



THE VIEW FROM BRUSSELS

DEVELOPMENTS IN FEBRUARY

February has seen some important advances in the negotiation process, including the issuance by the Commission of a draft [Withdrawal Agreement](#) and [the Prime Minister's speech](#) outlining the UK proposal for the future relationship.

Many of the supposed red lines of the two sides conflict making it difficult to see how an agreement can be reached. Also, the EU has been vocal in highlighting the impossibility of both leaving the Single Market and Customs Union and preserving frictionless trade. But as the Prime Minister pointed out in her speech, there are tensions – we would say contradictions – in the EU position as well. One such contradiction on which we will comment today is the inconsistency of refusing to negotiate the future relationship until the UK has left the EU (which has led to the perceived necessity of a "standstill" transition period) while insisting that the relationship of the EU with Northern Ireland be regulated in a legal text before Brexit occurs.

THE IMPLICATIONS OF THE PROTOCOL ON NORTHERN IRELAND FOR THE FUTURE RELATIONSHIP

The Protocol on Northern Ireland included in the Commission's draft withdrawal agreement has received enormous political attention. It translates into legal text the "fall-back" option defined in the Joint Report from the negotiators in December. It proposes the maintenance of Northern Ireland in the Customs Union and the creation of a "common regulatory area" covering a series of sectors while leaving open the possibility of an agreement based on the other two possibilities mentioned in the Joint Report and preferred by the UK.

For EU lawyers however the most interesting question should be: what would be the correct legal basis for the proposed Protocol on Northern Ireland and, if it can be negotiated and concluded on the basis of Article 50 TEU, why cannot the future trade relationship between the UK and the EU also be based on article 50 TEU?

The importance of the correct legal basis under EU law

Article 5 of the TEU makes it clear that the Union only has the competences conferred on it and that it must act within the limits of those competences. The Treaties also set out specific procedures for the Union to act and these differ according to the precise action undertaken. That is why the legal basis empowering the Union to act is always of fundamental importance and is always mentioned at the beginning of all Union acts. Indeed, the Court of Justice has made it clear that an indication of the legal basis is an essential part of the reasoning required by Article 296(2) TFEU. It has also insisted that legal bases need to be selected on the basis of objective considerations susceptible to judicial review and are not at the disposition of politics. The absence of a legal basis, or the use of the wrong legal basis justifies the annulment of an act and this must also be raised by the Court of Justice of its own initiative when it is asked to rule on the validity of acts.

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BREXIT BLOG

The EU's view of the scope of the Article 50 TEU legal basis

Article 50 TEU empowers the Union to conclude a withdrawal agreement with the withdrawing Member State "setting out the arrangements for its withdrawal taking account of the framework for its future relationship". That is the scope of the power and determines what the withdrawal agreement may contain.

The Commission took the view early on that the withdrawal agreement could only deal with "separation issues" and could not include an agreement on a future trade relationship. A future trade relationship required a different legal basis (in particular the trade legal basis in Article 207 TFEU and possibly the association legal basis in Article 217 TFEU) and could only be negotiated with a third country – that is only once the UK had left the EU. The most that it was prepared to concede was that since there was reference to "taking account of the framework for its future relationship" the withdrawal agreement could include transitional provisions to act as a bridge towards the future relationship – that would be set out in some political declaration.

The UK has apparently accepted the EU's position on this and as a consequence concentrated on achieving a transition or implementation period where as little as possible changes (the standstill transition avoiding or at least postponing the cliff edge Brexit).

Does Article 50 TEU allow the conclusion of the Protocol on Northern Ireland?

The Protocol on Northern Ireland included in the Commission's draft Withdrawal Agreement appears not to take such a narrow view of the arrangements for withdrawal. It sets out the objective of protecting the "Good Friday or Belfast Agreement" and for that purpose would, if no other solution is found, establish a "common regulatory area" between the EU and Northern Ireland "in which the free movement of goods is ensured and North-South cooperation protected". This will include maintaining Northern Ireland within the EU Customs Union and applying a long list of EU legislation.

If this can be agreed under Article 50 TEU in relation to Northern Ireland, why can it not be agreed for the whole of the United Kingdom? And if it can be, why would it not be possible for any agreement setting out a future trade relationship with the UK to be included in the Article 50 Withdrawal Agreement?

Of course the Good Friday or Belfast Agreement is doubtless endangered by the withdrawal of the UK and protecting it is important. But so also are countless other relationships that have been created during the period of the UK's membership of the EU. Assuming that the protection of existing interests is a legitimate objective of a withdrawal agreement, why should these other relationships not also be protected?

The consequences

Two possible conclusions are possible. Either the EU's initial approach was mistaken and Article 50 TEU does allow the conclusion of both the Protocol on Northern Ireland and a bespoke trade agreement with the UK, or the EU's initial approach was correct and the Protocol on Northern Ireland must be concluded on another legal basis – and only once the UK has become a third country.

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