Agreement. The measures were intended to address concerns – shared by the Attorney General – that the backstop would endure indefinitely, unless and until replaced by a subsequent agreement with the EU.
2. In our opinion these measures:
 - a. do not allow the UK to terminate the backstop in the event that negotiations over its future relationship with the EU cannot be brought to a satisfactory conclusion, and
 - b. do not provide the UK with a right to terminate the backstop at a time of its choosing, or indeed at any time, without the agreement of the EU.
3. The furthest they go is to reiterate the possibility that the backstop might be suspended in extreme circumstances of bad faith on the part of the EU which are highly unlikely to be demonstrated. This was already apparent from the Withdrawal Agreement, and had been acknowledged in the Attorney General’s previous legal advice.
4. Looking at the measures individually:
 - a. ***The joint EU-UK instrument relating to the Withdrawal Agreement*** reduces the risk that the UK could be deliberately, and in bad faith, held in the backstop indefinitely. That was only ever a very limited risk. The far greater risk of being held in the backstop indefinitely as a result of the failure of good faith negotiations remains unmitigated.
 - b. ***The UK’s unilateral declaration*** goes beyond the joint instrument only in suggesting that the UK might seek to disapply the backstop as a whole if negotiations had failed because of bad faith on the part of the EU. It does not suggest that there are any circumstances other than proven bad faith in which the backstop might be disapplied. Whether or not the UK’s understanding of the Withdrawal Agreement is correct will be a matter for the Court of Justice of the EU, which is likely to be sceptical not least because the UK’s declaration goes beyond the terms of the joint instrument.
 - c. ***The joint EU-UK statement supplementing the Political Declaration*** has no effect whatsoever on the Withdrawal Agreement but merely explains certain of the parties’ aspirations for the future negotiations and the future relationship.
5. Taken as a whole, these measures do not come close to meeting the ERG’s test of clearly worded, “treaty level” provisions which unambiguously override the stipulation of the Withdrawal Agreement that the backstop shall remain unless and until the UK and the EU agree otherwise.
6. It is crystal clear that the measures do not alter the fundamental legal effect of the backstop, as previously and correctly explained by the Attorney General. The backstop will endure indefinitely, unless and until superseded by another agreement, save in the extreme and unlikely event that in future negotiations the EU acts in bad faith in rejecting the UK’s demands.

THE ADVICE SOUGHT

1. On 11 March 2019, the Government and the European Union announced a package of measures regarding the arrangements for the so-called Northern Irish backstop (“**the backstop**”) which are set out in the EU Withdrawal Agreement (“**the Withdrawal Agreement**”) and its accompanying Protocol to the Withdrawal Agreement on Ireland and Northern Ireland (“**the “Protocol”**”). These measures (“**the 11 March texts**”) - were:

- (1) A joint EU-UK Instrument relating to the Withdrawal Agreement (“**the Joint Instrument**”).
- (2) A joint EU-UK Statement supplementing the Political Declaration (“**the Joint Political Statement**”).
- (3) A unilateral declaration made by the UK stating its understanding of the operation of certain provisions of the Withdrawal Agreement and Protocol (“**the UK Unilateral Declaration**”).

2. We have been instructed to advise:

- (1) Whether the 11 March texts justify a change to the conclusions reached by the Attorney General in his previous advice relating to the legal effect of the Protocol,¹ and in particular his conclusion that the backstop would “*endure indefinitely*” unless and until a superseding agreement took its place.
- (2) Whether the 11 March texts amount to a “*clearly worded, legally binding, treaty-level clause which unambiguously overrides*” the text of the Withdrawal Agreement and/or the Protocol. That is a test which, we understand, has been prescribed by the European Research Group of Conservative MPs as a condition for supporting the Withdrawal Agreement and the Protocol as currently drafted when they come to be voted upon in the House of Commons on 12 March 2019.

¹ The Attorney General has advised on the legal effect of the Protocol in: (a) written advice to the Cabinet dated 13 November 2018, (b) written advice to Parliament in a document titled ‘EU Exit: Legal position on the Withdrawal Agreement’ dated December 2018 (Cm 9747), and (c) statements made to the House of Commons on 3 December 2018.

3. It is our opinion that:

- (1) The 11 March texts do not materially change the legal effect of the Withdrawal Agreement and the Protocol. It follows that there is no basis for any substantive change to the Attorney General's previous advice on the backstop.
- (2) The 11 March texts, and in particular the Joint Instrument, do not amount to a clearly worded, legally binding, "treaty-level" clause which unambiguously override the text of the Withdrawal Agreement and/or the Protocol.

THE WITHDRAWAL AGREEMENT AND THE PROTOCOL

4. The Withdrawal Agreement and the Protocol form a single treaty between the EU and Euratom on the one hand, and the UK on the other. The Protocol is an "integral part" of the Withdrawal Agreement, meaning that the Protocol will become legally binding upon the parties if the Withdrawal Agreement comes into force on 30 March 2019 as currently agreed (see Article 182). However, the provisions of the Protocol containing the "backstop" will only come into force upon the expiry of the transition period provided for in the Withdrawal Agreement, on 31 December 2020 (see Article 185), assuming that no comprehensive agreement regarding the future relationship between the UK and the EU has been concluded in the meantime, and renders the backstop unnecessary. There is an obligation upon the UK and the EU to use their best endeavours to reach that comprehensive agreement by the end of December 2020 (Article 184). The obligation to use best endeavours in the negotiations, along with every other obligation imposed upon either party by the Withdrawal Agreement, must be performed in good faith (Article 5).
5. The effect of the backstop provisions of the Protocol are, in broad summary, to prevent the return of a "hard border" between Northern Ireland and the Republic of Ireland by requiring Northern Ireland to follow EU single market rules, whilst maintaining the UK as a whole within a customs union with the EU. The preamble to, and the text of, the Protocol state that the backstop is intended to apply only temporarily, and unless and until superseded by a subsequent agreement (Article 1(4) of the Protocol). The parties' intention is that, if it comes into force, the backstop will be replaced by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing, either by way of a comprehensive trade agreement between the UK and the EU, or through the implementation of new technological solutions which render customs checks at the border unnecessary. However, the backstop is not subject to a time limit.
6. Any dispute concerning the interpretation or application of the Withdrawal Agreement may, if the dispute has not been resolved after every attempt at negotiation has been made, be submitted to an arbitration panel (Article 170 of the Withdrawal Agreement). In the case of the backstop,

however, Article 20 of the Protocol establishes a review mechanism, the effect of which is that (subject to certain conditions), the EU and the UK may “decide jointly” that the Protocol is “no longer necessary” to achieve its objectives and mutually agree that it shall be terminated in whole or in part. This provision reflects the general position under international law that the parties may terminate a treaty by mutual consent. There is no provision for the question of the termination of the backstop to be decided by the arbitration panel. At most, if the arbitration panel found that the EU had breached its obligations to negotiate in good faith and that the EU had failed to remedy that breach then, as a last resort, it would have the power to approve the *temporary and proportionate suspension* of certain obligations under the Withdrawal Agreement or the Protocol (Article 178 of the Withdrawal Agreement).

7. The Attorney General’s previous legal advice revealed that the UK had proposed a unilateral termination mechanism which would enable one party to bring the backstop to an end by giving notice, on grounds that there was no longer any reasonable prospect of an agreement superseding the backstop, but that this was rejected by the EU (letter of advice dated 13 November 2018, §24). Given that, and the absence of any other provision in the Protocol regarding its termination, it seems clear that the UK could only exit from the backstop by way of a subsequent agreement with the EU and that neither party has a treaty right to terminate the Protocol, and bring the backstop to an end, unilaterally. The parties have recorded their intention that the backstop be temporary and are under an obligation to use their best endeavours to negotiate alternative arrangements (see Article 2(1) of the Protocol) but the backstop will continue for as long as alternative agreement has not been reached.

THE ATTORNEY GENERAL’S PREVIOUS ADVICE

8. It follows that we agree with the conclusions previously expressed by the Attorney General regarding the enduring character of the backstop, as provided for by the Withdrawal Agreement and the Protocol. In particular:
 - “[D]espite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part, as set out therein. Further, the Withdrawal Agreement cannot provide a legal means of compelling the EU to conclude such an agreement.” (13 November 2018, §16).
 - “[T]he current drafting of the Protocol, including Article 19, does not provide for a mechanism that is likely to enable the UK lawfully to exit the UK wide customs union without a subsequent agreement. This remains the case even if parties are still negotiating many years later, and even if the parties believe that talks have clearly broken down and there is no prospect of a

future relationship agreement. The resolution of such a stalemate would have to be political” (13 November 2018, §30).

- “[s]ince the Agreement does not contain any provision on its termination ... it is not possible under international law for a party to withdraw from the Agreement unilaterally” (Legal position on the Withdrawal Agreement, December 2018, §88).

9. We also agree with the Attorney General’s previous advice insofar as it recognised the limited significance of the parties’ obligation to use their best endeavours to conclude a further agreement and their obligation to perform the Withdrawal Agreement in good faith. In future negotiations the EU may simply disagree with the UK’s position regarding new trading relations without breaching any obligation imposed by the Withdrawal Agreement or the Protocol. Such disagreement would not in itself amount to evidence that the EU was not negotiating in good faith, or not using its best endeavours. As the Attorney General recognised in his advice, it is a well-established principle of international law that clear evidence will be required in support of any allegation of bad faith and that this must go far beyond the mere fact of disagreement in the negotiations. This test would be applied by the arbitration panel as well as by the Court of Justice of the European Union, which is likely to have jurisdiction over any dispute as to whether one party or another has been negotiating in accordance with the principle of good faith, as it stands under EU law (see Articles 131 and 174 of the Withdrawal Agreement).

THE 11 MARCH TEXTS

The Joint Instrument

10. It is, in our view, crystal clear that the Joint Instrument does not alter the fundamental legal effect of the backstop, as explained in the Attorney General’s previous legal advice.
11. The Joint Instrument does not form part of the terms of the Withdrawal Agreement or the Protocol. Nor is it a separate treaty. Its preamble explains its legal effect as a “*document of reference*” containing “*in the sense of Article 31 of the Vienna Convention on the Law of Treaties ... a clear and unambiguous statement by both parties to the Withdrawal Agreement of what they agreed in a number of provisions of the Withdrawal Agreement, including the Protocol*”.
12. The Joint Instrument therefore makes only the limited claim to be a joint interpretative declaration which will be taken into account as relevant context when interpreting the Withdrawal Agreement, pursuant to Article 31(2) of the Vienna Convention on the Law of Treaties (“**VCLT**”). It has “legal force” only in the sense that it is relevant to the interpretation of the Withdrawal Agreement and is “binding” only in the sense that the parties cannot not later deny the

interpretation they have agreed. It neither modifies the terms of the Withdrawal Agreement nor creates new treaty rights or obligations. It is not “treaty level”.

13. The fact that the Joint Instrument does not purport to change the terms of the Withdrawal Agreement is immediately evident from the language of its recitals, which set out its objectives. The parties “reiterate”, “recall” and “underline” what they have already agreed. More specifically, the parties:
 - (1) Recall their “*determin[ation] to replace the backstop...by a subsequent arrangement*”. The Protocol already clearly states this intention.
 - (2) Underline that the Protocol “*will be subject to regular reviews*”. Article 20 of the Protocol already provides that the UK may seek a review “*at any time*”.
14. The Joint Instrument recalls the “*best endeavours*” obligation in Article 184 of the Withdrawal Agreement and states that “*a systematic refusal to take into consideration adverse proposals or interests, would be incompatible with their obligations under Article 2(1) of the Protocol and Article 5 of the Withdrawal Agreement*” (§§3-4). Similarly, the parties agree that “*to act with the objective of applying the Protocol indefinitely*” would be inconsistent with those obligations (§12). These reflect established examples of bad faith, and clear and credible evidence of a “*systematic refusal*” or “*objective*” would be required. That is a high threshold indeed, which would not be met in the most likely scenario for deadlock in the negotiations, in which the EU rationally disagreed with the UK’s proposed alternative arrangements.
15. The Joint Instrument contains various procedural details regarding the conduct of the negotiations, which spell out what the “*best endeavours*” obligation requires (§§5-9). These go to process not substance, and do not address the rights of the parties in the event of the negotiations being deadlocked. Nothing in these paragraphs disturbs the clear statement in Article 2(1) of the Protocol that it “*shall apply unless and until it is replaced*”.
16. The Joint Instrument also clarifies that alternative arrangements which replace the Protocol “*are not required to replicate its provisions in any respect, provided that the underlying objectives continue to be met*” (§10). This is an unnecessary clarification: the Protocol as already agreed has objectives which must be achieved by any replacement agreement (Article 1(3)), but makes no stipulation as to the specific terms of any future replacement agreement.
17. The Joint Instrument contains various references to dispute settlement, none of which deviates from or supplements the Withdrawal Agreement or the Protocol:

- (1) The preamble recalls that after the end of the transition period *“any dispute concerning compliance with Article 5 of the Withdrawal Agreement, Articles 2(1) and 20 of the Protocol ... will be subject to the dispute settlement mechanism”* in the Withdrawal Agreement. This was already evident from the broad terms of Articles 169 and 170 of the Withdrawal Agreement.
- (2) The parties state that *“if a dispute arises in relation to Article 5 of the Withdrawal Agreement and Article 2(1) of the Protocol”*, they *“will immediately enter into consultation in the Joint Committee”* (§13). This is already provided for in Article 169 of the Withdrawal Agreement.
- (3) The parties reiterate the terms of Article 175 of the Withdrawal Agreement that a ruling by the arbitration panel shall be *“binding”* on the EU and the UK (§14). They also repeat the terms of Article 178(2), recalling that persistent failure to comply with a ruling of the arbitration panel would trigger a right for the aggrieved party *“to enact a unilateral, proportionate suspension of its obligations”* under certain provisions of the Withdrawal Agreement, including the Protocol (§14).

18. Finally, the Joint Instrument refers to *“safeguards for Northern Ireland”* but these again add nothing to the existing text of the Withdrawal Agreement and the Protocol. In particular:

- (1) The Joint Instrument states that the Protocol *“does not affect or supersede the provisions of the 1998 [Good Friday/Belfast] Agreement in any way”*, including under Strand II of that agreement. But the preamble to the Protocol, which forms part of the context relevant to its interpretation, already affirms the 1998 Agreement and states that it *“should be protected in all its parts”*. Article 1(3) of the Protocol expressly states that one of the objectives of the Protocol is to *“protect the 1998 Agreement in all its dimensions”*.
- (2) The Joint Instrument states that *“any new Union act ... will require the agreement of the United Kingdom in the Joint Committee”* before becoming part of the backstop (§16). Reference of new Union acts to the Joint Committee is already provided for in Article 15(5) of the Protocol. There was already a requirement of UK agreement within the Joint Committee, since its decisions are taken *“by mutual consent”* (Article 166(3) of the Withdrawal Agreement).
- (3) The Joint Instrument confirms that the Protocol *“does not prevent the United Kingdom”* from including representatives of the Northern Ireland Executive as part of its delegation in the Joint Committee (§17). This is unnecessary since, as would be expected, the Withdrawal Agreement leaves to the UK the choice of its own representatives in the Joint Committee (Article 164 of the Withdrawal Agreement).

19. In short, the Joint Instrument re-packages rather than re-writes existing provisions of the Withdrawal Agreement and the Protocol. The possibility of the UK unilaterally exiting from the backstop without agreement is addressed only by spelling out extreme and highly unlikely circumstances of bad faith on the part of the EU. These circumstances were already apparent from the Withdrawal Agreement and had been taken into account in the Attorney General's previous legal advice. They do not cover the far more likely situation where future negotiations become deadlocked simply because the EU does not wish to accept the UK's demands. In that scenario, it remains entirely accurate to say that the backstop will endure unless and until it is replaced by a subsequent agreement.

The Unilateral Declaration

20. The Unilateral Declaration records the UK's understanding of the effect of Article 1(4) of the Protocol, which provides for it to be temporary rather than permanent, in very specific circumstances. Those circumstances are where it is not possible for the UK and the EU to conclude an agreement superseding the Protocol *"due to a breach of [the obligation to act in good faith under] Article 5 of the Withdrawal Agreement by the [EU]"*.

21. In that extreme scenario – which, as we have already noted, does not include the situation where the EU rationally declines to accept the UK's demands in the negotiations – the UK's understanding is that the Withdrawal Agreement would not prevent it from *"instigating measures that could ultimately lead to the disapplication of obligations under the Protocol, in accordance with Part Six, Title III of the Withdrawal Agreement or Article 20 of the Protocol, and under the proviso that the UK will uphold its obligations under the 1998 Agreement in all its dimensions and under all circumstances and to avoid a hard border on the island of Ireland"*.

22. The Unilateral Declaration seeks to clarify the interpretation of the Withdrawal Agreement rather than to modify the UK's legal obligations under that agreement. Whereas the Joint Instrument binds both parties as to the interpretation of the Withdrawal Agreement, the same is not true for the Unilateral Declaration. If, as appears likely, it is not endorsed by the EU, the Unilateral Declaration could only be one element among many when interpreting the Withdrawal Agreement pursuant to Article 31 VCLT (and not a particularly persuasive one given its unilateral nature and its apparent departure from the Joint Instrument).

23. We would add that any attempt to secure *"disapplication of obligations under the Protocol"* through the arbitration mechanism in the Withdrawal Agreement would face two difficulties. First, since the good faith obligation under Article 5 of the Withdrawal Agreement raises issues of EU law, the arbitration panel would likely be required to refer the matter to the Court of Justice of the European Union (Article 164 of the Withdrawal Agreement). Second, even if the arbitration panel found that there was clear evidence that the EU had acted in bad faith, and the EU

persistently failed to comply with its ruling, as a last resort, it is clear from Article 178 of the Withdrawal Agreement that the UK would be permitted only to *suspend, temporarily and proportionately* certain obligations under the Protocol. Only the most extreme case of bad faith and non-compliance could justify disapplication of the Protocol as a whole, and even then, according to Article 178(5), this could only be temporary. The Unilateral Declaration notes that the UK would act in accordance with Part Six, Title III of the Withdrawal Agreement, which includes Article 178.

The Joint Political Statement

24. The Joint Political Statement has no effect whatsoever on the Withdrawal Agreement but merely explains certain of the parties' aspirations for the future negotiations and the future relationship.

Government claims made to the House of Commons on 11 March 2019

25. This Opinion was finalised before we had sight of the Attorney General's written opinion promised for today. We do however address and respond to certain of the claims made for the 11 March texts by Rt. Hon. David Lidington MP when introducing them to the House of Commons:

- (1) *"[T]he Prime Minister and the Secretary of State have secured legally binding changes that strengthen and improve the Withdrawal Agreement and the Political Declaration".* Neither the Joint Instrument nor the Unilateral Declaration change the Withdrawal Agreement. The Joint Instrument is a legally relevant aid to the interpretation of the existing terms of the Withdrawal Agreement but it is not determinative of that interpretation. The Unilateral Declaration is not legally binding on anyone (although the UK could not subsequently deny the interpretation which it puts forward). We do not consider that either the Joint Instrument or the Unilateral Declaration materially strengthens or improves, in legal terms, the UK's position with respect to the key question of its power to exit the backstop without the agreement of the EU.
- (2) *"The Joint Instrument has equal status in law to the Withdrawal Agreement itself";* both instruments *"have the status of treaties under international law"* and the Joint Instrument *"should be read as a protocol to the Withdrawal Agreement"*. These claims are all incorrect. The Withdrawal Agreement, and its Protocols, will constitute a treaty. The Joint Instrument is not incorporated into the Withdrawal Agreement, it is not a Protocol to the Withdrawal Agreement and it is not a treaty in its own right. Its status under international law, as acknowledged in its own preamble, is as a *"document of reference"* to be used in interpreting the Withdrawal Agreement.

- (3) *“Once made, the Unilateral Declaration would have legal status in international law, and such declarations are commonly used by states alongside the ratification of treaties.”* This is correct but potentially misleading. Unilateral declarations do indeed have legal status in international law but their legal force is limited and much less than that of a joint interpretative declaration such as the Joint Instrument. It would certainly be wrong to suggest that the Unilateral Declaration would itself amount to a legally binding interpretation of the Withdrawal Agreement.
- (4) The Joint Instrument *“[provides] a UK lock on any new EU laws being added to the backstop”*. That is not correct: the “UK lock” was already present in the mechanism for reaching agreement in the Joint Committee which is set out in the Withdrawal Agreement.
- (5) *“Working to achieve alternative arrangements by 2020 now becomes a legal obligation”*. The Withdrawal Agreement already contained a legal obligation to use best endeavours to agree alternative arrangements by 31 December 2020.

CONCLUSIONS

26. In summary, therefore, our principal conclusions are that:

- (1) The interpretative declaration does not materially change the legal effect of the Withdrawal Agreement and the Protocol. There is no basis for any substantive change to the Attorney General’s previous advice that UK may not leave the backstop unilaterally, and that the backstop may accordingly endure indefinitely.
- (2) The interpretative declaration is not a clearly worded, legally binding, “treaty-level” clause which unambiguously overrides the text of the Withdrawal Agreement and/or the Protocol.



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