

Brexit: Last call

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THE EUROPEAN COUNCIL

Donald Tusk cannot be criticised for mincing his words. The President of the European Council is deeply frustrated at Britain's inability to define its future relationship with the European Union. After the close of the European Council meeting on 29 June, he warned the UK that "this is the last call to lay the cards on the table". The official communiqué of the meeting chided the British for their lack of progress in completing the Withdrawal Agreement, not least on the thorny question of the Irish border, and added:

"Work must also be accelerated with a view to preparing a political declaration on the framework for the future relationship. This requires further clarity as well as realistic and workable proposals from the UK as regards its position on the future relationship."

Commission President Jean-Claude Juncker told the press: "We cannot go on to live with a split cabinet. They have to say what they want and we will respond to that".

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Missed deadlines, ambiguity and indecision have dogged the UK's performance ever since the Prime Minister sent her peremptory letter to Mr Tusk on 29 March 2017, triggering the Article 50 process. To be fair, Theresa May has not been helped by her Conservative party, which having been riven with division on Europe for forty years, is now at breaking point. Nor has she received the support a prime minister might expect from her cabinet which contains an unusually high quota of incompetent and disloyal ministers.

Moreover, while trying to negotiate Brexit in Brussels, the Prime Minister has had to surf the turbulent cross-party currents of a parliament at Westminster that is still angry and emasculated in the aftermath of the referendum which it blithely promoted — and lost.

But still. When Mrs May accepted the top job on the momentous premise of leading the country out of the European Union, she was immediately categorical in laying down terms and conditions based on her singular interpretation of the meaning of the referendum vote. She has not been keen subsequently to take other advice, some of it admittedly gratuitous.¹ The EU side has been plentiful in supplying clear guidelines and negotiating directives (and even slides

and tweets) which contradict her position. But bend she does not.

A WHITE PAPER

Agonisingly, the EU still waits for the British government to send it a detailed prospectus for the post-Brexit relationship. A White Paper that was promised before last week's European Council was postponed until after (probably 11 July). Apparently the first draft of this document, under the auspices of David Davis, has reached an alarming 190 pages. If past form is anything to go by, the White Paper will be repetitive, poorly edited, and filled with banalities aimed at bamboozling a British domestic audience. Let us hope for something better than that, and something new, even if it is only a case of advancing a clear choice between a narrow trade agreement on the one hand and continuing regulatory alignment on the other. The White Paper will also have to spell out the cabinet's final proposals with respect to customs.

The UK's definitive blueprint for its long-term future relationship with the EU is more likely to take the form of a written contribution to the drafting of the Political Declaration which is to accompany the Article 50 Withdrawal Agreement. This British memorandum is being drafted under the auspices of Olly Robbins, Mrs May's chief Brexit negotiator. It is expected to be much more concise than the White Paper and is intended to be dispatched to Brussels later in July to give the EU 27 something serious to work on.

THE POLITICAL DECLARATION

The Political Declaration will define the framework for the future relations between the UK and the EU that is called for in Article 50(2). The Declaration is not an optional extra. If there is no consensus on the future framework, and there is nothing to take account of, the Withdrawal Agreement will become a mere secession treaty, effectively reduced to extricating the EU from its rights in and obligations to the UK. If there is no pointer to Britain's future landing zone, the much-needed transition period can only be an extension of the status quo, postponing but not preventing the cliff-edge Brexit. And without a convincing orientation towards a long-term partnership there will be no agreement to extend the transition period beyond 31 December 2020.

The question of the format of the Political Declaration remains to be resolved. The Council intends to keep the Declaration at arms' length from the Withdrawal Agreement and only to make a reference to it in the Withdrawal Agreement as an accompanying document. This semi-detachment is intended to discourage any national parliament among the 27 from treating the Withdrawal Agreement as a 'mixed agreement' in terms of EU law requiring ratification by all member states. Article 50 lays down simply enough that the Withdrawal Agreement shall be concluded on behalf

of the Union by the Council, after obtaining the consent of the European Parliament. The Article 50 formula suggests that the Political Declaration will be treated as the product of '27+1' and not as a formal accord between the 28. Indeed, a legally binding treaty between the UK and the EU can only be concluded once the UK has ceased to be a member state.

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Many Brexiteers in Britain will seek to dismiss the Political Declaration as non-binding. But recently, in an interesting development, the lead Brexit committee of the House of Commons argues to the contrary. Its MPs want to treat the Withdrawal Agreement and the Political Declaration as a single integral package requiring a vote of approval (or, more ambiguously, amendment) before it can enter into force. The committee demands that the Declaration should achieve a "high level of detail" and be formally annexed to the Withdrawal Agreement "in order to give its content greater force".²

The same committee appears now to realise that the Westminster Parliament can hardly decline to grant its consent to the Brexit package. A vote to send the government back to the negotiating table in Brussels is highly unlikely to succeed in squeezing from the EU 27 a somehow better deal. The MPs may try to keep open the possibility of asking for a "limited extension" of the Article 50 timetable, but they know that all 27 states would struggle to agree even to make this concession. Nobody sane or sober in London now argues that no deal is better than a bad deal.

As far as the EU is concerned, while the Political Declaration will not be a formal law of the Council, it will have the effect of soft law, carrying much more weight than the standard conclusions of a meeting of the European Council. It will bind the European Council politically. Were the Political Declaration to be later overturned, it would require a unanimous decision of equal solemnity. It will also form a vital part of the European Parliament's considerations as it decides whether to approve the package tabled before it by the Council and Commission.³

President Tusk's task is to corral the 27 leaders behind the Political Declaration. Once he has done so, he will use it, in effect, as the first draft of the mandate that will eventually be issued by the Council to the Commission for the negotiation of the future partnership (Article 218 TFEU). The Declaration will

comprise the heads of agreement of the final post-Brexit treaty. Through this exercise Mr Tusk is anxious not only to gather together his 27 but also to bind the British to pursue a consistent objective, knowing full well that Mrs May might not be the prime minister who concludes the negotiation.

Britain's hesitation in producing its own prospectus has meant that discussions among the 27 about the EU's future relationship with the UK are not far advanced. Some argue that such talk is even now premature. Finding Brexit an unwelcome distraction from more important business, a few EU leaders would settle for making a short, general statement about the desirability of keeping the Brits as good neighbours (Article 8 TEU). But such a lazy approach is insufficient and underestimates the adverse impact of Brexit on the Union as a whole. The European Council needs to recognise that the secession of the UK renders the EU smaller, poorer and weaker. The Political Declaration is the immediate opportunity for the 27 leaders to make a considered response to the reputational blow suffered by the Union and to engage in some deeper reflection about 'the future of Europe' which Mr Tusk hopes to conclude at a summit meeting in Sibiu, Romania, next May.

LOSING THE EUROPEAN PLOT

Many in Britain, and not just Brexiteers, resent being treated by the EU like third-country aliens. But if the UK is to regain its credibility and recuperate its position in European affairs post-Brexit, it needs to show itself much more understanding of the EU's own plight. The EU never invited the UK to leave it. Britain's unilateral decision to depart destabilises the Union. It puts the EU 27 under substantial budgetary pressure, and causes costly disruption. It gives an easy win to nationalists elsewhere in Europe. No doubt it delights Vladimir Putin and Donald Trump. Brexit weakens the fabric of the Union, and may tempt other member states down the same path.

Furthermore, if the outcome of the referendum was a bad shock to the system, the manner in which the UK government has conducted itself in the Article 50 negotiations has hardly added lustre to Britain's soiled reputation as a European partner. Naturally, it is the EU's Anglophiles – the Danes, Dutch and Irish – who resent Brexit most. While nobody wants to humiliate the British, it can hardly come as a shock to the British establishment that the EU is now in the driving seat and not they. As Irish Taoiseach Leo Varadkar told the Financial Times (28 June): "Any relationship that exists in the future between the EU and the UK isn't going to be one of absolute equals. We're 500m people; the UK is 60m. The basic facts need to be realised and understood".

CHEQUERS

The challenge, therefore, that confronts the Tory cabinet at its meeting at Chequers on 6 July is to come to terms with Britain's decline as a European power.⁴

Ministers have to decide whether or not they agree to accept the consequences of the Prime Minister's red lines – which are, to recap, no single market, no customs union, no freedom of movement, no large contributions to the EU budget and no European Court of Justice. Mr Robbins will be able to tell them that his efforts in Brussels over the last few months to skirt around the red lines have been to no avail. The EU is adamant that unless the government modifies its red lines, the UK will be lucky to leave the EU with a trade deal no better than that recently accorded Canada. Mr Davis, if he is honest, will own up that his own visits to other capitals attempting to undermine the cohesion of the 27 have also been futile: indeed, they may even have been counterproductive.

If the Chequers meeting does not modify the red lines, the UK will pursue the Canada option, touted by the Brexiteers, which amounts to a minimal free trade agreement for manufactured goods. Services are left to their own devices. There would be no free movement of persons between the UK and the EU, no joint governance, and only fee-based contributions to the EU for services rendered. Northern Ireland would be governed under the separate regime set out in the Commission's backstop proposal of last December, apparently accepted by Mrs May only in desperation. Border controls across the Irish Sea would have to be strengthened. But Great Britain would have definitively left the single market, the customs union and the common commercial policy. Britain would be free to set its own standards where it chose not to align with EU norms, and British merchants could freely roam the world in search of business.

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Chancellor Philip Hammond and Business Secretary Greg Clark want the Chequers meeting to modify the red lines and remain as closely aligned as possible to the EU acquis so as to maximise participation in and access to the single market. This implies a comprehensive rules-based trade and investment partnership with the EU to be negotiated in the form of an Association Agreement (Article 217 TFEU). The European Council and Commission have made it clear that they are ready to facilitate such a negotiation as and when the UK relaxes its red lines.⁵ The European Parliament would welcome it. I have written previously on how the EU's Association Agreement with Ukraine of 2014 offers a useful legal template and political precedent for the UK.⁶

CUSTOMS COOPERATION

Under the auspices of the Association Agreement, the UK would adhere to the EU Customs Code and new customs cooperation arrangements would be introduced to minimise disruption to travel while ensuring verifiable respect for the EU's level playing field. Nevertheless, talk of a 'frictionless' border is idle: veterinary and phytosanitary checks are always required, as is the levying of VAT and excise duties, and market surveillance to verify product standards in manufactured goods. If the UK goes further and stays in the EU customs union (as most of the Labour party seems to want), there will be no customs duties to levy and no need for rules of origin certification, but all those other controls will still be required, along with proof of status.

Staying in the EU's customs union means sticking with its common commercial policy and external tariff regime. Ministers are openly divided as to the merits of that as set against the potential (but wholly unproven) benefits of running an independent trade policy. The cabinet will have to clarify the government's position one way or the other in advance of the vote in Parliament later in July on the trade and customs bill.

REGULATORY FRAMEWORK

Adopting the route of the Association Agreement means that Britain will put in place a new regulatory apparatus to compensate for the loss of direct supervision by the EU institutions of its business and commerce. Such home-grown regulatory bodies will have to be sufficiently autonomous from ministerial direction in order to be trusted by the EU Commission and Court of Auditors, as well as by stakeholders and consumers. The new regulators will enforce compliance with EU norms in terms of nuclear safety, citizens' rights, quality control, labour rights and social and environmental standards. Mr Clark has already proposed that competition and state aids policy should fall under the aegis of the Competition and Markets Authority. Nuclear matters, bereft of Euratom, will go to the Office for Nuclear Regulation. Michael Gove is less forthcoming about how his environmental empire will be policed: his current proposals merely to send out advisory notices to entities that breach the rules, and to have regard to on-going EU law, do not cut the mustard. The Commission also harbours particular doubts about the capability of Her Majesty's Revenue and Customs to handle itself post-Brexit.

However, it is only once the UK proves itself able to guarantee equivalent standards to those established by EU legislation that its new bodies will be permitted to participate (without a vote) in the work of the EU's many agencies. In the first place, to keep the drugs coming, planes flying and lights on, those are the European Medicines Agency, the European Aviation Safety Agency and the Agency for the Cooperation of

Energy Regulators. But there are few sectors of any European economy, third country or not, that can happily ignore the scope and force of EU regulation. The European Environmental Agency, for example, and the European Food Safety Authority play critical roles.

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SECURITY

The Prime Minister, at least, knows that it is a matter of vital national interest that the UK concludes, and quickly, one or more security treaties with the EU in matters of data protection, intelligence sharing, civil justice, police and judicial cooperation in criminal affairs and collaboration in EU foreign, security and defence policies. Such chapters of the new Association Agreement would allow continued British participation (without a vote) in Europol and Eurojust. They would also be the basis for UK involvement in the work of the European Defence Agency and the Galileo space project.

MOBILITY

Professional services and goods-related services constitute over 80% of the British economy and over 70% of the EU economy.⁷ Each is the other's largest single services customer. Because the government is determined to stop the free movement of EU citizens into Britain, and because it is people who deliver services, Britain's service economy is in trouble. In negotiating the association agreement, the EU will be stricter on services than on goods, and will bar British participation in those sectors of its internal market, notably banking and insurance, which are heavily regulated at EU level. The UK's new approach will focus on maximising the mobility of EU workers, subject to a registration scheme, including seasonal agricultural workers. Presumably the UK will continue to respect EU law on the mutual recognition of professional qualifications, and transnational companies will be able to operate intra-company transfer of staff. A question mark hangs over the fees payable by EU students at British universities.

The cabinet needs to know that the EU insists the treatment of movement of people be reciprocal: any restrictions imposed on EU citizens applying to study or work in the UK will be met by comparable constraints on British citizens in the EU. British limitations on the right of EU citizens to establish business in the UK, or to carry services, will meet like with like across the EU.

GOVERNANCE

The Chequers meeting will be aware, too, that if it plumps for the Hammond market paradigm in preference to the Davis trade paradigm, it will be committing the UK to a robust system of long-term joint governance. The Withdrawal Agreement will install a Joint Committee to manage the Brexit process at least until the end of the transition period. That Joint Committee will then morph into the general secretariat of the joint EU-UK institutions set up to govern the future partnership. The structure of these joint institutions will be quite elaborate, involving summit, ministerial and parliamentary meetings as well as many technical committees to oversee the whole gamut of the association.

An Association Agreement necessitates an effective dispute settlement mechanism. The British government and Supreme Court should make a proposal for the creation of a joint EU-UK tribunal. The EU may well insist that it maintains a majority of judges on that court. It will surely insist on upholding the ultimate jurisdiction of the European Court of Justice in matters of EU law. This is a fundamental requirement.

Brexiters will balk at the scale and scope of the institutional machinery required to manage the association agreement. Somebody at Chequers should remind them that the price of leaving the executive, legislative and judicial institutions of the Union leaves the UK with no voice at the table – a prospect which in her day appalled Margaret Thatcher. One purpose of the new joint governance arrangements will be to remind the EU 27 of Britain.

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TIMING

Brexiters also reject the idea that the transition period should be extended beyond 2020. They fear that if the UK is still 'in transition' at the time of the next general election in May 2022, it will be possible for a new prime minister somehow to halt Brexit. That will not be the case. The UK will already have left the EU under the terms of the Withdrawal Agreement and preparations for the future partnership, as articulated in the Political Declaration, will be far advanced. After 29 March 2019 any radical change of course, such as a return to the status quo ante, could not be accomplished under the terms of Article 50.

If ministers fail to agree to ask the EU to extend the transition period and if they fail to accept a large measure of continued regulatory alignment with the EU, along with joint governance, the UK is headed for a very hard Brexit.

What is the case, however, is that the full Association Agreement will not have entered into force by 1 January 2021. Nor will streamlined customs procedures be fully operational. So an extension of the transition period is inevitable, and provision for that must be made under the terms of the Withdrawal Agreement. The cabinet at Chequers should instruct Mr Davis to immediately ask for such an extension clause, whether he likes it or not.

All sides are placing great weight on the Chequers meeting. No doubt too much is being expected. But if ministers fail to agree to ask the EU to extend the transition period and if they fail to accept a large measure of continued regulatory alignment with the EU, along with joint governance, the UK is headed for a very hard Brexit. The EU will react swiftly and negatively to a wrong-headed outcome from Chequers. Equally, if the meeting is constructive and the signals positive, the EU stands ready to open talks on the drafting of the Political Declaration, even in August.

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¹ Most recently, *Brexit: What Theresa May's White Paper must do*, EPC Discussion Paper, 16 May 2018.

² House of Commons Exiting the EU Committee, *Parliamentary Scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship*, 28 June 2018.

³ European Parliament Resolution on Brexit, 14 March 2018.

⁴ The Prime Minister has summoned her whole cabinet to a crisis meeting at her country house residence on Friday 6 July.

⁵ See especially the European Council guidelines of 23 March 2018.

⁶ For example, *Brexit: Half In, Half Out or Right Out?*, EPC Discussion Paper, 6 March 2018.

⁷ See the letter from the European Services Forum to MM. Barnier and Davis, 26 June 2018.

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