

Thoughts on Good Negotiating Practice

Notes from a Small Island

Lessons Learned from the Brexit Process

By Sharon Finch, Medius Associates

For political observers, it has been an incredibly long watch and wait to see what may emerge from the protracted discussions which make up the Brexit debacle since the UK Government/Prime Minister invoked Article 50 of the Treaty on European Union (EU) on 29 March 2017. Since that time, the UK Withdrawal Bill based on discussions with the EU has been presented to Parliament 3 times for approval, [see below] each time being voted down. A fourth vote was planned, but will not now occur as the Prime Minister has resigned as leader of the Conservative Party and will be replaced as Prime Minister by July.

The Brexit Bill, which seeks approval from Parliament regarding the withdrawal terms negotiated with the EU is without doubt the most constitutionally significant legislation for the United Kingdom, since the original European Communities Act in 1972 and it has not had a clear passage.

So, what lessons can we learn which may be of benefit to us in our BD negotiations? This article reviews some of the issues that have arisen with thoughts of how adopting good negotiating practice might avoid some of these pitfalls.

Planning

Every negotiation benefits from a plan. The plan usually consists of a statement of objectives, the strategy to achieve those objectives and a plan of action. In the case of Brexit, the overall objective was clear – it was to leave the EU. However, there was no definition of what precisely this meant and what the objectives were in terms of trade, immigration, etc nor was there any clear definition of the target (best) deal; of the (worst) walk away deal or the BATNA (best alternative to a negotiated agreement). There appeared to be a lack of defined objectives but there was also a lack of buy in from the UK stakeholders.

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Voting on the UK Withdrawal Bill in the UK Parliament 2018/19

Date	Status	Votes against	Votes for	Outcome
14 November	Published			
10 December	Vote pulled			
16 January		432	202	-230
12 March		391	242	-149
29 March		344	286	-58

It is a golden rule that if individuals have been invited to contribute to the plan, then it is far harder to complain and decline to participate in the solution that emerges. In the BD world, it is a given that there has to be clear corporate approval, usually from the Board or investors for the outline scope of the deal so that the negotiators have a clear mandate for their discussions. Negotiating in free space with no certainty that the deal is either feasible in terms of operational application or approvable by senior stakeholders is a nightmare scenario best avoided.

Buy in by all stakeholders is critical on both sides of the negotiating table. One of the immense hurdles of the Brexit discussions is the need to reach consensus between 27 independent European countries and the bigger challenge, the UK parliament. It has been remarkable that there has been a unity and consistency displayed by the 27 independent European countries in contrast to the UK.

Following the loss of an outright majority in the House of Commons after the June 2017 General Election, it became apparent that there is little harmony either within the Conservative party or across the other political parties which has led to the current impasse. Fortunately, in pharma BD even in-house politics tends to be more aligned behind a single business mandate, i.e. the financial or strategic benefit to the company. Commanding the authority to negotiate and agree binding commitments is an absolute *must have*.

Furthermore, having a core belief that the opportunity is of benefit to the business carries a clear conviction into the negotiation discussions which can be conveyed to the counter party. Negotiating something you truly believe in makes the task at hand more compelling and more rewarding.

Core to the difficulties in the Brexit negotiations is the wide spectrum of views reflected by the fact that the referendum was such a very close run; the decision to leave was based on a 48% - 52% vote. Furthermore, the *binding* or *not binding* nature of the referendum* has also been a source of much debate, but it has been clear over the subsequent months that the full implications of undoing a 46 year long relationship would never lead to an easy divorce.

The more complex the deal, the better the plan has to be to provide the flexibility to accommodate the key risks and problems that may arise. In this regard, there can hardly be a more complex deal than that required to de-couple the UK from the EU after so many years of close integration.

It is not clear to the man in the street what precise due diligence was conducted

Virtually every aspect of daily life is impacted by European guidelines from employment terms and conditions through to rules governing data protection. So, one would imagine that a great deal of thought would have gone into the detailed planning before triggering any time limiting event such as Article 50.

A critical feature of planning is to know exactly and fully understand what it is that is trying to be achieved. In the case of Brexit, before triggering Article 50 that set a fixed timescale for negotiation, it would be expected that the UK government would have defined the plan and sought buy in from a majority of MPs. The plan, like any plan to license a product or technology, would have been a full and complete package rather than a hard framework of deal breakers or red lines. Understanding where the borders are for any negotiation is of course important but too many red lines can lead to inflexibility and a lack of a clear path through the maze.

It is not clear to the man in the street what precise due diligence was conducted into defining exactly that the Withdrawal Bill might need to cover, but from the headlines that have regularly hit the press, the Department responsible for Brexit may not have addressed this very well. In addition, there did not seem to be a Plan B, as a backup plan ready to go if Plan A failed. A no deal scenario is the one thing that Parliament agreed would not be an acceptable Plan B.

Deal Complexity and Joined up Thinking

Noting that the deal complexity here may be immense, the next planning step would be to understand the interconnectivity of the various key issues. Simple enough at a simplistic level but it seemed to be a *who knew?* moment by the government when it was fully realised that the current Withdrawal Bill proposal could lead to the reintroduction of the hard border in Ireland and that the Irish representatives from both sides of the border would be unlikely to agree to it added to which it is incompatible with the UK's responsibilities within the Good Friday Agreement (which brought peace to Northern Ireland and an end to The Troubles) to re-introduce a hard border.

* Although the referendum was legally non-binding, the Conservative government at that time promised to implement the result, leading to the initiation of the official EU withdrawal process on 29 March 2017.



Deal terms

It is always difficult when working on deals to ensure that every eventuality is covered by the deals we negotiate, particularly as we aim to future proof the deal to cope with variable circumstances such as price cuts, generic competition, product profile being below par – the list is endless. So, trying to write the Brexit divorce bill across so many interests and industries is a Herculean task. The more difficult the deal, the more likely it is to disappoint or fail and thus the need for a Plan B as a backup is essential. Of course, in the case of Brexit, with so many opinions and stakeholders, trying to bring people away from Plan A onto Plan B can be a nearly impossible task.

Teamwork

Generally, in pharma discussions the team responsible for the task will remain consistent, both in who is there to represent the company and in their company's negotiating position. This concerted ownership of the solution by the team allows for the relationship between the parties to develop enhancing the chances of success of the partnership.

Sadly in the case of the Brexit discussions, there have been several responsible persons taking the lead (Secretary of State for Exiting the EU: David Davis, Dominic Raab, Stephen Barclay) which has led to a lack of consistency in the position. Changing team members is unhelpful in negotiations as it interrupts the continuity and breaks any bonds formed across the table between negotiators.

In addition, there seemed to be elements of disloyalty, as on leaving the team some negotiators disowned the deal under negotiation, undermining any sense of cohesion.

The expertise of those negotiators was also brought into question, with Dominic Raab allegedly saying *"I hadn't quite understood the full extent of this, but if you look at the UK and look at how we trade in goods, we are particularly reliant on the Dover-Calais crossing"*.

It is simply not possible to successfully negotiate something that you do not understand, as the risk of signing up to something with unanticipated negative outcomes is far too great.

Again, for pharma negotiations, our jobs depend on us performing well in our role, and the team can be constructed to include the right knowledge base and skill set with specific advisors such as patent agents, marketing directors attending negotiations on an as needs basis.

Interpersonal skills

The majority of BD personnel have the inherent interpersonal skills needed for BD, an ability to connect with people, communicate, who enjoy creating and delivering on business opportunities. The ability to interface effectively has to apply both in house as well as with the counter party; indeed, the in-house internal lobbying is often cited as being the more difficult task. This is certainly the case in the Brexit negotiations!

As noted above, early involvement with key stakeholders so that there is buy-in into the negotiation plan works well. In the case of Brexit, a cross party committee to build the negotiating platform at an early point in the preparations might have yielded a different result. However, the tribal nature of UK politics had prevented this tactic being deployed until just recently.

In addition, with the stakeholders being beholden to the electorate, the negotiating platform is constantly changing depending on the latest polls so even key representatives do not hold clear positions. An example of this is the Labour Party policy of trying to represent the diametrically opposed positions of both Leave and Remain.

As a general rule, bringing in creative new ideas to try to break an impasse is a positive force in a negotiation but in the case of Brexit it has not proved possible to gain broad support for other options i.e. when indicative votes have been introduced for different approaches or proposals. Time pressure also can work in a positive sense,



encouraging negotiators to take timely decisions but the deadlines have not been productive for Brexit. With the next deadline set for 31 October, it is hard to see that a further extension may be viable particularly as the leading contenders for Prime Minister are currently all campaigning on a platform of leaving on 31 October even if a Withdrawal deal is not agreed.

The role of the CEO in the team

The role of the CEO in pharma negotiations is always a moot point. For major companies, the lead role would rest with transactions personnel but in biotech's the CEO might seek to be involved. This certainly adds authority but it does remove the ability of the negotiating team to refer back to a higher authority, always a useful option to give more time to think through an issue before formally agreeing the point.

With Theresa May now stepping down as PM, the EU as counter party, might prefer to wait to deal with the new CEO because the outgoing person would lack authority at the negotiating table. Haste to get a deal across the line, and not necessarily the best deal, is also dangerous, especially with the noted time pressures. Politicians are driven by polls - they may not be around next year, unlike in a company where you hope to keep your job and/or build a successful career!

Communications

Another must have in good negotiations is effective communication skills. Transparency, truthful and open language is the key currency to effective deal making. Unlike pharma BD



executives, the language used by politicians is frequently quite obscure, so proposals are difficult to interpret, a practice often referred to as the use "weasel" words (something that someone says to avoid answering a question clearly or to hide behind the fact that they may not have a clue about the issue).

An example would be the recent proposal made by Theresa May in the latest bid to gain support for the passing of the Withdrawal Bill in Parliament. The offer read, "a legally binding offer to seek solutions to a change to the Northern Ireland border". So, what exactly does that mean? An undertaking to seek but not to resolve or deliver anything solid and tangible?

In line with having a consistent negotiating position and consistent negotiating team, the ability to adhere to a position once stated or agreed is certainly good negotiating practice. Ignoring data because they do not suit your argument is not helpful.

The ability of politicians to perform a volte face is no longer surprising as regretfully it happens with increasing frequency. As well as the direct F2F discussions, negotiations do continue outside the meeting room. Fortunately, pharma deals are not subject to the intense scrutiny of the media in the way that Brexit has, with the press eager for any sound bite to add to the news flow. In such situations, feelings do flow over and disparaging comments are let loose which can negatively impact the relationship. Comments such as "*I have been wondering what a special place in hell looks like for those who promoted Brexit without even a sketch of plan how to carry it out*" for example may be very satisfying at the time (as well as making a good headline) but does not make for a positive contribution.

We do however, need to recognise the role of emotions; negotiation is rarely not under intense pressure; it is a high profile and demanding activity so tempers become frayed and people can act out of character. Taking time out to cool down, refresh and review the proposals under consideration works well to lower the atmosphere of any discussions. Trading insults is a very negative behaviour which rarely works well, respecting the counter party is a far better course of action.

Not telling the truth is simply not acceptable as good practice in negotiation.

Leaks to press, trying to negotiate "in public" makes for a particularly difficult backdrop to the negotiations. For example you would not show your hand nor publicise your tactics before you entered the negotiation. Everyone has an opinion on what concessions should be made and the press only bring further pressure. It is further confusing when strong off plan messages come from other warring factions; from within the negotiating team and within the political party.

People carping from the sidelines in the belief that they could achieve a better deal without knowing the full facts and what is actually going on in the negotiating room is very unhelpful whether in BD negotiations or for Brexit.

Deal structure

Designing the deal structure in terms of what rights and obligations are being included so this fits the business opportunity is important in the BD person's skill set. Having clarity on what is and what is not agreed has to be clearly stated so all parties understand what is being finalised. Certainly, our legal advisors would turn us away from any uncertain aspects such as an agreement to agree. For example, in a pharma licensing deal there may be a number of linked agreements such as a licence, a supply agreement, a quality agreement, etc. Where the parties cannot finalise the terms of a particular agreement other than the main agreement e.g. supply, then it is usual to define the key terms of the unfinished agreement so that the detailed document can be finalised at a later date. Often these key terms are binding e.g. the supply price. In the case of Brexit, the UK Government acceded to the EU request to have two documents, a legally binding withdrawal agreement and a non-binding political document. From what we can understand, the political document set out some general objectives with no clear definition of key terms and none were binding i.e. an agreement to agree.

In what circumstances would a pharmaceutical licensee agree to pay £40bn to the licensor without having a binding set of terms covering the other key economic terms e.g. the supply price? It is incredible that a party would agree to pay so much money without knowing what it will get back in terms of trade, etc.

Approval and post signature

Not telling the truth is simply not acceptable as good practice in negotiation. It has regrettably become a feature of public life that certain politicians have appeared to be untruthful in the statements they have made, misleading the public with claims that have not been substantiated. This has certainly been the case in the campaigning ahead of the referendum and is the subject of a court case here in the UK with an action being sought against Boris Johnson (just recently been dismissed).

Trust is an essential ingredient, it does not arrive in a package on day one of a negotiation; it is a precious commodity, hard earned and easily lost. Patience and goodwill on both sides is a critical requirement, which not surprisingly after some 3 years is really beginning to wear a bit thin.

So, in summary, a few thoughts from a small island for successful negotiations:

- Know what you want, have a plan B
 - at all costs avoid an omnishambles*
- Think about the process of gaining signature and implementation
- Get full stakeholder buy in
- Have an effective negotiating team with good interpersonal skills and expertise
- Negotiate a deal structure that binds the parties to key terms
- Negotiate in good faith for a balanced win-win deal

Implementation is usually the hardest part and the challenge is that this is only the "divorce" and we have still yet to negotiate the trade deals with the EU!

** a situation, especially in politics, in which poor judgment results in disorder or chaos with potentially disastrous consequences.*

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