
DISCUSSION PAPER

Brexit: Dealing with withdrawal symptoms

Andrew Duff

Britain's efforts to leave the European Union are in trouble. At the press conference on 31 August after the third round of talks, Michel Barnier evinced his frustration:

"The UK wants to take back control, it wants to adopt its own standards and regulations but it also wants to have these standards recognised automatically in the EU. That is what the UK papers ask for. This is simply impossible."

The tiresome cheeriness of Brexit minister David Davis cannot disguise his own slender grasp of detail or the lack of Conservative cabinet cohesion on the overall Brexit strategy. He is reduced to repeating his call for more flexibility and imagination. Growing distrust between the Barnier and Davis negotiators means it is unlikely that the European Council in October will be able to take the decision that "sufficient progress" has been made in the first phase of the negotiations in order to allow a move to phase two. Without such a change of gear, the British will be unable to get the EU27 to talk about the transition period to bridge the gap between Brexit and the entry into force of a new UK-EU association agreement, which Theresa May describes hopefully as "a deep and special partnership".

There is no point in London trying to divide the EU27. Contrary to British claims made in bilateral discussions in other EU capitals, the Brussels Article 50 team is not broken, Mr Barnier commands solid support within the Commission, Council and Parliament, and the European Council guidelines of 29 April still apply in full.

There are three topics in the first phase of the Article 50 talks. Progress must be made on all three before the heads of government will agree to talk about the transition, let alone the long term. This article concentrates on those 'separation issues' and highlights the main sticking points in each.

Citizens' rights

Both sides pay lip service to the idea of reciprocity of citizens' rights – in other words, EU citizens living in the UK will be treated in the same way as UK citizens staying on in the EU. It's a neat conceit, but not in fact deliverable. The UK government has made it perfectly clear that it does not accept that EU citizens residing in Britain after Brexit will have acquired wholesale rights by virtue of the status they previously enjoyed under EU law.

Mr Davis has launched his so-called Repeal Bill – officially the European Union (Withdrawal) Bill – in order to legislate for Brexit.¹ But the Bill does not seek to replicate the current rights of EU citizens. Instead, a separate Immigration Bill is envisaged that will create a new class of 'settled status' for EU citizens in Britain under conditions less generous than those continuing to apply to Brits in the EU under the terms of the Long-Term Residence Directive (except in Ireland and Denmark, which have opted out of the directive). The new British immigration law is intended to give EU citizens better terms than those that apply to third country nationals (according to a 1971 Immigration Act) but not as good as the rights they have now, in particular with regard to family members. Moreover, their new status will be based on privileges rather than rights, and privileges granted under UK law may also be withdrawn by UK law.

Putting governance in place

Despite the absence of reciprocity, divergences on the remaining technical aspects of this part of the Article 50 negotiation may be overcome.² The EU27 has to be reassured that the UK public administration can stretch to decent treatment of its EU citizens. But a final settlement of the citizens' dossier will not be reached unless there is a solid agreement on issues of governance – so far barely addressed. Specifically, how can we ensure that the Article 50 withdrawal agreement once signed and sealed will be correctly applied in terms not only of international law but also within the domestic legal orders of the UK and the EU? So far, the two sides are diametrically opposed, and continue to talk past each other.

The UK has rejected the EU's proposals, published on 12 June, which assumed that the European Court of Justice would continue to have "full jurisdiction" to protect the rights of EU citizens living in the UK.³ The British find this a contradiction to the EU's expressed intention to treat the UK post-Brexit like any other third country. That being the case, say the Brits, there can be no justification for the continuing sway of any European Court over internal British affairs. There is an overwhelming desire at Westminster, and no doubt much rejoicing across the nation, at the prospect of imminent liberation from EU law. Nevertheless, it is important to recognise that the direct effect of the Article 50 agreement means that it will be up to the UK courts to guarantee the correct application of the agreement. British courts have lived quite happily with the doctrine of direct effect for 45 years, and there seems little reason to deny it now.

In any case, it is the Repeal Bill which will legislate for the implementation of the secession treaty in UK law, and the EU institutions will therefore need to monitor the legislative process closely to ensure that transparency is clear, no legal lacunae are created and complaints procedures are sound. Britain's decision not to take over the EU Charter of Fundamental Rights into UK law will compound uncertainty, as its terms will bind one party to the Article 50 agreement but not the other.

The UK argues that all will be well for EU citizens if judicial protection of their privileges is left entirely up to British courts. But in its own position paper on enforcement and dispute resolution (23 August), it is now admitted that while the UK still needs to escape from its jurisdiction, British courts may continue to pay heed to the jurisprudence of the European Court as it stands on 29 March 2019 but also as it evolves thereafter.⁴ Here the Repeal Bill presents something of an obstacle because it expressly removes the right of British courts to make a reference to Luxembourg for preliminary rulings under Article 267 TFEU. This slip can be corrected by the British Parliament as it ploughs through the Bill: direct effect works best when the decentralised courts have direct access to the ECJ as and when they need it.

More consistency in London would help things along. But bold institutional innovation is also required if vast legal confusion is to be avoided. There is an unarguable case for the creation of a new judicial authority neither wholly British nor wholly European to oversee the uniform application of the secession treaty.

What form could this body take? There is a choice. The first option is for a joint tribunal of, say, four judges from the EU Court of Justice and three judges from the UK Supreme Court (UKSC) empowered to refer questions of interpretation of the secession treaty to either the ECJ or the UKSC, or both. A judgment of the

joint tribunal against an action by the UK or the EU on the misapplication of the Article 50 treaty would lead to amendment of the offending measure. Failure to respect the judgment of the tribunal could cause the suspension of the relevant provision of the treaty.

A precedent for a joint tribunal of this type was created when the European Economic Area was first established. At that stage, however, (Opinion 1/91) the European Court struck down the proposal on the grounds that the proposed hybrid body could compromise its own authority to interpret EU law: sufficient homogeneity, it argued, could not be guaranteed between itself and the proposed EEA joint court.⁵

In the event, the final EEA agreement established not one joint tribunal but a parallel judicature whereby cases disputing the application of the EEA treaty involving the EFTA member states would be brought before a special EFTA court while those involving the EU states would continue to be addressed to the ECJ. That twin-track compromise, which is Brexit's second option, was deemed acceptable by the ECJ (Opinion 1/92) because provision was made for the EFTA court to refer matters to the ECJ, and a joint committee was to be set up to monitor the evolution of EU law and its application by the EEA states. The parallel system has worked reasonably well in practice, as the EFTA court undertakes to follow the jurisprudence of the ECJ as closely as it can. The EFTA court agrees to "pay due account" of relevant ECJ decisions and has described itself as a sister court of the ECJ.⁶

Whether such a sisterly accommodation could be reached with the British is another matter altogether. The volume of relevant ECJ case law and the complexity of post-Brexit litigation will be very much greater than that which worries the EEA. One recalls that in recent years the Court of Justice has been very active in advancing the cause of EU citizenship on the legal basis of Article 20 TFEU which says that citizens have the "right to move and reside freely" across the EU. The Luxembourg judges have taken that injunction fairly literally, and they are unlikely to fade away now just because of Brexit: rather the contrary.

An EFTA-type solution for the UK would mean the setting up of a new, busy all-British court that subjected itself to follow the European Court. It would be difficult to square that construction with the terms of the Repeal Bill or, indeed, more generally with the political imperative to respect the settled meaning of the Brexit referendum.⁷

The best solution, therefore, is for the UK to revert to the first option originally crafted for the EEA. A joint UK-EU tribunal with strong powers should be established to oversee the application of the secession treaty with respect to citizens' rights, to resolve disputes and to provide national courts with appropriate remedies.⁸

The art of compromise

To reach such a result, both Britain and the EU27 would have to compromise (which is itself rather satisfying). Under the auspices of a joint tribunal the UK would accept the jurisdiction of the ECJ regarding any piece of EU law applied post-Brexit, including (and particularly) citizens' rights derived from EU law prior to Brexit. Such an arrangement could be time-limited, although one hopes many EU citizens living in the UK will survive for a long time. The EU would accept to dilute the autonomy of its legal order on behalf of its ex-member state in so far as legacy citizenship issues were concerned. In effect, the EU would have to concede that the UK should not be treated like any other third country but would acquire the status of privileged partner.

Is such a privileged status legally and politically acceptable? There are signs that it could be so. The two sides in the Article 50 talks already seem to have agreed in principle to the establishment of a 'Joint Committee' to see through Brexit. Although the mandate and composition of the Joint Committee have yet to be determined, it is obvious that such a joint transition authority will monitor the application of the Article 50 agreement, deal with unforeseen problems, and attempt to resolve disputes politically before they escalate into litigation. One could well imagine the Joint Committee being transformed into a surveillance authority and secretariat of any future UK-EU association agreement to be negotiated under Article 217 TFEU.

So, two questions must be answered promptly. First, can the Tory party oblige the prime minister to soften her hostility towards the European judiciary? The answer will come soon when Mrs May makes a big speech on Europe in the run-up to the Conservative Party conference on 1-4 October.

Second, can the European Court of Justice be persuaded to agree to accept a joint judicial tribunal for the British of the kind it rejected for the Norwegians and Icelanders fifteen or so years ago? Nobody will really know the answer to that question unless and until it is asked of the Court. But soundings can be made by the Commission. In the last resort, it would be up to the European Parliament to file a case under Article 218(11) to verify the compatibility of the emerging withdrawal agreement with the EU treaties.

Money troubles

A second major disagreement in the Article 50 circus persists over the financial settlement. The Commission team was stung by the accusation from a British official that their financial methodology had simply "no merit". Mr Barnier complained:

"In July, the UK recognised that it has obligations beyond the Brexit date. But this week, the UK explained that these obligations will be limited to their last payment to the EU budget before departure... After this week, it is clear that the UK does not feel legally obliged to honour these obligations after departure."

So, who's right? The UK is party to the EU's multi-annual financial framework that runs until the end of 2020. The Treaty of Lisbon obliges EU annual budgets to comply with the MFF (Article 312(1) TFEU). If the UK pulls out of the MFF agreement it will be in breach of EU law. Because deficit financing is not allowed, it would pitch the EU into default. Such a 'hard Brexit' would at once blow a hole in the EU's revenue estimated at EUR 40bn. Scuppering the EU finances would turn all the EU27 against the UK – the poorer countries because they need the money and the richer (including such Anglophile governments as the Dutch and the Danes) because they would have to pay more.

Then there are other longer term commitments that the UK has made, including pensions and contingent liabilities, promises to Ukraine and Turkey, and pledges via the European Development Fund to overseas aid. There are off-budget items such as Galileo, and the UK commitment to the European Investment Bank. These are all legal commitments and, as such, can always be broken – but at what cost? It would be less easy for the UK to escape from its moral obligations. To be fair to Mr Davis (and why not?) he seemed to be admitting as such in emphasising that the Article 50 agreement would be "in accordance with the law and spirit of the UK's continuing partnership with the EU". That does not presage a breakdown of the talks on money grounds, but the quarrelling about budgetary methodology is sucking away what little trust remains between Britain and the EU27, stirring up British nationalism, and causing futile delay to the Article 50 process.

When all is said and done, it would be better for the UK to agree to stay in the MFF until 2021 and simply make a deal on the rest of the money for a fairly random sum. Almost any figure could be justified later in a dozen different ways and be made payable over several years until the accounts were closed. Mr Davis calls for "flexible and imaginative solutions" but comes up with none. There's one.

The Irish question

Lastly, what to do with the dysfunctional province of Northern Ireland? The uniqueness and intractability of the problem has been recognised by giving it pride of place in the Article 50 process. The UK's own position paper (16 August) offers little more than wishful thinking and a plea for a "flexible and imaginative approach that goes beyond current EU frameworks". The new Irish government, a bit incoherently, has floated the idea of an all-Ireland free trade zone which would somehow (implausibly and illegally) straddle two customs unions. Both Dublin and London have talked longingly of a "seamless and frictionless" border.

Talks to date have focussed on, first, the future of the Common Travel Area arrangement for persons: here, the UK will have to create effective new ways, via employers and universities and local government, to keep track of EU citizens coming across to Britain from Belfast. A second topic has been how to guarantee the maintenance of the nexus of integrated relations that fall within the Good Friday Agreement, which, like the Common Travel Area, is underpinned by EU law. The Good Friday Agreement involves the sharing of sovereignty between the national, regional and local governments of the UK and Ireland on issues, mainly domestic, that concern the welfare of the province. But it is also the framework inside which many services, such as the power grid and health services, are shared between the two jurisdictions. Oddly, it seems to work.

Negotiations on the future of more general Anglo-Irish trade in goods and services must wait until phase two of Article 50 commences. They will be difficult. There is no escaping the fact that Brexit causes to be re-imposed tax, excise, customs and other regulatory controls around the UK's six counties of Ulster. Reality will be rather different, however. For the combination of a distinct lack of political will, the fear of a return to sectarian violence and weak administrative capacity makes border controls in this case virtually inoperable. The Irish frontier will be the most porous external border of the EU, poorly policed and much smuggled.

The Dublin and London governments will have to accept their liability under EU and WTO rules for any breach of standards¹ rules or uncollected VAT, excise duties and tariffs on goods and services that cross the Ulster border. Much will be made of the potential of hi-tech solutions to simplify the tracking and tracing of goods, persons and cows. But, as witnessed by the recent OLAF investigation into Chinese counterfeiting, the record of HM Revenue and Customs in preventing contraband is not good at the best of times. Discreet measures can be taken to mitigate the scale of the problem by tightening the frontier controls at the other frontiers of the Irish Republic and in Great Britain, but the Ulster problem itself will not go away.

It is irrefutable that the Irish dilemma reinforces the already strong argument for the UK to try to retain membership of the existing customs union and single market arrangements during a transition period that must last until the new association agreement, at the heart of a deep and special partnership, enters into force. Here again, there is room for compromise. For the duration of this transitional period, the UK will need to respect in full the jurisdiction of the ECJ. In return, the EU27 and the EU institutions will have to turn a blind eye towards the state of their Irish border. Some folk, especially German lawyers, will hate being complicit in such a grand collusion; but nobody will be able to deny that, when needs must, they have not proven to be flexible and imaginative.

Another speech

As the Article 50 negotiations falter in Brussels, the Westminster parliament begins its deliberation on the vast, complicated and controversial Repeal Bill.⁹ The purpose of this law is to replicate the entire content of the EU acquis in UK law – with the regrettable exception of the Charter of Fundamental Rights – and then to retain, amend or annul such law. As much of what has to be done, including the replacement of EU regulatory bodies by new British public authorities, will not be known in detail until the Article 50 treaty is concluded, the government has reserved for itself unprecedentedly wide executive powers to expedite Brexit.

It is possible that opposition forces in the Commons and Lords will combine to modify the government's stance at the Article 50 talks. A few pro-European MPs and peers even want to wreck the Bill and stymie Brexit altogether; other (more numerous) anti-European MPs would prefer a hard Brexit to the accommodation implicit in signing up to an Article 50 withdrawal agreement.

Further uncertainty will arise as the devolved parliaments in Scotland, Wales and Northern Ireland make their bid to take over powers once executed by the Commission, for instance in agriculture and fisheries. But the Remainers have one big problem: if by hook or by crook they destroy the current Article 50 process,

there will be no second chance. The EU is preparing to leave the UK behind at midnight on 29 March 2019. In the absence of an Article 50 treaty there will be no looking back.

One has learned over the years not to anticipate without trepidation British prime ministerial speeches on Europe. Theresa May's speech in the run-up to her party conference – possibly on 21 September and, we are told, 'in Europe' – is of more than usual importance. First of all, she would be wise to tone down her rhetoric: her party's braggadocio may be symptomatic of Brexit, but it is not seemly. Withdrawal is, after all, a retreat.

Mrs May could reassure us as to the capacity of the apparatus of the British state actually to deliver Brexit. She should tell us what kind of a European country she hopes Britain eventually to be. She must shed light on the nature of the transition period, its financing and governance, and locate clearly the UK's future landing zone. In how it moves the Tory party, the speech will make or break her leadership. How it is received in Brussels will inform the decision of the European Council on 19-20 October about whether to move to the next phase of the Article 50 negotiations.

The prime minister's self-appointed task is to expedite Brexit. A display on her behalf of real pragmatism, flexibility and imagination will point the way towards an orderly departure and a serious association agreement beyond. Conversely, another display of tactical incompetence, snared by delusion, will assuredly ruin Britain and cause deep collateral damage to the rest of Europe.

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

Endnotes

- ¹ <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>.
- ² https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-positions-citizens-rights-after-third-round-negotiations_en.
- ³ All EU papers are to be found at:
https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en.
- ⁴ All UK government papers are to be found at:
<https://www.gov.uk/government/publications?departments%5B%5D=department-for-exiting-the-european-union>.
- ⁵ The same need to guard its supremacy has been shown subsequently in the Court's opposition to accepting the external jurisdiction of the European Court of Human Rights (Opinions 2/94 and 2/13) consequent on the EU's accession to the ECHR.
- ⁶ That Switzerland is not party to the EFTA/EEA judicial system is the cause of friction with the EU.
- ⁷ For this reason we do not follow the line taken in the interesting CEPS paper of 1 September by Steven Blockmans and Guillaume Van der Loo, *Brexit: Towards an 'EFTA-like' dispute settlement mechanism* (<https://www.ceps.eu/publications/brexit-towards-efta-dispute-settlement-mechanism>). Our argument is predicated on the assumption that the UK government holds to its decision not to re-enter EFTA in order to seek membership of the EEA. We agree with the government that EEA membership is too undemocratic for the UK to contemplate with equanimity.
- ⁸ Depending on the nature of the eventual UK EU association agreement, similar joint tribunals would be needed to cater for other aspects of the future relationship, notably trade.
- ⁹ The EU (Withdrawal) Bill was published on 13 July. On 1 September the House of Commons Library issued a Briefing Paper on the Bill. <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8079>.

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