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# DISCUSSION PAPER

## Brexit: après May, le déluge

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After the kerfuffle in the courts over who should have the final say on invoking Article 50, the British parliament has done its stuff. Having supported Mr Cameron's Brexit referendum without demur, both the Lords and the Commons had to accept the negative result of the referendum. Then, having already backed Theresa May's timetable for starting Brexit negotiations, both Houses passed the legislation empowering the prime minister to send the famous letter to the president of the European Council, via Eurostar, on 29 March.<sup>1</sup> So she did. And parliament at Westminster is now entirely complicit in the decision to abandon the United Kingdom's membership of the European Union.

In her letter to Donald Tusk, Mrs May asked for "a deep and special partnership" between Britain and Europe, and promised to come forward in due course with "detailed proposals for deep, broad and dynamic cooperation". The only concession she made to secure parliamentary backing was the promise that both MPs and peers will have an indicative vote on the draft secession treaty before the European Parliament decides whether or not to give its own consent to the package. This preliminary vote at Westminster supplements the constitutional right that the Commons already enjoys to veto any international treaty. So we have the intriguing prospect of there being two moments in late 2018 or early 2019 when the British parliament could halt Brexit.

### 'Look before you leap'

Speculation around the possibility of rescinding Article 50 is therefore bound to continue. The problem for ardent Remainers, however, is that there is no consensus among them about what should happen next in the event of no Brexit. The opposition parties in Britain offer no coherent alternative prospectus for Britain's future in Europe. Some believe that if the UK were to change its mind about leaving, things would simply go back to the *status quo ante* and British membership would continue (after a suitable apology) as if nothing very much had happened. Others, however, of whom I am one, believe that a unilateral decision by the UK to rescind its notification to withdraw from the Union would give rise to serious complications. *Rebus non sic stantibus*.

The sad fact is that the rest of the EU has already reconciled itself to losing the British and is anxious to move on to other matters as soon as possible – notably, the reform of eurozone governance. Initial disbelief at David Cameron's referendum escapade has long since given way to resignation and a fresh determination to expedite Brexit in as quick and orderly fashion as possible.

A Brexit 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 in the

way of formal opt-outs from the euro, Schengen and justice and home affairs. Held in equal suspicion have been Britain's cop-outs from the efforts to uphold common norms such as the Charter of Fundamental Rights and the banking union. Its failure to help out its EU partners, notably in the refugee crisis, is held in contempt. The other members of the EU have seen all too often how British ministers in the Council have sought to dilute the content of common policy and to weaken the force of EU law – including legislation that will not apply to Britain. On foreign and security policy, where the UK could have made such a contribution to Europe, London has insisted on form over substance. The British budget rebate is universally resented, and with the UK as a continuing member state the reform of the EU's financial system is out of the question.

Traditional British support for enlargement of the Union was clearly based on a presumption that more new members would lead to a weakening of the dynamic of integration and to an eventually looser Union. More Gaullist than the French, British governments of both left and right have always dragged their feet about the constitutional development of the Union – most recently in 2011 in the dispute over the fiscal compact. Mr Cameron's laborious 'new settlement' for the UK of 2016, which would have badly damaged the European project, was really the last straw: his sabotage of the historic mission of "ever closer union" would never have been forgiven or forgotten. In short, toleration for British troublemaking has reached its limit.

A sudden demand in 2019 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 of Article 50, to be followed by another painful round of institutional and budgetary readjustment. Any move late in the day by a new, presumably post-May government to seek a somehow 'better' version of the Article 50 treaty than the one on offer is not considered in Brussels to be a realistic hypothesis. Article 50 provides for only one shot at reaching a withdrawal agreement. Although the EU 27 is making contingency plans for a failure of the Article 50 talks, nobody contemplates a second Brexit negotiation. That much is made clear in the draft guidelines of the European Council which Mr Tusk shared with the press on 31 March.<sup>2</sup> Those in Britain still tempted to try to revoke Article 50 would do well to consider carefully the advice of a former Conservative prime minister, Lord Melbourne. "Look before you leap", he said. "Then don't leap."

## **The guidelines**

The European Council will finalise its guidelines at a special meeting on 29 April. The formal mandate for the Commission to start the negotiations will be delivered thereafter as soon as there is a new French government in place. Even in their draft form, however, the guidelines are useful and their clarity provides a blessed relief from the ambiguities and platitudes that pepper most of the UK government's own Brexit pronouncements. British Remainers can find in the guidelines a roadmap to a soft Brexit. Brexiteers, on the contrary, should take note of the guidelines' warning that no deal with the EU 27 will be much worse for the UK than what is on offer from the EU 27.

The guidelines state that the unity of the EU is paramount, that the EU will negotiate in its own interests, and that the UK must accept obligations if it wishes to have a privileged special relationship with the EU. The four 'free movement' principles of the single market are indivisible, and Britain cannot expect to have a partial sectorial membership of the market. The EU 27 will negotiate the secession treaty as a bloc. There will be three phases to the overall negotiation: first, to "settle the disentanglement" of the UK from its rights and obligations to the EU; second, to identify an "overall understanding on the framework for the future relationship"; third, to "determine transitional arrangements which are in the interests of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship". The European Council will decide if and when to move to the second phase "as soon as sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal".

## Enter the European Parliament

Whereas the British parliament has attached no conditions to Brexit, the European Parliament voted on 5 April its first substantive resolution on Brexit by 516 votes to 133 with 50 abstentions.<sup>3</sup> Majority votes of over 500 are relatively rare in the House, and reserved only for either the most or the least important of matters. This vote was not trivial because it shapes how Parliament's representatives at the sherpa-level meetings will comport themselves and it sets the context for Parliament's final decision on the Article 50 secession treaty. Drawn up under the auspices of the Liberal leader Guy Verhofstadt, who is Parliament's Brexit coordinator, the resolution makes its points clearly and sometimes bluntly.

In most respects, MEPs adopted a similar line to that of the European Council and Commission. That in itself matters in that Parliament evinced no wish to obstruct the departure of the British from the Union or to make Britain's departure so easy as to encourage other states to follow. Parliament regrets that the UK will no longer participate in the single market, the EEA or the customs union. It "considers that a state withdrawing from the Union cannot enjoy similar benefits as an EU member state and announces therefore that it will not consent to any agreement that would contradict this". And it warns bluntly that there can be no trade-off in the negotiations between cooperation in security policy on the one hand, and the future economic relationship on the other.

Unlike Mrs May's letter and Mr Tusk's guidelines, Parliament did not shirk the highly controversial question of whether the UK can change its mind before the end of the two-year period allotted for the negotiations. A revocation of notification to withdraw from the Union, it says, "needs to be subject to conditions set by all EU 27 so it cannot be used as a procedural device or abused in an attempt to improve the current terms of the UK's membership". Parliament's assumption that Article 50 could be rescinded by the UK, but that it could be so rescinded only in accordance with terms and conditions set by EU 27 is important legally and politically. No other EU institution has opined on this matter – although it is likely that, one way or another, the European Court of Justice will be given the chance to do so.<sup>4</sup>

The European Parliament goes on to assert that the secession treaty "must be in conformity with the Treaties and the Charter of Fundamental Rights of the European Union, failing which it will not obtain the consent of the European Parliament". One recalls that Parliament has the power under Article 218(11) TFEU to make a reference to the Court of Justice in order to verify compatibility with the Treaties – and it may do this either as the outline of a withdrawal agreement emerges from the negotiations or when the final draft agreement is presented formally to it by the Council. It is odd that MEPs did not remind themselves of their right to have recourse to the Court in their resolution, but the existence of this right is very well understood, not least by Mr Verhofstadt. Indeed, Parliament is assuming that the procedures for the negotiation of international treaties as laid down in Article 218 will apply in full to the Brexit treaty, as well as the practice of parliamentary engagement with such negotiations, except in so far as Article 50 differs from those Article 218 procedures (which it does, but not to the detriment of the Parliament).

## The legacy of EU citizenship

Both Mrs May in her letter and Mr Tusk in his guidelines put proper emphasis on decent treatment for their citizens living across Europe and left adrift by Brexit. EU citizenship consists of a number of rights which, after Brexit, will not be automatically '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 people deprived of their EU citizenship can be turned into guaranteed *privileges*. The European Council is looking to agree citizenship guarantees that are reciprocal, enforceable and non-discriminatory.

The European Parliament, likewise, is demanding fair and reciprocal treatment of EU citizens and British nationals. The MEPs stress that any loss of rights with respect to the free movement of EU citizens that took place before the UK exits the Union would be contrary to EU law. The idea floated by the ALDE group to allow British nationals to pay a fee to continue to enjoy the privileged status of EU citizenship did not make

it into the resolution: it is merely proposed that the problems raised by the loss of citizenship rights should be further examined.

## **Settling the bill**

Money is a priority for the EU side – not least because the UK contributes some 15% of the EU's annual budget revenue. The European Council says that a single financial settlement should cover "all legal and budgetary commitments as well as liabilities, including contingent liabilities". One of the first things to be decided is whether or not the UK should remain within the terms of the current multi-annual financial framework (MFF) until the end of 2020: a decision to hang on in there would minimise disruption and cost to all concerned. There will be other costs the UK may 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. The EU wants Britain to pay what it owes and not a centime more. How much extra Britain agrees to contribute will depend on the quality and closeness of the future special relationship it seeks.

The European Parliament, which is the co-equal budgetary partner to the Council, stresses that the UK "must honour all its legal, financial and budgetary obligations, including commitments under the current MFF, falling due up to and after the date of its withdrawal". The basis for the financial calculation will be the EU's accounts as signed off by the Court of Auditors, including off-balance sheet items, contingent liabilities and "other financial costs that arise directly as a result" of Brexit.

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.

## **Other matters**

The Article 50 talks will address the problematic border of Northern Ireland. Here the guidelines envisage "flexible and imaginative solutions ... avoiding a hard border, while respecting the integrity of the Union legal order". There will be an adjustment of the status of the UK's sovereign bases on Cyprus. Arrangements will be made for the relocation out of the UK of the European Medicines Agency and European Banking Authority.

As the EU 27 takes on the international treaty obligations of the EU 28, Britain will be expected to honour its share of those commitments, for example in matters of climate change. The European Council hopes for a "possible common approach" to third country partners and international organisations.

The secession treaty will also cater for the needs of business and other agencies, such as universities, which have made trading and contractual arrangements across the internal borders of the EU and with the EU institutions.

Arrangements will be needed to deal with on-going cases at the European Court of Justice in which the UK government or British citizens or corporate entities are involved at the time of Brexit, as well as for possible future litigation referring to pre-Brexit issues. The transfer of administrative measures from the European Commission and EU agencies to home-grown British authorities will have to be assured. Knowing how sensitive Theresa May is to the liberation of Britain from the clutches of the Court of Justice, the guidelines insist that the secession treaty should set up appropriate dispute settlement mechanisms for the implementation of the withdrawal agreement itself as well as to cater for any unforeseen difficulties. "This should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union."

## **The future 'close partnership'**

The second phase of the Article 50 talks will attempt to define Britain's final landing zone. "[S]trong and constructive ties will remain in both sides' interest and should encompass more than just trade." The

European Council stands ready to initiate the negotiation of "an ambitious free trade agreement" once the UK has exited. Although this deal will stop short of the single market, it can be "wide-ranging". The FTA must "ensure a level playing field in terms of competition and state aid, and must encompass safeguards against unfair competitive advantages through, inter alia, fiscal, social and environmental dumping".

The EU will also agree to continue political cooperation with the UK in other areas, particularly concerning crime, terrorism, security and defence. I have argued elsewhere that the recent association agreement with Ukraine provides a useful template, as well as a political precedent, upon which the EU could craft the special relationship with its erstwhile partner.<sup>5</sup> Mr Tusk's guidelines add that such a partnership must include dispute procedures and institutional machinery that do not compromise the EU's autonomy.

As far as the European Parliament is concerned, the framework for the future relationship should be defined on the basis of Article 8 TEU (special relationship with neighbouring countries) and Article 217 TFEU (an association agreement). It would be helpful, indeed, if the finalised guidelines of the European Council would follow Parliament's lead and refer specifically to the need to respect in full the spirit of Article 8, which enjoins the Union to aim "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". To return the compliment, the UK government would do well to spell out that they want a new treaty on the legal basis of Article 217.

The reference by the European Council to Gibraltar has provoked a huge reaction in the British media, as well as quite a storm among MEPs. The relevant paragraph in the draft guidelines refers not to the Article 50 secession treaty but only to the future association agreement which, it says, will not apply to Gibraltar unless both Spain and the UK agree that it should do so. As the future agreement in any case needs the unanimous agreement of all 27 member states of the EU as well as of the EU institutions, this caveat may not add up to very much. But the inclusion of the Gibraltar clause in the European Council's guidelines may serve usefully to remind the British that they are not the only European state to have special national interests. It is clear, therefore, that jingoistic statements from Fabian Picardo, the chief minister of Gibraltar, and Foreign Secretary Boris Johnson would make an unhelpful contribution to the accomplishment of the delicate Brexit exercise.

## **Managing the transition**

Everyone now accepts that there must be a transitional period after Brexit to complete the phasing out of the UK's ties as a member state and to prepare, if possible, for the future new relationship. The European Council says that the transition must be "clearly defined, limited in time, and subject to effective enforcement mechanisms". Any temporary extension of the EU *acquis* to the UK would "require existing Union regulatory, budgetary, supervisory and enforcement instruments and structures to apply". The MEPs say the transitional period shall be no longer than three years.

The UK is transforming itself from a member state into a third country. Its participation in ongoing EU legislative and judicial matters, to say nothing of trade talks, during the initial two-year period is therefore highly sensitive. The guidelines remind the UK of the need to maintain a spirit of sincere cooperation, as it is bound to do by Article 4 TEU as long it remains a member state.

In the meantime, the UK needs to progress its work on the Great Repeal Bill. The government's white paper of 30 March clarifies some of the issues of legal hierarchy leading up to and following on from Britain's departure from the EU.<sup>6</sup> It sketches out the vast work that the Westminster parliament will have to undertake to sift the 12,000 EU laws and rules now in place, and to retain, amend or ditch them. It suggests very clearly how, although the UK can escape the direct jurisdiction of the EU's Court of Justice, it cannot evade its jurisprudence either now or in the future.

It is obvious that the risk of legal uncertainty, even a vacuum, is very real. The case grows for the creation of a new special body, answerable to both parties, to oversee 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 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, courtesy of the Great Repeal Act. It would monitor the substitution of the role of the Commission and the functions of EU agencies by the newly rebuilt executive apparatus of the British state and its devolved administrations.

As and when a future EU-UK treaty takes shape based around 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 association council, minimising regulatory divergence and unblocking obstacles to trade, as well as servicing political cooperation in the fields of internal and external security policy.

## **Leftovers**

The European Parliament has contributed the Brexit resolution that will determine its priorities for the Article 50 talks and shape the nature of its decisive final vote on the secession treaty. It still has some urgent unfinished business, however. There will be no British MEPs elected at the next elections in May 2019, and it falls to Parliament to propose a new apportionment of seats among the remaining 27 states – if possible according to an elusive mathematical formula.

There will be 73 vacant places. Parliament has previously proposed that it establishes a pan-European constituency for which a certain number of MEPs would be elected from transnational lists. Why not a transnational list of 73? But this proposal is contested by the Council who seem to be intent on blundering yet again – and despite the absence of a British veto – to miss the chance to reform the electoral procedure and enhance the democratic legitimacy of the European Parliament.

Mr Verhofstadt is also disappointed, though hardly surprised, that the EPP group could agree in the resolution to no more than "a broad public debate and ... an in-depth inter-institutional reflection" on the impact of Brexit on the broader future of Europe. It behoves the EU to wonder what it might be possible to accomplish without the Brits that could not be accomplished with the Brits. Oh, for a new French president who could wonder so.

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

## Endnotes

- <sup>1</sup> <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>
- <sup>2</sup> <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf>
- <sup>3</sup> The draft resolution was passed without amendment.  
<http://www.europarl.europa.eu/resources/library/media/20170329RES69090/20170329RES69090.pdf>
- <sup>4</sup> Jolyon Maugham QC has launched a case in Ireland that seeks a reference to the European Court under Article 267 TFEU in order to clarify the question of revocation of Article 50, the exclusion of the UK from meetings of the European Council and the legacy status of EU citizenship. <https://goodlawproject.org/dublin-case-update-2/>
- <sup>5</sup> *Britain and Europe: A new entente*, Policy Network/European Policy Centre, 23 February 2017.
- <sup>6</sup> <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>

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