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## DISCUSSION PAPER

# What now? Options for Brexit – And a cry for help

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At least as far as the British side were concerned, the Brexit process had been stagnating ever since Theresa May had invoked Article 50 on 29 March. There was even a sense of anti-climax. The UK gave no official reaction to the publication by the European Council of its guidelines for Brexit on 29 April or to the settling of the detailed negotiating directives of the European Commission on 22 May. The general election of 8 June, therefore, has delivered some shock therapy.

### **The botched election**

As far as Mrs May is concerned, the election has had one unintended and two intended consequences. First, she has achieved her goal of entrenching the referendum decision of 23 June 2016 that the UK should leave the European Union. The election provided parliamentary legitimacy to the controversial popular vote: both Labour and Conservatives campaigned to complete Brexit, and all the smaller parties who wanted something else lost votes. So there will be no more talk of the possible revocation of Article 50. Brexit does indeed mean Brexit.

Second, the prime minister has successfully pushed the date of the next scheduled general election forward two years to 2022, leaving the conclusion of the Article 50 withdrawal agreement, its endorsement by the Westminster parliament, and indeed Brexit day itself (29 March 2019) free from the shadow of immediate electioneering.

However, the unintended consequence of the snap general election has been devastating for Mrs May and her party: she has lost the slim but overall majority that she inherited from David Cameron, and will now be reliant for survival on a 'confidence and supply agreement' with the Members of Parliament of the Democrat Unionist Party (DUP) – an anti-EU, populist and sectarian party from Northern Ireland who will demand more money for the province. If Theresa May had hoped that a much larger contingent of Tory MPs would give her sufficient room for manoeuvre to sack various under-performing and eccentric Brexiteer ministers, she has been confounded. The Brexiteers stay in the cabinet, and are even joined by Michael Gove as the new secretary of state for the environment.

Furthermore, the election result has left many Tory MPs with very slender majorities in their constituencies over Labour and Liberal Democrat challengers. Another general election held before 2022 would not only be exceedingly unpopular in the country, but would almost certainly lead the way to Jeremy Corbyn stumbling into No 10. Despite their divisions over Europe, the Tory party in the Commons will back Theresa May until she finishes the job of Brexit. Her parlous political position has already forced her to be contrite to the point of humiliation. She has apologised to her MPs for "getting us into this mess", and has had to

sacrifice her two closest anti-EU advisors. Some accommodation with the Tory Remainers seems to be underway: although they will hate this, the Tory Brexiteers dare not trigger another general election. Mercifully, we should not hear again that "no deal is better than a bad deal" – at least from the lips of the prime minister.

Philip Hammond, who was facing the sack from the Treasury, has been conserved for the nation. And several other, useful Tory Remainers have been promoted to government – notably First Secretary (Cabinet Office) Damian Green, Minister of Justice David Lidington and her new chief of staff Gavin Barwell. Ruth Davidson, the successful pro-EU Tory leader in Scotland, also promises to exert her influence.

Overall, the new composition of the House of Commons has improved the chances that if agreement can be reached in Brussels on a technically acceptable Article 50 treaty, it will be approved at Westminster with Labour and DUP support. On Brexit, the Labour manifesto was disconcertingly similar to that of the Conservatives'. To shore up Labour support for an orderly Brexit, former Tory leaders John Major and William Hague have urged wider, cross-party talks in order to reach a reliable consensus that can back a softer Brexit and to oppose the harder version previously on offer from the pre-election May. Labour, Lib Dem and SNP spokesmen have joined them in this adventure. As does, ludicrously, Mr Cameron.

Such a transparent cross-party approach would have the advantage of obliging rather more British politicians to read and digest the EU's Brexit guidelines and directives. When they do so, they will discover why the European Union will not permit cake-eating and cherry-picking. When Brussels speaks of a level playing field it wants to ensure there is a steady equilibrium between rights and obligations – for instance, not allowing the UK to enjoy the rights of Norway with only the obligations of Canada.

Westminster also needs to know why nothing will be agreed by the EU until everything is agreed by the EU, and that sectoral deals (such as citizens before money, or cars before fish) are unacceptable. The EU 27, for whom solidarity and unity are paramount, are on the look-out for signs of the classic British policy of divide and rule. If there was ever any tolerance left for maladjusted behaviour by the British, it was squandered by Mr Cameron in his fruitless and spurious attempt to renegotiate the UK's terms of EU membership.

When they look at Westminster today, the EU 27 see not only a government in chaos but also a shambles in the opposition. The idea that Mr Corbyn is ready to slink into leading a minority government that would smoothly execute Brexit is clearly fanciful. There has been no consistency or clarity or even an assured grasp of the facts among Labour's many spokesmen.

## **Re-launching Article 50 under the Tories**

The best assessment of the state of play in London is that if the prime minister responds constructively to her Tory critics she will be kept in office until after the UK has formally concluded its secession from the Union. Nonetheless, she still faces a big challenge – not least when she goes to Brussels for the European Council meeting on 22 June where she will be expected to inform her European colleagues of her plans. She should apologise for the delay and disruption she has caused to the Brexit process, and retract the nationalist rhetoric she adopted in the election campaign. She would also be wise to accept en bloc the sequencing of the Article 50 talks as proposed by Michel Barnier, the EU's chief negotiator, who insists on dealing with the financial settlement, citizens' rights and the border questions first before moving on to other things.

I am not concerned here so much with the details of the Article 50 negotiations: we can return to them if and when the talks get going. Complicated though some of them are, the items on Mr Barnier's list are essentially technical matters that, with good political will, will be resolved in time for a draft secession treaty to be voted on at Westminster in the autumn of 2018 and then formally endorsed by the European Parliament. Of course, accidents may happen – especially if David Davis, Britain's chief negotiator, were to

fall out of line with a more constructive position adopted by the May II cabinet. But as a bust up of the Article 50 talks on money matters, for example, would lead inevitably to the collapse of the May government and the holding of the next, much-feared general election, the self-preservation of the Conservative party will be uppermost, even in the mind of Boris Johnson.

Nevertheless, the Article 50 talks will not and cannot succeed unless the secession treaty makes explicit reference to the framework of the UK's future relationship with the EU. In practice, this means that Britain's future place in Europe has got to be clearly defined and broadly agreed during the next six to nine months. Without a clear sight of the future landing zone there can be no transition arrangements included in the Article 50 withdrawal agreement. Without a decent transition out of the EU, the UK economy will suffer very great harm and Brexit will also do severe collateral damage to the EU 27. So the stakes are high, and Mrs May's first appearance on the EU stage after her election crisis must be dedicated to minimising these political risks.

### **Dispensing with the EEA**

First, when she comes to Brussels for the European Council, the prime minister needs to dispel the idea – still peddled by some Labour and Liberal Democrat MPs – that the UK will seek somehow to stay a member of the single market. In truth, the only way to do this would be to join EFTA and the European Economic Area along with Norway, Iceland and Liechtenstein. This would mean paying a hefty annual fee to the EU budget, accepting full freedom of movement of people and taking every instruction decided and issued by the EU institutions in Britain's absence. Not only would EEA membership be an inferior deal to full EU membership but it would also amount to a rejection of the referendum result. There would be democratic outrage when EEA membership was revealed to mean that far from "taking back control", the UK was now even more subservient than it had been previously to the diktat of Brussels.

The EEA was invented to prepare states to become full members of the EU. Only three countries are now left behind as non-EU members: rich Norway, poor Iceland and small Liechtenstein. For the UK, which is none of those things and is leaving and not joining the Union, the EEA is an impasse. It would be unseemly for Great Britain to accept such a post-colonial relationship with the continental bloc.

### **Retaining the customs union**

The better choice for Britain would be to apply to stay a member of the EU customs union until such time as a new and deeper relationship can be negotiated. This requires a U-turn by the prime minister, but she can be assured that an announcement of her intention to adhere to the common commercial policy of the EU would be met with immediate relief by the other heads of government. The Germans would be able to continue to sell their cars to Britain, and the French their wine and cheese. For Ireland, which exports 80% of its products either to the UK or in transit through the UK, the maintenance of customs union would be a huge relief. The DUP – along with everyone else on the island of Ireland – would be satisfied that the Northern Ireland border with the Republic could remain soft. Staying in the customs union for substantially all goods, including agriculture, would be the least disruptive of Britain's current commercial arrangements, and would avoid having to embark on lengthy tortuous negotiations under the auspices of the WTO. Customs controls for goods would continue at Britain's borders much as now.

Continued membership of the EU customs union would restrict the freedom of "global Britain" to strike new trade deals with third countries. But retaining the EU's common commercial policy and external tariffs would permit the UK to try to hitch a ride on the EU's growing number of free trade agreements with other countries. The UK would also remain free to do trade agreements with countries with which the EU does not (yet) have deals. However, quite frankly, Liam Fox's initial exploratory talks with third countries across the planet have not revealed much potential for early bilateral trade deals – with the exception of Turkey which is, *par hasard*, already a member of the EU's customs union. It seems beyond dispute that the costs

of leaving the EU's customs union would hugely outweigh the potential benefits of any FTAs the UK could dig up elsewhere.

## **Towards a new Accord**

Remaining in the customs union on present terms for as long as it takes to negotiate a new arrangement would signify reconciliation between the UK and the EU. Continuing customs union membership would need to be feature as part and parcel of the transitional arrangements laid down in the Article 50 withdrawal agreement that will come into force on 30 March 2019.

Mrs May also needs to pursue her much touted but very vague aspiration of a future, long-term "deep and special partnership". She needs to spell out to her European Council colleagues what she means by this – which is basically a comprehensive free trade agreement (building on the customs union, but widened to embrace services) plus political collaboration in both internal and external security matters. She should leave them in no doubt that this is how the UK views the framework for its future relationship with the EU.

The European Council next week will not agree to discuss this plan in any detail until they deem that Mr Barnier has made "sufficient progress" in the first phase of his talks with David Davis. But it would do them good to know of it first hand, and for the prime minister to encourage them to pass on to the second phase of the Article 50 talks as soon as possible, hopefully at the next meeting of the European Council in October.

Such a long-term partnership agreement would be opened for formal negotiation as soon as the UK had left the EU. There is precedent for this and a sound legal base in Article 217 TFEU. A useful template is the 2014 association agreement between the EU (including the UK) and Ukraine. The bespoke British EU deal, however, will be unique and needs its own name. Let's call it an Accord. Its main job will be to ensure continued regulatory equivalence for the trade in goods and services across the Channel. There will have to be an agreement on mobility of labour, but it will not be full free movement. The UK could elect to continue to participate in many of the EU's agencies and in EU science and education programmes on a fee-paying basis. A good Accord would presage a happier and more stable era in Anglo-European relations than we have known since 1945.

A strong institutional connection would be needed to service such an Accord, involving joint ministerial and parliamentary meetings as well as numerous technical committees, sector by sector. Whereas the customs union agreement would fall under the supervision of the European Court of Justice, the Accord would need a new type of joint juridical tribunal to cover the broader spectrum of British European cooperation. Creative thinking is needed, jointly, on what shape such a judicial apparatus could take.

## **Making the transition**

Once the future framework is so defined (and sufficient progress has been made on Phase I), Michel Barnier and David Davis will be able to negotiate the crucial transitional arrangements. Ideally, the transition needs to do three things: to oversee the phasing out of the UK's membership obligations to the EU (and vice versa); to iron out unforeseen problems arising from Brexit but not included in the Article 50 treaty; and to prepare for whatever comes next. The more the transition is managed jointly, the more successful and useful it will be. Good transition arrangements would aim to resolve disputes politically, thereby avoiding a rush to litigation. A joint transition authority could act as a help-desk for citizens and businesses beached by Brexit. Should the roadmap to Britain's final landing zone be clear, a joint transition authority could then morph into becoming the secretariat of the new Accord.

Another function for a joint transition authority would be to coordinate the exodus of the EU from Britain with the passage of the Great Repeal Bill which, we were told, will transpose the whole of the *acquis communautaire*, along with attendant regulatory authorities, into UK law. Without mutual coordination of the exodus of the EU from Britain, a legal vortex beckons. But in London since the election a blanket of

silence has descended on the question of the Great Repeal Bill. Presumably David Davis is gearing up to inform and consult Michel Barnier on all of this whenever they eventually get to meet up. At the time of writing, such is the shambles in London that the date of the opening session (originally scheduled for 19 June) as well as the protocol, are still up in the air.

### ***Au secours!***

In the immediate aftermath of Britain's latest tryst with the electorate, I have been accused of being uncharacteristically optimistic in plotting a course designed to expedite an orderly Brexit. One may be too late. More progress would have been made if there had been no 'snap' election – which in fact turned out to be a rather long-winded campaign. We would have been further down the path, for example, in designing the governance structure for the transitional period for which there is clearly a great need but about which only the brightest and best in Whitehall or Westminster seem remotely aware.

One may be confounded, as Mrs May has already been, by the internal circus of Conservative party politics. But meanwhile the EU is impatient and ready to get on with dispatching the British from membership. The rest of Europe needs to turn away from the problems of disintegration to reviving the noble cause, once again, of "ever closer union". The EU's leaders could help things along by responding positively to a reconstructed Theresa May. A friendly steer here from President Tusk and a firm pull there from President Juncker towards guaranteeing Britain's future as a European country could make all the difference. We British are unlikely to manage this on our own if left to our own devices and desires.

Theresa May has one more shot at Brexit, but only one: I am assured that any request by the UK for new and softer guidelines from the European Council would be counterproductive.

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

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