
DISCUSSION PAPER

Brexit and Europe: a new entente

Andrew Duff

Given that UK membership of the European Union is unsustainable, divorce is for the best. The Article 50 withdrawal agreement is the divorce settlement. As in all such marital breakdowns, there is a risk of bitter recrimination.

Theresa May is already well-known for her lucid statements, such as "Brexit means Brexit". Another favourite is her assurance that although quitting the EU, "Britain is not leaving Europe". She does not want membership of the European Economic Area (on offer), nor associate membership of the EU (not on offer). Instead, she wants a "new, strong, constructive partnership" with the EU, which is also both "equal" and "strategic" (Lancaster House speech, 17 January). And she prefers bespoke tailoring to off-the-peg.

From this we may glean that Brexit will not be the end of the story of Britain's many and varied continental entanglements. In this paper I examine whether we can begin to look at the Article 50 process in a more positive light – that is, whether Brexit could herald a new period of entente between Britain and Europe. For this to happen, both parties need to spell out quickly and clearly what is within the bounds of the possible.

The EU 27 has necessary guidance from its Treaties, which it would be wise to heed. The broad goal is to develop "a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness" (Article 8 TEU). More specifically, the EU may conclude an agreement with the UK "establishing an association involving reciprocal rights and obligations, common action and special procedure" (Article 217 TFEU).

Mrs May's ministers, however, like latter-day British explorers, seem to be embarking on an intrepid adventure with no clear idea where they are going. The prime minister is obviously worried that the publication of a roadmap and itinerary would blow her cabinet and party apart. She should nevertheless take comfort from the long-winded parliamentary debates at Westminster which suggest that there is ample potential to build a decent cross-party consensus behind a prospectus for Britain's future relations with the EU. However, she has only a few weeks left to set out her stall, including her concept of the "framework for the future relationship" (Article 50(2)). She would be wise to ask President Tusk to try to reach an agreement on that framework at the December 2017 meeting of the European Council (once the new German government is in place).

Meanwhile, both sides should nudge their way forward towards defining Britain's future landing zone. Mrs May's next opportunity to elucidate is when she triggers Article 50 in March. The European Council

will have the chance to respond when it sets out its guidelines for the conduct of the negotiations at its special meeting in April, as will the European Parliament in a preparatory report. The Commission will have its turn in June when the official Article 50 negotiations actually begin.

The institutions of a new partnership

Call it what you will – pact, concordat, pragmatic compromise – the treaty that emerges from the negotiation will be unique. But if it is to deliver what the prime minister wants and encompass the range of matters she proposes, including trade and security cooperation, it will be in similar territory to the association agreements envisaged under Article 8 TEU. Familiarity with the concept of formal association should make it easier for the EU 27 to reach a neighbourly deal with the British. A recent template for such a thing already exists (signed by the UK as well as the EU 27 in 2014) with respect to Ukraine.¹ An earlier model is the UK's "intimate and enduring" association agreement with the European Coal and Steel Community agreed between Churchill and Monnet in 1954.²

No matter the terminology, at the heart of any new agreement will be the comprehensive free trade area already signalled by Mrs May. Britain's level of ambition in the matter of EU trade must be much higher and the scope of its FTA much wider than that of the CETA, the recent minimalistic agreement with Canada. The EU's new partnership with Britain will start from a point where no other FTA has begun: extensive economic and regulatory convergence between economies deeply intertwined after 45 years of integration.

What the prime minister does not, or dare not say is that future British access to the single market shorn of tariffs and tariff quotas requires strong institutions to supervise it. Traditional institutions used by the EU to manage FTAs – a technical working group here and there – are unlikely to be sufficient to oversee this much deeper and dynamic relationship. Rather, a network of joint committees of trade officials will be needed, sector by sector, to supervise standards and to ensure approximate regulatory equivalence. While British harmonisation with the EU *acquis* can be assured on day one after Brexit, divergence is bound to occur in the years to come as the EU 27 and their EEA partners continue to deepen market integration, notably in energy and services. British business must continue to be heavily involved in the EU-wide trade and professional associations based in Brussels that shape the development of EU policy and law-making.

If Britain and the EU agree to follow the template of the association agreement, a council of association will be required to sit on top of these sectoral committees, which may number about 30, to survey their progress and settle disputes. The council will be empowered to alter the technical annexes to the partnership agreement to reflect the dynamics of EU and UK law, ensuring regulatory convergence is maintained where both wish it to be. Decision-making in the association council will be intergovernmental – that is to say, nothing will be agreed that is not jointly agreed between the UK and the EU. British ministers will sit in the association council alongside relevant members of the European Commission and the rotating presidency of the EU Council of ministers.

Dispute resolution

In cases where it is not possible to reach political compromise, a dispute resolution mechanism will be required. Lord Cockfield, the member of the Commission who drafted the plan for the European single market, insisted that this was essential for ensuring that the terms of trade were respected and that member states would carry out their commitments properly. For the EU's internal purposes, this function is performed by the European Court of Justice (CJEU). A comparable mechanism is required if the new UK-EU agreement is to function satisfactorily for both parties. This should take the form of a judicial tribunal – to which businesses or either party to the agreement could bring cases – and which could issue binding arbitration, empowering the aggrieved party to seek compensation or, ultimately, to suspend the partnership agreement.

One model for such a tribunal is found in the EFTA court which litigates disputes relating to the three non-EU members of the EEA. It regards itself as a 'sister court' to that of the CJEU, and both courts work hard to maintain consistency of judgment. Alan Dashwood recommends that the EFTA court is borrowed by the UK-EU agreement, but other models are available.³ A simple judicial tribunal of three judges – one from each party plus a neutral third – would, for example, do the trick, thereby liberating the UK from the direct jurisdiction of the CJEU which appears to be one of Mrs May's main political objectives. Unlike the CJEU, the judgments of the joint tribunal would not have direct effect on the laws of either the EU or the UK, although both parties would use their best endeavours to comply with tribunal rulings as part of their commitment to respect international law. Unsolvable disputes between the UK and the EU would end up either under WTO arbitration or ultimately at the International Court in The Hague.

Projecting security

Having a stab at free trade will not be enough of a basis for a durable and settled special relationship between the EU and Britain. The EU's association agreements involve a level of political commitment to developing a strategic partnership, by both sides. Their institutional apparatus is designed to facilitate trustful diplomacy based on common values and principles. No special relationship with a neighbour will be more important for the EU than the one it manages to establish with Great Britain.

The UK-EU council would have oversight of the elements of political cooperation in the fields of foreign and security policy and of justice and home affairs. Problems of Britain's patchy connection with the EU's fast-changing immigration, asylum and border control policies would be addressed in this forum. As would preparation for G7 and G20 summits, and the coordination of positions at the UN and in international climate change conferences. The joint commitment to combat together terrorism and organised crime would be often on the agenda.

In the hierarchy of the partnership agreement, above the association council would be annual summit meetings between the British prime minister and the presidents of the EU institutions. Below the council would be a joint parliamentary committee of MEPs and an equal number of British MPs, peers and, possibly, members of the devolved assemblies. This parliamentary element would be very important in keeping the UK engaged in the political life of the European Union. Alongside the official bodies could be a consultative committee composed of representatives of the social partners and organised civil society.

Making the transition

Once, but only once the framework for the future relationship is agreed upon will it be possible to advance the discussion on transition. At the outset, quite rightly, Michel Barnier sees the need for transitional arrangements in order to phase out those of Britain's obligations that will not be guillotined at the bewitching hour when the Brits leave the EU institutions and the Union Jack is lowered at the Berlaymont. These legacy issues will primarily involve the EU budget, but there will also be other matters to disentangle, such as the UK's diminishing adherence to EU regulation and the balance to be struck between the UK's rights and obligations with regard to international treaties to which both the EU and its member states are party. On these and other doubtless unexpected questions, more time for phasing out will be necessary if a legal vacuum is to be avoided and collateral damage minimised.

If the European Council has been able to agree with the British that the best framework for their future relationship is a treaty of association (call it what you will), the transitional period can also be used for the phasing in of regulations that will bridge the gap, in the interest of continuity and legal certainty, between Brexit and the conclusion and entry into force of the new agreement.

In my view, a dedicated transitional authority will need to be established to monitor and supervise the Brexit process and to manage inevitable legacy difficulties over an indefinite period. Such an EU-UK transition

agency, with a small joint secretariat, would be charged with coordinating the dismantling of the UK's ties to the EU with the passage and implementation of the Great Repeal Bill and the setting up of the new regulatory regime in Whitehall.

The creation of the transition authority would be provided for in the Article 50 withdrawal agreement. As and when a new partnership treaty is concluded, the transition authority could easily morph into the secretariat of the association council, and it would be given new powers at that stage to encourage economic development and political cooperation between Britain and Europe.

In the longer term, who knows where this entente between Britain and Europe would lead? But it would surely be somewhere better and brighter than any obvious alternative.

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

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- 1 See my evidence to the House of Lords EU Committee on the Ukraine Association Agreement, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/written/43513.html>
 - 2 <http://andrewduff.blogactiv.eu/2016/09/01/intimate-and-enduring-britains-first-association-agreement-with-europe/>
 - 3 <https://infacts.org/eea-good-model-dispute-resolution-post-brexit/>

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