



Deal or no deal? Five questions on Johnson's Brexit negotiation

by Charles Grant

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With less than six weeks to go before Britain is due to leave the European Union, Boris Johnson says his government is working hard for a deal. This article considers five key questions. Is Johnson serious about getting a deal? If there is a deal, what would a revised withdrawal agreement look like? Does the political declaration on the future relationship matter? What factors could encourage the EU and the UK to find a compromise? And what are the obstacles to a deal?

1. Is Johnson serious about getting a deal on Brexit?

Nobody beyond the prime minister and perhaps his closest confidants can be quite certain what he wants out of the Brexit process. The very hard line that he took in his early weeks as prime minister convinced many that he actively sought to leave with no deal. His talk of negotiation appeared to be a ploy to make it look like the EU would be to blame for a breakdown.

Yet Johnson made a fairly good impression during his meetings in August with EU leaders like Angela Merkel, Emmanuel Macron and Mark Rutte. He seemed well-informed and serious about a deal, according to officials present. Having initially said that he would insist on many changes to the withdrawal agreement, he switched to saying that he could live with it so long as the backstop was removed. And despite everything that has happened since – such as the proroguing of Parliament and the sacking of 21 moderate MPs from the Conservative Party – politicians and officials in EU capitals remain more optimistic than those based in Brussels.

Johnson's recent failures at home have increased his incentives for striking a bargain. If he cannot get the withdrawal agreement through Parliament by October 19th, the Act of Parliament promoted by Hilary Benn will make him seek an extension of Article 50 until January 31st. Parliament has also blocked Johnson's efforts to hold a general election, at least for now. So he is stuck: he can do what the Act requires, which would be humiliating – since he promised to take the UK out by October 31st, "do or die"; or he can refuse to implement the bill, in which case he would be acting illegally. But if he can forge a deal with the EU in time, and push it through Parliament, the Act's requirement that he seek an extension becomes void. He could then move towards an election in triumphant mode, having achieved Brexit, and almost certainly weakened the Brexit Party.

Johnson could also secure a deal through alternative but longer routes. He could secure the extension from the EU, blaming Parliament for his inability to deliver Brexit, and then fight an election on 'The People versus Parliament'. Or he could avoid the embarrassment of asking the EU for an extension by resigning, so that somebody else's government had to do the deed and prolong British membership. And when the election came he could claim that he had refused to obstruct the will of the people. In either case, if he won the election, he would be in a stronger position to make the compromises required to forge a deal with the EU.

While very few people can be sure of Johnson's true wishes, it seems unlikely that he wants a no-deal Brexit. He knows that it would cause considerable chaos and disruption in the short-term, at the very least, and would not want to take the blame during an election campaign. In recent days, on both sides of the Channel, more people have jumped into the camp believing that the British government is working for a deal.

2. What would a deal on the backstop look like?

If there is a deal, it would probably be a modified version of the original Northern Ireland-only backstop that the EU proposed in early 2018. The all-UK backstop that Theresa May obtained a year ago – putting the UK into a customs union with the EU, and Northern Ireland into parts of the single market – would be dropped. The EU would be happy with arrangements that left Northern Ireland in its customs union and those parts of the single market that are relevant to maintaining an open border. As for the UK, it would be free to make trade agreements with other parts of the world that applied to most of its territory, though not to Northern Ireland.

Nevertheless the Northern Irish backstop in its original form would be difficult for some Britons to swallow, and not only the hard-line Unionists in the Democratic Unionist Party; part of the UK would be subject to substantial amounts of EU regulation. And there would have to be customs and other controls on goods crossing the Irish Sea between Great Britain and Northern Ireland.

So what might be the way forward? For some time the position of Macron and Merkel has been that the EU can scrap the backstop, so long as other methods are found for protecting the Good Friday Agreement, north-south co-operation on the island of Ireland and the integrity of the single market. Jean-Claude Juncker, the Commission's outgoing president, said much the same on September 19th.

One key building block would be the creation of an all-Ireland area for plant and animal regulation – the so-called sanitary and phytosanitary (SPS) measures – as Johnson recently proposed. If Northern Ireland aligned with the EU on agriculture, that would remove about 30 per cent of the need for border checks between the region and Ireland. Plants, products of animal origin and live animals are the only things that, according to EU rules, have to be fully checked on borders. The British appear to have accepted a role for the European Court of Justice (ECJ) and EU officials in policing this common agricultural space.

But difficulties remain. For example, the UK wants to define the scope of SPS very narrowly, while the EU wants more areas to be covered. More fundamentally, the EU has all sorts of reasons for controlling its borders, in addition to policing its SPS regime, such as compliance with rules on VAT, customs, standards and product safety. The EU emphasises that it is impossible to disentangle SPS regulations from the customs controls that must also apply to farm produce.

Yet the UK's current line is that Northern Ireland must not be part of the EU's customs union. Ministers in London seem to imagine that the EU will accept some sort of 'alternative arrangements', whereby customs checks are moved away from the border with Ireland, via trusted trader schemes, clever technology and on-line form filling. But such schemes – which have been discussed at great length over the past three years – would still require intrusive policing to prevent fraud and smuggling, which the absence of physical border infrastructure would incentivise. Furthermore, a border community that by and large would not recognise the legitimacy of new controls would have to participate in the alternative arrangements. At the moment it is hard to see the EU accepting any kind of Northern Ireland-only backstop unless the region stays de facto in the EU's customs union.

Nevertheless an official from one influential member-state says that as far as goods are concerned, controls could be "dedramatised, dematerialised and delocalised". He suggests that dedramatisation could work through a combination of regulatory alignment in some areas and discreet checks away from the border in others. In some areas there would have to be both, says the official, and in areas where there was less alignment there would need to be more controls. He does not specify in which areas the EU might agree to controls away from the border. But it is hard to see it being willing to encourage smuggling by accepting controls away from the border for customs and VAT. There could be an evolutionary element to these arrangements: if and when clever ways of eliminating the need for physical infrastructure could be shown to work, Northern Ireland would be freer to diverge from EU rules.

British officials have said that they are ready to sign up to the principle of an open Irish border, but that the details of how checks could be carried out away from the border should be worked out later, during the transition and the negotiation of the future relationship. That will not satisfy the EU, which will insist on a legally operable plan for avoiding a hard border; it will not accept a deal based on a promise.

British officials speculate that a final deal could involve a compromise whereby some of the detailed arrangements for checks could be worked out soon, and others left for the implementation period. But they have still not ceded the principle of Northern Ireland aligning with the EU in any area other than SPS.

Could this kind of 'de-dramatised' scheme work for the EU? Commission officials say that these ideas are not acceptable. But national diplomats from influential member-states think they might work – while emphasising that the UK must first make some serious, written proposals, which it has not yet done. If it produced papers of substance, France and Germany – and then probably the Commission – would engage.

"The withdrawal agreement is not sacrosanct," says a diplomat from a small country bordering the North Sea, adding that, "we will take any UK proposal very seriously." He said that his government would have five criteria for a deal: it must satisfy the EU on money, citizens' rights, the integrity of the single market and the peace process in Northern Ireland – and the British government must be able to get the deal through the UK Parliament.

3. Does the political declaration matter?

Alongside the talks on the withdrawal agreement there are separate discussions on the political declaration. The arguments over this document, which sketches out the future relationship, are less fundamental than those on the backstop, since it is not legally binding and can be changed quite easily. Nevertheless they have an impact on what happens to the backstop. Johnson says he wants a minimal, Canada-style free trade agreement (FTA), with pronounced regulatory divergence from the 27. That would

increase the regulatory gap between Ireland and the UK, thus making the EU even keener to maintain some sort of Irish backstop, as a way of avoiding the need for controls on or near the Irish border.

During recent meetings in Brussels, Johnson's envoy David Frost annoyed the EU by emphasising a desire for regulatory divergence – and expressing hostility to so-called level playing field (LPF) provisions on social, environmental and consumer policy. May signed up to some stringent LPF provisions in the all-UK backstop. But Johnson's government doesn't see why, if it is going for the 'Canada' option, rather than 'Switzerland' or 'Norway', it need follow lots of EU rules on social and environmental issues – or tax and state aid.

The EU responds that because of the UK's proximity and size it is a strategic competitor, unlike Canada. There is a real fear that the UK will become a deregulated Asian-style offshore tiger, and thus putting companies within the EU at a disadvantage. Furthermore, say EU officials, more divergence means a less ambitious trade deal, which for some countries, like the Netherlands, is bad news. And if the future relationship is going to be more distant, that reduces the motivation on the EU side to strive for a compromise on the backstop. "If the British say they don't want LPF provisions, we say that means they want something less ambitious than Canada", says a Dutch official. Commission officials say that if, in the future relationship, the UK will not accept EU rules on the level playing field, then it may have to accept tariffs in its FTA.

EU officials also claim that Frost has called for a looser relationship on defence, foreign and security policy than May had envisaged. This baffles and annoys the UK's friends in the EU, who hope that the UK will remain a big player in European security.

But although some arguments on the political declaration have been heated, they are not going to prevent a deal if an accord can be reached on the Irish border. Both sides could agree to fudge the details of the future relationship until they start to negotiate it.

4. What factors could encourage a deal to be struck?

The prospects for a deal look quite bleak, because the gap between the two sides remains wide. But those who want to see a deal emerge point to the fact that none of the main parties wants a no-deal Brexit, and hope that this will push both sides to abandon some of their red lines. As explained earlier, a deal would get Johnson out of his current fix. So he is probably motivated to bargain.

If Johnson does decide to show flexibility, the party which until now has been unyieldingly opposed to compromise could come to his aid. The quasi-Northern Ireland backstop outlined above would require controls on goods crossing the Irish Sea, because of regulatory divergence between the two islands. The DUP's opposition to such controls is softening, because of pressure from the Unionist grass roots, notably farmers and business people who fear a no-deal Brexit. The party is now saying that it could accept some checks across the sea, so long as Northern Ireland was not in the EU's customs union, and so long as some mechanism allowed Northern Ireland's institutions to give consent to the new arrangements. The EU would probably agree to a consultation mechanism for Northern Ireland on the laws applying there, so long as there was no talk of veto rights.

Among EU governments, one hears more worry about the prospect of no deal than a few months ago. Officials say that with the German economy slowing down and the possibility of a deeper trade war with the US, a no-deal Brexit could trigger a German and then a European recession.

France and Germany seem particularly keen, for somewhat different reasons, to find an accommodation with the British. Having long been the toughest member-state on Brexit, France is now so fed up with the whole business that it would consider quite radical compromises in order to get the British out on time. Macron fears that the UK's continued presence distracts the EU from moving ahead with French-inspired reforms, while boosting the forces of euroscepticism across the continent. Germany is more concerned about the geopolitical consequences of a no-deal Brexit: if Britain crashes out in acrimony, the future relationship is likely to be fraught for many years. And that will undermine Britain's much-needed commitment to European security, defence and foreign policy. Europe would be left weaker vis-à-vis the strongman leaders who surround it.

5. What are the obstacles to a deal?

The fact that France, Germany and the DUP are willing to compromise a little, and that Johnson may really want a deal, doesn't guarantee that the two sides can forge a compromise. Many of the EU's officials in Brussels are particularly pessimistic.

One reason is the mixed and sometimes contradictory messages that come out of Johnson's government. EU officials have now had several meetings with Frost. These meetings led some of them to conclude, at least initially, that the UK was not serious about a deal. Frost has been seen as a messenger for the government, purveying red lines, rather than as a negotiator. He has apparently lacked the freedom to explore compromises that his predecessor, Ollie Robbins, enjoyed.

However, when he went to Brussels on September 13th, Frost made a better impression, leading one EU official to say that for the first time he had engaged seriously on the content of a possible deal. But then on September 19th Brexit Secretary Stephen Barclay made a hard-line speech in Madrid, saying that the details of how a hard Irish border could be avoided should be worked out after the UK had left the EU; he must have known that was completely unacceptable to all 27 member-states, so what was he trying to achieve?

Another reason for the pessimism has been the aggressive tactics of Johnson and his aide Dominic Cummings in proroguing Parliament, expelling rebel Tories from the Conservative Party and repeatedly refusing to rule out disobeying the legislation on extending Article 50. These moves led some Brussels officials to conclude that the UK wanted to crash out; surely a government intent on a bargain with the EU would behave with more moderation? These tactics also raised concerns in Brussels about the UK's ability to respect the rule of law, with some officials saying that this could make them more reluctant to compromise with the British. EU officials add that Johnson has been right in one respect: the Act requiring the government to extend Article 50 and postpone Brexit has taken the pressure off both sides to compromise.

EU officials are right that the biggest obstacle to a deal is currently the UK's inability to offer either serious texts for negotiation, or much of substance, beyond SPS alignment. The texts will appear at some point; the UK made a small start on September 19th with three unofficial 'non-papers', on SPS, manufactured goods and customs, though they apparently said little that was new. The problem is that on substance the UK is not yet willing to go far enough to incite compromises on the EU side. The EU is unhappy that Johnson has abandoned May's line on the Irish border – that there should be no friction at all – for a new stance that trade across the border should be as frictionless as possible.

The people most worried about this shift are in Dublin. Many of the Irish believe that any physical infrastructure for controlling trade, even if away from the border, will be a provocation to potential

terrorists. The biggest obstacle to the kind of agreement sketched out above may well be Leo Varadkar's government. The Irish position is that the backstop cannot be disaggregated, and that no infrastructure is acceptable, even if it is away from the border.

Irish politicians say they are resigned to the prospect of no deal. The badmouthing of the Irish government by some Tory politicians in recent months has strengthened their resolve. They would like a deal, but think that the economic costs of no deal would be bearable, at least in the long run, with some help from the EU. It is the political cost in terms of the impact on the peace process that causes most concern, according to one Irish official, who added: "A deal without a backstop is as bad as no deal."

Nobody on the EU side wants to put pressure on Ireland to shift its hard-line defence of the full backstop. The optimists in some EU capitals hope that Varadkar might soften his line if the deal can be presented as a solution that is equivalent to the backstop and protects the Good Friday Agreement.

Perceptions of British parliamentary arithmetic are another potential obstacle to a deal. Some EU officials don't want to make the effort of forging a painful compromise if Parliament then votes it down. They believed May when she said she could get her withdrawal agreement through Parliament, yet she was thrice defeated by MPs.

In fact the parliamentary arithmetic could conceivably work for Johnson. Some of the 24 independent MPs want to leave with a deal rather than stop Brexit, so would vote for a deal. So, possibly, might 20 or more Labour MPs – who, representing Leave constituencies, are keen to show their voters that they are respecting the popular will. The DUP could offer support, if its own red lines are respected. As for the 28 hard-line Conservative 'Spartans' who voted three times against May's deal, the majority would probably support a deal negotiated by Johnson, especially if the DUP backed it.

Voting the other way would be most Labour MPs, and nearly all the Scottish and Welsh Nationalists and Liberal Democrats. And even Labour MPs who are keen to leave with a deal of some sort may be reluctant to vote for a plan that would boost Johnson's credibility and deliver (for most the UK) a very hard Brexit, outside the EU's customs union and single market. Furthermore, a deal that gave Northern Ireland a special status could annoy MPs from all parties who are strongly committed to the union with Scotland. For if London denied Scotland membership of the customs union or the single market, while Northern Irish obtained quasi-membership, it would fuel demands for Scottish independence. So a parliamentary vote on a Johnson deal could be very close.

In summary, the answers to the questions posed in this article are: Johnson is probably very keen to strike a deal with the EU; any deal will be a variant of the 'Northern Ireland-only' backstop that the EU proposed in early 2018, but modified to make it more palatable to the UK; arguments over the political declaration, and the extent to which the British should follow EU rules in an FTA, will not be a deal-breaker; Johnson has some chance of striking a bargain with the EU, because of the desire of all the key players to prevent no deal; but at the moment Johnson looks more likely than not to fail, because the gap between what is acceptable to his party and to the EU remains, for now, very wide.

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