

The morning after the vote that wasn't...

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There was never any real question over whether the parliamentary vote was going to be lost. The relevant question was always: how much would the Government lose by? If the prospect was of a narrow loss then it was likely that Theresa May would be able to use this to make some changes at the margins to reassure waverers and attempt another parliamentary vote within weeks. The fact that the vote was postponed indicates that any defeat was going to be utterly resounding. So what happens now?

Theresa May is having meetings today in The Netherlands, Germany and Brussels with a view to seeking further compromises (particularly around the contentious backstop for Northern Ireland). This is likely to prove extremely challenging as the stated view of the EU is that the Withdrawal Agreement is final – any further changes or amendments are likely to be technical. One area that might be relatively easy to change is the political statement on the future partnership. This could be amended to suggest something more palatable to wavering Conservative MPs. However, it is not legally binding so this is unlikely to be sufficient to placate would-be parliamentary rebels.

Nevertheless, additional clarifications of this nature might enable the PM to win over some waverers, alongside a strenuous campaign from “Leavers” in the cabinet. They are likely to stress the fact that there is a real possibility that – one way or another – Brexit might not occur. Given the scale of the expected parliamentary defeat, however, it is highly unlikely that this will be enough.

The Prime Minister could seek to reopen discussions about the Withdrawal Agreement itself. Even if the EU agreed, the timing is incredibly challenging – at present UK law states that parliament needs to vote on something by 21st January. If the Article 50 period is extended then parliament might vote to also move the 21st Jan deadline to a later date. This would need unanimous agreement of other EU members and an extension of more than 2 months is

problematic because that is when elections to the European parliament are scheduled.

We then face the fundamental question: what can realistically be changed? In order to avoid a hard border in Ireland, the north and south need to share a common customs territory and certain elements of the Single Market. One option is to alter the backstop such that the proposed customs union only encompassed Northern Ireland and not Great Britain. The problem with this is that Northern Ireland and Great Britain would then be in separate customs territories, which would enrage the Democratic Unionist Party and many Tory MPs still further. This was the initial EU proposal, incidentally.

Another suggestion is that the Withdrawal Agreement might be amended such that the backstop made explicit reference to some kind of independently proven technological solutions. This might mollify Conservative Brexiters, although one would imagine that the EU would want to maintain some kind of say over what precisely would constitute sufficiently well proven solutions (as it would over any other external border). No such technological have yet been proven to the satisfaction of the EU (they have not been deployed anywhere in the world as yet). There is a small possibility of more substantive concessions on the part of the EU but this seems extremely unlikely.

One other option that has been posited as a “plan B” is the adoption of a “Norway style” agreement as the future relationship. This would necessitate freedom of movement of labour, which is a red line for the UK government. It raises problems for the EU especially Article 102 of the EEA (European Economic Area) agreement, which allows members to withdraw with one year’s notice. As such, there would still be a need for a Withdrawal Agreement and a backstop, in case the UK later decided to withdraw from the EEA.

At present, in order to become a member of the EEA, the UK would first need to (re)join EFTA (the European Free Trade Association). Naturally, other EFTA members would need to acquiesce to the UK joining EFTA and we know that there are concerns about this, particularly given the relatively tight timeframes involved. The EU would be concerned about fishing rights, which is not covered under the EEA. The UK (or at least Northern Ireland) would still need to be in a common customs territory with the EU with all the

disadvantages/problems that entails (not to mention the problems of third-party FTAs, whether cumulation would be agreed with trade partners etc.).

Finally, there is talk of another referendum. This raises a number of tricky issues, some of which are political and others are related to timing. There is now almost certainly insufficient time to properly organise, debate and hold a referendum prior to the 29th March deadline. The Government will need to act in some fashion by 21st January at the latest. However, the EU might well be reticent about granting a longer extension to the Article 50 period due to the fact that there are elections to the European Parliament in late May 2019. In other words, the UK might well end up with insufficient time to hold a referendum. More fundamentally, whatever the outcome of any referendum, it is likely that a substantial portion of the population will feel disenfranchised and deeply disaffected from the political decision that ends up being taken. Fundamentally, it is difficult to see an easy solution to the questions posed here (the improbable scenario of the [UK unilaterally revoking Article 50 – a right confirmed by the Court of Justice](#) of the EU notwithstanding).