

Brexit, the Backstop and European Sovereignty



By David Hearne, Researcher, Centre for Brexit Studies

Each of the EU's 28 members are wholly sovereign in their own right – they merely voluntarily surrender that to certain supranational institutions. The ultimate exercise of that sovereignty is the ability to withdraw from the Union. Article 50 of the Lisbon Treaty sets out the appropriate conditions to exercise such a right. In this sense, the Union is, indeed, a voluntary arrangement in the same way that other modern free trade agreements are. Eagle-eyed readers will note that the primacy of national sovereignty is what underpinned the Court of Justice's ruling that Article 50 could be unilaterally revoked.

In a fundamental sense, this sovereignty remains untrammelled: any member state has the ability to leave the EU without conditions. However, in order to exercise this sovereignty the state in question must sever all ties abruptly and immediately – what has become known in popular parlance as a “no-deal” scenario. Doing so would do enormous damage both to the country wishing to secede from the EU as well as its neighbours. Were Sweden to choose to leave the EU with ‘no deal’, Finland, Norway and Denmark would inevitably be hugely affected in addition to the huge impact on Sweden itself.

Of course, all of this can be avoided by agreeing a Withdrawal Agreement. This is not about outlining how future relations are to be governed but rather about ensuring that key things are decided. Failure to agree a Withdrawal Agreement to the satisfaction of the EU will result in the severance of ties as specified in the paragraph prior. In the case of Brexit, this is complicated by the status of Northern Ireland: the Withdrawal Agreement entails a potentially indefinite loss of sovereignty over a constituent part of the UK. Although many in Great Britain would be only too happy to see Northern Ireland reunited with the Republic, viewing it as an anachronism left over from a conflict which ended in 1922, the mainland feels politically bound to accept the wishes of the majority of the population living there in this matter.

Some analogies are perhaps helpful here. Whatever legitimate grievances the FLNC might have in Corsica, it is extremely difficult to envisage the French state acquiescing to the island being potentially indefinitely bound by a legal system over which they have no influence and which is different to that on the mainland. An equivalent analogy might be the Basque country in Spain. Would Madrid be content if a condition of signing a Withdrawal Agreement were for the Basque country to maintain indefinite adherence to the same phytosanitary regulations as France, irrespective of what policies are decided by the Spanish government?

Of course, from a game-theoretic perspective the strategy pursued by the EU makes complete sense as the following paragraphs illustrate. First, note that whatever else they might agree on, both the UK and the EU benefit from the absence of tariffs between them. There should, therefore, be no barrier whatsoever in agreeing to a ‘vanilla’

free trade deal: zero tariffs on goods –whether or not any other agreements can be signed.

Similarly, on 30th March *whatever happens* the UK and EU will continue to share exactly the same sanitary and phytosanitary standards, so it would make logical sense to agree reciprocal recognition of standards for as long as this continues to be the case. Were either party to change their standards in any way then the other party would need to choose whether to match that change or if checks needed to be imposed. At a stroke this would obviate the need for some 70-80% of checks on trade. Once again, both sides benefit from this.

However, the key element here is that the EU (as an institution) benefits from the Withdrawal Agreement being agreed. Thus, in order to guarantee that this will be agreed by the UK, it is necessary to be able to credibly threaten not to implement these mutually beneficial measures if the UK is to leave without agreeing it. In game theoretic terms, the EU needs to be able to credibly promise to punish the UK if it does not cede sovereignty in this manner. I use the term ‘punish’ advisedly: it is not an emotional rant, simply a factual statement of strategy. The EU thus must promise not to negotiate an FTA (at least for a period of time) in the event that the Withdrawal Agreement is not ratified. A similar logic applies to mutual recognition of standards.

After all, a Withdrawal Agreement ensures that certain fundamental desires of the EU (above and beyond these) are appropriately met. Specifically, it ensures that monies owed by the UK to the EU are guaranteed to be paid. The rights of EU citizens living in the UK are protected, although it’s almost certain that this would occur anyway. Crucially, it also ensures that *irrespective of the future actions of the UK or EU*, the EU would never need or want to inspect (or impose customs checks on) goods coming from Northern Ireland. The advantages of such an arrangement are twofold: firstly, there can be no possibility of goods entering the EU that do not meet the requirements of the Single Market and secondly the EU cannot be found in breach of WTO rules on preferential trade. Once again, the key here is that this would apply irrespective of the future actions of either party.

Yet, this same strategy poses serious questions of the nature of the Union. After all, it implies that the exercise of absolute sovereignty (leaving the Union) will cause punishment. Yet a non-member would be able to negotiate a Free Trade Agreement (bearing in mind that CETA, for example, removes some 98% of tariffs and by all accounts it was the non-tariff barriers that took time to negotiate). Moreover, the removal of tariffs alone is the purview of the Union authorities and *not* those of nation states so there is little reason not to proceed extremely quickly.

This is deeply problematic for a Union of sovereign states. If the EU is indeed merely a group of states that have agreed to pool sovereignty, then there can be no reason not to engage with a member wishing to exercise some part of that sovereignty directly. From the EU's perspective, this punishment is necessary in order to demonstrate that leaving the Union entails a cost sufficiently high to discourage others from doing the same.

Two issues are thus raised. Firstly, this approach would make vastly more sense were the Union a true federation. Perhaps the obvious solution is to stop obfuscating and simply agree that this is where we need to be. There is no reason for political authority to be coterminous with what groups of people feel their identity to be. One can feel German and yet be ruled from Brussels just as one can feel Bavarian but be run from Berlin.

The second major issue is that these actions suggest significant ossification of the structures of the Union. We need to be clear about this – the value of the EU lies not in what it is or how it is structured but what it *does*. As Europeans, rather than fearing populism we need to engage with it. There is no threat to Europe from a prosperous Britain lying outside of the Union – far from it. European states do not lose from British participation in the European Aviation Safety Agency. We do not lose from agreeing to recognise phytosanitary standards that are identical, and there is no need for a Withdrawal Agreement to do so. Our continent's troubled history shows that magnanimity is a better strategy than punishment. We can use Brexit as an opportunity to reinvent the Union in a way that reacts to and addresses the concerns of disaffected citizens: not just in the UK but across Europe.