PISM | POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH
THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

BULLETIN

No. 82 (1153), 20 June 2018 © PISM

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Prospects for a Brexit Agreement with the Clock Ticking

Przemysław Biskup

At the halfway point of the Brexit talks, the time pressure is increasing. The European Commission is trying to use the approaching deadline to "soften" the UK's stance, despite the steadily growing risk of a lack of agreement. Comparing the procedural and political frameworks of both sides, there are two windows of political opportunity for a breakthrough: one in June and the other in November this year. If the parties fail to finalise the deal by then, the most likely solution will be the "no-deal" Brexit.

The Brexit negotiations from the beginning have been characterised by contradictions between the parties' positions. The solution preferred by the EU remains the customs union while for the UK government, it is either a vague "customs partnership" that would exclude participation in the customs union and the single market or an extensive free trade agreement. The Brexit talks culminate in the ratification of an exit treaty. Treaty-making is a complex and tricky thing, however. Agreeing the exit treaty will require significant concessions, which seriously endanger its ratification. The degree of complexity of the negotiations means that time pressure has become the key factor limiting the parties' room to manoeuvre, the UK's in particular.

Procedural Issues. Article 50 TEU determines the period of two years for conducting negotiations concerning the conditions of an exit by a Member State and the framework of its future relationship with the EU. The period counts from the day of notification by letter to the European Council and includes the ratification of the exit treaty. Therefore, if the ratification process is not completed by 29 March 2019, all rights and obligations of the UK towards the EU will automatically expire. An extension of the negotiations by unanimous consent remains theoretical. On the EU's behalf, the treaty will be signed by the European Council and ratified by a qualified-majority vote in the Council of Ministers, and with the European Parliament's (EP) consent.

Important to the process, the EU institutions have retained their own political agendas. The EP has been exerting pressure to tighten the EU position on civil rights and the Irish border. The European Council gave the initiative in the negotiations to the European Commission, resigning itself to approving the negotiation mandate developed by the Commission. The Commission also insisted on phased talks (exit conditions and then future relations), which the UK government finally accepted. As a consequence, the EU strategy has been leading to negotiating two separate agreements, and before March 2019, the future model of UK-EU cooperation will at best be subject to a framework political declaration. The Commission estimates it will take another 5-10 years to ratify the treaty on future cooperation.

Importantly, the UK government and parliament play separate roles in the implementation of Brexit: negotiation and ratification of the exit treaty is the prerogative of the Crown while parliament will be transposing it into UK law. Constitutionally, in case of a cabinet and parliamentary crisis, there are no obstacles for the UK to leave the EU without an exit treaty. The implementation of the exit treaty requires, however, cooperation between the government and parliament. There is also the political necessity to gain acceptance for the exit treaty from the Scottish, Welsh, and Northern Ireland national assemblies, despite party competition between the Conservative government in London and the Labour government in Cardiff, the nationalist one in Edinburgh, and the lack of

one in Belfast. An additional problem is the dependence of the Tories on Democratic Unionist support in the House of Commons.

EU's Approach to the Time Pressure. The Commission assumes it holds the whip and that the UK government will finally accept the EU conditions given the lack of time to negotiate more favourable ones. The dispute over the form of border on the island of Ireland, currently hampering progress in the negotiations, should be seen in this context. Formally, the UK government rejects the customs union with the EU after Brexit but wants to maintain an "invisible border" to protect the peace process in Northern Ireland. The EU stance is to protect the integrity of the single market while rejecting "bespoke solutions." In fact, this is a dispute over a post-Brexit UK-EU customs union. The Commission is taking advantage of its political leadership in the negotiations, since the attention of the Member State heads of state and government has shifted towards the EU budget process (Multiannual Financial Framework 2021–2027), the European election in 2019, and the appointment of a new Commission. The Commission's approach was legitimised by the success of the first phase of the Brexit talks in December, when the EU essentially achieved all its objectives by constant pressure on the UK government. Technically, the Commission's strategy is supported by the fact that it is easier to modify the UK's negotiating strategy than the EU's. A change in the EU's mandate can be made only by the European Council, in practice only after numerous consultations with the Member States and the EP, with all their political complexity. Meanwhile, the most senior UK negotiators, such as Prime Minister Theresa May or Brexit Secretary David Davis, have greater latitude.

UK Reactions. Most of those against Brexit, the Remainers, support some form of customs union as a basis for the UK's future relations with the EU, but for determined Leavers, Brexit will be successful only if the UK is fully independent of the EU in terms of legislation, the judiciary, and immigration and trade policy. Notably, both sides use the time pressure as an argument in their favour because, with the approaching Brexit date, successfully concluding the negotiations is becoming less likely. This may push the UK increasingly toward either accepting the EU conditions or leaving without an agreement. The losers in the UK debate are the proponents of a compromise version of Brexit based on a "bespoke" UK-EU free trade agreement.

Negotiations Timeframe. In the case of the EU, the pace of negotiations is determined by the European Council summits (28–29 June, 18–19 October, 13–15 December). The decision on signing an exit treaty must be taken at the December summit at the latest to enable timely ratification. On the UK side, the government's cooperation with parliament must take into account the summer recess (24 July to 4 September), followed by a series of party conferences, which will significantly heat up the political debate.

For the UK to accept the EU conditions, Prime Minister May must make a fundamental political turn. In practice, this is feasible only in two windows of opportunity. The first one in June offers the possibility of spending the summer and autumn obtaining limited concessions from the EU. The price for May would be having to immediately confront her own cabinet and to have no time to prepare the UK public for the U-turn. The other window will emerge in November and would allow more time for a UK public and party debate. It would not, however, leave time for any significant negotiations with the EU.

As a result, the march of time has constantly worsened May's negotiating position with respect to both the EU and UK Eurosceptics. The prime minister will have to make a decision from among accepting a no-deal Brexit, building a cross-party coalition to adopt the EU conditions, or going for a snap general election to increase her support. The last two options are highly problematic: there is no natural cross-party House of Commons majority in favour of either the customs union or a no-deal Brexit and a snap election may aggravate the stalemate.[1] In this context, the key difference is that the first option does not require any steps from the UK government.

Conclusions. The UK is increasingly facing a take-it-or-leave-it choice. Consequently, the probability of extreme solutions increases at the expense of compromise. The Commission plays the risk of a no-deal Brexit against the unbending defence of EU interests. In the UK, however, perpetuating the competition between the Remainers and Leavers strengthens the acceptance of a no-deal Brexit, despite its undoubted costs.

Under these circumstances, the European Council could make the EU negotiating mandate more flexible and intensify the talks by targeting them more at future cooperation, as it is the main motivation of the UK to engage in the talks. Consequently, it would require the European Council to take a more active part in the negotiations, since a political solution to the political problem is urgently needed. A fresh look at the issue of the border in Ireland (e.g., perhaps to one based on a small border traffic agreement) is also necessary.

In the case of a no-deal Brexit, its cost to the EU will hit mainly those Member States that have large numbers of citizens living in the UK (e.g., Romania, Lithuania), a trade surplus (e.g., Spain, Germany), or are net beneficiaries of EU funding (e.g., the V4 countries). Poland, though, is in all three categories. From its point of view, what is important is that the EU's achievements in the Brexit talks so far will become legally binding only when the exit treaty is ratified by both parties, otherwise any UK concessions agreed to date may be reset. At the same time, Poland also needs to start preparations for a no-deal Brexit analogous to those undertaken by Ireland or France.

[1] P. Biskup, "Brexit Negotiations after the 2018 Local Elections in England: The Confirmation of Uncertainty," *PISM Spotlight*, no. 32/2018, 7 May 2018.