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THE WITHDRAWAL AGREEMENT NEGOTIATIONS

The Salzburg Summit

Ahead of the informal Salzburg summit of EU Heads of State and Government (19-20 September), there was optimism that a deal could be within reach and potentially finalised in October (at the European Council) or in November at a specially arranged meeting of EU leaders.

However, the Salzburg summit appeared to present a backward step in the negotiations with reports suggesting the UK was isolated as the EU27 rejected the UK Government’s proposals for the future relationship and addressing the Irish border question.

Speaking after the summit, the President of the European Council, Donald Tusk highlighted three issues to emerge following the Brexit related discussions:

1. “First, we reconfirmed that there will be no Withdrawal Agreement without a solid, operational and legally binding Irish backstop. And we continue to fully support Michel Barnier in his efforts to find such a model.

   Second, we agreed to have a joint political declaration that provides as much clarity as possible on the future relations. Everybody shared the view that while there are positive elements in the Chequers proposal, the suggested framework for economic cooperation will not work. Not least because it risks undermining the Single Market.

   Third, we also discussed the timetable for further negotiations. The moment of truth for Brexit negotiations will be the October European Council. In October we expect maximum progress and results in the Brexit talks. Then we will decide whether conditions are there to call an extraordinary summit in November to finalise and formalise the deal.”

Speaking the day after the summit, the UK Prime Minister addressed the two issues which have proved sticking points in the negotiations, the Irish border and the future relationship.

The Prime Minister began by setting out the options for the future economic relationship presented by the EU:

1. “The first is our economic relationship after we have left.

   Here, the EU is still only offering us two options.

   The first option would involve the UK staying in the European Economic Area and a customs union with the EU.

   In plain English, this would mean we’d still have to abide by all the EU rules, uncontrolled immigration from the EU would continue and we couldn’t do the trade deals we want with other countries.”
That would make a mockery of the referendum we had two years ago.

The second option would be a basic free trade agreement for Great Britain that would introduce checks at the Great Britain/EU border. But even worse, Northern Ireland would effectively remain in the Customs Union and parts of the Single Market, permanently separated economically from the rest of the UK by a border down the Irish Sea.

Parliament has already - unanimously - rejected this idea.”

On the Irish border question, the Prime Minister suggested the two sides are no closer to finding a resolution:

“Creating any form of customs border between Northern Ireland and the rest of the UK would not respect that Northern Ireland is an integral part of the United Kingdom, in line with the principle of consent, as set out clearly in the Belfast/Good Friday Agreement.

It is something I will never agree to - indeed, in my judgement it is something no British Prime Minister would ever agree to. If the EU believe I will, they are making a fundamental mistake. Anything which fails to respect the referendum or which effectively divides our country in two would be a bad deal and I have always said no deal is better than a bad deal.”

The Prime Minister reiterated that the UK still wished to reach a Withdrawal Agreement and also re-committed to the need for an Irish border backstop, commenting that:

“We both agree that the Withdrawal Agreement needs to include a backstop to ensure that if there’s a delay in implementing our new relationship, there still won’t be a hard border between Ireland and Northern Ireland.

But the EU is proposing to achieve this by effectively keeping Northern Ireland in the Customs Union.

As I have already said, that is unacceptable. We will never agree to it. It would mean breaking up our country.

We will set out our alternative that preserves the integrity of the UK. And it will be in line with the commitments we made back in December - including the commitment that no new regulatory barriers should be created between Northern Ireland and the rest of the UK unless the Northern Ireland Executive and Assembly agree.”

The Prime Minister also appeared to suggest that negotiations would not progress until the European Union provided a response and alternative to the UK Government’s proposals on Northern Ireland and Chequers. She stated that:
“We cannot accept anything that threatens the integrity of our union, just as they cannot accept anything that threatens the integrity of theirs.

We cannot accept anything that does not respect the result of the referendum, just as they cannot accept anything that is not in the interest of their citizens.

Throughout this process, I have treated the EU with nothing but respect. The UK expects the same. A good relationship at the end of this process depends on it.

At this late stage in the negotiations, it is not acceptable to simply reject the other side’s proposals without a detailed explanation and counter proposals.

So we now need to hear from the EU what the real issues are and what their alternative is so that we can discuss them. Until we do, we cannot make progress.

In the meantime, we must and will continue the work of preparing ourselves for no deal.”

Finally, the Prime Minister told EU citizens in the UK that irrespective of whether a deal could be agreed, they would be welcome to stay and their “rights will be protected”.

The week after Salzburg, the German Chancellor Angela Merkel addressed Brexit during a town hall event in Hanover. The Chancellor is reported as calling for the EU and the UK to lay out a “fundamental vision” of their future relationship by November. According to a report by Bloomberg the Chancellor said:

“A key goal is to make trade in goods “uncomplicated,” though “it probably won’t happen completely without controls,”

On the border between Northern Ireland and the Republic of Ireland, she suggested technological advances could help with a solution:

“This is a very complicated problem,“

“There are many modern methods with which to do that.”

Writing for the Scottish Centre on European Relations (SCER), Danuta Hübner MEP, Chair of the European Parliament’s Committee on Constitutional Affairs and former European Commissioner for Regional Policy suggested it was time for the UK to bring forward realistic proposals on the Irish border and the future relationship.

The MEP wrote that a key outcome from Salzburg was the indication from the EU27 that they will not give up on having an operational, legally-viable backstop for Northern Ireland in the withdrawal agreement. On the progress of negotiations in relation to the Irish border she added:

“Most worrying of course is the lack of progress on the Irish issue. The EU’s current backstop proposal contains the minimum level of controls necessary to protect the integrity of single market and some precise procedures related to
customs, fiscal and regulatory control. Some of these procedures have been used for years between Spain and the Canary Islands (which are outside the EU customs territory), and have nothing to do with potential emergence of a new border in the Irish Sea.”

In relation to finalising the Withdrawal Agreement, the MEP also highlighted that other aspects which still require agreement are governance of the Withdrawal Agreement (and the role of the Court of Justice) along with disagreement over geographical indications (discussed in more detail in this SPICE briefing).

Danuta Hubner also expressed EU27 frustration at the UK Government’s proposals outlined in the Chequers plan for the future relationship suggesting that the UK Government’s proposals are unworkable and increase the risks of a no-deal Brexit:

“The EU also has significant issues with the UK’s Chequers proposals for the future framework, in particular on the economic partnership dimension. Our opinion on both the UK’s proposed customs mechanism (the ‘Facilitated Customs Arrangement’ – FCA) and ‘common rulebook’ for goods continues to be negative.

In fact, it is frustrating to us that the UK has left the same unworkable arguments on the table for so long without changing them at all. The risk is growing that the only option to avoid a no-deal scenario will be to have a rather hollow political declaration on the future EU-UK relationship, which will accompany the withdrawal agreement.”

Finally, the MEP set out the UK’s red lines for the negotiations present great difficulties in achieving a Withdrawal Agreement due to an inability to agree a frictionless border on the island of Ireland:

“The UK’s decision to leave the EU’s single market and customs union means without doubt that ‘frictionless trade’ in goods is not possible. Still, the UK government tries to claim that its proposals of the FCA and common rulebook on goods could produce this frictionless outcome. The FCA is an innovation that has no precedent worldwide, has never been tested, and is based on a non-existent technology.”

Other Reaction to Salzburg

On 24 March, Sky’s political editor Faisal Islam published an article setting out the behind the scenes events at the Salzburg summit and analysed where events leave the Article 50 withdrawal process.

A key point made in the article is that the dismissal by the EU of Chequers is not the threat to the Article 50 negotiations in the way that has been presented in the UK. The real challenge to avoid a no-deal scenario for the Prime Minister is the Irish border question:
Faisal Islam also argued that the disagreement over Chequers and the future relationship can be fudged in the Withdrawal Agreement given it will involve high level principles. The Irish border question however is integral to the terms of Withdrawal being agreed.

Writing for the UK in a Changing Europe website, Professor Anand Menon, director The UK in a Changing Europe and professor of European politics and foreign affairs, King’s College London has suggested that the EU might come to regret weakening the Prime Minister at Salzburg.

Professor Menon begins by suggesting that in negotiating terms not much has changed following Salzburg:

“But, again, mood aside, it was ever thus. The EU has repeatedly expressed its concern about Chequers and particularly about its plan for customs and partial UK participation in the single market. The UK has long rejected the binary choice of Canada minus and Norway plus.

So in terms of the negotiations, the substance is as it was. The two sides have to find a way to agree on an Irish backstop that, as it stands, avoids both Norway plus and the intra-UK customs border implied by Canada minus. And they need to agree a (non-binding) political declaration that can command support in both the European Council and the House of Commons.”

He argues that what has changed is that the EU27 have weakened the Prime Minister at a crucial time in the negotiations and they have given succour to those in the UK who claim the EU is negotiating in bad faith and is unprepared to compromise. As such it gives strength to those who believe the UK should leave with no-deal or a basic trade deal.

Professor Menon concludes that it is possible that the EU27’s weakening of the Prime Minister ahead of her party conference will ultimately leave her less able to compromise and makes a no-deal Brexit possible.

PREPAREDNESS FOR A NO-DEAL BREXIT

Further technical notices

As reported in the last update, on 18 September, the UK Government originally published 25 technical notes intended to provide guidance to citizens, businesses, public sector bodies and NGOs in the United Kingdom on how to prepare for the possibility of the UK leaving the EU next March without concluding a Withdrawal Agreement.

On 13 and 14 September, the UK Government published a further batch of technical notes along with updating some of those notes already published. Another batch of notes was then published on 24 September, and once again it appears some notes were also updated. There are now 76 technical notes published under the following headings:
Applying for EU-funded programmes (8)
Driving and transport (6)
Farming (3)
Handling civil legal cases (1)
Importing and Exporting (9)
Labelling products and making them safe (11)
Meeting business regulations (8)
Money and tax (2)
Personal data and consumer rights (1)
Protecting the environment (4)
Regulating energy (4)
Regulating medicines and medical equipment (6)
Regulating veterinary medicines (3)
Satellites and space (1)
Seafaring (2)
State aid (1)
Studying in the UK or EU (1)
Travelling between the UK and the EU (4)
Workplace rights (1)

The latest SPICe Spotlight blogposts covering the no-deal technical notices are:

- Preparing for a no-deal Brexit: VAT for businesses
- Preparing for a no-deal Brexit: public procurement

HOLYROOD BREXIT ROUND-UP

Parliamentary debate on future trade deals

On 25 September, the Scottish Parliament debated UK Trade Arrangements: Scotland’s Role. This was a Scottish Government debate on proposals in its report Scotland’s Role in the Development of Future UK Trade Arrangements (see Brexit Update Issue 70 on 18 September).

SPICe provided the following background information to Members:

Trade policy is currently a competence of the European Union with trade agreements negotiated on the EU’s behalf by the European Commission. After the United Kingdom has left the European Union, it will be possible for the UK Government to negotiate new bilateral trade agreements as an independent entity.

As engagement with Foreign Affairs including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, and regulation of international trade are reserved under Schedule V of the Scotland Act, neither the Scottish Parliament or the Scottish Government has a formal role to play in the negotiations or subsequent
ratification of trade agreements. It would be possible for the Scottish Government to participate in future trade negotiations with the agreement of the UK Government.

However, modern trade deals increasingly cover issues wider than just removal of tariffs and now also cover issues such as mutual recognition of standards and providing greater market access for imports from the participants in the trade agreement. The policy areas increasingly covered in modern trade agreements overlap with some of the competencies of the Scottish Parliament such as agriculture and environmental standards.

On 30 August, the Scottish Government published a policy paper setting out its view that the Scottish Parliament and Scottish Government should have a formal role in the negotiation of the UK’s future trade agreements after Brexit.

Following the debate, Parliament agreed the following motion by 84 votes to 0 with 29 abstentions:

That the Parliament recognises the importance of international trade to the Scottish economy and the serious impact that future trading arrangements with both the EU and the rest of the world will have on Scotland; notes the publication of Scotland’s Role in the Development of Future UK Trade Arrangements and the intention of the Scottish Government to encourage a wide-ranging and urgent discussion about the best way to protect and enhance the interests of Scotland in the development of future trade deals, and calls on the UK Government to engage with the Scottish Government and the other devolved administrations to deliver a modern, inclusive process drawing on international best practice that ensures the interests and priorities of all parts of the UK are properly represented, protected and promoted.

Statement on the Common Agricultural Policy

On 26 September, the Cabinet Secretary for the Rural Economy, Fergus Ewing made a statement to the Scottish parliament on various aspects of the Common Agricultural Policy (CAP).

On funding guarantees after Brexit:

“…the Scottish Government has made it clear that no matter what else happens, farm and rural businesses will receive their current payment entitlements largely as they currently are, and not just in 2019 but in every year until 2022.”

On future levels of agricultural funding to be allocated to Scotland:

“One of the most pressing of those is the basis on which Scotland’s future funding allocation will be made. It cannot be made on the basis of the current low rate per hectare—the lowest in the UK… our farmers and crofters could continue to lose out in the future if the historical payment rates are used to
determine funding allocations beyond Brexit. I welcomed the most recent promise from Michael Gove to review that situation, but I have been less welcoming of the unwarranted delay in getting that review under way."

On future policy development:

“I advise Parliament that we will get on with establishing a task force to produce measures that will simplify the farm and rural support payments system from 2022 onwards. The task force will be led internally and will involve external stakeholders and contributors. Crucially, we want to ensure that the future of farming is represented through the inclusion of young farmers on the task force.

I am acutely aware that we must also start to shape a longer-term approach to future rural support. We already have many thoughtful propositions and innovative ideas to work from stakeholders organisations, the Government’s agriculture champions and Professor Russel Griggs’s greening group. The final report from the national council of rural advisers is also expected imminently.”

The SPICe briefing Post-Brexit Plans for Agriculture provides information on proposals across the UK.

Debate on exit from Euratom

On 26 September, a Members Debate was help on European Atomic Energy Community (Impacts of Leaving).

SPICe provided the following background information:

There is some concern regarding the UK’s withdrawal from the European Atomic Energy Community (EURATOM) post Brexit. EURATOM defines the safety standards relating to nuclear materials and aims to promote and support the development of nuclear energy in Europe. It monitors levels of radioactivity, as well as covering medical and occupational exposure to radiation and monitoring radiation in foodstuffs. Although EURATOM is established under its own treaty (The Euratom Treaty was signed in 1957 by the six founding States of the EEC (Belgium, France, Germany, Italy, Luxembourg and the Netherlands), it is governed by the EU institutions, including the CJEU. The Article 50 letter states that the UK intends to leave the European Atomic Energy Community.

There are potential implications of the UK leaving EURATOM. First, it would cause disruption to the UK’s nuclear industry. EURATOM regulates many aspects of the industry and it will take time to replicate these safeguards within the International Atomic Energy Agency. This is of particular concern to the UK as the UK has recently announced a multi-billion-pound plan to build new nuclear power stations. Secondly, EURATOM regulates the import and export of radioactive and nuclear materials. Medical isotopes, used in the treatment of cancer, are regulated and governed under the Euratom framework.
Medical isotopes cannot currently be produced in the UK. It is worth noting that the UK will have the ability to produce such isotopes at Hinckley Point Nuclear Power Station, from 2027. The UK Government says that it intends to legislate to pass on EURATOM’s current roles to the UK regulator, the Office for Nuclear Regulation (ONR).

The Joint Report and Commission Communication outlined areas where there has been limited agreement in the first phase of Brexit negotiation. In relation to Euratom, the UK Government has introduced the Nuclear Safeguards Bill received Royal Assent in June 2018. It is an Act which would allow the UK Government to make regulations for, and implement international agreements in relation to, nuclear safeguarding. This is required once the UK leaves Euratom. The UK Parliament Briefing for the Act can be found here.

UK Statutory Instrument notifications

The first notifications from the Scottish Government that they intend to ask the UK Government to make changes (required as a result of Brexit) to the law in devolved areas though UK SIs, have been laid.

1. Choice of Court Agreements (Hague Convention 2005 etc.) (Amendment etc.) (United Kingdom) (EU Exit) Regulations 2018 and the International Recovery of Maintenance (Hague Convention 2007 etc.) (Amendment) (United Kingdom) (EU Exit) Regulations 2018 (link)

2. Tobacco Products and Nicotine Inhaling Products (Amendment) (EU Exit) Regulations 2018 (link)

3. Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) (Amendment) (EU Exit) Regulations 2018 (link)


5. Insolvency (Amendment etc.) (EU Exit) Regulations 2018 (link)

Protocols governing arrangements for both SI and SSI processes have been agreed between the Scottish Parliament and Scottish Government.

SPICe briefing on EU funding

SPICe briefing SB 18-61 European Union funding in Scotland summarises the most significant EU funding programmes which are available to Scotland and what will happen to the funding after Brexit. This briefing is accompanied by an infographic briefing.
WESTMINSTER BREXIT ROUND-UP

Recess
The UK Parliament is scheduled to be in recess until 9 October.

Iain McIver & Iain Thom
SPICe Research

About this publication
This regular paper produced by SPICe sets out developments in the UK’s negotiations to leave the European Union, the process for which has now formally begun following the Prime Minister’s triggering of Article 50 on 29 March 2017.

The updates will provide information on the UK Government’s approach to leaving the EU including the domestic legislation necessary to ensure a smooth transition in terms of the UK statute book, along with details of the positions of the Scottish Government and the other Devolved Administrations. The updates will also provide information on developments within the EU with regard to the UK’s departure. Finally, the updates will provide information on the key issues likely to be at play during the negotiations and in developing the UK’s future relationship with the European Union.

As was clear both during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis.
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