

# Brexit Tale of Two Irreconcilable Halves

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**\*Written on Sunday 20th October 2019**

In writing this piece today, Sunday 20<sup>th</sup> October, I had hoped greater clarity would be emerging after the 'Super Saturday' sitting of the House of Commons.

With such a thing not having occurred in 37 years, the scene was set for the government to drive through the PM's new withdrawal agreement, Saturday being the last opportunity to avoid having to ask for an extension of Article 50 under the European Union (Withdrawal) (No.2) Act 2019, known as the *Benn Act*.

However, clarity remains as elusive as ever as we battle to comprehend not only where we are, but where we are going.

Action lines have opened up on four fronts – in government, in Parliament, in court, and across the EU, with business doing its best to simply get on with things regardless.

As we know now, Commons Speaker, John Bercow, selected the Letwin amendment to Boris Johnson's Brexit deal to be voted on this past Saturday afternoon, 19<sup>th</sup> October. The motion, with named support from Labour's Hilary Benn, the leader of the Liberal Democrats, Jo Swinson, and former Tory chancellor, Philip Hammond, and also supported by the SNP and DUP, with 9 independent former Conservatives, was passed by 322 to 306 votes.

The Letwin amendment required government to pass detailed legislation – the Withdrawal Agreement Bill — before parliament could vote on the Withdrawal agreement, triggering the Benn Act, in turn requiring the PM to write to the EU Commission to ask for an extension to Article 50.

The DUP, known for their opposition to the current withdrawal deal for its 'betrayal' in placing a border in the Irish sea, were after all, only sticking to a position outlined by the PM a year ago when he had stated, "no British Prime Minister, could or should", sign a deal which essentially destroyed any alignment between one country and the rest of the kingdom.

Since then the PM has indeed since written to the EU Council President, Donald Tusk – three times as we have now famously heard.

His first letter asks the EU to delay Brexit until January 31<sup>st</sup> and has been sent as an unsigned photocopy with the PM stressing it is "Parliament's letter", not his.

A second letter from the PM was sent to Donald Tusk, disowning the first letter and making it clear the PM does not want delay.

A third letter, not from the PM, was sent as a cover letter from the UK's Permanent Representative in Brussels, Sir Tim Barrow, making it clear that the request for the extension is not the view of the British government and noting that the first letter was from Parliament and not from the PM.

The PM's third set of letters were sent to the leaders of the other EU nations – all of whom are required to back an extension in order for the request to be granted – stating the prospect of a delay would be "deeply corrosive" which could "damage the interests of the UK and our other EU partners."

By sending these letters in parallel some including a former Tory Cabinet Minister have said the PM was behaving in a way that was "against the spirit of the Benn Act."

Ed Davey MP tweeted, *"Multiple letters, implicit contradictions, denying the spirit of the law parliament passed, if not simply flouting it. #Johnson: see you in court #UnfitForOffice."*

Donald Tusk also tweeted on receiving the PM's letter stating, *"The extension request has just arrived. I will now start consulting EU leaders on how to react."* France and Ireland have already warned

that a further delay isn't guaranteed, with Macron noting it was not in 'anyone's interests'.

The EU is awaiting the outcome of further votes in the UK parliament this week with some experts (and Michael Gove) continuing to state it is still possible for government to get the approval it needs for the deal to pass through Parliament in time for the PM's self-imposed 31<sup>st</sup> October Brexit deadline.

In the Courts several actions have been taken. Campaigners, including the MP Joanna Cherry QC, petitioned the Scottish Court of Sessions asking the justices to issue court orders forcing Johnson to send the letter asking for an extension to Article 50 as also required under the Benn Act. Their request was for the judges to use some unique powers, known as *nobile officium* to write that letter on his behalf if he failed to do so. The Court said it would wait to see what happened and suspended judgement with this Monday 21<sup>st</sup> October set for a recall.

Joanna Cherry, also involved in taking the case challenging the PM's prorogation of parliament, has called the PM's behaviour in writing multiple letters to Donald Tusk, 'pathetic'. In speaking about this court case she stated:

*"Boris Johnson promised the Scottish court he would comply with the Benn Act and not seek to frustrate it.... Fortunately no need to raise new proceedings, our existing case is back in court on Monday."*

A separate case, taken by Jolyon Maugham QC, had argued that the new withdrawal deal contravened existing law, the Taxation (Cross-border Trade) Act 2018, Section 55, stipulating it was "unlawful for Her Majesty's government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain". However this action failed.

Lord Pentland rejected the case stating:

*"The orders sought would unquestionably interfere to a major extent to the proposed proceedings in parliament. I cannot see that it would be right for parliament to be invited to consider a draft treaty which the court had suspended on the basis that it was unlawful. It is a cardinal*

*principle of constitutional law that the courts should not intrude on the legitimate affairs and processes of parliament.”*

With Brexit uncertainty continuing to hit business EY warned that UK quoted companies had issued the highest profit warnings in 2019 since 2008. However, Chancellor Sajid Javid refused to release economic impact data on the latest withdrawal deal despite cross-party calls stating it would be “incomprehensibly irresponsible” not to do so. Hilary Benn had also written to Stephen Barclay, the Brexit Secretary, calling for publication of this data. “*One was produced in November last year modelling a number of scenarios*” stated the Chancellor. It was “still out there” and “anyone can look it up”.

The Chancellor insisted that the PM’s revised proposals would be “good for the economy”, and that even if there were costs it would be “good for the fabric of our democracy” in getting Brexit agreed.

The government’s own estimates published last year suggested that an agreement similar to Boris Johnson’s deal proposing a limited free trade deal with the EU, would take 6.7% from the UK GDP, making people on average £2,250 a year poorer by 2034. The former PM, Theresa May’s deal would have resulted in a smaller 2.1% impact over the same period.

The May deal had envisaged a customs partnership with the EU whereas the Johnson deal saw the UK outside the customs union with complex tariff and separate arrangements for Northern Ireland. The UK, except Northern Ireland, would move away from EU regulations setting its own rules or adopting those of other trading partners including America. The principles of freedom of movement would no longer apply and services making up 80% of the economy were not included in either version of the deal.

Meanwhile UK manufacturers were being hit with the first US tariffs imposed as a result of a 15 year old aerospace dispute concerning illegal state aids between Airbus, the European firm, and US rival, Boeing. Products ranging from Scotch whisky, biscuits, and luxury cashmere and Savile Row suits were hit with 25%-40% tariffs from 18<sup>th</sup> October.

Carolyn Fairburn, Director General of the CBI continued to stress the ongoing concerns of many in the business community whose business models have been built on a forty year development process leading to integrated markets and frictionless supply chains. *“Decades of free and frictionless trade with the UK’s largest market, forged by thousands of firms big and small, must not be abandoned. Frictionless EU trade and regulatory alignment is vital for UK prosperity and jobs.”*

Whatever happens time is of the essence. The European Union is embarking on the conclusion of its next round of planning ahead of its mid-term multi-annual financial framework (MFF) requiring firm decisions to be made by its partners. Effectively the UK needs to be either in or out by April 2020.