

## Exiting or Entering the Union: EU Consistency in Accession and Withdrawal Negotiations

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### Executive Summary

The accession process and Brexit largely deal with the same issues. A comparison allows for assessing EU consistency across the two cases:

- > First, the EU's decision to act in unity for the rights of EU residents in the UK is a display of solidarity, and should be acknowledged as such.
- > Second, if the four freedoms of the single market are seen as indivisible in Brexit negotiations, this should also be the case in accession talks.
- > Third, a solution to the border regulation in Northern Ireland may be inspired by the Annan Plan for the reunification of Cyprus. This would mean applying some parts of EU law to Northern Ireland.
- > Fourth, regarding the governance of the withdrawal agreement, inspiration can be taken from the association agreements. The Court of Justice of the EU and the Commission could have a stronger role for dispute settlement in the fields of residents' rights and EU law. Conversely, a Joint Committee with the right of deferral to arbitration or to another dispute settlement mechanism could deal with other issues in the withdrawal agreement.
- > Finally, while the accession process can take as long as needed for the candidate country to adopt all EU rules, the exit process has a fixed deadline. This should be handled responsibly.

This policy brief compares the European Union's (EU) negotiating positions *vis-à-vis* the UK on Brexit with its positions *vis-à-vis* candidates which have started their accession negotiations, namely Turkey, Serbia and Montenegro, as well as the Former Yugoslav Republic of Macedonia (FYROM), whose candidacy represents a number of political aspects worth highlighting in the context of this paper. These two types of processes can be seen as reflections of each other: while the withdrawal talks with a member state are about how to become an 'outsider', the enlargement negotiations with the candidate countries are about how to make them 'insiders' of the EU political system. The Brexit negotiations seek to result in a new structured relationship between the EU and the future outsider, whereas the accession negotiations draw on an already structured relationship and aim at club membership as *finalité*. Such a comparison allows for testing the EU's consistency and helps to reflect on whether lessons from one case can help resolve challenging issues in the other case.

This policy brief will focus on the main debates in the Brexit negotiations, namely the rights of residents, access to the single market, the regulation of borders (notably with Ireland), and the governance of the withdrawal agreement, as well as the pace of the negotiations. It compares these discussions with the negotiations on the same set of issues in the accession talks, before outlining the policy implications of this comparison for both the Brexit and the accession negotiations.

#### Reciprocal rights of residents

The main negotiations in the Brexit case seem to focus on the rights of EU citizens who have settled in the UK

and the rights of UK nationals settled in the rest of the EU. Judged by the current state of the debate, the final regulations on the rights of EU citizens in the UK and those of British citizens in the EU will be similar. The Guidelines Following the Notification of the United Kingdom under Article 50 TEU (European Council 2017) state that ‘throughout the 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 interests of its citizens’.

The experience of accession negotiations demonstrates that EU member states may have different preferences regarding possible transition periods for the free movement of the citizens of new member state(s). This differentiation actually caters for the national needs of each member state to be taken into consideration against possible migratory flows from the incoming country. However, if this differentiated logic was extended to a withdrawal agreement, then different reciprocal rights could be foreseen for the citizens of each EU member state. This might well be to the detriment of some, especially newer, member states. The EU has therefore chosen to act as a bloc on this issue, not allowing negotiations between the UK and individual member states. This is a sign of concrete solidarity among the member states. If maintained and concluded successfully, this experience should be explicitly presented as a success in protecting national interests collectively within the EU.

### **Consistency of principles regarding the single market**

The UK’s desire to maintain access to the single market without allowing for the free circulation of labour is criticised as ‘cherry-picking’ by the EU. The first principle stated in the Guidelines (European Council 2017) is that there will be no sector-by-sector approach to the single market and that its four freedoms are indivisible. This entails that the British government will not be allowed to pick and choose.

Inversely, ‘cherry-picking’ regarding the single market does exist in the accession negotiations. For instance, the Negotiating Framework for Turkey states that ‘derogations, specific arrangements or permanent safeguard clauses on free movement of persons may be considered’ in the case of Turkey joining the Union (Council of the European Union 2005). In this case, the

Council thus allows for EU ‘cherry-picking’ regarding the four basic freedoms of the single market to be enjoyed by the citizens of a new member state.

If the single market is an indivisible whole, as is argued in the Brexit negotiations, the same logic should be applied to the accession negotiations and for both sides at the table. This is particularly important if the EU wishes to be consistent and preserve the homogeneity of its single market and the non-discrimination of its citizens. In the EU-Turkey negotiations on the free movement of persons in particular, the EU should be reminded about this need for consistency of its principles.

### **Territorial and border problems**

In accession negotiations, the resolution of territorial problems and border issues is considered as very significant. Good neighbourly relations equally play a major role, as the EU wants to avoid importing political problems by being dragged into regional conflicts or endangering its prospective relations with the new neighbours. Nonetheless, some EU membership candidates have witnessed a ‘nationalisation’ of enlargement policy, as countries like Serbia, FYROM and Turkey were taken hostage by disputes with one of the member states, which either vetoed or threatened to veto any progress in the accession process unless a solution was found (Hillion 2010).

The UK does not have outstanding disputes with any of the member states that could hinder its relationship with the Union. The EU has granted Ireland, Spain (regarding Gibraltar) and Cyprus (in relation to the UK’s sovereign base areas on the island) separate negotiating rights with the UK to regulate their future border management. The experience of the Western Balkan candidates and Turkey shows that sensitive relations with an EU member state can be problematic for taking the accession process further. Similar deadlocks with Ireland in the Brexit case could render the UK’s negotiations with the EU difficult. Among the three abovementioned cases, the preservation of the Common Travel Area between Ireland and the UK, the rights of persons residing in these areas as well as avoiding a new ‘hard’ border will be significant aspects of the withdrawal agreement. British negotiators have to realise that the Republic of Ireland holds a veto right



over any future relationship of the UK with the EU. This already resulted in a similar ‘nationalisation’ of the negotiations on the withdrawal agreement. Therefore, the preservation of the Good Friday Agreement and a mutually satisfactory agreement on the regulation of the border is of vital importance for both Ireland and the UK.

The Guiding Principles on Dialogue on Ireland/Northern Ireland (European Commission 2017a) state that ‘North-South cooperation between Ireland and Northern Ireland is a central part of the Good Friday Agreement ... [, which] is embedded in the common framework of European Law policies ... the fact that the EU law ceases to apply in the United Kingdom after its withdrawal might impact continued cooperation and [...] specific provisions [may] need to be inserted in the Withdrawal Agreement’. This situation very much resembles the derogations from EU law that were envisaged in the Annan Plan for the Comprehensive Settlement of the Cyprus Problem, in case a united Cyprus had joined the EU in 2004. In that case, provisions were foreseen to regulate the residential rights of EU (especially Greek) and Turkish citizens in Northern Cyprus. If the Annan Plan had been adopted as a result of the 2004 referenda, there would also have been certain derogations from EU law in Northern Cyprus.

This example can provide inspiration for the case of Northern Ireland, that is, certain parts of EU law could be made applicable to Northern Ireland and its border. This situation would be facilitated by the fact that Northern Ireland voted ‘Remain’ in the Brexit referendum. Nevertheless, the fact that Prime Minister May’s government needs the support of the Democratic Unionist Party complicates this possible solution, as evidenced by that party’s recent veto to a similar compromise.

### **Governance of the withdrawal agreement**

The EU mandate for the Brexit negotiations foresees that for the transition period the withdrawal agreement should ‘set up an institutional structure to ensure an effective enforcement of the commitments under the agreement’, and ‘appropriate institutional arrangements to adopt measures for unforeseen situations not covered in the Agreement’. It should also

include provisions relating to the overall governance of the Agreement to ensure settlement of disputes and enforcement of the Agreement. The jurisdiction of the Court of Justice of the EU (CJEU) and the supervisory role of the Commission should be maintained (Council of the European Union 2017) in matters relating to ‘continued application of Union law, citizens’ rights and applications and interpretation of other provisions of the agreement such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations’.

These negotiating directives indicate that the EU envisages non-judicial enforcement mechanisms in the withdrawal agreement that are similar to the ones that exist in its various types of ‘association’ relationships. The EU’s Position Paper on Governance states that a ‘Joint Committee’ should be established to enforce the provisions of the withdrawal agreement that do not relate to citizens’ rights or the continued application of EU law. On these other provisions, the Joint Committee will be able to adopt appropriate measures to implement the withdrawal agreement and find a solution to a dispute at hand (European Commission 2017b).

This ‘non-judicial solution of disputes’ is similar to the provisions of the association agreements that designate the Association Council for Turkey or the Stabilisation and Association Councils for the Western Balkan countries as the first place to handle the disputes regarding the agreement. This non-judicial, but political, mechanism for the settlement of disputes requires that the parties of the dispute actually settle it themselves. The need for unanimity in the decision-making process generally leads to an impasse.

In the case of Turkey, the Association Council may either resolve the issue itself, or decide to send the case to the CJEU, or to another court or to arbitration. Visa and residence issues of Turkish citizens resulting from the implementation of the Ankara Agreement and customs union regulations, for instance, have either been settled in the national courts of relevant EU countries or in the CJEU. For the Free Trade Areas to be developed according to the Stabilisation and Association Agreements with Serbia and Montenegro, WTO dispute settlement mechanisms are also foreseen as an additional way of dispute settlement. Since settlement



rights and the continued application of EU law will stem from the withdrawal agreement, a role for the CJEU would be appropriate. For the rest of the issues in the withdrawal agreement, a Joint Committee or Council that has a right of deferral to arbitration or any other dispute settlement mechanism can be sufficient.

### The pace of the negotiations and their end result

The EU is very reluctant in its negotiating frameworks for accession negotiations to state the prospective accession date of candidate countries to the Union. Rather, it frequently reiterates the open-ended nature of accession talks. In its prelude, the Negotiating Framework for Serbia merely states that ‘the negotiations are aimed at Serbia integrally adopting the EU acquis and ensuring its full implementation and enforcement’ (Council of the European Union 2014). Only the second paragraph of this negotiating framework states that ‘the shared objective of the negotiations is accession’. Quite in contrast to this logic, which foresees a complex ‘package deal’ before the accession can take place, the UK will be exiting the Union independently of whether a deal is reached or not.

However, the EU seems to adopt a unilateral approach to negotiations in both cases. In the Brexit case, the EU refuses to speak about the future relationship treaty before a basic understanding is reached on the withdrawal agreement. The second phase of the negotiations is likely to foresee a transition period after the withdrawal date. The treaty with the UK on its future relationship with the EU can only be signed after the UK becomes a third country. Brexit negotiations preclude package deals on the withdrawal agreement and the agreement on the future relationship between the EU and a ‘third country’ UK. This makes it technically difficult for especially the British negotiators to see the whole picture for the talks ahead, and slows down the pace of the negotiations.

At the start of all accession negotiations, it is stressed that progress depends on the merits and pace of the candidate country. As in the cases of Turkey and FYROM, the enlargement talks can take decades, even though the stalling of the process in these two cases cannot be blamed on these countries alone. If accession negotiations or the ratification of the final treaty fail,

this will lead to the *status quo ante*, which is not the case for the ‘way out’. According to Article 50 of the Treaty on European Union, the exit process has a solid deadline that leaves the parties with unregulated and unforeseeable consequences if the negotiations are not completed on time. This should push all parties to complete the withdrawal agreement and the relevant transitional arrangements in a responsible manner to allow for timely ratification.

### Conclusions and recommendations

The British government has called for more ‘imaginative and creative’ talks on Brexit, but it can be expected that the EU will be very much driven by its decades-long experience of EU accession negotiations. Based on the historical insights, this policy brief makes the following **recommendations for the Brexit talks:**

- If the EU maintains its unified stance in the negotiations on the reciprocal rights of British and EU residents to guarantee similar rights for all EU citizens in the UK, this should be celebrated as the triumph of European solidarity to preserve national interests collectively. Alternatively, if the member states were divided and conducted their own talks, this would bear the risk of being to the detriment of the citizens of some member states.
- Derogations foreseen in the Annan Plan for the Comprehensive Settlement of the Cyprus Problem can, if mirrored onto the Brexit case, inspire a solution that would allow certain elements of EU law to be valid in Northern Ireland. This solution would be facilitated by the fact that Northern Ireland voted ‘Remain’.
- A role for the CJEU with a supervisory role for the Commission would be appropriate regarding the preservation of the residential rights and oversight of EU law foreseen in the withdrawal agreement. As a dispute resolution mechanism for other issues a Joint Committee or Council that has a right of deferral to arbitration may be sufficient.
- Exit negotiations are not open-ended like accession negotiations. Eventually with or without a deal, the UK exits from the Union by the deadline date, unless there is a unanimous decision to prolong the process. Whereas ‘no deal’ means the *status quo ante* for



candidates, it has unforeseeable consequences for the EU and the UK.

Lastly, this policy brief advances two **recommendations for the accession talks** in light of how the EU presents itself in the Brexit negotiations:

- If the single market is an indivisible whole, as is argued by the EU in the Brexit negotiations, and if no cherry-picking is allowed about its four basic freedoms, then this principle should also apply in accession negotiations. This consistency is about the integrity of the EU's character. Accession country negotiators

should not hesitate to remind the EU of this whenever necessary.

- Similar to the deadlock in accession negotiations, the negotiations on the UK's withdrawal agreement have gained a 'nationalised' character with relevance to the Irish border problem. A detailed analysis of this process could possibly inspire new perspectives for some candidate countries, like Turkey, FYROM and others, to overcome the deadlocks for the 'nationalised' problems in their accession processes.

## Further Reading

Council of the European Union, *Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, Brussels, 22 May 2017.

Council of the European Union, *General EU Position on the Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union*, Brussels, 21 January 2014.

Council of the European Union, *Draft General EU Position at the Ministerial Meeting Opening the Intergovernmental Conference on the Accession of Montenegro to the European Union*, Brussels, 29 March 2012.

Council of the European Union, *Negotiating Framework (for Turkey)*, Luxembourg, 3 October 2005.

European Commission, *Guiding Principles for Dialogue on Ireland/Northern Ireland*, TF50 (2017) 15-Commission to UK, Brussels, 20 September 2017a.

European Commission, *Position Paper on Governance*, TF50 (2017) 4-Commission to UK, Brussels, 12 July 2017b.

European Council, *Guidelines Following the United Kingdom's Notification under Article 50 TEU*, Brussels, 29 April 2017.

Hillion, C., 'The Creeping "Nationalisation" of the EU Enlargement Policy', *SIEPS Report*, o. 6, 2010. Available at: [http://www.sieps.se/en/publications/2010/the-creeping-nationalisation-of-the-eu-enlargement-policy-20106/Sieps\\_2010\\_6.pdf](http://www.sieps.se/en/publications/2010/the-creeping-nationalisation-of-the-eu-enlargement-policy-20106/Sieps_2010_6.pdf)?

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