
DISCUSSION PAPER

Brexit: Sufficient Unto the Day¹

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If context is everything, what are we to make of a British prime minister making a speech on Europe in a gloomy cloister of a Florentine church? Her audience was the Westminster press lobby, flown out and back on fat expenses, and a clutch of patronised and bewildered Italian dignitaries. Surely the event cannot have been part of the government's charm offensive launched to demonstrate that Britain's Rolls-Royce diplomacy will continue effortlessly after Brexit? Indeed, the spectacle in the cloister (probably the brainchild of a Tory-boy press officer) was pretty desperate. Florence has other more dignified venues, notably the European University Institute at Badia Fiesolana. Compare just for a moment the tortured delivery of Theresa May in the artificial contrivance of Santa Maria Novella (22 September) to the effortless fluency of Emmanuel Macron in his natural habitat of the Sorbonne (26 September). Politics is cruel.

Florence

Fortunately, context is not everything. If we are to take Mrs May's speech at face value, the text matters too.² She explained why Brexit is happening – something which continues to mystify many non-Brits. The decision to leave is about taking back control over Britain's own affairs. The UK, she added, "throughout its membership ... has never totally felt at home being in the European Union". May wishes the Union well in its endeavours and wants Britain to be Europe's "strongest friend and partner". But she sees the UK as a co-equal partner, working "hand in hand with the EU". Just like Anthony Eden in the 1950s, May assumes that the rest of Europe will wish to treat the UK as its most privileged partner. She clarified what Britain does not want at the end of the Article 50 negotiations: neither continued membership of the customs union or the single market, nor continued jurisdiction of the European Court of Justice (ECJ). In return, the UK will not "try and attain an unfair competitive advantage". Britain is not looking for either a Norwegian style quasi-membership ("loss of democratic control") or a Canadian-type free trade agreement ("restriction on our mutual market access").

All this was useful and necessary clarification. The tone of her speech, being more positive than her previous effort at Lancaster House in January, encouraged those involved in the Article 50 negotiations in London and Brussels. In terms of specifics, May announced that the Article 50 secession treaty would be incorporated "fully" into UK law so that UK courts "can refer directly to it" – something which Brexit minister David Davis calls "direct effect". British courts, said May, should be enabled to refer to the judgments of the ECJ "with a view to ensuring consistent interpretation". Here she was stating the obvious: British courts take into account any relevant international jurisprudence unless they are explicitly prohibited from doing so by parliament. But she spelt out the facts of the matter for the benefit of hard-of-hearing Brexiteers.

The prime minister recognised that the Brexit agreement will be based on a balance of rights and obligations – the central point of the European Council's Article 50 guidelines (29 April).³ But emphasising the advantages currently enjoyed by the UK because it shares the EU's standards and regulations, she was in difficulty in trying to explain how British divergence from the Union *acquis* will be managed in the future. (Divergence from the *acquis*, she could have added, is the whole point of Brexit.) Under the terms of the "new economic partnership" there will be a need for "a strong and appropriate dispute resolution mechanism". A partnership agreement must be interpreted in the same way by the UK and the EU; but neither the ECJ nor the UK courts can be the arbiter of disputes between the EU and the UK on the implementation of the agreement.

Just as there is no pre-existing EU model suitable for Britain in the field of external economic relations, so also in the matter of security.

"So we are proposing a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation: a treaty between the UK and the EU ... [W]hat we are offering will be unprecedented in its breadth, taking in cooperation on diplomacy, defence and security, and development. And it will be unprecedented in its depth, in terms of the degree of engagement that we would aim to deliver."

As I have argued before, the prime minister had to do two things in her speech.⁴ The first was to ask for a transitional period. On 29 March 2019, she said, neither the UK nor the EU will be "in a position to be able to implement smoothly many of the detailed arrangements" underpinning the new relationship. Because the new special partnership will take time to negotiate and ratify, people and businesses should only be asked to plan for one set of changes. Until then the status quo should prevail.

"The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations. How long the period is should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin that future partnership. ... As of today, these considerations point to an implementation period of around two years."

There must be a guarantee that the "implementation period" is time-limited. Moreover, because nobody wants to prolong the agony ("to stay longer in the existing structures than is necessary"), some aspects of the future relationship could be implemented early – namely, the new dispute resolution mechanisms.

The second thing Theresa May had to do was to offer some money. She did:

"I do not want our partners to fear that they will need to pay more or receive less over the remainder of the current budget plan as a result of our decision to leave. The UK will honour commitments we have made during the period of our membership."

Round Four

In a cautious welcome to the Florence speech, Michel Barnier immediately called for its propositions to be turned into "clear negotiating positions", not least on the three issues which comprise the first phase of the Article 50 talks. Without "sufficient progress" being made on all three items, the European Council will not agree to move on to the second phase involving the framework for the future relationship.

Although Florence had given Brexit new impetus, the fourth round of the negotiations (25-28 September) was not an unqualified success. Agreement was closest on *Citizens' Rights*, but the UK is not happy to accept EU norms on the rights of family reunification (too liberal); and the EU dislikes the British proposals on the exporting of social security benefits (too miserly) as well as the system proposed for the registration of EU citizens seeking settled status (too burdensome).⁵

Discussions about *Northern Ireland* have scarcely moved beyond principles, on which at least there seems to be broad agreement. Negotiations continue on how to ensure the continued application of the Good Friday Agreement partly in and partly outside the EU jurisdiction. The British government knows that if the UK ever leaves the customs union it will be reintroducing the Ulster border. The Irish government is not prepared to accept suboptimal technical solutions to the question of border management, but both sides will need to commit to doing their best to regulate and levy taxes on goods and animals traded in and out of the province to the Republic. Although some latitude may be given in return for safeguards, the EU 26 and Commission will be unwilling to condone a porous external border of the internal market.

It is, frankly, difficult to see how much further progress can be made on the Irish question without a clear perspective on the long-term trade agreement and customs arrangements between the UK and EU 27. More time is also needed before a new Northern Irish Executive can be established. It is essential, therefore, that the UK as a whole should remain within the customs union and the single market for the whole transition period.

The *Financial Settlement* was always going to be the most difficult item for the British government to sell to the Conservative party at home. It is welcome that the prime minister has at last conceded that no member state will pay more or receive less because of Brexit for the duration of the current multi-annual financial framework (2014-20). Needless to add, this concession (about €20bn) is not the end of the matter. Commitments made by the UK during the whole period of its membership are contained in the outstanding RAL (*reste à liquider*) of which the British share is about 14%, as well as in certain other contingent liabilities, including pensions, that may or may not be needed. How to extricate the UK from the European Development Fund, which is run on an intergovernmental basis, has yet to be addressed. As Theresa May says, the UK will engage in other future spending commitments, for example in R&D programmes and security arrangements, once the final association treaty is agreed and the full nature of the "deep and special partnership" is known.

Governance

The Article 50 talks have not advanced on the wider governance issues. The mandate and composition of the Joint Committee which will be set up to oversee the transition are still unclear. The question of the Court of Justice remains critical to the citizenship question and to Northern Ireland, and will become so for trade. Understandably, the British refuse to accept the direct jurisdiction of the ECJ once the transition period is over. They also interpret the Brexit referendum decision as a rejection of the option of joining the European Free Trade Association (EFTA) and the European Economic Area (EEA). Alarming, however, they have yet to grapple internally with the shape of the alternative dispute mechanism of which May spoke in Florence. The options are limited both by precedent and by treaty.

The best suggestion is to establish a joint UK-EU tribunal composed of both EU and British judges. Its job will be to see that the provisions of the future association agreement (Article 217 TFEU) are applied correctly. The joint tribunal would hear disputes brought by the EU institutions or the UK government, and under defined circumstances by third parties. It would, in turn, be able to refer questions for preliminary opinion to the ECJ (Article 267).⁶

The sensitivity of the concept of joint jurisdiction would make it certain that the Article 50 secession treaty is sent in due course to the European Court of Justice for verification that its terms comply with the EU treaties and its governance ensures the coherence of the Union's legal order. The European Parliament, the Council, the Commission or any member state is empowered to dispatch the emerging treaty to the ECJ for such a purpose (Article 218(11)).

Party conferences

British politics is at its most febrile during the party conference season. The significant outcome of the Labour conference is that Brexit spokesman Keir Starmer has finally secured an official party policy of

staying in the customs union and the single market for the transition period. If Labour's position holds, Theresa May and Philip Hammond, Chancellor of the Exchequer, will be assisted in securing the same from the Article 50 talks. The Liberal Democrats continue to want a second referendum, although on what is unclear: Remainers need to know that a defeat of the Article 50 treaty would see the UK crashing out of the EU without a deal. None of the political parties, alas, has yet defined the location of Britain's landing zone beyond transition.

The Conservative party in conference at Manchester continues to face meltdown on Europe. Boris Johnson, on manoeuvres to depose Theresa May, insists that the transition period should last no more than two years and should not see the EU impose new laws on the UK during that period. Jacob Rees-Mogg, another eccentric character, says that the ECJ should have no part to play during the transition period.

The European Council

The fifth round of the exit talks is due to start on 9 October. If May and Davis were clever, they would do four things. First, they should repeat the request for a transitional deal during which the UK stays in the internal market and the customs union. Second, on the financial settlement, they should concede something substantial to meet the UK's RAL commitments, to be spread over several years. Third, they should break the general stalemate over the role of the ECJ by making proposals for a joint judicial tribunal. Fourth, the British should argue that there is no realistic chance for progress on Ireland without an opening of trade and customs talks. These moves would put the ball firmly in the court of the European Council when it assembles on 19-20 October to decide, after hearing the advice of Barnier, if "sufficient progress" has been made to proceed to phase two.

The European Parliament, in a solid resolution to be voted on 3 October, says that insufficient progress has been made.⁷ As things stand, it is right to do so. But if May survives her conference without rowing back from her Florence speech, and if there is some momentum in the fifth round of talks, what will the European Council do? If it does not wish to proceed at once to the second phase, the European Council should signal its intention to do so no later than its next scheduled meeting in December and, if preparations are in place, earlier. The leaders should in any case welcome progress made to date (even if insufficient), including the fact that the issues still outstanding in the first phase have been clearly identified.

The key decision of the European Council in October, however, should be to let the Commission open talks on the transition period. Such a step is not contingent on "sufficient progress" being made in the first phase. In fact, negotiating a transitional period will help to conclude the first phase by bringing greater clarity and legal certainty to citizens, businesses, stakeholders and international partners about the immediate effects of Brexit. The European Council should usefully reiterate its own guidelines, namely that during any transition "existing Union regulatory, budgetary, supervisory and enforcement instruments and structures" will apply. In effect, this means that during the transition period, the UK will be staying in the EEA (but in the EU pillar and not the EFTA pillar), and thus subject to all the disciplines of the ECJ.

The heads of government should also respond positively to any British invitation to advance talks on governance issues, including the role of the ECJ in any future association agreement. They should stress the need to intensify the negotiations on all subjects and at all levels. Lastly, Donald Tusk might remind everyone, in that blunt way he has, that the clock continues to tick towards midnight on 29 March 2019, and that the EU is making contingency plans to withdraw from the UK in the case that there is no Article 50 agreement.

There are two important preconditions for making progress in this way. The first is that the EU 27 prepares itself psychologically to negotiate a new trade and security treaty with its ex-partner. As both Juncker and Macron have suggested, the time is now ripe for a new reflection on the future of Europe. The British question will continue to feature in those strategic debates.

The second precondition is that the British Tory government does not fall apart quite yet. If Theresa May cannot convince her EU partners that she and Davis are a stable and credible negotiating team, the European Council will never be able to proceed to the second phase. Equally, a snub delivered to May by a hostile European Council would be certain to polish her off as prime minister. The fate of the Article 50 treaty and an orderly Brexit rests with Mrs May. Whatever misgivings the European leaders still harbour about the state of the United Kingdom, the prospect of Boris Johnson as its prime minister should be persuasive. Sufficient unto the day, indeed.

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

Endnotes

- 1 "Sufficient unto the day is the evil thereof". The Sermon on the Mount, St Matthew 6.34.
- 2 <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>
- 3 <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brex-it-guidelines/>
- 4 http://www.epc.eu/documents/uploads/pub_7891_brexitdealingwithwithdrawalsymptoms.pdf
- 5 https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en
- 6 British lawyers would have to be given special dispensation to continue to appear before the Luxembourg judicature (Article 19 of the ECJ Statute). The tribunal might be established by a regulation in the EU legal hierarchy as a specialised court (Article 257).
- 7 <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2017-0538&language=EN>

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