

BREXIT: So What Does The End-Game Now Look Like?

Even the most hardened of commentators would have assumed that by the second week of December the UK and EU negotiators would by now have delivered a BREXIT deal, albeit one which was some way off from the original claims of hardline Brexiteers that an FTA Canada deal would be something the EU would be happy to sign up to as it was clearly in their interests to do so.

Following the deep gloom of last week, Sunday saw the UK and EU agreeing to 'go the extra mile' in search of a deal. Both Boris Johnson and EU Commission president, Ursula von der Leyen agreed on Sunday that there had been enough movement over the weekend to allow negotiations to continue. Without a trade deal in place, the UK would begin trading with the EU on World Trade Organisation (WTO) terms, leading to taxes (tariffs) being introduced and consequently significant increases in the cost of certain imported goods such as cars and food.

Whilst there continues to be a lot of talk about the intractable position of both sides on the question of fishing, what was once seen as the most politically sensitive and problematic area of difference is now viewed as potentially soluble with a transitional period of up to 5 years and quotas based on total "value of catch" and allocated between individual stocks. The EU wish to maintain linkage between fish and access to the single market. If access to fishing stocks is materially reduced over time, so may access to certain parts of the trade agreement.

What appears to be the real sticking point covers the issue of regulatory alignment and in particular the EU demand that this alignment should be "dynamic". This would mean that any change in EU regulations would see a similar change in UK regulations, failing which Britain would be hauled in front of a court where the EU would be both judge and jury and the UK would face the prospect of further sanctions through the imposition of tariffs.

In an effort to make progress, the UK have conceded that there should be no reduction in existing rules and regulations. These "non-regression clauses" on standards will be part

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of any trade deal and should there be future disputes between the UK and EU, procedures to adjudicate such disputes will be included in any treaty based on objective measures of actual disruption to trade. This however is as far as the UK Government is prepared to compromise. The latest EU request for dynamic alignment impinges on what the UK Government sees as the fundamental reason for leaving the EU, allowing the UK sovereignty over its own laws. It seems almost unconscionable that an agreement that is reportedly “97% agreed” should fall apart on areas of regulation covering working practices, food and the environment, policy areas with respect to which many would argue Britain is a leading force for good in the World. However, the issue of sovereignty on the one hand and the terms on which to grant access to the largest single market in the World on the other, bring both sides into areas of deep rooted philosophy”. It is rumored that the EU is prepared to concede that in the event that a court were to decide that there had been a material divergence in future regulations, any tariff could only be imposed in the context of that specific area of trade and not more generally. It is also reported that the EU has agreed that the arbitrator of any disputes can be “independent” and is no longer insisting on a role for the European Court of Justice.

The final sticking point relates to the question of “State Aid”. Whilst Brussels wants Britain to agree to limits on its ability to subsidise directly its industries, the EU wants the European Commission to be exempt from all State Aid provisions. This could allow the EU to directly subsidise its industries while if the UK tried to do the same, it would be in breach of its agreement with the EU. One example of this is the European Commissions’ plan for its Euro 750 billion coronavirus recovery fund at the EU level. Possible compromises have been discussed, for example allowing the UK Government to provide State subsidies of an equivalent proportion to the amount of the recovery fund.

Following agreement on Sunday that talks should continue, perhaps the most interesting feature of this joint announcement was that the announcement did not include any further deadline of when agreement had to be reached, leading to the possibility of negotiations continuing even between Christmas and the New Year. We have entered the territory of the “blame game” if no deal is reached and neither side wish to be seen to be walking away from what, with the benefit of hindsight, might be seen as the basis for a potential deal.

In the meantime can the two sides finally demonstrate that the art of statecraft is not after all “dead” and find a way to ‘fudge’ these last few issues?