
DISCUSSION PAPER

Brexit: time for Plan B

Andrew Duff

Given recent developments at home and abroad, it is not too early to be drafting a Plan B for Brexit. The British government and the EU institutions are in danger of putting themselves in diametrically opposed positions, with little room for manoeuvre when the real negotiations start in a couple of weeks' time. If we go on like this, the probability is that the Article 50 talks will fail.

What do the British want?

One must assume, for the sake of parliamentary democracy, that when Tory ministers speak out on Brexit they mean what they say. The nationalistic rhetoric that they have unwisely stoked in the course of the general election campaign will not be forgotten after the election on 8 June. Prime Minister Theresa May continues to repeat her ill-judged line that 'no deal is better than a bad deal'. And neither she nor, disappointingly, the opposition party leaders have put forward viable, coherent plans for British European relations after Brexit.

In the unlikely event that Jeremy Corbyn becomes prime minister, nobody would know what to do, in London or Brussels. We must presume a return of a Conservative government with a workable majority of loyalist Tory MPs who will ensure the passage of an Article 50 secession treaty.

That being the case, Brexit minister David Davis (or his successor) will soon square up to the EU's chief negotiator Michel Barnier at their first negotiating session in Brussels. At this meeting, possibly on 19 June, the British will be presented with a package of demands from the EU side that has been set out in guidelines laid down by the European Council on 29 April and in the detailed negotiating mandate of the European Commission, which were finalised on 22 May.¹

As far as the EU is concerned, the first phase of the negotiations will comprise three big problematic items: citizens' rights, money and the Irish question. The second and more useful phase of Brexit will begin only after the European Council (of 27) has judged that "sufficient progress" has been made on the first phase.

If we take him at his word, Mr Davis will have no choice but to reject the Commission's opening sally. He has already said he does not accept the EU's published criteria for the budgetary settlement. He also opposes the sequencing of the negotiations that the EU 27 seeks unilaterally to impose, preferring not to agree the money until there's a trade deal in sight.

What the EU wants

The methodology proposed by the EU for the single financial settlement says that the UK shall be responsible for meeting all its existing and contingent liabilities for the financing of the Union, including those outside the annual EU budget (such as the European Development Fund).² The British are expected to pay for the costs of their withdrawal, including those falling to the relocation of the European Banking Authority and European Medicines Agency out of the UK.

Other than the return to the Bank of England of the UK's paid-in capital to the European Central Bank, no provision is foreseen for giving the UK a share of EU assets: as far as the EU is concerned, it is an autonomous legal entity and not a partnership with shares to be doled out. The UK's financial commitments to the EU will be controlled by the appropriate EU institutions for as long as it takes to close the accounts. Figures of between EUR 50bn and EUR 100bn have appeared in the press (about EUR 20bn of which would relate to meeting Britain's obligations under the current multi-annual financial framework which runs until the end of 2020).

The EU is demanding that there should be no material change to the position of EU citizens living in the UK.³ They (and those who move to the UK before 30 March 2019) are to retain the right of free movement, and the right to work and of establishment that they would enjoy had the UK stayed a member of the EU, including the right to permanent residency after five years, with all attendant social security benefits and employment opportunities. Those rights stemming from EU citizenship shall be turned under British law into "directly enforceable vested rights for the life time of those concerned". No discrimination will be permitted against EU citizens by the British authorities on the grounds of their nationality. The UK will have to reflect in its law any future changes to the relevant EU legislation.

The EU is offering to be flexible with regard to Northern Ireland in that it will try to reconcile the common travel area agreement between the UK and Ireland with EU law on free movement of people, including workers, across the new external border of the Union. But as the EU is to treat the post-Brexit UK as a third country, the retention of a soft border in Ulster for the passage of goods and services would mean the imposition of a hard border between Ulster and Britain. It is not obvious that the EU side has realised the practical, political or constitutional consequences of such a proposal for the United Kingdom or for the Irish Republic or for Anglo-Irish relations.

The Commission is also mandated to insist on the retention of the judicial authority of the European Court of Justice (ECJ) over the process of disentanglement. Arrangements will be sought for continued judicial cooperation in terms of public administration and law enforcement, notably for data protection, including security data. The EU wants British courts to be able to continue to address the ECJ after Brexit on cases relevant to the time of British membership of the Union, and for the UK to remain liable for penalties laid down by the Commission or Court as a result of prior or on-going cases at the time of withdrawal.

According to the EU, the UK shall take over and become responsible for all the assets (enriched uranium and nuclear waste) belonging to Euratom on British territory.

The EU is to propose a new governance structure to ensure the enforcement of the withdrawal agreement. No precedent exists for this. A novel institution will have to be created to protect the autonomy of the Union's legal order, to monitor the phasing out of the UK's rights and obligations, to oversee the continued rights of EU citizens resident in the UK, to ensure control of the UK's legacy obligations to EU finances, to cater for the future amendment of EU law in the UK context and, lastly, to manage any events unforeseen in the secession treaty.

Where EU law is directly involved the supervisory powers of the Commission and the juridical authority of the Court of Justice shall be maintained. Where matters of mixed UK and EU competence give rise to legal disputes, any joint dispute resolution procedure must meet the standards of the ECJ: in so far as the UK escapes the direct jurisdiction of the ECJ, the UK must nevertheless continue to respect the jurisprudence of the ECJ.

Finally, the EU has published its own rules on how it intends to treat the Article 50 process in terms of transparency.⁴ For very good democratic reasons, the negotiations will be transparent – and much more open than is customary in Whitehall.

How will Britain react?

To the EU 27 and to the EU institutions, the stance they have adopted seems eminently fair and rational, designed only to achieve the orderly withdrawal of the UK from membership without doing too much collateral damage to those it leaves behind. The self-confidence of the EU side with its well-marshalled troops contrasts sharply with the appearance of demoralised shambles on the side of the British.

The full revelation of the EU's negotiating stance will be portrayed by ardent Brexiteers and Britain's nationalist press as forcing Britain into a post-colonial relationship. If the EU treats post-Brexit Britain as an inimical third country, there will be demands at Westminster to return the favour. The EU 27 should accept that as the UK will not be in the European Economic Area it cannot be expected to accept terms and conditions similar to those imposed on Norway and Iceland as the price for their membership of the single market. Nor will the UK agree to be put in the same clientele position as Switzerland.

We know that Theresa May, in particular, has a strong antipathy against the European Court of Justice. HM Treasury, under all governments, loathes the payment of dues to Brussels. As to citizens' rights, being seen to curb EU migration into the UK is a top political priority for the Conservative government. We suspect that the prime minister has not yet told her party about the need to install a new formal governance structure under EU auspices to supervise the withdrawal agreement. Taken together, the area of disagreement is vast.

So it is difficult to see how the UK can accept at face value what the EU is now demanding. Objectively speaking, moreover, it is very much in the UK's national interest that the Article 50 process can move on to its crucial second phase as fast as possible. There the things that really matter to the British will be addressed: the arrangements for the financial services industry, the framework for the future relationship involving a comprehensive free trade agreement and security cooperation – as well as transitional arrangements which will build a bridge between membership, via Brexit, to a new form of association.

First skirmish

In order to avoid an early breakdown of the talks, therefore, and to aim to get as good a deal as possible out of Article 50, Theresa May must be at her most emollient when she attends the next meeting of the European Council on 22 June. She should be prepared at that early stage to spell out precisely what she means when she calls for "a deep and special partnership" with the EU after Brexit. She should ask that the European Council of 27 readies itself to take the decision to move to the second phase of the negotiations as early as its next scheduled meeting on 19-20 October.

She should gently remind the 27 leaders of their treaty commitment under Article 8 TEU to "develop a special relationship" with their new neighbour the UK, "aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation".

The prime minister should propose that a flexible transitional period, extended for as long as it takes, would be in the mutual interest of both parties, and that these transitional arrangements should involve Britain's continued, albeit temporary membership of the single market and customs union. She should welcome the concept of a specific governance structure to manage Brexit, but insist that it be jointly constituted between the UK and EU. She might even suggest that a report be commissioned to come up with options for the establishment of the joint transition authority, making recommendations as to its contours, functions and accountability.

At his own meeting with Mr Barnier, David Davis (or his successor) should accept the logic of the sequencing proposed by the EU. He should offer to reciprocate in terms of transparency. He must explain how the government intends to enact and implement the Great Repeal Bill, transposing the whole *acquis* into British law, which will be announced in the Queen's Speech on 19 June. The minister could suggest that the joint transition authority coordinates the phasing out of Britain's rights and obligations as an EU member state with the passage of the Bill.

If he can find good reason to do so, Mr Davis (or his successor) should query the EU's proposed criteria for the financial settlement. He should insist that any deal for EU citizens in the UK is made reciprocal on an EU deal for British citizens who choose, against the odds, to stay on in Europe. He should press for a detailed explanation of the concessions the EU is prepared to make on Ireland. Above all, Mr Davis (if it is still he) should drop the bluff and bluster that has characterised his performance so far.

What could possibly go wrong?

This is the counsel of pragmatism, if not of perfection. If the new UK government takes other advice (or none), the talks will collapse. If Mrs May cannot put country before party, she will be lost. The British have blundered into the diplomatic maze that is Article 50, and being now trapped in the EU's formal rigid process they are thereby barred from any joint reflection with the EU 27 on the future of the Union. Quite frankly, the British need help to find their way out of the labyrinth.

Meanwhile, Michel Barnier and his team, for their part, are also boxed in by the rigour of the European Council's guidelines and the tightness of the negotiating directives issued by the General Affairs Council. Mr Barnier does not have room for manoeuvre if the new UK government bluntly rejects his proposals. In that event, he would have to return to the European Council for further guidance, and new guidelines would not be a pretty sight for British eyes.

President Emmanuel Macron and Chancellor Angela Merkel, not the least of European leaders, have made it plain that their imperative is the unity, solidarity and reform of the European Union – and that's a European Union without the British. So if the UK walks away from the Article 50 talks, the EU's clock keeps on ticking. The EU will complete its preparations to pull out of the UK on schedule at midnight on 29 March 2019. Yet although a disorderly Brexit would hit the UK much harder than the EU, the Union could not avoid becoming weaker and poorer as a result. In the short term, at least, there would be recrimination, litigation, political instability and currency volatility.

A rupture over Article 50 would not, of course, expunge the UK from the geography of Europe. A new cross-Channel relationship would in the end have to be found. The EU has every political capacity and legal base it needs in order to negotiate any kind of commercial and political agreement with the UK as a third country. The Commission is already scoping such a Plan B exercise. The options range from a mere commercial pact under Article 207 TFEU to a full-blown association agreement under Article 217 TFEU, including intensive intergovernmental cooperation on matters of security and defence. And once the dust has settled, the door will always remain open for the UK to launch a fresh application to re-join the EU under Article 49 TEU.

Such a Plan B would be much more costly than a secession treaty hammered out under the terms of Article 50 within the context of an agreed future framework of "deep and special partnership". And a completely new start for Britain in Europe would be longer in the making over a period stretching way beyond Mrs May's next tryst with the voters in 2022. But the time to start thinking about Plan B is now.

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

Endnotes

- ¹ The guidelines of 29 April are here: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexite-guidelines/>. The directives of 22 May are here: [http://www.consilium.europa.eu/en/meetings/gac/2017/05/22/?utm_source=dsms-auto&utm_medium=email&utm_campaign=General+Affairs+Council+\(Art.+50\)%2c+22%2f05%2f2017](http://www.consilium.europa.eu/en/meetings/gac/2017/05/22/?utm_source=dsms-auto&utm_medium=email&utm_campaign=General+Affairs+Council+(Art.+50)%2c+22%2f05%2f2017)
- ² The Commission's working paper *Essential Principles on Financial Settlement* (24 May) is found here: https://ec.europa.eu/commission/sites/beta-political/files/financial-settlement-essential-principles-draft-position-paper_en.pdf. A useful annex lists the 65 EU spending programmes from which the UK will have to be extricated.
- ³ The Commission's working paper *Essential Principles on Citizens' Rights* (24 May) is found here: https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf
- ⁴ <http://data.consilium.europa.eu/doc/document/XT-21023-2017-INIT/en/pdf>

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