

Construction or demolition? Explaining Boris's new Brexit battle

By Matt Ross in *Global Government Forum* on 06/10/2020

UK PM Boris Johnson had been wildly happy about his new EU exit deal; then he introduced a law undermining both it, and the last round of trade negotiations. Speaking with two former permanent secretaries of the UK's EU exit department, Matt Ross asks whether Johnson is applying firm leverage – or deliberately sabotaging the trade talks

What is the UK government up to? Prime minister Boris Johnson deposed his predecessor Theresa May to demolish her EU Withdrawal Agreement – then negotiated his own “wonderful” exit deal, presented it to the public as a great victory, and won a big majority in December's election. But just four months before the UK will leave the Single Market – and with only a few weeks left to agree a new trade deal – he's introduced legislation that directly challenges the core of his own exit deal, throwing a hand grenade into the trade negotiations.

Indeed, Johnson's Internal Market Bill appears designed both to exacerbate the EU's existing worries over his policy on 'state aid', and to destroy its trust in the UK – wrecking his chances of securing agreement to his preferred light-touch compliance model. No wonder that many suspect Johnson is actively sabotaging negotiations, calculating that the economic advantages of his preferred 'thin' trade deal are outweighed by the political advantages of blaming the EU for all the disruption and economic damage that – deal or no deal – await the UK from 1 January 2021.

In a bid to discern the Johnson government's real Brexit policy goals, GGF has spoken to two former permanent secretaries of the UK's Department for Exiting the European Union (DExEU): Philip Rycroft, who joined DExEU in 2016 and led it from October 2017; and Clare Moriarty, who took over in March 2019 and ran the department until its abolition in January 2020. But before we consider what happens next, we need to reflect on how we got here.

A tension at the heart of Brexit

Ever since May began negotiating the UK's exit from the EU, talks have constantly bumped into one apparently irreconcilable tension. For Brexiteers, leaving the EU was about reclaiming sovereignty: winning the freedom for the UK to decide its own laws, regulations and trade deals, and escaping the jurisdiction of EU bodies such as the European Courts of Justice (ECJ). Realising this goal involves the creation of a new trade jurisdiction – and this, inevitably, creates a border between the UK and EU. But the Northern Ireland (NI) peace process was built on a deliberate blurring of national identities, allowing nationalists to live as Irish people on an island without physical divisions. Re-imposing a 'hard' border on the island of Ireland would sweep away this constructive ambiguity – and this, says Rycroft, “would be potentially disastrous for the peace process.”



Philip Rycroft

Entering exit [talks in 2017 with all guns blazing](#), May set out red lines – including freedom from ECJ jurisdiction – that ruled out a really close trading relationship. So a border between the UK and EU would be required, and it would need policing: “The European Union cannot accept a situation where there is a hole drilled into the Single Market which would allow goods to cross that border without any sort of checks,” Rycroft comments. But where to put the border?

May’s eventual solution – after years of internal party squabbling, Parliamentary chaos and a disastrous snap general election – was the ‘backstop’. This promised that, should the UK and EU not agree a trade deal that averted the need for a UK/EU border, the whole of the UK would remain aligned to the EU’s Customs Union. On regulatory alignment, the UK would not be required to follow future EU changes in England, Scotland and Wales. But in order to prevent a regulatory border from appearing on the island of Ireland, NI would have to remain within the EU’s regulatory orbit: if Britain diverged from EU rules, a new regulatory seam would arise between the province and the British Isles. And the UK would have to remain in the backstop until it came up with a trade deal that both avoided a physical land border, and protected the territorial integrity of the Customs Union: an interesting conundrum that a handful of Brexit campaigners – and nobody else – thought could be resolved through the introduction of unspecified technologies.

Bashing the backstop

The backstop protected peace in Ireland. But [in many ways, it was a terrible deal](#) for the UK – and Brexiteers lined up to attack it. Northern Ireland’s main loyalist party, the DUP, hated the potential for a regulatory border in the Irish Sea. And for English Brexiteers, the prospect of indefinite confinement in the backstop represented far too great a retreat from their promises of a newly sovereign, independent UK. In a series of Parliamentary votes, May proved unable to persuade her own party’s Brexiteers to compromise their vision.

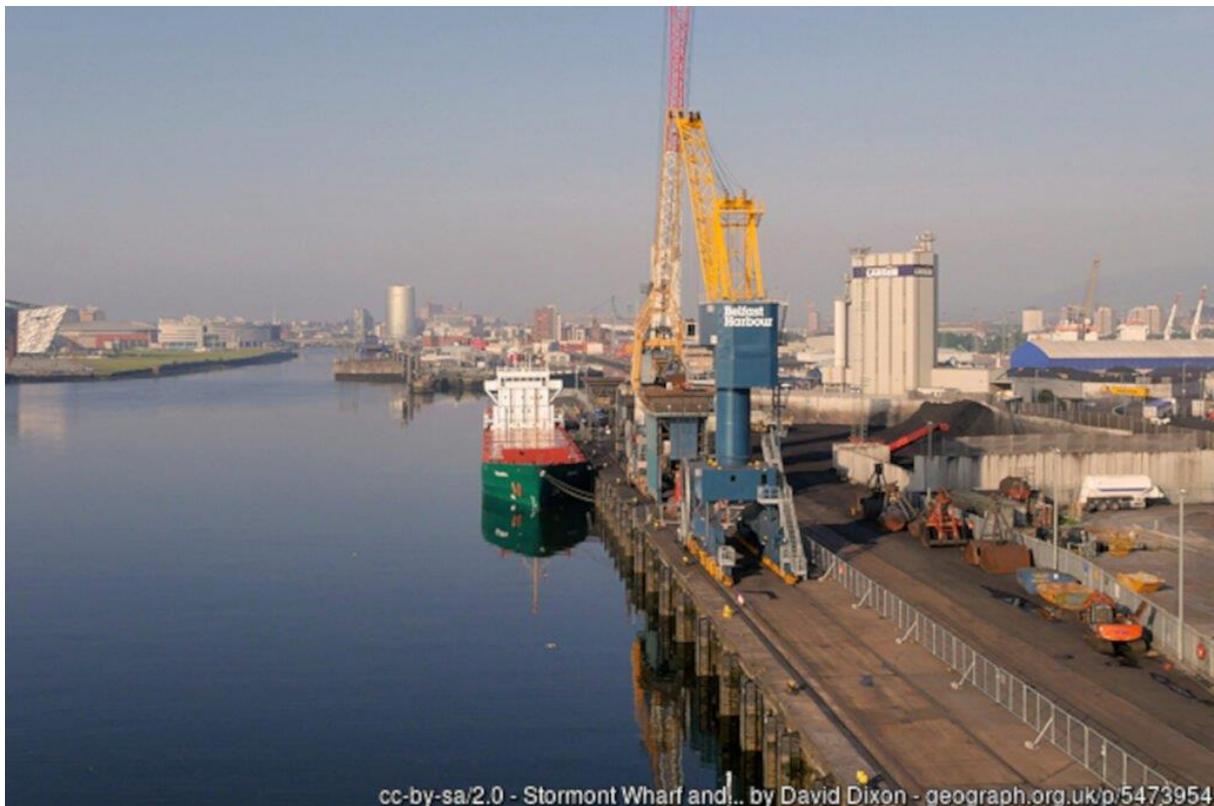
When May fell in July 2018, new PM Boris Johnson assured Brexiteers that no such compromise was necessary. He reopened negotiations, agreed a new Withdrawal Agreement with the EU, then held a

general election: he'd secured a great deal, he said, and needed a parliamentary majority to "get Brexit done". In December, he secured the Tories' biggest majority since 1987.

The reality is, though, that Johnson had made a major compromise in order to secure his Withdrawal Agreement. His 'Northern Ireland Protocol' reinstated key elements of an idea originally touted by the EU: that NI remain fully aligned with the EU's customs and regulatory regime, while the British Isles went their own way. May had rejected this very idea in February 2018: "No UK prime minister could ever agree" to such an arrangement, [she said](#), arguing that doing so would "threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea."

Conceding an Irish Sea border, ECJ powers

She hadn't bargained on Boris, nor factored in his uncanny ability to – as [our election analysis explained](#) – "reverse positions without suffering reputational harm". During the election campaign, [Johnson had maintained](#) that under his deal "there's no question of there being checks on goods" crossing the Irish Sea. But while his protocol tacks a democratic mechanism onto the EU's original plan – giving members of NI's Legislative Assembly a 2024 vote on whether to continue the arrangement – its main effect is exactly that foreseen by May. From January 2021, the protocol says, the UK must both collect 'exit summary declarations' from people shipping goods from the province into Britain, and apply the EU's customs rules, agricultural standards and product requirements to all goods moving in the other direction.



Belfast port: in the case of a no deal exit, Johnson's Withdrawal Agreement requires the UK to impose tariffs on goods moving from Great Britain to Northern Ireland

So under the protocol, if the EU imposes tariffs on British exports – as it will if no trade deal is agreed by January – the UK government must impose those tariffs on goods moving west across the Irish Sea. This applies wherever there is a risk that – in the view of an EU-UK joint committee – goods might be carried onwards, across the open border into the republic. And Johnson made another important compromise, ditching May's 'red line' over the ECJ's reach: within Northern Ireland, "EU institutions will have jurisdiction in the UK in respect to the articles on customs, regulation, VAT, state aid and the single

electricity market,” [an in-depth report by the Institute for Government](#) explains, while “the European Court of Justice will enforce EU law in those areas”.

The DUP hated it. But with an 80-strong parliamentary majority, Johnson no longer needed their handful of MPs. He moved onto trade talks; and it soon became clear that his vision of a trade deal was very different from May’s. His predecessor was “expecting to negotiate a degree of alignment, and recognised that might come at the cost of autonomy,” comments Moriarty. “You could say the objective was to have as little change as possible and as little friction as possible.” But for Johnson’s administration, “decision-making autonomy was really important; they were clear-eyed that a degree of friction was going to be inevitable.”

The basics of a thin deal

So Johnson pitched for a ‘thin’ trade deal, ensuring only that British goods wouldn’t be subject to tariffs or quotas. This largely restricted negotiations to the division of fishing rights and the EU’s ‘level playing field’ (LPF) rules – which govern the standards for workers’ rights, taxation, social and environmental protections, plus state aid: the controls on governments subsidising private companies.

On LPF, the EU feared that the UK might loosen standards or fund private companies, giving its businesses a competitive advantage over their EU counterparts. Indeed, EU negotiators had ensured that under the Northern Ireland Protocol, EU state aid rules – with ECJ jurisdiction – would apply not only to businesses within the province, but also to any UK government subsidy that could affect trade between NI and the EU. This could, for example, allow the ECJ to block subsidies to a British-based firm which had a branch in NI.



Clare Moriarty

Certainly, Brexiteers had talked of cutting regulations to support business growth. And as Moriarty recalls, some EU nations “had a very, very high expectation of under-cutting: for example, the French thought that

as soon as we exited, we were going to want to cut all environmental standards... It was very difficult to persuade other European countries that it was about having autonomy, rather than under-cutting.” To protect free competition within the no-tariffs area, the EU wanted Johnson to sign up to its LPF regime and a robust dispute resolution mechanism.

A new obstacle: state aid

Here, a new obstacle arose. The EU wanted the UK to follow EU state aid rules, with oversight via the ECJ; but the UK would accept only the adoption of World Trade Organisation rules – preferring recourse to a body with no operative enforcement mechanism. On the Continent, brows furrowed: did Johnson intend to create new state-sponsored businesses, then take advantage of his zero-tariffs gateway into EU markets?

Rycroft is puzzled by the Johnson administration’s apparent determination to protect its ability to subsidise businesses, describing it as “very un-Conservative”. The EU’s state aid regime, he points out, reflects “an absolutely core Conservative economic policy since Thatcher”. Indeed, Margaret Thatcher – an icon for many Brexiteers – was “desperate to get away from the days when the government poured vast sums of money into enterprises like British Leyland, to almost zero return.” Media reports suggest the current position reflects Johnson adviser Dominic Cummings’ interest in creating state-backed tech businesses, Rycroft adds – but this policy rests heavily on “an untested set of propositions.”

Given a high level of trust between the negotiating partners, though, it’s possible that agreement could have been reached on state aid – perhaps involving a statutory UK regulator enforcing competition laws through UK courts. Which is why the UK’s next move looked, to many, like an act of deliberate sabotage.

Back to the hand grenade

In early September, Johnson’s government [published the Internal Market Bill](#) (IMB). While mainly concerned with repatriating EU responsibilities, the IMB also includes two provisions directly contradicting parts of the Northern Ireland Protocol – itself part of an international treaty already ratified by both parties. First, it would permit UK ministers to waive the need to submit exit summary declarations on goods moving from NI to Great Britain. And second, it would allow them to change how EU state aid rules may be applied – both to Northern Ireland-based firms, and to British businesses with operations in the province.

Johnson was trying, once again, to reverse positions without suffering reputational harm – this time ditching key elements of the arrangement that he had, less than a year ago, [championed in the general election](#) as an “oven-ready deal” that “delivers everything that we wanted from Brexit.” And on the Continent, furrowed brows creased into frown lines: Johnson’s IMB would free the government from its previous commitments on state aid in Northern Ireland, exacerbating suspicions that he intended to splash the cash liberally on private businesses.

What’s more, Johnson had introduced legislation contradicting an international treaty that he had ratified just months previously: this act – itself a breach of international law – made it crystal clear that the UK could not be trusted as a negotiating partner. How could the country now hope to secure a light-touch deal on state aid, dependent on domestic enforcement arrangements that the government could abolish at any moment?

Throwing the game, or edgy tackle?

Was Johnson hoping that the EU would walk away, allowing him to blame Europe for the disruption and economic damage caused by exiting without a trade deal – and masking the fact that even his favoured thin deal would have led to border delays, administrative costs and trade barriers? “There are two

interpretations of what he did,” responds Rycroft. “One is that it was a deliberate attempt to crash the process; the other is that it was hardball negotiating tactics.” Some Brexiteers, he comments, may have “wished it to be the former”.

According to one well-placed source, Johnson did at one point believe that the outcome of his favoured thin deal wouldn't be wildly different from leaving without a trade treaty. Last year, the source says, his team were working on the basis that “the difference between zero tariffs, zero quotas and no free trade deal is not so great that you would sacrifice a huge amount for it... Thin versus nothing is very different from a really thick deal versus a thin deal.”

Rycroft, though, points out the crucial importance of goodwill: “That border is not going to function perfectly on day one. We'll be lucky if it's functioning adequately by the end of month six,” he says. “It's going to require some easements on the EU's side of the border in the early weeks and months in order for traffic to flow smoothly. In a no deal world, the goodwill isn't there to do that. There's a risk of queues in Kent whatever happens, but the queues could get very much longer and persist for a lot longer.” And no deal, he adds, is not an end point. The UK buys about 10% of the EU's exports, he says, but 43% of the UK's exports go to the EU: “We'd have to come back to the table eventually; it's inevitable.”

Hard push-back

The government may also have been surprised by the strength of the reaction to the IMB. Jonathan Jones, the PM's chief legal adviser and head of the Government Legal Department, [quit his job](#). Nancy Pelosi, Democrat speaker of the US House of Representatives, [warned that](#) if the UK violates the Withdrawal Agreement “there will be absolutely no chance of a US-UK trade agreement passing the Congress.” And the EU [launched a court action](#), initiating an ‘infringement procedure’ that could end up in the ECJ. Pursuing the IMB, says Rycroft, would “make it so much more difficult for the UK to hold its head high as a permanent member of the UN Security Council; as a country that was seeking trade deals with other nations. It would do immense damage to the reputation of the UK as a responsible citizen of the global community.” The very suggestion that the UK would be willing to break international law has, in his view, already caused “a lot of collateral damage”.

Exiting without a trade deal while undermining the Northern Ireland Protocol, he adds, would also revive all the risks around the creation of a hard border on the island of Ireland – and this time, “with no prospect of a sensible resolution”. The province's decades-long Troubles, he notes, were for years “the worst internecine strife in Europe”. Creating uncertainty around the border issue would be “extraordinarily damaging for Northern Ireland and for Ireland, and very, very destabilising, and the absolute height of irresponsibility.”

Cocked-up conspiracy

In Rycroft's view, the government has now had second thoughts and “stepped back” – taking a more emollient line in the joint committee talks, parliamentary management of the IMB, and its public communications. “There's quite a lot of signalling there that says: ‘Whoops, we pushed this one too far, and now we're trying to pull it back’.”

And if Johnson does really want a deal, he says, the outlines of one are visible. On fisheries, the UK could “over time take a greater share of the catch from those waters, but do that in an ordered way which gives the EU fleet some year-on-year certainty about its catch.” On level playing field rules, a “relatively straightforward non-regression” pledge could form the basis of an agreement. And the two sides can agree an oversight and governance regime – perhaps built around a UK regulator but with a UK/EU dispute resolution mechanism allowing the EU “to impose tariffs selectively, in order to compensate for the unfair competitive advantage that [subsidies] had opened up.”



Dominic Cummings. (Image © Steve Taylor/SOPA Images via ZUMA Wire).

Asked the chances that a deal will be agreed, Rycroft puts them at 55/45. “It’s hugely in the prime minister’s political interests to get a deal. So much else has gone wrong: failing to get a deal would be the capstone on a pretty torrid year for him,” he comments. “And he could sell a deal as a great triumph and all the rest of it, and some people would believe him.”

“But time is very, very tight,” he adds. And Johnson’s team seem prone to errors: for Rycroft, the IMB drama is “a great illustration of the peculiarly almost apolitical nature of some of those sitting close to the prime minister. They don’t understand the political implications of some of the stuff they do.” Despite Dominic Cummings’ talk of super-forecasters, he says, the government “appears to be very unimaginative in some of the actions it takes.”

While a trade agreement is attainable, says Rycroft, it faces both “a time risk, and a political miscalculation risk.” And as the UK inches back towards a deal following its last political miscalculation, he is far from convinced that it won’t blow it again. “Any government that had good peripheral vision would have seen that stepping into this space was going to do enormous collateral damage. And that’s what’s happened,” he concludes. “There’s a risk that somebody says the wrong thing at the wrong moment, and you have a sudden spiral down; a loss of trust again. And suddenly we’re timed out.”

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