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FEBRUARY
2019

EXTENDING ARTICLE 50: Brussels Geopolitical Play

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The chaos in the House of Commons on 29th January had two major Conservative Party motivations. First of all from No.10 by the overriding objective of this government to keep the Conservative Party, however temporarily, together, whatever the cost to the United Kingdom. That was the underlying purpose of the Brady amendment (from the perspective of No.10) which required 'alternative arrangements' to be put in place to the backstop guarantees for Northern Ireland contained in the Withdrawal Agreement. The second objective, shared by the European Reform Group (ERG) of extreme Brexiters and their allies, was to undermine the Withdrawal Agreement and open the way to a 'no deal' result. The ERG is quite aware that the Brady amendment will be rejected by the European Union. They cheerfully believe they can sit on their hands for a few more weeks creating diversions and distractions for the media, as the clock ticks down, and they push the UK out of the EU with no deal. They can then turn round and blame the EU for the subsequent disaster that would be 'no deal'.

The 'Blame the EU' strategy is very clear. This line is already being deployed in debates and in the media, and will go into overdrive if the UK leaves with 'no deal'. There are manifold dangers in this strategy for the UK itself and the EU. The danger of enormous public anger at the scale of economic disruption together with violence (at least) in Northern Ireland is likely to see the public search for scapegoats. If Brussels becomes the principal target then the ability of the EU and the UK to co-operate save at the most minimal levels of commerce and security co-operation will be lost to everyone's detriment. This would include a security spill over to Britain's membership of NATO and its willingness to honour the Article 5 guarantee, further weakening Europe's security in an already challenging climate. The other overlooked consequence in some Member States is that with significant public and political hostility between the EU and the UK triggered by no deal, the Republic of Ireland would then face a long period of time with a hard border between itself and Northern Ireland. A populist UK government rather than coming to the table in Brussels to do a deal could double down, introduce rationing and seek to sit out 'no deal' all the while blaming the EU. This could be a winning strategy.

The EU Council can pre-empt ERG attempts to make the EU take the blame for 'no deal' by making a generous and positive extension offer. A unilateral move to extend Article 50 by two years so the UK can work a means of securing an orderly exit would make it much more difficult for the ERG to subsequently blame the EU.

At that point it would be clear that the European institutions had provided a number of ways forward for the UK. The European Court of Justice would have made it clear in the Wightman case that the UK could always revoke. In addition, the EU Council would have offered a lengthy extension to give the UK more time to work out a smooth path to exit. In such circumstances, if the UK government egged on by ERG persisted with 'no deal' it would be difficult for them to subsequently pin the blame on the EU when both revocation and extensions were clearly available.

Furthermore, a positive advantage of extending Article 50 by two years is that non-Brexiter MPs faced with the choices between 'no deal' and the Withdrawal Agreement that they have voted down by a majority of 230 would probably take the prolongation over the other two options.

The other major advantage is that a lengthy extension would preserve the open border between the Republic and Northern Ireland for a further significant period of time. This is no small advantage given the prospect of the return of terrorism on a much wider scale (Northern Ireland already has had the most significant levels of terrorist activity within the European Union) and the prospect of spill over attacks in the Republic of Ireland and the rest of the UK.

One major objection to an extension is 'Brexit weariness' and the fear that the Brits will continually kick the can down the road to the next extension date. This is clearly a danger. However, providing more time has a number advantage aside from preserving peace in Ireland. As time goes on, the economic and political pressures increase on the British government and London will have to deliver a deal which is workable whether it's the Withdrawal Agreement or something closer to the EEA. Furthermore, little by little informed opinion (something an oxymoron historically in the UK over the EU) and the broader public began to understand that compromises have to be made and what compromises are worthwhile.

Any British government also faces its own electoral backstop, the last date for the next general election in June 2022. It is unlikely that any UK government can go into the next general election not having come to some deal if only a withdrawal arrangement with the EU in place. A two year extension offer ending in March 2021 would focus the minds of a British government then having to go to the polls just over a year later. Furthermore, if a deal were done and agreed before March 2021 it could potentially go into force, terminating the extension before March 2021.

There is the question whether as a matter of Union law an extension of Article 50 can be more than a few months. Some commentators have taken the view that any extension would have to be limited. However, Article 50 itself remains silent on this matter. Given the overriding objectives to maintain the uniform application of Union law and the integrity of the single market and to avoid having either disrupted by 'no deal', it is difficult to see how a lengthy extension to avoid such disruption could be deemed to be out with the scope of Article 50.

Given also that the 'disruption' also would include the prospect of bloodshed as a result of hard border being resurrected between the Republic of Ireland and Northern Ireland, one can also pray in aid the preamble of the original European Coal and Steel Community which recalled that one of the principle European objectives was (and remains) to create 'the foundation of a broad and independent community among peoples long divided by bloody conflict'. Given that the Union can take steps to avoid such bloody conflict between Europeans it is difficult in such a context to see how an Article 50 extension could not be justified under Union law.

The major political objection is the European Parliament elections on May 23rd-26th. This does create practical problems. Some UK seats have already been reallocated and may have to be allocated back. There is a danger of a heavy win for UKIP in the UK elections (though to the contrary we may find that the British anti-Brexiteers and the three million EU nationals in the UK flock to the polls to register their protest for one last time). The argument here again is that the political inconvenience notwithstanding the advantages for peace, economic security and legal integrity of Union law, override the practical problems technical and political of the European Parliamentary elections.