

Brexit: How was it for you?

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PART ONE: THE PRESENT

BUMPS IN THE SECESSION ROAD

On 10 November 2015, after months of veiled threats, Prime Minister David Cameron wrote a letter to Donald Tusk, President of the European Council, demanding a renegotiation of the terms of Britain's membership of the European Union.¹ Four years on and three prime ministers later, we may be about to see the denouement of Brexit.

Against the sceptics and cynics, Mr Johnson continues to argue that he is trying for a deal.

Nothing is yet certain, and there will be many more surprises – “bumps in the road”, as Boris Johnson calls them – before the UK's relationship with the EU is stabilised. But if the prime minister is to be believed (and why not?) the UK will secede from the EU at midnight on 31 October – deal or no deal.²

Against the sceptics and cynics, Mr Johnson continues to argue that he is trying for a deal. He has good reason to do so. He knows, like we do, that Brexit without a deal would be very harmful for the British economy and society. The threat of no deal has split his own party, perhaps irrevocably. The prime minister has lost the slender parliamentary majority he inherited from Theresa May. Cabinet responsibility, which is one of the core disciplines of Britain's famously unwritten constitution, has disintegrated. Civic disorder is rising. The devolution arrangements in Scotland, Wales and Northern Ireland are creaking under pressure. The courts, including the UK Supreme Court, have had to intervene on the matter of parliamentary prerogative versus executive power. The government's decision to prorogue Parliament on 9 September until 14 October has dragged the Queen into the constitutional furore.

THERE CAN STILL BE A DEAL

To add insult to his injury, the prime minister finds himself trammelled by the cleverly crafted terms of the EU Withdrawal (No. 2) Act 2019, promoted by Labour's Hilary Benn MP with the support of pro-European Tory rebels. The new law instructs Mr Johnson to write to Mr Tusk by 19 October requesting an extension of Article 50 until 31 January 2020 if either no deal has been reached by then, or if there has been no agreement by then fixing a date for a no deal exit.

The Act says that the purpose of the extension is “in order to debate and pass a Bill to implement” the Withdrawal Agreement, “including provisions reflecting the outcome of inter-party talks as announced by the Prime Minister on 21 May 2019, and in particular the need for the UK to secure changes to the political declaration to reflect the outcome of those interparty talks”. That last clause was tabled by Stephen Kinnock MP, a leading Labour figure on the side of compromise. Significantly, the amendment was accepted by the government without a vote.

In the speech referred to, Mrs May offered a ‘New Brexit Deal’ with a ten-point plan, to be guaranteed by law, some of which merely concerned parliamentary procedures at Westminster, along with the promise of a Commons' vote on holding a second referendum. The sticking point at the cross-party talks concerned the degree to which the UK would continue to align itself with the EU customs union. Mrs May offered Labour a compromise option of a temporary customs union on goods only, including seeking a UK say in relevant EU trade policy. Effectively, this meant that it would be up to the next government, after the May 2022 general election, to decide on the final direction of UK policy. Her ten concessions were Mrs May's last roll of the dice. After a brutal reception in the Commons and a cabinet resignation on 22 May, and the results of the European Parliamentary elections on 23rd, the prime minister resigned on 24th.

It is nevertheless significant that Boris Johnson has tacitly agreed to resurrect the May package. He has more flexibility than his predecessor for two reasons. Having lost his Commons majority he is no longer dependent on the votes of the ten DUP MPs who oppose a Northern Ireland-only deal. Few English nationalists make Ireland, North or South, their priority. And the hard-right Brexiteers know that if Mr Johnson does not deliver Brexit, nobody else will: he is their last chance.

The very great advantage that a deal brings over no deal is the gift of the transition period.

A revised Irish backstop that left Northern Ireland fully aligned with the Republic for trade in farm produce – which is, in any case, the preferred option of the European Commission – is unlikely to be blocked in the House of Commons. The EU has already committed itself to helping the UK and Ireland discover ‘alternative arrangements’ that would minimise the need for border

checks. It should be possible to specify more exactly what ‘no hard border’ really means in terms of trade in essential goods and services. Other clarifications could be made to bring the governance of the post-Brexit settlement more explicitly in line with the North-South institutional machinery established under the Good Friday Agreement, which might include a bigger role for the Stormont executive and assembly in determining the future of the province. Stormont could even be given a guaranteed place on the Joint Committee that is to manage the Withdrawal Agreement.

If Mr Johnson delivers the concessions in the Kinnock package guaranteeing no regression by the UK from the highest EU social and environmental standards, he will gain support at Westminster from the moderate majority. He could even risk a Commons’ vote on a second referendum, as did Mrs May, in the safe knowledge that it would not pass.

The very great advantage that a deal brings over no deal is the gift of the transition period, designed under the terms of the Withdrawal Agreement to avoid disruption and keep supply lines open. The transition period is due to expire in December 2020, but can be extended by one or two years.³ Even that, however, may not give enough time to conclude the final treaty with the UK. So Mr Johnson would be wise to ask for a new protocol to be added to the Withdrawal Agreement that would allow the transition period to be further extended, if necessary, to elide with the entry into force of whatever the final treaty between the EU and the UK will be. Apart from other advantages, such a flexible extension to the transition would obviate the need to deploy the Irish backstop.

In these circumstances, it would seem best to jettison the Political Declaration entirely, and invite the Commons to vote only on the Withdrawal Agreement.

GOODBYE TO THE POLITICAL DECLARATION

There remains the problem of the Political Declaration. The EU has long said that it would be happy to revise the Declaration in the direction of closer regulatory alignment, even to embrace a new customs union with the UK. But Boris Johnson aims in a different direction, questioning commitments made by Theresa May to keep the level playing field. His new team of unschooled negotiators risks shoving the Brexit talks into reverse. Questions thought to be settled under Mrs May, like the role of the European Court of Justice and security guarantees, are being opened up again by the Johnson team. Neither side dares put a text of a new Declaration on the table. What used to be seen as an aid to building

consensus about the Withdrawal Agreement now turns out to be an obstacle.

It remains the case that the best way to avoid no deal is to do a deal. As successive votes have shown, there is no obvious Commons’ majority for any other option – including a second referendum, revocation of Article 50 or a snap general election.

In these circumstances, it would seem best to jettison the Political Declaration entirely, and invite the Commons to vote only on the Withdrawal Agreement. An exchange of letters setting out the modalities of the future talks, with scope and timetable, should suffice to fulfil the Article 50 requirement to take into account the framework for the future relationship. In truth, nothing substantive can be agreed on customs outside the negotiations of the future free trade agreement. Only the nitty-gritty of a trade negotiation undertaken during a necessarily lengthy transition period will settle the issues of customs and tariffs and determine how frictionless future trade will be.

A deal on these lines is possible before the end of October. It remains the case that the best way to avoid no deal is to do a deal. As successive votes have shown, there is no obvious Commons’ majority for any other option – including a second referendum, revocation of Article 50 or a snap general election.

If the deal on such a basis can be done at the European Council on 17-18 October, the House of Commons will have to deliver its positive ‘meaningful vote’ (as it is bound to do under the terms of the EU Withdrawal Act 2018) in double-quick time, so that the European Parliament can then ratify the package.⁴ Thereafter, once the deal is done, both Houses of the British Parliament will need to enact the much-anticipated Withdrawal Agreement Bill, which should be the priority item of the Queen’s Speech on 14 October. In those circumstances, a short extension of Article 50 beyond 31 October into the first weeks of November would be inevitable to allow for the final legal acts to be taken properly on both sides. With Brexit done, a general election could then be anticipated.

YET ANOTHER EXTENSION?

On the other hand, should no deal emerge from the late flurry of talks, the October European Council will be faced with a flailing British prime minister forced under duress by his Parliament to seek an extension to Article 50. How should the heads of government then react?

When confronted by the UK's previous request to extend the timetable, the leaders needed eight hours of discussion in order to agree, by unanimity, that they would agree to an extension "to allow for the ratification of the Withdrawal Agreement ... Such an extension should last only as long as necessary and, in any event, no longer than 31 October".⁵ A similar debate in October promises to be even more fraught.⁶ Nothing can be presumed. The EU is in a better state of preparedness for a no deal Brexit than is the UK.⁷

Repeated extensions of Article 50 look weak. Endless prevarication over Brexit is damaging the morale, reputation and efficiency of the European Union.

The European Council will only be minded to grant a third extension if convinced there is a serious purpose behind the request. A general election may or may not be a serious reason for delaying Brexit: the fear is that an election will not clarify what the UK wants as

both the Tory and Labour parties will remain deeply divided about Brexit during and after the campaign. The heads of government would be bound to try to set stricter conditions than they did in March, and fix a firm deadline for the termination of Article 50 that best suited the EU's needs (which is not 31 January 2020).⁸ While it is true that none of the EU leaders want to be seen to be bullying the British people, in recent weeks the mood has turned against the British government. Repeated extensions of Article 50 look weak. Endless prevarication over Brexit is damaging the morale, reputation and efficiency of the European Union. If Boris Johnson were to reject the EU's offer of a revised deal, he could expect no more favours from Brussels.

When they come to bring closure to Brexit (one way or the other), the EU institutions and its member states would do well to reflect on how they have managed the secession process so far. What lessons can be learned? A preliminary assessment of how the EU has played its Brexit cards will be useful in guiding future strategic decisions. Even in the short term, no matter what happens on 1 November, talks between the UK and the EU will have to start up again immediately, revisiting familiar territory but on a different legal basis. Brussels needs to be ready for the next episode in the drama of Britain's relations with Europe, and it can learn much from having had the practical experience of Article 50.

PART TWO: THE PAST

ARTICLE 50 REVISITED

Article 50 TEU, which governs how a state should leave the Union, was inserted into the Constitutional Treaty of 2004 with the support of both federalists (who want renegade states to leave the federal union) and nationalists (who want liberation from federal union). Whether or not the clause was ever intended to be used is academic: opinions in the Convention differed, and both Greece and Britain were floated as potential candidates. It was agreed that it was better to have a provision which provided for a voluntary democratic exit – with the implication that no state could or should ever be expelled from membership against its will. The Convention's president, Valéry Giscard d'Estaing, proposed the two-year time limit in order to minimise collateral damage to those states remaining.

From the outset it was clear that Article 50 was more about defending the interests of the EU than aiding and abetting the departing member state. It is wrong to draw too strict an analogy between Article 50 and Article 49 TEU, which regulates the accession of a new member state. The EU is committed in spirit and in law to widen its membership. It proselytises in the hope of recruiting more members. Article 49 establishes elaborate but systematic processes by which a candidate

state is pulled towards and across the threshold of membership.

It is not the fault of the EU, still less of the drafters of Article 50, that the UK transpired not to have the faintest idea what it wanted to do post-Brexit. But nor is it the job of the EU to rescue the UK from its own folly.

Not so Article 50, whereby the errant state is enjoined before leaving to agree to the terms of its withdrawal: if no agreement is reached, the EU treaties simply cease to apply to that state two years after it triggered the formal process. The main purpose of Article 50, then, is to allow the EU to cut its legal and political links, leaving the erstwhile partner to its own devices. Pointedly, Article 50(4) recalls that if a state which has withdrawn asks to rejoin, it must use the route provided by Article 49.⁹

Implicit in the European Union's Article 50 process is the assumption that the departing state knows why it is leaving and where it intends to end up having left. That is why Article 50(2) speaks of the need to settle the state's withdrawal arrangements "taking account of the framework for its future relationship with the Union". It is not the fault of the EU, still less of the drafters of Article 50, that the UK transpired not to have the faintest idea what it wanted to do post-Brexit. But nor is it the job of the EU to rescue the UK from its own folly.

The EU did its best to accommodate the UK's confusing and contradictory red lines without compromising its own core principles. Unlike enlargement, where the Commission actively encourages the candidate's progress, the college has retained studious neutrality over Brexit. Its Task Force 50, led by Michel Barnier, focussed on accomplishing its mandate to reach a withdrawal agreement with the UK. It did not draft texts on behalf of the UK government even when it could easily – and helpfully – have done so.

CAMERON'S LEGACY

The EU's officially cool position was much influenced by its recent bad experience of coping with the British. Lessons were drawn from Mr Cameron's damaging renegotiation of the UK's terms of membership in which the European Council under Donald Tusk conceded much of what he sought. The 'New Settlement' of February 2016 was negotiated laboriously in a well-meaning but vain attempt to rescue the UK prime minister from the plight of his own making.¹⁰ Had the botched new arrangements ever entered into force, the UK as a disaffected and insincere member state would have been a continuing source of European disintegration.

In particular, the concession to the UK of an opt-out from the historic mission of "ever closer union" was a gross error with potentially devastating consequences for future cohesion and solidarity. Thanks to Charles Michel, the Belgian prime minister, a late clause was added to the New Settlement that made the whole package deal null and void should the British people, in their wisdom, reject it. As they did. The constitutional integrity of the Union was at least preserved, and the prospect of rows with the European Parliament and litigation at the European Court of Justice over the implementation of the New Settlement was avoided.

SECOND CHANCE

In one sense, therefore, the referendum decision of 23 June 2016 gave the European Union a second chance to regather its troops and retrieve momentum. Evidence of the change of direction on behalf of the European Council came only a week later. The statement of 29 June of the European Council minus Mr Cameron was made under the concertation of Jeppe Tranholm-Mikkelsen, Secretary General of the Council. It established the ground rules for the deployment of Article 50:

"There is a need to organise the withdrawal of the UK from the EU in an orderly fashion. Article 50 TEU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK's intention to withdraw from the Union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place."

Note the introduction of the concept of orderliness, not found in Article 50 itself.

"In the future, we hope to have the UK as a close partner of the EU and we look forward to the UK stating its intentions in this respect. Any agreement, which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations. Access to the Single Market requires acceptance of all four freedoms."

The explicit insistence on balancing rights and obligations was novel, indicating to all concerned that the UK as a third country could not expect more rights than it had when a member state. Access to the internal market would depend on its ability to respect, and to be seen to respect, the level playing field.¹¹ The assertion of the indivisibility of the four principles of freedom of movement was an elaboration of existing treaty provisions made in the knowledge that the UK wants to restrict immigration from the EU.¹²

GUIDELINES AND CORE PRINCIPLES

Backed by Parliament, Theresa May pulled the trigger of Article 50 on 29 March 2017.¹³ Again the EU moved quickly to instil discipline and direction into the Brexit business. The European Council published seminal guidelines on 24 April:

"[T]he Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States ... With this in mind, we must proceed according to a phased approach giving priority to an orderly withdrawal ... Throughout these negotiations the Union will maintain its unity and act as one with the aim of reaching a result that is fair and equitable for all Member States and in the interest of its citizens. It will be constructive and strive to find an agreement. This is in the best interest of both sides. The Union will work hard to achieve that outcome, but it will prepare itself to be able to handle the situation also if the negotiations were to fail."¹⁴

Note the first explicit appearance of the concept of the EU's own interests – a term not found in the treaties. Returning to their main theme, the European Council fired another warning shot across the bows of the British:

"It further reiterates that any agreement with the United Kingdom will have to be based on a

balance of rights and obligations, and ensure a level playing field. Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no “cherry-picking”. The Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union.”¹⁵

These core principles would apply not only to the negotiation of an orderly withdrawal but also “to any preliminary and preparatory discussions on the framework for a future relationship, and to any form of transitional arrangements.”

The hybrid nature of EU governance was established – Commission and Council working in tandem – but so also was the hierarchy between the EU institutions and national capitals. Brussels was in charge, and tightly organised.

Alongside what came to be the very familiar bogey of cherry-picking, came the idea of a time-limited transitional period. Again, transition periods are not to be found in Article 50 – although they have proven useful in smoothing the accession to the EU of new member states under Article 49.¹⁶ Finally, the UK was enjoined not to forget that while it remained a member state it remained subject to the treaty principle of sincere cooperation.¹⁷

The European Council decided to phase the talks with the British and to sequence their phasing when it was satisfied various conditions had been met: in other words, priority issues had to be resolved first before moving on to wider political discussions about the nature of the future relationship. Nothing would be agreed until everything was agreed in a single package deal.

Although the Commission was mandated as chief negotiator, the heads of government were not going to let go of the reins. Here Article 50 does begin to resemble the intergovernmental diplomacy of Article 49 – but with the important caveat that “there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union”. The EU would speak and act with one voice.

The hybrid nature of EU governance was established – Commission and Council working in tandem – but so also was the hierarchy between the EU institutions and national capitals. Brussels was in charge, and tightly organised. The Commission’s Task Force 50 was backed up by the Council working group, chaired by Didier Seeuws, and supported by the European Parliament Brexit steering group under the leadership of Guy Verhofstadt. The rotating presidency of the Council of ministers played no role. Off-message remarks by ministers in national capitals were swiftly slapped down. The most revealing moments of EU insider politics were exquisite comments dropped to the press by Donald Tusk and Jean-Claude Juncker at the close of meetings of the European Council, often late at night.

So already, at the outset of the actual Brexit negotiations, the EU had established its paramourcy in the negotiations and had laid down the scope of the Withdrawal Agreement and Political Declaration as well as the rules under which the negotiations would be conducted.

TOUGHENING UP

The European Council issued subsequent guidelines in December 2017 and March 2018. The line did not vary but the language got tougher, especially as attention turned to the nature of the future relationship and the May government became entangled in barbed wire around its own red lines. In March 2018 the European Council warned:

“[T]he European Council has to take into account the repeatedly stated positions of the UK, which limit the depth of such a future partnership ... In this context, the European Council reiterates in particular that any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member.”¹⁸

The two decisions to extend the deadline of the Article 50 process beyond 29 March may have been unwise but the European Council can hardly be faulted on the grounds of inflexibility.

Where the UK has been fickle and disorganised, the EU has been firm yet fair. The European Council always maintained that if the British adapted their red lines, the EU position would be adaptable accordingly. The

EU made every effort, short of compromising its core principles, to ensure that Brexit takes place within the constitutional ambit of the Union, maintaining the spirit of sincere cooperation. The EU deferred to London's version of the Irish backstop, keeping the whole UK territory in the customs union. The two decisions to extend the deadline of the Article 50 process beyond 29 March may have been unwise but the European Council can hardly be faulted on the grounds of inflexibility.¹⁹

Brexit has served to propel the EU into a period of introspection from which it should emerge with a greater understanding of what it is to be a member state – even as the British discover more about what it is not to be a member state.

The extent to which Brexit poses a fundamental blow to the Union is underestimated in Britain. The departure of the UK will leave the EU smaller and poorer, with its profile on the world stage undeniably diminished. The risk that other European leaders, such as Matteo

Salvini or Viktor Orban, will play the Cameron card is considered a real one.

The current reflective mood is accentuated by the EU having had recourse, for the first time, to the use of Article 7 TEU which lays down procedures of discipline and penalty in the event that a member state breaches the rule of law. The new Commission of Ursula von der Leyen will be committed to pursuing Article 7 measures against Hungary and Poland, and may well have to open comparable proceedings against Bulgaria, Romania and Croatia, the newest member state, in light of endemic corruption.

A CONSTITUTIONAL MOMENT

Brexit has served to propel the EU into a period of introspection from which it should emerge with a greater understanding of what it is to be a member state – even as the British discover more about what it is not to be a member state. This is for the Union an important constitutional moment of self-definition. We do not yet know whether Article 50 has worked to achieve an orderly Brexit. But it is clear that the transparent and disciplined way in which Mr Barnier conducted the negotiations on behalf of the Commission under the watchful guidance of the European Council has paid dividends in terms of the EU's internal unity and cohesion. It is not an exaggeration to say that, perversely despite the loss of a major member state, the EU is emerging somehow stronger out of the Brexit process.²⁰

PART THREE: THE FUTURE

TOWARDS ASSOCIATION

How might that unity survive during the next phase of negotiations with Britain? The Lisbon treaty provides some useful pointers. Article 8 TEU binds the EU to “develop a special relationship with neighbouring countries, 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 EU may conclude specific agreements with such neighbours containing “reciprocal rights and obligations as well as the possibility of undertaking activities jointly”.

Whether or not there is a deal under the terms of Article 50, the EU and the UK will have to sit down without delay to discuss their future association. Even a minimal free trade agreement will require an EU-UK treaty that deals not only with tariffs and non-tariff barriers but also with the level playing field. Differing levels of regulatory alignment will open different degrees of British access to the EU market. Subjects to be covered in any trade agreement are bound to include technical regulations and standards, state aid, labour and social policy and

environmental policy. Any more ambitious association agreement will require joint governance, surveillance, supervision and dispute resolution mechanisms. Again, the association options are varied but limited: the choice between them has strategic importance.

Whether or not there is a deal under the terms of Article 50, the EU and the UK will have to sit down without delay to discuss their future association.

Within the broad political context of Article 8, Mrs May aimed at concluding an ambitious association agreement with the EU under the legal base of Article 217 TFEU. Ukraine's association agreement of 2014 provides a useful template. The partnership – which would embrace a deep and comprehensive free trade agreement, political cooperation in the security field, and robust

arrangements for joint governance – would need the unanimous approval of all member states plus the assent of the European Parliament.²¹

Boris Johnson prefers a less close continuing relationship with the EU. He wants a “best in class” free trade agreement in which the UK would be more loosely aligned with EU norms, with consequently reduced access to the EU market. Article 207 TFEU provides the legal base, and the recent Comprehensive Economic and Trade Agreement (CETA) with Canada the obvious template. Such a narrow agreement could be decided by qualified majority vote in the Council.²²

THE NEED FOR BIPARTISANSHIP

The United Kingdom is a deeply divided country. For some anti-Europeans, any type of association with the EU post-Brexit is anathema. Pro-Europeans may find that a formal association agreement is acceptable only as a temporary or transitional arrangement. Beyond the next general election in Britain a more progressive government may take office committed to repairing the UK’s broken links with the EU. The option of re-accession will one day have to be addressed. Speculation (much of it idle) has already started about what conditions would be attached by the EU to any new accession treaty with Britain.

The idea that the UK would be welcome to rejoin on exactly the same terms as it left is palpable nonsense. Other considerations aside, the mistrust induced by Brexit is a serious political obstacle to a quick and easy membership bid. The EU would want to know that there could be no repeat of the Brexit experience. This means that any reversal of British European policy has to be genuine and durable, and based on a solid bipartisan majority at Westminster.

The option of re-accession will one day have to be addressed.

The overly adversarial nature of British politics has always prevented the emergence of a broad-based cross-party consensus on Europe. When a Tory government fought to enter the EEC, Labour opposed. When Tony Blair edged closer to the EU, the Tory opposition objected. The current Labour leader Jeremy Corbyn has voted against every EU treaty. Indeed, revisions to EU treaties have squeaked through the House of Commons by negligible majorities constructed only by virtue of divisions within the ranks of the Labour and Tory parties. Even the more pro-European Liberal Democrats, briefly in government, promoted the EU Act 2011 which unilaterally imposed UK referendums on all future EU treaty amendments. Britain has never been a solidly reliable member of the European Union.

Could the UK be truly converted to the European cause? The rest of the EU will certainly be watching closely to see if any pro-European swing in British public opinion is accompanied by a shake-up of the political system at Westminster. Above all, will the Commons at last be elected by proportional representation so that seats won in the chamber reflect votes cast in the ballot box? Electoral reform would certainly see a number of far-right English nationalist MPs elected, but it would also make possible stable coalition government of the liberal centre. In short, a system of fair votes would make British politics very much more European. On that basis, a new application to join the EU would be welcomed.²⁵

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REJOINING UNDER ARTICLE 49

The test of eligibility to launch a successful candidacy for EU membership is much tougher than when the UK joined the European Community in 1973. In those days, accession negotiations concentrated on reducing Britain’s Commonwealth preference for agricultural goods. Once France’s President Pompidou had heard from British Prime Minister Heath that the UK would respect the unwritten rule of unanimity in the Council (the Luxembourg compromise), the way ahead was cleared.

In today’s much wider and deeper Union there are three basic conditions for membership – the Copenhagen criteria – which were adopted in 1993 and 1995. For accession negotiations to be launched, a country must satisfy the first criterion; to be concluded, all three.

The first criterion demands that the candidate state enjoys stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. A UK engaged in constitutional reform should have no difficulty here. The second requirement is to possess a functioning market economy capable of withstanding the competitive pressure and market forces of the European Union. Again, no problem for the UK.

The third criterion, however, insists on the incomer’s ability to take on the obligations of membership, including the capacity to implement effectively the rules, standards and policies that make up the body of EU law (the *acquis*), and to adhere to the aims of political, economic and monetary union. Its inability to meet these demands is why the UK is no longer a viable member state.

Once a state is accepted as a candidate, the Commission presents 35 sectoral chapters, all of which have to be opened and closed. The only real ‘negotiation’ comes towards the end of the enlargement process and weighs on budgetary matters. As with Article 50, so with Article 49: the EU side is dominant. One significant difference to procedure is that while Article 50 is concluded by a QMV decision of the Council, Article 49 requires an inter-state treaty agreed by unanimity and ratification in all member states.

Its inability to meet these demands is why the UK is no longer a viable member state.

It is fanciful to think that the UK could simply re-engage as a member state on its previous terms. The fudgy compromises that pepper the UK’s current terms of membership will no longer apply. Indeed, Britain’s opt-outs will be defunct along with the rest of its membership obligations on 31 October. Protocol No 15, the UK opt-out from the euro, and Protocol No 21, the UK reservations on justice and home affairs, will be null and void. The infamous British budget rebate is already jettisoned in the negotiations among the EU 27 on the new multi-annual financial framework that will apply from 2021.

A REFORMED EUROPEAN UNION

The European Union the UK would be applying to rejoin will not be the same EU as it is leaving in 2019. We have seen how the Brexit episode has already served to strengthen the state-like qualities of the Union and to sharpen its self-identity. Brexit has clarified what membership means.

The political agenda of Commission President-elect von der Leyen suggests that further constitutional reform of the Union is once again realisable. In this, she will be helped by Charles Michel, the new President of the European Council. A more federal union beckons, and with it the probability that the EU will be imaginative about developing a series of dynamic association agreements with its neighbours designed to foster cooperation, manage conflicts and encourage convergence.²⁴

It is even possible that the next treaty revision installs a new class of associate membership expressly in order to accommodate privileged partners of the Union, committed to the first two Copenhagen criteria but not the third.²⁵

In any case, if a reformed EU works well it will be a more attractive proposition for the UK: it will also be better equipped to deal with British exceptionalism. Britain returning would be a vote of confidence in the European project. But there should be no doubt that when faced with the British application, the future EU can be expected to be especially vigilant about its capacity to maintain the momentum of future integration with Britain back as a full member. As and when these matters are negotiated, the manner of Britain’s leaving the Union, which has still to be finally determined, will surely be remembered.

A more federal union beckons, and with it the probability that the EU will be imaginative about developing a series of dynamic association agreements with its neighbours designed to foster cooperation, manage conflicts and encourage convergence.

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- ¹ Cameron, David, "[EU reform: PM's letter to President of the European Council Donald Tusk](#)", 10 November 2015.
 - ² Johnson, Boris, "[PM letter to Donald Tusk](#)", 19 August 2019.
 - ³ Article 132 of the Withdrawal Agreement.
 - ⁴ MEPs are due to disperse after 24 October for the All Saints' holiday: the next plenary session is not scheduled until 13 November.
 - ⁵ European Council, [Article 50 Conclusions](#), press release, 10 April 2019.
 - ⁶ See my previous discussion of these problems in Duff, Andrew (2019), "[Brexit: Time regained](#)", Brussels, European Policy Centre.
 - ⁷ For the EU: European Commission, "[Finalising preparations for the withdrawal of the United Kingdom from the European Union on 1 November 2019](#)"; Communication, 4 September 2019.
For the UK: UK Government, "[Latest Yellowhammer Planning assumptions](#)"; 2 August 2019.
 - ⁸ In passing, we may note that the letter from Boris Johnson to Donald Tusk as laid down in the annex to the EU Withdrawal (No. 2) Act contains no serious purpose.
 - ⁹ A diverting historical analogy is 410 AD when the Roman legions simply packed up and left England and Wales: holding the far-reaches of the empire had become too costly (and maybe just too cold and wet). Nobody knew whether the Roman government would be back. It would not. Roman norms seem to have survived in Britain for a while before they eventually dwindled away, overtaken by history.
 - ¹⁰ European Council, "[European Council Conclusions EU/CO 1/16](#)", 19 February 2016.
 - ¹¹ See Brunner, Larissa and Zuleeg, Fabian, et al. (2019), [Ensuring a post-Brexit level playing field](#), Brussels: European Policy Centre.
 - ¹² The free movement of goods, persons, services and capital is provided for under Article 26(2) TFEU.
 - ¹³ On 1 February 2017 the House of Commons voted by 498 to 114 to trigger Article 50.
 - ¹⁴ European Council, "[Guidelines for Brexit negotiations](#)", press release, 29 April 2017.
 - ¹⁵ Article 19 TEU, supplemented by relevant case law which advances the prerogatives of the Court, notably Opinion 2/13 on the EU's frustrated application to become a party in its own right to the European Convention on Human Rights.
 - ¹⁶ The fact that the UK government tries to rename the 'transition' period as an 'implementation' period illustrates, albeit unwittingly, that it really has no idea where it is going.
 - ¹⁷ Article 4(3) TEU.
 - ¹⁸ European Council, "[European Council Conclusions EU/CO XT 20001/18 – Article 50 Guidelines](#)", 23 March 2018.
 - ¹⁹ Duff, Andrew (2019), "[Brexit: Losing control](#)", Brussels: European Policy Centre.
 - ²⁰ Christophe Hillion goes further: Hillion, Christophe (2018), "Withdrawal under Article 50: an integration-friendly process", in *Common Market Law Review*, nr 55.
 - ²¹ Article 218(8) TFEU.
 - ²² Article 207(4) TFEU.
 - ²³ To forestall endless argument about what kind of PR system would be best for Britain, the best starting point is the *Report of the Independent Commission on the Voting System*, chaired by Roy Jenkins (at the behest of Tony Blair), Cmnd 4090, 1998.
 - ²⁴ See Duff, Andrew (2019), "[The political reform agenda of Ursula von der Leyen](#)", Brussels: European Policy Centre.
 - ²⁵ That is, a new Article 49a TEU.

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