
DISCUSSION PAPER

Brexit: how to manage the talks and the transition

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"Not partial membership of the EU, associate membership of the EU, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave. ... No deal for Britain is better than a bad deal for Britain."

Theresa May, 17 January 2017

"We will not be intimidated by threats that no #Brexit deal is good for the UK and bad for the EU. No deal bad for everyone, above all for the UK."

Donald Tusk, 15 March 2017

So, we're off. On 29 March Theresa May will at last notify President Tusk of her country's intention to withdraw from the European Union. The Brexit camel has come to the eye of the needle.

However forewarned, the triggering of Article 50 is likely to induce a fair panic both in London and Brussels. Here, then, are some tips for the Brexit negotiators.

Drop the clichés

The British side should stop pretending that 'no deal is better than a bad deal'. It is not. In fact, there's really nothing worse than no deal. So it's not a clever tactic for the UK to start off negotiations by repeating a cliché that at best nobody believes and at worst sounds mildly threatening.

Nor will it be true that 'nothing is agreed until everything is agreed'. The Brexit process is complex and large-scale, squeezed within a two-year timetable. Some things will be agreed quicker and easier than others. The terms of partial agreement should be released as soon as possible so that citizens and business get a sense of where they stand. In the end there will be some leftovers: there always are.

Get on with it

The Commission should avoid legalistic posturing about not talking trade deals until after the UK has formally left the EU. It is perfectly possible to negotiate two things at once, and we need not make a fetish out of sequencing. Article 50 says that the Brexit treaty will take into account the framework of Britain's future relationship with the EU. The guidelines that will be issued by the European Council on 29 April must treat leaving the EU and finding a new basis for the relationship as a twin exercise. Everyone knows that the one cannot succeed without the other.

Certainly, the parallel sets of negotiations will take place at a different pace (the 'comprehensive free trade agreement' will take much longer than two years) and will be conducted according to different decision-making procedures. The Article 50 secession treaty will be enacted in 2019 as a Council decision (voting by super QMV with the consent of the European Parliament, without national ratification). The legal base of any 'new partnership' treaty will be Article 217 TFEU, negotiated under the procedures of Article 218 (requiring the consent of the European Parliament, unanimity among all 27 states, plus national ratification).

Striking a dissociation agreement

While nobody has any experience of using Article 50, the EU has concluded numerous treaties on the basis of Articles 217 and 218. An obvious, but over-looked precedent is the EU's recent association agreement with Ukraine, which offers a neat template for the British. If Mrs May finds the concept of association unpalatable, let's call it dissociation.

Whereas the secession treaty will be negotiated mainly by the Commission, the political agreement on the future partnership will be achieved mainly by the European Council. The words defining the 'framework for the future relationship' should not be put directly into the Article 50 treaty but should appear only in the conclusions of a meeting of the European Council (to which the secession treaty can then refer). This manoeuvre should prevent the Article 50 treaty from being treated as a 'mixed agreement' that would then require national ratification by all 27 states.

The definition of the future relationship must be agreed by the European Council as soon possible – even in December 2017 after the German elections – so that transitional arrangements can be discussed as part of the Article 50 process: it will be impossible to make a transition if Britain's final destination is unclear.

Be polite

The UK is transforming itself from a member state into a third country. Its participation in ongoing EU legislative and judicial matters during the two-year period is therefore highly sensitive. Doubtless well-schooled British ministers, judges, MEPs and officials will handle themselves with self-restraint in such sensitive circumstances. One hopes they will be polite.

Above all, London should resist the temptation to try to divide and rule its soon to be ex-partners. As the European Council guidelines on 29 April will undoubtedly testify, maintaining solidarity among the 27 is the EU's paramount objective. Rightly so.

The UK should take care not to overplay its hand in the matter of security intelligence, foreign affairs and defence. Unfairly or not, in recent years the British have not had a good reputation for being team players in Europe: and they will not be able to recover it in a hurry now.

To return the British compliment of good behaviour, the EU 27 should be moved to respect in full the spirit of Article 8 TEU which enjoins them to 'develop a special relationship' with post-Brexit Britain 'aiming to establish an area of prosperity and good neighbourliness'. The European Council guidelines should promise this.

A Joint Transition Authority

The transition will be complicated, and needs careful oversight. At the moment, only a short transition (say, two or three years) is being envisaged. That timetable may prove to be over-optimistic.

Deserving serious consideration is the option to set up a special body, answerable to both parties, to oversee over a longer period the full completion of the Brexit process. A Joint Transition Authority (JTA) would be charged with the job of managing the phasing-out of the UK's rights and obligations to the EU, and vice versa. The JTA

would aim to settle the disputes that will inevitably arise during the period in which the Brexit deal is being implemented. Acting pragmatically, it could deal with unexpected difficulties and avoid a rush to costly and lengthy litigation in both the British and European courts. With a joint governing board and a light secretariat, the Authority would also advise, warn and report. The existence of the JTA would ensure that relations with Britain will not fall off the agenda of the EU 27 once the UK has left – a very real likelihood otherwise.

The British government is to introduce a Great Repeal Bill to annul the European Communities Act 1972, as well as a number of other primary and secondary laws intended to keep, change or scrap the *acquis communautaire*. In order to avoid a dangerous legal vacuum, the Joint Transition Authority should aim to coordinate the phasing out of EU law applicable to the UK with its gradual replacement by home-grown British law and the rebuilding of the executive apparatus of the British state and its devolved administrations.

As and when a future EU-UK treaty takes shape based on a free trade agreement, the Joint Transition Authority could be tasked with preparing its operation, including the phasing-in of the necessary institutional and regulatory features. In other words, the JTA could become the embryonic secretariat of a new EU-UK joint council, minimising regulatory divergence and unblocking obstacles to trade, as well as servicing political cooperation in the fields of internal and external security policy.

Legacy citizenship

Both sides put proper emphasis on the treatment of their citizens left somewhat adrift by Brexit. EU citizenship consists of a number of rights and the principles of reciprocity and non-discrimination which, after Brexit, will not miraculously become 'acquired' by those brave souls who stay on.

Instead, in order to ensure at least some measure of continuity, a bundle of measures should be designed around the concept of legacy citizenship. The former *rights* of British nationals resident in the EU deprived of their EU citizenship could and should be turned into *privileges* consistent with those EU principles. Chief among such privileges must be the ability to vote in municipal and European Parliament elections: the EU 27 would do well to continue to extend the franchise to its British residents.

And the UK, of course, must reciprocate the gesture for EU citizens resident in Britain, at least in so far as local elections were concerned. These privileges should also be extended to keeping the European Health Insurance Card and to sharing consular protection in third countries.

Follow the money

The media will concentrate on the budgetary settlement. Money is also a priority for the EU 27, Commission and European Parliament – not least because the UK contributes some 15% of the EU's annual budget revenue. Speculation about numbers from zero to 60bn EUR are meaningless until it is decided whether or not the UK should remain within the terms of the current multi-annual financial framework until the end of 2020. To minimise disruption and cost, it would be sensible to do so. A specific transitional arrangement for the financial regulation would be needed to accomplish this.

There will be other costs the UK will be ready to absorb in order to smooth its transition out of the EU, as well as new costs it should be willing to pay by way of a deposit on the new partnership. Who ever said Brexit would be cheap? The EU wants Britain to pay what it owes and not a penny more. How much extra Britain agrees to contribute will depend on the quality and closeness of the future special relationship it seeks.

In the end there will be an agreement on a global figure to be settled over a period of several years. Ample justification exists for almost any sum, but the justification must be tailored to satisfy the national parliaments of the 27 states that they are not being fleeced by the departing Brits. (What Westminster will say on the matter is up to Mrs May.)

No extension, revocation or differentiation

There will be no extension of the two years – a decision that needs unanimity – unless it is to allow for current litigation in the European Court of Justice to play out, or for other technical or legal reasons.

Litigation in the European courts against both the process and substance of the Brexit agreement, or aspects of it, is probable: there are several Treaty-based routes to Luxembourg and a legion of lawyers. The European Parliament, for example, has the right (under Article 218(11)) to send the draft withdrawal agreement to the judges in Luxembourg in order to verify its compatibility with the EU Treaties – and there is precedent for this type of reference.

As things stand, however, MEPs are not looking to block Brexit: indeed, rather the contrary. The European Parliament will vote its first resolution on Brexit in Strasbourg on 5/6 April.

Nobody in Brussels is contemplating a change of mind by the British that would justify a sudden unilateral revocation of Article 50 some way through the two-year process. Although a reversal of Britain's policy to leave the Union is possible as long as it remains a member state, such a volte-face would be hugely problematic for the rest of the EU.

British 'Remainers' should know that there are many in the EU who believe that concessions were too easily made in the past to the UK (and to Denmark) in the way of opt-outs and cop-outs. The British budget rebate is universally resented. A demand by prodigal British for yet another renegotiation of the UK's terms of EU membership would not be met well. There would undoubtedly be costs falling to the UK associated with a unilateral revocation, followed by another painful round of institutional and budgetary adjustment.

Likewise, a move late in the day by the UK to seek a somehow 'better' version of the Article 50 treaty than the one on offer to Mrs May is not considered to be a realistic hypothesis. No contingency is being made for a second Brexit negotiation.

The plight of Northern Ireland and Scotland, who voted to remain in the EU, is understood with sympathy. But there is no scope for any experiment with differentiated disintegration: Brexit applies to the whole of the United Kingdom; the EU deals with integrated markets and whole member states. A 'Europe of the regions' has yet to come even for federal states – and the UK is not a federal state.

Article 50 is meant to expedite the secession of a member state from the European Union in a legal, orderly and democratic way. It presents a narrow portal through which, for reasons of its own, the UK is now choosing to take the Brexit caravan.

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The views expressed in this Discussion Paper are the sole responsibility of the author.

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