

How legal fictions can avoid a no-deal Brexit

Nigel Moore shows how May's deal and no-deal are far from the only options for a timely Brexit on 29 March 2019. There is always another way if the political will is present on both sides. With the use of legal fictions – for which there is plenty of EU precedent – a mutually beneficial deal can still be found even at this late stage.

Parliament has rightly rejected May's Brexit-in-Name-Only (BRINO) deal with the EU, by such an overwhelming margin that this deal must surely be considered dead. Thus, as things stand, the UK and EU are heading for a no-deal Brexit.

The problem is that both sides have been inflexible. Mrs May made an early reckless decision to leave the Single Market and wider European Economic Area (EEA), and has been trying to find a solution to conflicting objectives ever since. The Withdrawal Agreement does not achieve this, and instead creates an unworkable, destabilising nightmare of a deal from which, since it would be enshrined in an international treaty, the UK would have no future escape.

The EU has made a lot of noise about being committed to the Northern Ireland peace process and Good Friday Agreement, and yet ironically, its rigid insistence on the backstop has brought about a situation where no-deal is much more likely. Pretending it has to be legally inflexible is clearly contradicted by existing precedents. The Single Market (implying homogeneity) is a legal fiction. There are often local variations across many products. Even pro-EU Professor Anand Menon accepts that the supposed 'integrity' of the Single Market "is obviously negotiable – as the cases of Switzerland and Ukraine illustrate all too clearly – for non-member states." Special exceptions have previously been made

for specific borders and territories nominally outside the EU, as Dr Lee Rotherham has revealed.

Nevertheless, if the will is present both in the UK government and in the EU, a practical win-win solution can still be found, even at this late stage. It is still possible to avoid both no-deal and a hard border in Ireland – through the use of legal fictions.

What is a 'legal fiction'?

A legal fiction is *an assertion (invented 'fact') that is accepted as true for legal or administrative purposes, even though it may be untrue or unproven*. The European Union (EU) and the European Court of Justice (ECJ) often create such legal fictions to facilitate the EU's political agenda and accommodate de facto situations. Terms such as *economic operator*, *EU citizen* and *union railways* are simple examples. The recent ECJ Article 50 Judgment relied on more elaborate legal fictions to arrive at the 'right' conclusion.

Is it realistic to expect the EU to use legal fictions to reach a deal? Absolutely, because **the transition period in the current draft Withdrawal Agreement (WA) itself creates a legal fiction!** The UK will legally leave the EU on 29th March 2019. Yet the EU is permitting the UK to remain within the Single Market during the transition period. This is despite the fact that the only states supposedly permitted to participate in the Single Market are 1) EU Member States, and 2) countries within the European Free Trade Association (EFTA). The UK's membership of the Single Market during the transition period is thus a legal fiction.

This shows that the EU can find workarounds if it wants to – providing the UK offers something in return. In the case of the transition period the price extracted by the EU from May has been steep: continued contributions to the EU budget; oversight by the ECJ; UK compliance with all EU laws; freedom

of movement; and remaining subject to the Common Fisheries Policy. But the terms of the EEA Agreement for the EFTA states shows that the price need not be so extortionate.

How can a legal fiction avoid no-deal?

The easiest legal fiction to avoid no-deal would be to allow the UK to remain in the Single Market via the EEA, but without being in the EU or EFTA. This would allow largely frictionless trade to carry on as normal, benefitting all parties. The EU could call it a 'technical adjustment to EEA and associated legislation' which does not require EU Parliamentary or European Council approval (of the details). The European Commission could quickly draft some short enabling legislation that could subsequently be amended to cross reference all other legislation to include the UK's 'temporary', 'pathway' or 'shadow EFTA' status alongside the EU and EFTA.

Some EU legislation relating to the Single Market has political origins and aims. Notably, freedom of movement of persons was always intended as part of creating a 'common citizenry' of a European superstate, rather than for any (questionable) economic benefit. Since the referendum result was for the UK to leave the political control of the EU, the UK Government is obliged to seek to be excluded from the EU's political aims that have been incorporated into the laws of the Single Market. This can already be facilitated to some extent within the EEA Agreement. The EEA Agreement's Article 112 (the Safeguard Measures) does permit non-EU members of the Single Market (i.e. the EFTA countries) to unilaterally control freedom of movement. It should be possible to extend this principle further as and when required, if necessary by creating legal fictions.

Always a better way

The problem is not the technicalities, but the motivation and the inventiveness. It is likely that the Brussels Eurocrats

actually want a solution – to avoid ongoing uncertainty, severe trading disruption, costly new infrastructure, and blame. If this is indeed the case, then it is actually Mrs May and her team, together with certain hard-line EU politicians, who are the obstacles. Yet obduracy, deceit or bullying by the EU's political apparatus will undoubtedly increase resentful populist hostility to the 'European Project' and instability in Member States.

The current Withdrawal Agreement is far from the only deal possible: legal fictions offer a whole range of solutions. The only question is whether the political will is present on both the UK and EU sides to take advantage of them. With Parliament effectively killing the existing deal last week, it is time for both sides to start afresh with a new flexible and open-minded approach.