
DISCUSSION PAPER

Brexit: Launching Satellite Britain

Andrew Duff

The collapse of the Juncker-May talks on 4 December has plunged the Brexit process into crisis. Whether the outstanding issues can be resolved in time for the European Council on 14-15 December is unclear. If the problems persist, we may conclude that the Conservative minority government is incapable of delivering Brexit and that another general election must ensue. It is in any case wholly improbable that the Tory party can hold together once the content of the Article 50 withdrawal agreement is known.

In Brussels, meanwhile, the clock keeps ticking towards midnight on 29 March 2019 when the EU treaties will cease to apply to the UK. Media attention inevitably focuses on the descent of the UK into political and constitutional chaos. But Brexit also poses for the EU its biggest challenge since the fall of the Berlin Wall in 1989. Whether or not the heads of government can decide to move on to the second phase of the Article 50 talks, the EU will have to face up to some important strategic decisions which it has ducked for too long.

Europe's leaders know that failure to manage Brexit well will risk the further disintegration of the Union. Brexit may mark the end of Britain's unhappy membership of the EU, but it is not the end of Europe's British problem. After Brexit the UK will still be there, lurking a stone's throw off Calais, as a dysfunctional state run by populists with an attitude problem. Recusant Britain will lurk as a constant reminder that the EU's historic mission to simultaneously widen its membership and deepen its integration has comprehensively failed. This will be embarrassing. The disgraced David Cameron, who tried to kill off 'ever closer union' as the goal of the Union, may have the last laugh after all. That would be tragic.

The first twenty years of the life of the then European Community were plagued by the British problem. Would the Brits want to join – and, if so, should they, how and when? Was it worth sacrificing the dream of federal union on the altar of British membership? Or could alternative arrangements be preferable in the form of association agreements? Would friendly competition between the EFTA Seven, led by the UK, and the EEC Six turn into outright rivalry? Were the British really fifth-columnists for the USA, as General de Gaulle believed?

If today's European Union is to avoid a repeat of the difficulties caused by the British in the 1950s and '60s, the 27 member states need to come up over the next few weeks with a decent plan to settle the British problem for the long term.¹ Although the EU has had a lot of experience in drafting association agreements with third countries seeking to converge with it, Brexit is the first time the EU has had to agree on a process of divergence.

Privileged partnership

Lest we forget, Article 8 of the Treaty on European Union enjoins 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"*. That's a good basis on which the Union can build, in Theresa May's phrase, a "close and special partnership" with an erstwhile member state.

Such a plan, in essence, means that the British – stricken as they are – need to be treated by their erstwhile partners not like any other third country but as a privileged partner. That sense of betrayal about Brexit which is felt strongly by Angela Merkel, amongst others, will have to be put aside. Larger factors matter.

For one thing, the UK is the EU's largest export market in terms of both goods and labour. The UK is the place where the EU does most of its financial services, having access to an unrivalled pool of liquidity in the City of London. And the UK is the EU's top performer in terms of science R&D. This relationship will change a bit, even a lot, as the effects of Brexit shrink the size and change the shape of the British economy. But geographical contiguity will not change. And it would be counter productive for the EU 27 wilfully to erect tariff and non-tariff barriers to British trade unless there were good reasons to do so, such as social dumping, unfair tax competition, massive counterfeiting and a deliberate flight in Britain away from the EU's regulatory standards.

Indeed, while the EU's chief negotiator Michel Barnier is undoubtedly right to question whether the UK wishes to remain adherent to the 'European model', the EU would be mad not to do its best to retain the UK as a satellite country within its own regulatory orbit. It is also very much in the EU's interests to keep the UK contributing to certain of its common policy programmes such as Horizon 2020 and participating in some of its bodies such as the European Research Council and Europol.

The EU, nevertheless, is faced with the decision of the British government and parliament that in order to give effect to the result of the Brexit referendum the UK has to leave the EU's customs union and single market. The difficulties of maintaining equivalence between British and European norms in these circumstances – as well as the costs of not doing so – are increasingly obvious. British access to the European single market will be severely impaired unless the UK can guarantee continuing regulatory equivalence with the EU *acquis*. But there is no consensus within the UK on how to handle this problem. Parliament remains emasculated by the botched referendum, and the British government seems equally incapable of articulating a serious prospectus for the country's future once it leaves the EU. Nobody in London seems able to think beyond the end of the transition period. It falls to the EU 27, therefore, to work out its future British strategy in the expectation that the UK will eventually catch up and concur.

Neither Canada nor Norway

The options are not limitless, but they are not binary. Mr Barnier is fond of saying that the UK cannot have the rights of Norway with only the obligations of Canada. The truth is, however, that the UK will end up with a different set of rights and obligations to both Norway and Canada. These will be written down in an association treaty whose legal base as far as the EU is concerned is Article 217 TFEU, which says:

"The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

The core of the new association will be a comprehensive rules-based trade and investment partnership, including new customs arrangements, in the form of a free trade agreement, whose purpose will be to limit economic self-harm for the UK and minimise collateral damage to the EU economy. Under the over-arching

association agreement, there will be a security and defence treaty and arrangements for intergovernmental collaboration in police and internal security matters.²

Michel Barnier is ready to begin discussions with the British as early as January about options for future trade. Work must also commence on defining the framework for the future relationship. It would be helpful if Mrs May's colleagues could persuade her to propose that both sides prepare for the negotiation of a bespoke association agreement. Donald Tusk, President of the European Council, aims to conclude discussions on the concept of the future partnership at the heads of government meeting on 18-19 October 2018 in time for the definition to be taken into account by the Article 50 secession treaty.

Reinventing the British state

A key element in reaching such a rules-based trade and investment partnership between the UK and the EU is the erection of new apparatus in the British state on which the EU authorities will be able to rely to ensure compliance with the terms of the new association agreement.³ Home grown British regulators will be needed to substitute for the role of the European Commission in surveillance of regulatory equivalence and compliance enforcement. In some cases such UK equivalents exist and will be able to perform their new functions once they are accorded an increase in powers and resources. In other cases, wholly new regulatory authorities will have to be created.

In all cases, however, the key issue as far as the EU is concerned will be the relative independence of the British regulatory framework from political control. Unless British regulators can take the UK government to court for failure to act to apply correctly the terms of the new EU trade agreement, the necessary equivalence will not be ascertained. And without guaranteed autonomy of the British regulatory framework, the UK will not be readmitted to partial membership or observer status of the important EU agencies in critical areas such as medicines, food safety, environmental policy, nuclear industry and aviation safety. An association agreement is a prerequisite for participation in the EU agencies.

The Irish question

The problem of trustworthy regulation is particularly acute at the new external border of the EU in Ireland. While this border cannot be 'frictionless', neither can it be heavily policed. The concept of a hard border is ruled out under the terms of the Good Friday Agreement, the UK Northern Ireland Act 1998 and the respective legislation of the Republic of Ireland. These measures were a historic compromise, pooling British and Irish sovereignty and creating dual citizenship.⁴ Sovereignty that is shared constitutionally cannot be revoked unilaterally, especially when it is recognised explicitly in the EU treaties and under EU law and supported politically by the EU 27.

While the politics of the island of Ireland are still fraught, its social and economic integration runs deeper than the level of integration resulting from joint membership of the EU single market. In some cases, such as that of wholesale electricity market, there are UK-Irish co-regulators, and many public services, including health, education and emergency services are supplied and run jointly on a cross-border basis. Both the London and Dublin governments agree in principle that this joint activity should not change, but they cannot ignore entirely the consequences of Brexit.

It has already been agreed that the Article 50 secession treaty will entrench the Anglo-Irish common travel area – a kind of mini-Schengen agreement – which privileges British citizens living in Ireland and Irish citizens living in the UK with rights beyond those normally granted to EU citizens resident in an EU state other than their own. So already the notion of privileged partnership becomes implicitly a part of the post-Brexit settlement, at least with respect to citizens' rights.

It is when those citizen travellers are commercial that things get more complicated. Under normal circumstances the Commission, backed up by the European Court of Justice, would penalise the Dublin

government for failing to levy the appropriate VAT and excise duties, to check rules of origin or to supervise the health and safety standards of goods entering its jurisdiction from Belfast. If an exception is to be made in this case, Ireland's 26 EU partners as well as the EU institutions will have to evince a large measure of tolerance about their uniquely porous external border.

To write down in treaty form the time-honoured procedure of turning a blind eye is not unprecedented, but can never be straightforward. A generous dispensation can be given to micro-traders below the customs radar, but such latitude will be merrily exploited by smugglers too. The moment the first chlorinated chicken struts its stuff across the Ulster border the EU will have to bring the shutters down.

One avenue that seems closed, at least for the moment, would be to devolve much greater powers of public administration on to the Northern Ireland Executive at Stormont. Unfortunately, and for their own sectarian reasons, the local political parties have agreed not to re-establish the government after recent elections.⁵ The absence of a trustworthy Belfast administration hardly helps to establish the necessary conditions for dealing with the Irish question elsewhere in Europe. Ideally, the current Anglo-Irish arrangements would be adapted to strengthen cross-border cooperation in order to ensure the balance of rights and obligations on which the Commission rightly insists.

Northern Ireland cannot be part of two customs unions. Even if it were on offer from Brussels, no special trade deal for Northern Ireland that divided up the UK is likely to be acceptable in constitutional terms. The Good Friday Agreement provides for a softer customs border in Ulster than does or will exist between Great Britain and the EU. But if there is to be regulatory equivalence between Northern Ireland and Ireland, there must be a similar level of regulatory equivalence between Great Britain and the EU. If the Commission and Council have not understood this they have not been well advised. The regulatory arrangements agreed for Northern Ireland as part of an UK-EU association agreement will apply to the whole of the UK. There is absolute urgency, therefore, in moving towards the negotiation of such an over-arching trade agreement, including its customs components.

In the event that no EU-UK association agreement can be reached, the British and Irish governments have accepted in principle that they will ensure continuing regulatory alignment between the two jurisdictions on the topics covered in the Good Friday Agreement. This is the perfectly sensible fall-back position to which the DUP stupidly objected on 4 December.

Governance

Beyond the special set of arrangements relevant for Ireland, the overall new association agreement between the UK and the EU 27 will need robust joint institutions at ministerial, technical, parliamentary and judicial levels. The judicial tribunal is the more tricky to design. The European Court of Justice will have to drop its opposition to sharing its jurisdiction with a privileged partner state through the mechanism of a joint court. A long time ago the Court rejected the idea of a joint court for the European Economic Area, and left the three EFTA countries to form their own sister (and largely subservient) court.⁶ But because the UK is not seeking to join the EEA, that judgment is not strictly relevant. Brexit throws up a unique set of problems which demands unorthodox measures. The volume and complexity of legacy litigation will be significant, requiring a streamlined, efficient and trustworthy judicial process.

Building on the model of the joint tribunal included in the EU's association agreement with Ukraine, a joint Anglo-European court would be the best solution. The Court of Justice can well enough protect the autonomy of the EU legal order from any adventurism on behalf of the UK Supreme Court by keeping a majority of EU judges on the joint court.

In the interim, while the association agreement is being negotiated and until it enters into force, there is a complicated transitional period to surf. It will be ordained for two years, but should be rendered renewable on a unanimous decision of the European Council. The transition will not be the 'implementation phase'

first touted by Tory ministers: there is no time or appetite left for that. The new-style transition period will maintain the status quo of membership absent the EU's political institutions. Just like old times, without the nuisance of having to go to Brussels to represent the country.

The Article 50 treaty will lay down the terms of the transition. A joint transition authority ('Joint Committee') will be set up in Brussels to deal with difficulties, both foreseen and unforeseen. David Davis, Britain's very own *Monsieur Brexit*, is to introduce yet another draft law to the House of Commons – the Withdrawal Agreement and Implementation Bill – that will determine from the British end the arrangements for the transition period.

The main purpose of this transition law will be to re-introduce to the UK on a temporary basis the very EU powers that the EU (Withdrawal) Bill will just have annulled on a permanent basis. Mrs May has not yet divulged much of this to her expectant party, parliament or public. But she needs to do so soon. Perhaps Mr Tusk from his Brussels podium, in that way he has, might usefully nudge her in that direction.

Satellite Britain and its weak government need all the help it can get from its European friends if the country is to stay safely within Europe's orbit. And if the United Kingdom settles to its new trajectory, the European Union will be saving itself a lot of future trouble.

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

Endnotes

- ¹ This theme is developed in my forthcoming book *On Governing Europe: a federal experiment*, January 2018.
- ² As discussed previously in *Brexit: Terra Nova to explore together*, EPC Discussion Paper, 7 November 2017.
- ³ For more on this, see my speech to Centre on Regulation in Europe (CERRE), 22 November 2017, <https://www.scer.scot/database/ident-4058>
- ⁴ See Christopher McCrudden & Daniel Halberstam for the UK Constitutional Law Association, 21 November 2017, <https://ukconstitutionallaw.org/2017/11/21/christopher-mccrudden-and-daniel-halberstam-northern-irelands-supreme-court-brexit-problem-and-the-uks-too/>
- ⁵ By failing to reconvene the Stormont assembly, Sinn Fein and the DUP deftly evade their responsibilities to vote a legislative consent motion on the Article 50 treaty.
- ⁶ Opinion 1/91.

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