



Centre for
Cross Border Studies

CCBS BRIEFING NOTE

**Response to UK Government White Paper:
*Legislating for the Withdrawal Agreement
between the United Kingdom and the
European Union***

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July 2018

The White Paper, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*¹, published by the Department for Exiting the European Union (July 2018) sets out how the UK Government proposes to legislate for the transposition of the Withdrawal Agreement (which will be an international Treaty between the EU and the UK) – which will be implemented as the EU (Withdrawal Agreement) Bill.

In his introduction to this White Paper, Secretary of State Dominic Raab notes that beyond the practical requirement to transpose the terms of the Agreement into UK law and give legal certainty to people and businesses in the UK and the EU, it is intended to send “a clear and strong signal to the EU that the UK is a dependable negotiator, delivering on the commitments already agreed in the negotiations.”²

The White Paper is clear that the Withdrawal Agreement will be an international treaty and recognises that the EU is not legally able to conclude new treaties with the UK relating to the future relationship before the UK has left the EU in March 2019. However, it points out that the recently approved EU (Withdrawal) Act requires the House of Commons to vote to approve the Withdrawal Agreement and the Future Framework *before* the Withdrawal Agreement can be ratified. (para. 143) This particular circle is expected to be squared by the Government “providing Parliament with the Future Framework agreed under the Article 50 process” that will “ensure that Parliament is able to make an informed decision on the entirety of our proposed set of agreements with the EU before the UK ratifies the Withdrawal Agreement.” (para. 146)

The conditionality of the UK’s commitment is further underlined in the section of the White Paper on the financial settlement. The White Paper states that the Bill will allow Government to make payments that are due under the financial settlement and meet its international commitments (para 105) – that is, “a fair settlement of the UK’s rights and obligations as a departing Member State (para

¹ HM Government, *Legislating for the Withdrawal Agreement Between the United Kingdom and the European Union*, CM9674, July 2018 (White Paper).

² *Ibid*, p. 3.

104). It makes it clear that this is neither paying to exit, or costs associated with any future relationship such as participation in EU programmes such as Horizon. A sum of £35-39bn has been agreed as a reasonable estimate to cover the UK's commitments under the current Multi-Annual Financial Framework (MFF). Thus, the UK will continue to contribute to, but also benefit from EU programmes and projects including the Regional Development Fund (including Peace and Interreg), Horizon 2020 etc. (paras 109, 115, 117) The UK will pay its share of the EU's liabilities until 31 December 2020 and benefit from a share of EU assets; In some cases, the assets may reduce or remove a liability (para 118). The UK's residual liabilities include, for example, its contributions to pensions and employee benefits of EU staff.

Therefore, while acknowledging that the agreed payments are in respect of previously agreed commitments made by the UK as a Member State and include its participation and benefits from EU

In his introduction, Secretary of State Dominic Raab states the White Paper is intended to send “a clear and strong signal to the EU that the UK is a dependable negotiator, delivering on the commitments already agreed in the negotiations – but the conditionality of the commitments already agreed is stated as an ‘underlying principle’ and confirmed by Dominic Raab in his speech of 23 July.

funding programmes, the White Paper sets out as an ‘underlying principle’ its determination that

“the settlement has been put forward by the UK on the condition of an overall agreement under Article 50 on the UK’s withdrawal, taking into account the future relationship, including an agreement on transitional arrangements.”(para 110)

This conditionality was confirmed in Dominic Raab’s speech on 23 July 2018.³ It is therefore somewhat questionable whether this commitment in the Withdrawal Agreement does in fact provide “certainty to current recipients of EU funding, including farmers, businesses and academics, with the UK continuing to get receipts due under the current EU budget plan.” (para 112)

In addition to the financial settlement, the two remaining priority areas to be settled in the Withdrawal Agreement (and on which both the transition or implementation period depend) are issues related to citizens’ rights and the Protocol on Ireland/Northern Ireland⁴. (There are 13 ‘Other Separation Issues’ included in the draft Withdrawal Agreement, distinct from these three priorities.)

The Ireland/Northern Ireland Protocol

The Protocol, previously agreed in principle by the UK Government, recognises that it is necessary to address the unique circumstances on the island of Ireland through a unique solution in order to ensure the orderly withdrawal of the United Kingdom from the Union; affirms that the Belfast/Good Friday Agreement and subsequent implementation agreements should be protected in all its parts; recognises that cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the

³ <https://www.theguardian.com/politics/blog/live/2018/jul/24/brexit-dominic-raab-white-paper-growth-minimal-and-going-backwards-for-millions-of-poorer-families-says-thinktank-politics-live?page=with:block-5b575242e4b074d7eed5d092#block-5b575242e4b074d7eed5d092>

⁴ EU Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* TF50 (2018) 35 – Commission to EU27, 19 March 2018.

island of Ireland, and recalls the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and bearing in mind that any future arrangements must be compatible with these overarching requirements.⁵

The Protocol contains the EU Commission's text for the 'backstop' – maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed. The EU's position – reaffirmed many times – remains that, without an agreement on the backstop, there will be no withdrawal agreement and no transition period after Brexit.⁶

Although having accepted the need for a backstop in principle in the 8 December Joint Report, and reaffirmed by Prime Minister Theresa May in her 19 March 2018 letter to EU Commission President Donald Tusk, the UK Government has not accepted the wording proposed by the EU.

In its Technical Note of 7 June 2018 (see box opposite) the UK Government proposed to amend the Protocol – which offered a 'unique solution' to address the unique circumstances on

the island of Ireland – with a time-limited customs arrangement to apply to the UK as a whole. On the same day on which the Technical Note was published however, EU Brexit negotiator Michel Barnier reaffirmed that a time-limit would not be acceptable; nor could the offer to keep Northern Ireland in the single market in goods be extended to the rest of the United Kingdom. While welcoming the UK's publication of its proposal, M. Barnier set out three questions to be answered: 1) Is it a workable solution to avoid a hard border? 2) Does it respect the integrity of the Single Market/Customs Union? 3) Is it an all-weather (i.e. permanent) backstop? The EU has ruled out

Potential change to Article 4.2 of EU draft protocol*

Changes made to:

- Apply relevant customs legislation to the whole of the UK and to the Crown Dependencies

Article 4.2

Customs legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 of the European Parliament and of the Council as well as other provisions of Union law providing for customs controls of specific goods or for specific purposes listed in Annex 2.2 to this Protocol **insofar as it concerns the Common Customs Tariff or other tariff measures** shall apply to and in the **territory of the** United Kingdom in respect **Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man.** The territory of **the United Kingdom** Northern Ireland, excluding the territorial waters of the United Kingdom (the "territory of Northern Ireland"), shall be considered to be part of the customs territory of the Union. *This could also be addressed, as set out below, through the creation of a new customs territory comprising the customs territories of the UK and the EU.*

**Technical Note: Temporary Customs Arrangement
HM Government**

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⁵ The Protocol on Ireland/Northern Ireland attached to the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, EU Commission, TF50 (2018) 35 – Commission to EU27, 19 March 2018.

⁶ BBC News, <https://www.bbc.co.uk/news/world-europe-43949962>

extending access to the single market for goods to all of the UK because this would be a 'backdoor' into the Single Market for British goods without accepting all the rules of the Single Market.⁷

The White Paper, however, makes only passing reference to the Ireland/Northern Ireland Protocol and the Belfast/Good Friday Agreement:

“While the UK and the EU have made progress in the negotiations on the Northern Ireland and Ireland Protocol, discussions continue and consideration is being given to areas that may require domestic legislation. Throughout the process of negotiations, the Government has been clear about its steadfast commitment to the Belfast Agreement.”

Despite the fact that Dominic Raab has indicated (26 July) that he expects there to be agreement in October, the UK Government has not yet offered an alternative operable legal text.

Citizens' Rights

The White Paper aligns closely to the section in the Draft Withdrawal Agreement on citizens' rights – insofar as these relate to agreement that has been reached in the negotiations in respect of reciprocal rights for EU citizens in the UK and UK citizens in the EU. This reflects the UK position that “the UK's first priority in negotiating the withdrawal from the EU was to reach agreement on the rights of citizens.” (para 16). The agreement will cover all EU citizens legally resident in the UK before the end of the implementation period. (para 17).

There remain many question about how rights derived from the Withdrawal Agreement, the Common Travel Area and the Belfast/Good Friday Agreement may be interpreted and implemented.

The White Paper does reference and distinguish the citizens' rights provided under the Withdrawal Agreement from those rights and entitlements for UK and Irish citizens derived from the Common Travel Area and the Belfast/Good Friday Agreement.

“The rights agreed in the citizens' rights part of the Withdrawal Agreement are without prejudice to the reciprocal rights of British and Irish citizens in each other's countries as associated with the Common Travel Area arrangements between the UK and Ireland. These rights pre-date the UK's membership of the EU.” (para 21)

The Government's position is that the Withdrawal Agreement should recognise that the people of Northern Ireland will continue to have – as set out in the Belfast Agreement – a birthright to hold either Irish or British citizenship, or both. As such, the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens.” (para 22)

There remain many questions, however, about how rights derived from the Withdrawal Agreement, the Common Travel Area and the Belfast/Good Friday Agreement may be interpreted and implemented. Together they create a complicated landscape of principles, legal protections and custom and practice. The Human Rights Consortium and others have

⁷ <https://uk.reuters.com/article/uk-britain-eu-proposal-barnier/barnier-welcomes-uk-irish-backstop-sets-conditions-idUKKCN1J31NW>

raised concerns about the fact that the EU (Withdrawal) Bill (formerly the Great Repeal Bill) gives ministers powers to change laws without adequate parliamentary oversight and removes the Charter of Fundamental Rights from UK law and threatens to claw back powers from the NI Assembly.⁸

The White Paper notes that the Withdrawal Agreement will place binding obligations on the devolved administrations and identifies a number of areas in which implementation of the Withdrawal Agreement may touch on devolved matters. The White Paper commits the UK Government to working effectively with the devolved administrations and seeking their consent “where it is relevant to do so.”(para 9) Indeed, it promises that, “After the UK has left the EU, power will sit closer to the people of Scotland, Wales and Northern Ireland than ever before” and that the devolved institutions will see a significant increase in their decision-making powers. (para 10).

Irrespective of the fact that there has been no functional devolved administration in Northern Ireland for more than a year and a half and little prospect of the Executive and Assembly being reconstituted before the Withdrawal Agreement is signed, others with expertise have raised in particular concerns about the protection of rights in the devolved parts of the UK:

“Brexit poses challenges for the protection of rights in the devolved parts of the UK with many rights no longer underpinned by EU obligations. Future attempts at human rights reform will therefore see the Westminster Parliament able to legislate freely not only on the Human Rights Act, but rights currently protected by EU law. While the more general consequences of Brexit for rights protection are well rehearsed, the additional complexities posed by devolution are under-appreciated.

“There is a tendency to consider rather complex questions of reserved and devolved competences through a centralised lens. This is particularly true for the Northern Irish context where international obligations undertaken in the Good Friday (Belfast) Agreement complicate things further....”⁹

Summary

In summary, agreement on and ratification of the Withdrawal Treaty is required to ensure an ‘orderly exit’ from the EU by the UK at the end of March 2019. The three priority areas to be agreed in the Withdrawal Treaty are the reciprocal rights of UK citizens in the EU and EU citizens in the UK, the UK’s outstanding financial obligations and issues relating to Ireland/Northern Ireland.

The White Paper, however – rather than offering reassurance that the UK is “a dependable negotiator, delivering on the commitments already agreed in the negotiations” – underlines the

⁸ <http://www.humanrightsconsortium.org/consortium-concerns-eu-withdrawal-bill/>

⁹ Edinburgh Law School in collaboration with Queen’s University Belfast Law School, <https://www.eventbrite.co.uk/e/bren-belfast-roundtable>

conditionality of the UK Government's commitments. This has been made particularly explicit in respect of the UK's intentions to pay its outstanding financial obligations.

While citizens' rights issues appear to be largely agreed, at least for those citizens legally resident in the UK and the EU respectively at the end of the implementation period, there remain many questions about how rights derived from the Withdrawal Agreement, the Common Travel Area and the Belfast/Good Friday Agreement may be interpreted and implemented. The White Paper makes only passing references to the Belfast/Good Friday Agreement and the Ireland/Northern Ireland Protocol.

Despite the fact that agreement is needed by the EU Council meeting in October, this White Paper raises as many questions as answers about how the UK Government's approach to legislation for the Withdrawal Treaty.