
DISCUSSION PAPER

Brexit: No ordinary third country

Andrew Duff

The European Union (EU) continues to make fairly good progress with its preparations to withdraw from Britain on 29 March 2019. The EU machinery, I am told, has reached cruising speed.

Citizens

The first substantive question to be addressed in the Article 50 talks with the United Kingdom (UK) – that of citizens' rights – is now in the hands of the lawyers. There is less difference between the two sides than the media allows: the EU knows it has over-played its hand in demanding effectively no change to the privileged status of EU citizens resident in the UK after Brexit. It is aware of the apparent contradiction between, on the one hand, wanting to treat the UK like a third country and, on the other, insisting on permanent, continued direct jurisdiction of the European Court of Justice (ECJ). The extra-territorial jurisdiction of the ECJ cannot simply be presumed. The British Home Office, for its part, knows that if its acclaimed goal of reciprocity of treatment is to be achieved, British citizens resident in the EU cannot lay claim to more rights under EU law than EU citizens who stay on in Britain enjoy under British law. Accommodation between the two sides will be possible, however, once the outstanding questions over the interpretation and applicability of EU law in the UK are settled.

Ireland

The third question arising in Phase I of the sequence of the Article 50 negotiations concerns the EU's new frontier with Northern Ireland. Because the whole Irish question has been almost intractable for centuries, the solution here will be a political one, at a very high level, that will result in the turning of a blind eye to an EU porous border in Ulster. The situation on the ground will be much eased if the UK chooses to stay in the EU customs union, which the Article 50 treaty could enable at least provisionally.

Finance

It's the second question – money – where trouble lurks. On 24 May the Commission published its proposals for the criteria to determine what it calls a 'single financial settlement'.¹ As yet, however, there has been no official response from London. Without a bankable promise from the UK on the budget, the European Council will never judge that "sufficient progress" has been made on Phase I to allow it to trigger Phase II.² Unless and until Phase II starts there will be no political discussions on defining the framework for the future relationship between the UK and the EU. Without agreement on Britain's final landing zone, clearly defined and mapped out, it will be impossible to proceed towards a negotiation of the transitional arrangements. Here lies the rub.

The transition period can only be designed once it has been decided how long the UK will continue to honour its current budgetary obligations under the EU's multi-annual financial framework. The UK will also have to choose in which EU agencies and spending programmes it wants to have continued participation. Full agreement on the matter of money, therefore, is not achievable in Phase I. Good progress can only be made in Phase I if the UK has made up its own mind about its long-term financial engagement with the EU. For the moment, divisions in the Tory cabinet over the longer term relationship seem to be crippling the Treasury's efforts to respond substantively to the Commission's negotiating position.

So we are left with a conundrum. Irresolution on the British side makes it an unreliable negotiating partner who may not be able to deliver a final deal. Without the necessary confidence on the EU side, the European Council cannot take the decision at its October meeting to move to the second, less technical and more political phase of the Article 50 exercise. The heads of government are not, frankly, enormously interested or engaged in the intricacies of Phase I – except when it comes to the money. Brexit will blow a EUR 10bn hole in the EU's annual revenue. So the paralysis of the British government on the budgetary question is doubly a pity because it is precisely there that it has its greatest potential leverage on the 27 other members of the EU.

Transition

The lack of a decision on the transition arrangements is fatal for business in Britain, whose opportunities for investment are already declining. In any case, the longer it takes to put the transitional apparatus in place the less valuable the transition period becomes. Investors will not hang around the City of London waiting for clarity and purpose to emerge from Whitehall. Manufacturing industry badly needs to secure its supply chains over the medium term by retaining membership of the customs union on a provisional basis, at least until a new free trade agreement is ready to enter into force. Unless these matters of the budget and the transition period are quickly resolved, the Brexit escapade will likely inflict vast damage to the British economy.

A British response is also required to the imaginative proposal of the Commission (28 June) that a Joint Committee be set up to manage the actual Brexit process.³ This envisaged joint transition authority would:

- ensure the good execution of the Article 50 secession treaty;
- deal with things unforeseen in the secession treaty;
- adjust the secession treaty to reflect the evolution of EU law;
- seek to settle political and technical disputes before they get to litigation;
- "perform any other task conferred on it by the Withdrawal Agreement".

Among those other tasks is the need to synchronise the withdrawal of the EU regime from the UK with the passage of the UK's own Repeal Bill, which will transpose the European *acquis* into domestic law and put in place a home-grown British regulatory regime with new enforcement powers. Only close coordination between London and Brussels will avoid a legal vacuum.

The Court

Prime Minister Theresa May needs to prepare herself and her party to make a major concession on the future role of the ECJ. For as long as any transitional period lasts, the ECJ will retain its current powers to ensure that relevant EU law is applied appropriately in the UK. In so far as the UK on its way out of the Union seeks to maintain some of its rights of membership, it will also have to accept the legal obligations that flow from those rights. As British courts have been for over forty years faithful adherents to the EU legal order, this temporary extension should not be so difficult. And as the Commission has already confirmed, throughout the transition the UK will also retain its rights of access to the Court in Luxembourg to seek redress.

In the longer term there is bound to be a new Accord between the UK and the EU 27 based around the concept of an association agreement. This should comprise a deep and comprehensive free trade area plus political

collaboration in internal and external security matters and cultural ties for science and education. A new type of joint UK-EU juridical tribunal could then be envisaged which would replace the direct jurisdiction of the ECJ but would maintain links with and respect for the jurisprudence of that Court.

An accord on the future of Europe

As things stand, the British government and parliament seem concussed by the double whammy of the 2016 referendum and the 2017 general election. In such a political state, strategic thinking about the future of the country seems well-nigh impossible.

The EU 27 can and should help out by making the UK an offer of a future Accord that cannot reasonably be refused.⁴ The EU has been helpful in proposing the creation of the Joint Brexit Committee. It should now go one step further by launching a deep reflection on the future not just of the smaller European Union but of the wider Europe.

Once the German elections are out of the way in September, the European Union should debate how its own prosperity and security can be reconciled with good neighbourliness. It will become clear at that stage that the UK is no normal third country. Such a reflection exercise, even with some British participation, would change the context of Brexit and raise the chances of there being a successful Article 50 agreement in time for the EU's withdrawal from the UK on 29 March 2019.

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

Endnotes

- ¹ Updated on 12 June. https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-financial_settlement_en_0.pdf
- ² As the European Council guidelines of 29 April prescribe. <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexite-guidelines/>
- ³ https://ec.europa.eu/commission/publications/position-paper-transmitted-eu27-governance_en
- ⁴ I have elaborated this concept in a previous EPC discussion paper, What now? Options for Brexit – And a cry for help (15 June). http://www.epc.eu/pub_details.php?cat_id=17&pub_id=7788

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