

One step forward, two steps back: Towards no deal by default or design

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The UK political system is deadlocked, unable to make a decision between the different Brexit options on the table, with a high degree of uncertainty of what will happen next. The final outcome is far from clear: while many UK politicians reiterate that no deal does not command a majority, it remains the most likely outcome, as it is the default specified in Article 50, whatever Westminster decides. To prevent this worst-case scenario, more time is needed to find an alternative that can command a majority in the House of Commons, while at the same time is compatible with the principles of the EU. This will require statesmanship on the UK side but it is far from certain that someone will step up to the plate.

BUYING TIME

One idea to gain time, or even to stop the clock, which has been discussed in Westminster, is the revocation of Article 50, i.e. withdrawing the notice to the EU that the UK is leaving the European Union. The UK can do this unilaterally, as was decided by the European Court of Justice (ECJ) in the Wightman case. But the ECJ made it clear that this implies a decision to remain in the EU under current membership conditions; it is not a tool that can buy additional time. So going down the route of revocation requires a House of Commons majority to vote for, and publicly state the willingness to, remain in the EU. This is hard to sell to the electorate, especially to potential Conservative voters, who see their party as the one that has to deliver Brexit, and would punish what they consider as backsliding. And it is not only the Conservatives: many in the opposition support Brexit, either because they are convinced Brexiteers or because they feel they cannot go against the result of the referendum.

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So what about the extension of Article 50? In contrast to revocation, it requires the unanimous approval of the EU27 if the UK government asks for it (which it currently says it will not). If it is a technical extension to implement a joint decision that has already been taken, a short extension is virtually certain, as long as the length of the extension does not affect the European Parliament elections: potentially, if the UK is still a member state by July, some legal commentators believe that the UK would have to elect MEPs for the EP to continue to function legally. No one on either side relishes the prospect of having an EP election campaign in the UK, and the final outcome would remain uncertain until all is ratified, even if the UK has agreed on a way forward. A longer extension would thus need very compelling reasons,

such as the need for sufficient time to hold a second referendum.

A substantive extension in absence of a material decision in the UK opens a very different debate. It raises the possibility of the EU27 setting conditions, either narrowly in the interest of an individual member state (e.g. it might be seen as a lever by Spain to demand reassurances on Gibraltar) or more broadly to push the UK towards making a decision in the Brexit process. But, most likely, a (short) extension would be granted in the end as the EU27 are also keen to avoid the costs of a chaotic Brexit. But length might be a question: If there is no decision on the UK side, the EU might only grant a very short extension of a few weeks to force a decision, followed by, if needed, a longer one for implementation.

BETWEEN A ROCK AND A HARD PLACE

But even if the UK gets an extension, what comes next? At some point, a decision will have to be made – an extension merely postpones that moment, it does not remove the need for making a difficult choice.

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A second referendum is unlikely, especially when the full weight of the opposition is not behind it. Jeremy Corbyn appears to be deeply sceptical about referenda, potentially as it can be argued that they undermine parliamentary democracy. There is not a sufficient number of MPs that support it outright, with many fearing the electorate's reaction if there were to be another referendum, in addition to significant opposition in principle on both sides of the House. Even the design of such a vote is far from clear, including the format of the vote (one-off, multi-stage, multi-option) and what options to put on the ballot paper: May's deal (that has been rejected by Parliament), no deal (that the majority does not want), remain (that would lead to accusations of re-running the same referendum) or an option the EU does not agree with (e.g. access to Single Market but without freedom of movement)? The EU might well have something to say about this – a referendum would need an extension beyond June so it is a high hurdle to climb.

But even if a second referendum becomes possible, it is questionable whether it would lead to a different outcome in the end, given the deep political and societal polarisation in the UK. It is far from certain that such a vote would produce a convincing majority for remain, potentially producing prolonged uncertainty. The

chance of a pro-Brexit backlash could not be excluded in the referendum campaign or in the next general election, with the claim intensifying that this is exactly what the EU/the elites always do. It would also raise questions about the future of representative democracy if Westminster is unable to decide on such an important issue after it was clarified that constitutionally Parliament has the final say. In any case, it is unlikely that a referendum will find a majority in the House of Commons. MPs anticipate the likely outcome: the expectation is for remain to win. So those who are opposed to remaining are also unlikely to support a new referendum.

So what about May's deal? It has taken quite a battering, with a historic defeat in the Commons. It is hard to see how it can be resurrected without significant changes. The lack of a convincing market reaction (probably caused by markets believing erroneously that a rejection of May's deal implies remain or a soft Brexit) has resulted in a lack of momentum, although some of the real economic pain is starting to be felt. But even if she made some changes, acknowledging that she needs EU27 support for any deviation from the current deal, it is far from clear what would convince the House of Commons, in whatever direction she turns.

WESTMINSTER TAKING CONTROL

Exasperated by the limited choices available and wanting to avoid a no deal by default, some MPs are now proposing that Parliament takes control of the process from the government and, for example, pass legislation that would imply that the UK would revoke the Article 50 notification if no alternative is found to command a majority. But this effectively implies that the default is switched from no deal to remain and it seems unlikely that there is a majority for that.

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It also raises a number of additional questions, not least the impossibility of the EU negotiating with anyone but the UK government. Westminster would have to compel the government, which is legally tricky and might lead the government to fall, which Conservatives and DUP would not support. It is also far from certain that a vote in Westminster would produce a more implementable outcome. The most common variation currently

discussed is May's deal but with a time-limited backstop, which the EU27 could never accept.

ULTRA-SOFT BREXIT?

But even if Westminster would pick an alternative that is acceptable to the EU27, there are no obvious candidates that could convince the House of Commons.

Norway and Customs Union combined has repeatedly been mentioned as the best 'soft' Brexit option. Once it is in place, it guarantees an open border, thereby removing the need for the backstop. Without a backstop, the number of European Research Group/DUP MPs May would lose would be limited, and she would retain enough moderates/pro-Europeans within the Conservative party. In combination with opposition votes, her deal could make it through Parliament, especially when standing at the no deal cliff edge.

But not so fast. In the current political system of the UK, the opposition doesn't have a good record of supporting a rival government, even in extreme circumstances. The priority is to bring down the government and have new elections. The thinking is that whatever policy changes will need to be made, these can be made by the next government, given the UK's constitution that specifies that future parliaments cannot be bound by the decisions of the current one. In addition, the Norway+/Customs Union option does not remove the need for the backstop. Realistically, the only place the future model for the EU-UK relationship can go to is the political declaration, which is only aspirational. The backstop would still be needed. Writing Norway+/Customs Union into the Withdrawal Agreement would be technically tricky, essentially pre-defining the future relationship that still needs to be negotiated, and politically speaking, both the EU27 and the UK would resist this. For the UK, it essentially entails signing a blank cheque: in the end, the EU would have to define what the model will look like, for example on level playing field provisions or the role of ECJ, as it will need to be created as a newly designed, separate pillar in the European Economic Area. This would be completely unacceptable to most UK politicians, essentially relegating the UK to the role of blind rule taker.

A BREXITEER SOLUTION

Alternatively, May could try to rescue her deal by trying to please the Brexiteer wing of her party, as well as the DUP, by doubling down on the UK's red lines: exit from the Single Market and Customs Union, no further rule taking from Brussels. This is not enough to see it through now but, as Brexit day approaches and economic distress worsens, some more moderate Conservative MPs, together with a handful of Brexiteers from the opposition and abstentions driven by the fear of no deal/recession, might just be enough to get a hard Brexit deal through when standing in front of the abyss.

But this is also not feasible because of the backstop. The Brexiteers and DUP are adamant that they cannot

support a deal that contains a backstop unless it is time-limited or can be cancelled unilaterally by the UK. There is no way the EU27 could ever agree to this, so this path also does not lead to a majority.

PLAN C = PLAN B = PLAN A

For now, May seems to have decided that the best option left to her is to continue trying to push her deal through with some small additions and alterations, no matter how fierce the resistance. A combination of some procedural concessions on the role of the UK parliament, reassurances from the EU on the backstop and economic pressure, together with the fear of a Corbyn government, might change the arithmetic, although there is a long way to go. The hope is that if May's deal is the last alternative standing that can prevent Corbyn/new elections and/or a second referendum, Conservatives and the DUP might back it at the very end. But this is unlikely to work for now. As long as MPs still have other options, they will not go down this route.

With the endgame nearing and a no-deal scenario looming, some of those currently opposed to May's deal might support it. But the danger is that this change of mind only comes when it is too late, or that even in such extreme circumstances, faced with no deal, not enough MPs will choose this way forward. For Jeremy Corbyn and large parts of the opposition new elections are the priority and they will only support May's proposals if they can bring down the government. Within her party, there is also a significant opposition that votes on ideological grounds, not only within the ERG, but among many opposed to the backstop, including the DUP. So May's deal could be defeated yet again, even when standing at the abyss. It doesn't help that there are a number of MPs in her party who positively welcome the prospect of no deal.

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REVERTING TO NO DEAL

This brings us to the crux of the matter: Theresa May's real red lines. Her biggest priority is not to prevent no deal. From her perspective, no deal is better than a bad deal, but this has more to do with her own party than the negotiations with the EU. What she will seek to prevent at all cost is a split within her party and a Corbyn majority government. These red lines are shared by much if not almost all of her party, and are supported by the DUP, which is fiercely anti-Corbyn.

If she holds fast to her red lines, she might be left with no other option than to wait, running down the clock

and hoping for a last-minute reprieve. But, unless the threat of no deal is enough to force a decision, time will eventually run out, resulting in no deal by default.

Alternatively, she ensures the unity of the party, overruling the more pro-EU element and retaining the support from ERG and, crucially, the mostly Eurosceptic Conservative Constituency Associations. She could go back to Brussels demanding the removal of the backstop and, when rejected, lead the UK into no deal by design, blaming the EU and conjuring the Dunkirk spirit.

A WAY OUT?

Either way, no deal is the most likely outcome. The UK political class is faced with a classic prisoners' dilemma: no deal is not the desired outcome of either side but it remains the most likely, given the current red lines and political priorities of both major parties. Knowing what those priorities are, both sides are forced to dig in their heels, even though it would be in everyone's interest to compromise, eventually leading to an outcome that both (mostly) oppose – no deal, helped by it being the default specified in Article 50.

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How do you untangle such a prisoners' dilemma? Either side could change their red lines, accepting a compromise. Maybe a government of national unity or a technocratic government could be a way out, as we have seen in the EU and in other countries at the moment of acute political crisis. But there is no recent political tradition which would make this a feasible option within the UK and there is no overarching authority that could compel such an outcome, neither in the form of a president or a similar figure, nor in constitutional terms.

What remains is statesmanship: sacrificing short-term party objectives and one's own political future for the greater good, prioritising country over party and power. But how likely is that, given the current political leadership?

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