

---

# DISCUSSION PAPER

## Brexit: What if Britain changes its mind?

*Andrew Duff*

---

*If the UK revokes Article 50, it must expect that the EU27 would insist on applying new terms and conditions to its renewed membership. These would include a reaffirmation of 'ever closer union', agreement to contribute more to a higher EU budget, an end to British opt-outs in justice and home affairs, participation in common defence policy, engagement with Banking Union, and commitment to a common refugee policy. Britain should also drop referendums on future EU treaty changes.*

Recent excursions by Tony Blair and numerous others from the British establishment have lit up the argument about whether the United Kingdom can, and if so will change its mind about Brexit. There is a lot of nonsense talked about the likelihood and consequences of such a radical reversal of policy: too many lawyers, journalists and politicians seem to be stumbling upon the European Union for the first time. Yet in Brussels and other capitals one gets divergent views, too. So this article aims to cast some helpful light on the question of 'what if?'

### Revoking Article 50

First, let's deal with the nonsense. Article 50 was devised by the constitutional Convention of 2002-03, and later found its way seamlessly into the Treaty of Lisbon (2007). I took a particular interest in this question because I was the first member of the Convention to propose the insertion of a secession clause in the new treaty.<sup>1</sup> The proposal, at first controversial among those who feared Europe's disintegration, found eventual favour.

It was accepted that Europe's emerging polity deserved its own bespoke mechanism, over and above the classic secession provisions of the Vienna Convention on the Law of Treaties (1969). Federalists wanted a safety valve so that any member state objecting to deeper integration could depart in an orderly fashion from the Union minimising collateral damage and without disrupting the constitutional reforms desired by the majority of states. Germany was won around to the inclusion of a let-out clause by the thought that British insistence on repatriating EU competences back to the national level might at some future stage make continued German membership of the EU unpalatable.<sup>2</sup> Conversely, nationalists, fearing the federal state, also saw the advantage of an escape clause. The Convention as a whole agreed to the inclusion of a process by which a state could voluntarily leave the Union in preference to, and in avoidance of installing a procedure to expel a state involuntarily. (At the time of the Convention, Greek membership of the eurozone was already being questioned and the risky enlargement of the Union from 15 to 25 states was just around the corner.) It was the Convention's President Valéry Giscard d'Estaing who, being impatient, proposed to time-limit the secession process to two years.

It was and is my understanding that Article 50 was intended only to deviate from normal treaty practice in specific and limited ways – first, to ensure that any decision to leave the Union was constitutional in domestic terms (as opposed to a whimsical lurch by a *coup d'état*); second, to provide for an explicit role for the European Council; and, third, to lay down a special decision-making procedure (super qualified majority) plus consent of the European Parliament for the conclusion of the withdrawal agreement. Wherever Article 50 is silent one may safely assume that the relevant provisions of Article 218 TFEU, regarding the negotiation of the EU's international treaties, continue to apply. Importantly, those provisions include empowering a member state (not excluding the UK) or any one of the EU institutions (not excluding the European Parliament) to "obtain the opinion of the European Court of Justice as to whether an agreement envisaged is compatible with the Treaties".<sup>3</sup> In my view, indeed, a reference to the Court is very likely to be desirable in the case of Brexit mainly to verify the legitimacy of any novel governance arrangements agreed for the transition period.

In the same vein, the Convention worked on the assumption that what was not expressly prohibited by the constitution of the Union was permissible as long as the action was within the scope of the Treaties and conformed to the aims and general principles of EU law. One of those principles to be respected is that of "sincere cooperation" among member states in fulfilling their obligations under the Treaty.<sup>4</sup> This stipulation implies that a seceding state, having triggered Article 50 according to its own constitutional requirements, will act in good faith and will not indulge in the syndrome of the revolving door, constantly spinning in and out of the negotiations in order to obtain more favourable terms.

It was not deemed necessary, therefore, to include in Article 50 a sub-clause making it explicit that a state that had notified its intention to withdraw from the Union could, before the two-year deadline was up, rescind its notification. Clearly, it was always possible that a new government would want to reverse a decision of its predecessor to leave the EU. In fact, I know nobody involved in the Convention who claims now that Article 50 is in principle irrevocable. The drafting of the constitutional treaty was a democratic political process certified by lawyers; it was deliberate and not casual; so it is not relevant if anyone at the time thought, hoped or feared that Article 50 would never be used in practice.

Nevertheless, a bid by a new British government to revoke Article 50 would surely be challenged in the UK Supreme Court by a well-heeled Brexiteer. Their British lordships would be duty bound to refer the matter of interpretation of Article 50 to the European Court of Justice.<sup>5</sup> One may well imagine that such a hypothetical case is already the subject of informal conversations in the best Luxembourg restaurants.

## **The hypothesis**

Blair and his friends have yet to explain how the Westminster parliament, as recently re-constituted at the general election in June last year, will take the decision to reverse the decision of the 2016 referendum. Neither does it seem remotely likely that parliament will move to hold another referendum before the Brexit date of 29 March 2019. Nor is there any certainty at all that a second referendum would reverse the verdict of the first. Nonetheless, in good faith and suppressing my innate scepticism, let us consider that the deed is done and is sanctioned by the courts. The first job of a new British prime minister is to write a hurried 'Dear Donald' letter to President Tusk rescinding Theresa May's letter of 29 March 2017 which triggered Article 50. And for a change, let us make this hypothetical prime minister (HPM) a man. What would happen then?

Our HPM would be summoned to an emergency meeting of the European Council. He would have to be fulsome in his apologies for the enormous cost and distraction of Brexit. He would have to convince his new colleagues that the decision to rescind Article 50 was being taken in a constitutional manner and was intended to be durable. What HPM could not do would be to presume on a return to the *status quo ante*, as if nothing very much had happened. Brexit is already proving to be a great trauma for the European Union, but a reversal of Brexit if badly mishandled could prove to be almost as traumatic. Faced with the need to convincingly disown his prime ministerial predecessors, HPM would face an up-hill task in

restoring the trust of his European partners in British diplomacy. He should not expect to re-stake David Cameron's vainglorious claim to have a 'special status' for Britain in Europe.

It is difficult to exaggerate the disfavour into which the UK has fallen. Initial disbelief that Cameron was holding an unnecessary referendum on EU membership was replaced by expressions of regret when the result was known. The negotiation of Cameron's 'new settlement' of Britain's EU membership, concluded with difficulty in February 2016 before being rejected by the British voter, was protracted and tortuous. It has not been forgotten. To add insult to injury, May's attempt at negotiating Brexit has been feeble, chaotic and cack-handed – the very opposite of the neat, tidy and systematic approach favoured by the EU institutions. Toleration of the UK in Brussels and other capitals is now at rock-bottom, and a palpable sense of betrayal grows. On his first trip to Brussels, our HPM should expect to be greeted by his new colleagues with polite reserve.

## Catch-up

The European Council would ask the Commission to assess the legislative adjustments necessary were the UK to reclaim its lawful place as a full member state of the Union. For some years, and especially since the general election in May 2015, the UK has been only a semi-detached member state, preoccupied almost exclusively by Brexit. After the referendum in June 2016 the EU has been busy making policy for its 27 members in a deliberate effort to shore up the cohesion of the Union and establish a new momentum of integration. For several states, and for the European Parliament, Michel Barnier's Brexit tussle has been a grisly side-show but not their central concern. Brexit has been consigned along with Trump, Putin and Erdogan into the category of external challenges which reinforce the argument for European unity. The election of French President Emmanuel Macron in June 2017 has bolstered the EU's sense of internal purpose and solidarity.

Jean-Claude Juncker's state of the union speech to the European Parliament in September 2017 sets out the Union's post-Brexit agenda. The Commission's perspective stretches to 2025 (as does Macron's) and includes a step by step approach towards deeper fiscal integration and constitutional change. Of the Juncker portfolio, good progress is being made to bring the disciplines of the single market into the digital age. The objective of strengthening the EU's industrial base has meant a number of new initiatives in the field of company taxation, a revision of the posted workers directive, and the development of the concept of the capital markets union. Discussions are well under way with respect to reform of the economic and monetary union (EMU), facets of which involve a reinforcement of the powers of the European Central Bank, the transformation of the European Stability Mechanism into a European Monetary Fund, provision of a real back-stop to Banking Union, and the establishment of a fiscal capacity for the eurozone for public investment and stabilisation purposes, as well as reforms to the structure of governance. Undeterred by the collapse of TTIP, the Union is looking to negotiate ambitious trade agreements with Australia, New Zealand, Mexico and Mercosur and completing agreements with Japan, Singapore and Vietnam. The EU continues to develop its footprint in the realm of internal security, fighting international organised crime and anti-terrorism measures – all involving a greater commitment to intelligence pooling among member states. As is obvious, the EU's asylum and immigration policies are the cause of real division within the Union but, contrary to much (British) speculation, the Schengen agreement has not collapsed and the commitment towards reaching common policy in the field of legal migration grows. The European Council has taken the decision to proceed to implement the provisions of the Treaty of Lisbon with regard to military integration among a core group of states, which might lead in time to common defence.

To complement the work programme of the Commission and Parliament, President Tusk has proudly elaborated a 'Leaders' Agenda' for the European Council, and has increased the workload of the heads of government in addition to their quarterly formal meetings. Dubbed the Bratislava process, an informal summit meeting on the social dimension was held in November 2017 and will be followed by others on institutional issues in February, on the Western Balkans in May, on internal security in September and culminating in a grand strategic post-Brexit gathering in the Transylvanian city of Sibiu in May 2019. All these meetings and all this impending legislation are predicated on there being an EU of 27. The *renversement des*

*alliances* triggered by Britain's HPM would require on behalf of the EU a reconfiguration of its plans. Some states would adapt more willingly than others to having to make yet another shift of paradigm, this time to include the British, so soon after making the last one to exclude them. The Sibiu summit at 28 would be very different to that envisaged for 27.

## **Financial reform**

Such radical adjustment would be nowhere more sensitive than in the negotiations on the reform of the EU's finances. There are two sets of negotiations in train. The first concerns the new multi-annual financial framework (MFF) that will begin in 2021 and last probably for seven years. Regardless of Brexit, the Commission and Parliament are pushing to raise EU spending beyond its present cap of 1% of GDP. The larger budget is needed, they claim, to sustain the ambitious political agenda, not least in the field of security and defence. The second strand of reform concerns the 'own resources' of the Union, where inter-institutional talks are underway to reach agreement on new forms of revenue. Proposals for new taxes range from a tranche of VAT hypothecated for EU purposes to a chunk of corporation tax (after a common basis for taxing companies is agreed), to a new tax on plastics or other commodities in the context of combating global warming. As Brexit denies the EU budget of about 14% of its annual revenue, the discovery of new sources of money is critical. By this time next year, Presidents Juncker and Tusk hope to have concluded a financial package deal that will not only cater for the loss of the UK as net payer but also see the abolition of the complex system of abatements and exceptions that has grown up over the years to carry the burden of the British budgetary rebate.

## **Electoral reform**

For one institution, the European Parliament, the return of the Brits will be an immediate shock. That there will be no more British MEPs after the next elections has encouraged the Parliament to undertake an ambitious and long overdue reform of its electoral procedure. If seen through to completion, this reform will involve agreement on a mathematical formula for the regular re-apportionment of seats between states, the installation of an electoral threshold, and, most importantly, the introduction of a pan-European constituency from which a modest number of deputies will be elected from transnational party lists. The 73 vacant British seats are enough to also allow for an overall reduction in the size of the House without any state losing a current seat. A sudden end to Brexit, therefore, would mean the Parliament would have to scramble to reorganise its elections, due on 23-25 May 2019, on some other basis.

There will be other indignities. The Commission will no doubt confirm that the decisions to relocate out of London the European Banking Authority (to Paris) and the European Medicines Agency (to Amsterdam) have gone too far to be reversed.

## **A new 'new settlement'**

On receipt of HPM's letter, the European Council would look to make a new settlement of the relationship between the UK and the EU. In form this would not replicate the old 'new settlement' conceded in vain to the disgraced Cameron in 2016.<sup>6</sup> There would be no need for an international treaty to re-ascribe the UK to the primacy of EU law, but only the full restoration by the Westminster parliament of the European Communities Act 1972 and the repeal of all 'withdrawal' legislation. The return to a state of grace would be confirmed in the form of a decision of the European Council to terminate the Article 50 process alongside a legally-binding political declaration, plus a number of draft legislative decisions requiring enactment via the ordinary legislative procedure between the Council and the European Parliament.

The EU27 would be justified in wanting from the British hard evidence of renewed sincere cooperation. One of the first items in the decision of the 28 heads of government would be to confirm that the package offered to Cameron in 2016 was now dead and buried. A second pledge, following from the first, should be to recommit all member states to the historic mission of the European Union, namely to the "ever closer

union of the peoples of Europe". No ifs, no buts, no more dissembling (as with Cameron) about exemption from political integration. The UK could volunteer to reaffirm the commitments it made in its act of accession to the European Community in 1972, which include ever closer union.

A prodigal UK returning to the fold would be expected to accept the thrust of the financial reforms negotiated in its temporary absence. This implies accepting an up-lift in gross EU spending as well as saying goodbye to Mrs Thatcher's rebate and agreeing to a shift of revenue from direct contributions made on the basis of GNI towards 'genuine own resources', levied by the EU on taxpayers and corporate entities. Such a reform would save HM Treasury money, and should be welcomed by the UK on that account – especially if accompanied (as Macron has hinted) by a gradual move towards national co-financing of direct payments to farmers under Pillar I of the Common Agricultural Policy.<sup>7</sup> Such a radical reform to EU finances is long overdue and very much in the British national interest.

## **Ditching protocols**

The opt-outs negotiated by John Major and retained by Tony Blair in the field of justice and home affairs belong to a different age. While failing to quell rising Euroscepticism at home, the opt-outs have served to fuel suspicion in Europe about Britain's trustworthiness in the field of fighting crime and ensuring good justice for citizens. The UK has been a drag on integration in interior affairs by using its opt-outs to dilute the force and reduce the quality of much EU legislation, and to limit its usefulness. Because of British (and Danish) derogations, decision-making in this area has become ponderous and convoluted. Our pro-European HPM should accept the abolition of Protocol No 21 on the occasion of the next treaty revision of the EU treaties – and expect to be backed up by his pro-European majorities in the Houses of Commons and Lords.<sup>8</sup>

In the same vein, it will be time to ditch Protocol No 30 on the application of the Charter of Fundamental Rights to the UK. This was falsely claimed by Tony Blair to be an opt-out from the Charter. As jurisprudence of the EU Court has confirmed, it was never such a thing. As the source of much misunderstanding, the Protocol has only the effect of obscuring the value of the Charter as a modern and comprehensive catalogue of rights and principles applicable across the EU dimension to the benefit of all its citizens – including through the UK courts.

The UK could not reasonably be obliged to join the Schengen area on its return to full EU membership. But Britain would be pressed to drop its opposition to the formulation of common asylum and immigration policies, and the UK, as a mark of morality and sincere cooperation, should be ready to commit to accepting its fair share of asylum seekers under any new EU quota system.

As the grisly Brexit process has continued, voices in the City of London have been raised in alarm at the prospect of the UK's exclusion from the EU's fast-emerging Banking Union. David Cameron froze the UK's involvement in the full complement of EU measures taken in the wake of the financial crisis. Such a boycott means that London's financial services are less subject to the full supervision and surveillance of the European Central Bank and the EU's new regulatory apparatus than the equivalent industry within the eurozone. It would not be part of the restoration package that the UK would be required to surrender its opt-out from the euro: Protocol No 15 would survive not least in the hope that the UK may in the future soften its attitude against the single currency.<sup>9</sup> But the price to be paid for the UK's self-exclusion from the eurozone for its banking and insurance sectors will be an increasingly heavy one as EMU consolidates on the mainland and adopts stricter and more centralised forms of federal governance. If HPM is a friend of the City, he will make friendly overtures towards greater engagement in the Banking Union.

The UK could also be expected to sign up to the core group of member states that are politically willing and militarily capable of engaging in the permanent, structured cooperation in defence. The UK has long paid lip-service to the desirability in theory of European defence collaboration: it would now have the opportunity of proving it in practice.

Two constitutional commitments should be demanded of the returning British. The first is that the UK would never again seek to block the reform of the rules that govern the eurozone, as laid down in Protocol No 12.<sup>10</sup> It was Cameron's veto in December 2011 that forced the eurozone to draw up the fiscal compact treaty outside the EU framework.

The second necessary commitment relates to a piece of domestic British legislation which has profoundly adverse effects on the constitutional evolution of the EU. The EU Act of July 2011 imposes mandatory referendums in the UK on all future substantive EU treaty revisions. This means that the UK government holds a gun to the head of its EU partners whenever constitutional change is mooted. Certain other states have the option of using referendums in preference to their national parliament as the means of ratifying EU treaty changes. But after the cavalier way in which unilateral referendums are now used to thwart the Union, the EU is left in no doubt that the parliamentary route to ratification is always to be preferred. HPM should promise to amend the EU Referendum Act 2011 to promote the use of the Westminster parliament on EU constitutional matters and to minimise recourse to referendums. It is time to draw to a close Europe's recent populist spasm, and Britain could show a useful lead.

### **Avoiding a constitutional crisis**

I have assumed that as long as the UK demonstrates its willingness to be a better member of the Union in the future than it has been in the past, the European Council and Parliament would agree to the revocation of the Article 50 process. Juncker and Tusk have both been careful not to foreclose the scenario in which Britain has second thoughts about leaving. In that eventuality, however, hard commitments by the prodigal British of the type outlined above would certainly be necessary. Chancellor Merkel, in particular, is known to be anxious to prevent the British from setting a bad example to the Poles. Turnstile membership would pitch the Union into a deep and long constitutional crisis.

One cannot ignore the possibility that the EU27 would decline to accept the sincerity or viability of a British change of mind. While most member states, above all Ireland, would welcome the return of the Brits, others will have reservations. In the absence of consensus it is unclear how Donald Tusk would proceed. While it takes only a super qualified majority for the Council to agree on the terms of the withdrawal agreement, it takes unanimity to agree to extend the two-year deadline. There are some Council lawyers who will argue that a decision to accept the British back requires a unanimous decision of the 27. Politicians will tend to be more relaxed.

What is certain, at least, is that if its revocation of Article 50 were to be rejected, the United Kingdom, acting before midnight on 29 March 2019, could protest to the European Court of Justice.<sup>11</sup> The Court could then order a stay in the withdrawal – a temporary fix that would have much the same practical effect as a European Council unanimous decision to prolong the two-year timetable.

In normal circumstances, stopping the EU clock is an honourable practice and often leads to crisis resolution. When it comes to Brexit, however, almost anything could happen. A hypothetical British decision to stop Brexit in its tracks would be a highly calculated risk.

***Andrew Duff was a member of the constitutional Convention and one of Parliament's representatives at the drafting of the Treaty of Lisbon. He is President of the Spinelli Group and a Visiting Fellow at the European Policy Centre. His latest book, 'On Governing Europe: a federal experiment', is just published.***

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

## Endnotes

- 1 CONV 234/02, 3 September 2002.
- 2 As evinced in Article 48(2) TEU.
- 3 Article 218(11) TFEU). And then: "Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".
- 4 Article 4(3) TEU.
- 5 Article 267 TFEU.
- 6 See *Britain's special status in Europe: A comprehensive assessment of the UK-EU deal and its consequences*, Policy Network, March 2016.
- 7 The case for such a reform of the CAP is argued by the Bertelsmann Stiftung, *How Europe can deliver: Optimising the division of competences among the EU and its member states*, December 2017.
- 8 Protocol No 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice.
- 9 Protocol No 15 on certain provisions relating to the UK.
- 10 Protocol No 12 on the excessive deficit procedure.
- 11 Article 263 TFEU.

**European Policy Centre**  
**14-16 rue du Trône, 1000 Brussels, Belgium**  
**Tel: +32 (0)2 231 03 40**  
**email: [info@epc.eu](mailto:info@epc.eu) - twitter: [@epc\\_eu](https://twitter.com/epc_eu)**

**[www.epc.eu](http://www.epc.eu)**



**Europe for Citizens  
Programme**

**With the support of the Europe for Citizens  
Programme of the European Union.**