

Why the hype over a Brexit deal “getting over the line” is a microcosm of the misconception of “Getting Brexit Done”

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At the time of writing this, media outlets are full of the news that a Brexit deal could be ‘imminent’. Michel Barnier’s deadline of midnight on the 15th October dictates whether there will be a ‘deal’ in place to take to the European Council on Thursday for potential agreement by the EU27. If this were to happen, then this would be “Brexit Done”, surely?

The way that the events of this week have been portrayed is somewhat misleading regarding the legal steps that need to be fulfilled in order for there to be a finalised Withdrawal Agreement between the UK and the EU over the UK’s exit, in a way that echoes the somewhat misleading way that the Conservative Party’s slogan at the recent party conference inaccurately portrays what a finalised agreement means for the completion of the Brexit process.

To illustrate this in regard to the ‘deal’, it is necessary to consider several legal texts. The two most important pieces of legislation regarding leaving the EU with a ‘deal’ are Article 50 of the TEU, and s.13 of the European Union (Withdrawal) Act 2018. This is because they provide the mechanism at both UK and EU level for the conclusion and ratification of a deal.

Article 50(2) provides that an agreement dealing with the arrangements for withdrawal from the EU shall be negotiated by the EU, but must not only be concluded by the European Council, (the bit that everyone is focusing upon at the moment) but also that the consent of the European Parliament must be obtained. This means that in the event of an agreement being reached and agreed upon at Thursday’s European Council, there will also need to be a vote in the European Parliament on the substance of the agreement as well.

This is not merely a rubber-stamping exercise, as has been shown by the involvement of the European Parliament's Brexit Steering Group, who have emphasised the need to ensure that the agreement does not threaten the safeguards that are needed for the EU's Single Market and the Good Friday Agreement. Proper scrutiny by MEPs before consent is given will be required.

Similarly, at UK level, the European Union (Withdrawal) Act 2018, s.13 requires the agreement to be laid before the UK Parliament, approved by resolution by the House of Commons, and noted by a motion in the House of Lords, before an Act of Parliament is passed which implements this agreement.

The reality is that all of the above cannot be completed in a very short period of time, and therefore this is where the notion of an 'eleventh hour' deal meets the reality of parliamentary procedure. This is not like the ending of the film *Brewsters' Millions*, where the vital document is written, notarised and delivered in the time it takes a grandfather clock to strike midnight.

Although Parliament has shown that where required, action can be taken very quickly (e.g. the very rapid passage of the European Union (Withdrawal) Act 2019 (the 'Benn Act')), this is not a particularly satisfactory way of making law, as observed by Peter Bone MP, in the debate on that Act. The Withdrawal Agreement, if agreed with the European Council, will be a complex document which will have a great effect upon the UK for some considerable time, and should receive proper scrutiny. None of this is compatible with the 'last minute deal' that could still be agreed at the European Council on Thursday.

Returning to the title of this blog post, this is a microcosm of the same mistaken thinking applied to the Brexit process itself. The Conservative Party Conference this year was held under the slogan "Getting Brexit Done". This is as much of a misconception as the idea above of a last-minute negotiated deal being the resolution of the Article 50 process.

This is mainly because the 'deal' isn't actually a deal, no matter how many times it is referred to as such by the media. The Withdrawal Agreement, if ratified, governs the conditions for the UK's departure

from the EU. This is likely to include, as Theresa May's version of the Withdrawal Agreement did, a transitional period to allow for preparations for the effects of leaving the Customs Union and Single Market, as well as further negotiations on the future relationship between the UK and the EU.

Overly optimistic estimates suggest that such an agreement can be finalised in the transition period, although this is increasingly unlikely, because although Brexit Day has moved several times, the end of the transition period remains currently at the end of 2020. However, such an agreement is likely to be as complex, if not more so, than the Withdrawal Agreement (the May version ran to 585 pages) and itself would have to go through several stages before a finalised agreement is ratified.

As well as negotiation itself, it will then have to go through a process of translation into all official EU languages by lawyer-linguists, and then, because it will be what is referred to as a 'mixed agreement', will require ratification by all 27 EU Member States (including some states whose requirements also include regional ratification). This is more stringent than the Qualified Majority required for the ratification by the European Council for the Withdrawal Agreement, and this requirement of unanimity is likely to add to the length of time it takes to negotiate, because of the veto it effectively hands to every Member State of the EU. All in all, this process is therefore likely to last several years.

The debate around Brexit since June 2016 has been filled with war metaphors, so it is therefore appropriate that an accurate summary of where we are with Brexit should come from a very famous quote in a Winston Churchill speech from November 1942: "Now this is not the end. It is not even the beginning of the end. but it is, perhaps, the end of the beginning." This is an accurate description of the end of the Article 50 process and the departure of the UK from the EU.