

Brexit Essentials

EU Withdrawal Bill receives Royal Assent

27 June 2018

Finally in final form

Following some dramatic Parliamentary ping-pong, on 20 June the House of Commons approved the EU Withdrawal Bill (the Withdrawal Bill), which received Royal Assent yesterday.

The Government has successfully limited the number of agreed amendments to the Withdrawal Bill as originally laid before Parliament to a handful compared to the hundreds of pages tabled. However, in relation to some of the issues most heavily debated, the Government has been forced to compromise.

This Briefing contains a snapshot of the outcome on the headline battleground in the Withdrawal Bill - the ability of Parliament to direct the exit deal, both overall, and in relation to customs arrangements. It concludes with an outline of the challenges imminently facing the Government in what is likely to be an intense precursor to the summer break.

The “meaningful vote”

The Withdrawal and Implementation Bill (a separate piece of legislation, yet to be introduced to Parliament), will implement into UK law the “major policies” set out in the Withdrawal Agreement. However, it will not give Parliament a voice in relation to the contents of the Withdrawal Agreement, as it will be laid before Parliament after that Agreement has been signed.

Having promised Parliament a “meaningful vote”, the Government therefore proposed as a separate process, that Parliament should have a “yes-or-no” vote on the Withdrawal Agreement.

Parliament would be offered a choice in the Withdrawal Bill between two alternatives: approving the negotiated agreement and voting for “no deal”.

Formulating the vote in this way was intended to stave off amendments to the Withdrawal Bill. However, it also effectively discourages opposition to the deal, it being a widely held view that the alternative of the UK’s failing to reach a deal would be severely damaging to the national interest. The proposed voting mechanism was therefore criticised as not “meaningful” and proved to be the single most contentious issue in the Parliamentary debate.

Milestone or millstone?

A group led by Dominic Grieve put forward an amendment to the Withdrawal Bill that in essence entitled Parliament to impose binding instructions on the Government in subsequent negotiations with the EU if the Government’s “deal-or-no-deal” motion were defeated.

This provoked a frenzied negotiation which culminated in the Grieve amendment being withdrawn in favour of an 11th hour compromise.

The compromise provides that should the “deal or no deal” motion be defeated, or it otherwise becomes apparent that a deal will not be agreed with the EU, the Government must make a written statement to Parliament, which will be subject to a vote in the Commons. At the Government’s insistence, any such vote will be in the form of a “neutral”, ie non-amendable motion.

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In response to concerns that it would be unclear whether a motion could be “neutral” in such circumstances, the Government declared that, in accordance with parliamentary rules, the Speaker of the House of Commons would be required to make this determination.

Can this compromise be viewed as a victory for the Government?

It underlines that the Government, rather than Parliament, will continue to set the agenda as to the terms of the Britain’s exit from the EU. Importantly, it was sufficient to satisfy leading rebels that the vote will be “meaningful”.

On the other hand, the amendment has been dismissed as a political fudge that simply puts off the Remainers’ fight. As such it might be viewed as a millstone for the Government, rather than a milestone in the Brexit process.

It is clear that if the Government’s proposed terms are insufficient to ensure the support of a majority of Parliament, there will be a political crescendo regardless of the niceties of the legislation.

Kicking the can on customs

A further House of Lords’ amendment suggested that the Withdrawal Bill should not become operative (ie repeal the European Communities Act 1972) until the Government had laid before

Parliament a statement outlining the steps it has taken to negotiate the UK’s participation in a customs union.

There appears to be cross-party support for the UK continuing in a customs union with the EU after Brexit, a proposal which the Government continues to rule out.

The Government therefore proposed an amendment in lieu which was ultimately accepted by both Houses. This requires the Government to lay a statement before Parliament, before October 2018, outlining the steps taken to negotiate an agreement for the UK to participate in a customs *arrangement* with the EU.

This terminology, is all-important. A customs *arrangement* could conceivably be a customs union but also points to the Government’s preferred option of a “Customs Partnership”, or in the alternative, a “MaxFac” arrangement¹.

This compromise has been criticised as doing little other than postponing the debate on customs to when the Customs and Trade Bills return to Parliament in July.

The Taxation (Cross-border) Trade Bill (the Customs Bill) provides the framework for the UK’s post-Brexit import duty, excise duty and VAT regimes for cross-border transactions. The Trade Bill relates to the UK’s post-Brexit trade policy

¹ The Government’s view on customs as put forward in the August 2017 White Paper are outlined in our Brexit

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and will allow for the transitioning of existing EU trade arrangements.

Tory rebels led by Anna Soubry and Ken Clarke have proposed amendments to both the Customs Bill and the Trade Bill that seek a customs union with the EU. As shadow Brexit secretary Keir Starmer observed, “the question of a customs union is going to come to a vote one way or another”.

Patten amendment passes quietly

It is notable that the final Withdrawal Bill will include an amendment proposed by Tory peer Lord Patten, which explicitly preserves North-South co-operation in the Good Friday Agreement/Belfast Agreement after Brexit and prevents the establishment of new “physical infrastructure, including border posts, or checks and controls” between Ireland and Northern Ireland, unless agreed between the UK and the EU.

This amendment made its way into the final Bill with relatively minimal press attention or parliamentary debate. The caveat that other arrangements may be agreed between the UK and the EU in theory preserves the Government’s flexibility to depart from this position. However, as the most significant ingredient for avoiding a hard border on the island of Ireland is continued regulatory alignment (currently provided through single market membership), this amendment puts more pressure on the Government to deliver both a single market and a customs solution.

Next steps

The Withdrawal Bill is a key element of the no-deal scenario. Arguably, if a Withdrawal

Agreement including a transition period is concluded, large parts of the Withdrawal Bill are not needed in March 2019, but in January 2021. Its passing in principle is therefore a necessary and desirable preparatory step.

Negotiations continue in Brussels, but it seems improbable that much progress will be revealed either in advance of or following the EU Council meeting later this week. A draft resolution published last week reflects the EU’s view that there has been no “substantial progress”, amid warnings that businesses should prepare for no deal. The EU and UK negotiators published a Joint Statement on 19 June outlining areas where progress has been made, but these appear limited and confined to technical issues.

As we have previously predicted, it seems that the finalisation of the Withdrawal Agreement will not happen by the originally proposed deadline of October. Autumn may therefore be a period of heightened uncertainty for business.

Attention is currently focussed on whether the UK will continue to participate in a customs union or equivalent. However, the more pertinent question is perhaps what level of regulatory alignment with the EU the UK is prepared to accept. A customs union (or customs “arrangement”) will not guarantee market access or frictionless borders in the absence of a level regulatory playing field. It is thus central to a satisfactory solution for the Irish border. Regulatory alignment is also the clear preference of business.

Theresa May has promised that “over the next few weeks [the Government] will publish more details of our proposed future relationship with the EU in a White Paper, and will bring the Trade

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and Customs Bills back to the House of Commons.”

Cabinet members are due to meet at Chequers to finalise this long-awaited White Paper in early July. It remains to be seen whether it will provide more clarity on the Government’s position both on customs and on levels of regulatory alignment in a manner that gives a realistic basis for engagement with EU negotiators. Only then will it contribute to a smoother path for the Government, still bruised from 270 hours of debate on the Withdrawal Bill, to finalising the Trade and Customs Bills before the summer recess.

In our experience, ministers are interested in and are listening to businesses’ concerns. Whether they will make allowance for those concerns awaits to be seen but the more they hear, the greater the prospect. Recognising that it is regrettably not risk free for businesses to speak up, with crucial decisions being thrashed out by ministers over coming weeks, those whose operations are likely to be affected by the UK’s settlement on the single market and customs union may find there is no other or better time to make their voices heard.

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