
DISCUSSION PAPER

Brexit: Terra Nova to explore together

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Much hinges on whether, during the next weeks, the UK can persuade its soon-to-be-gone EU partners that the time is ripe to move on to the second phase of the Brexit talks. Specifically, Theresa May will have to convince the European Council on 14-15 December that her intentions on the financial settlement are both adequate and honourable, and that her vision of the "deep and special" future partnership is in Europe's interests too.

Unless Britain's compass bearing is steady, and its own preferences for the final landing zone made clear, the EU27 will not be prepared to grant any more than rudimentary transitional arrangements – and certainly not the comprehensive "implementing provisions" on which Mrs May presumes. If there is no outline political agreement on the nature of the future relationship between Britain and the EU, the end product of the negotiations now being conducted between Michel Barnier and David Davis will be no more than a thin technical treaty of secession devoted to extricating both sides from their mutual rights and obligations.

On the other hand, if it is possible for the Article 50 withdrawal agreement to take full account of the framework for the future relationship between the UK and the EU27, the transition period will comprise interim arrangements designed to bridge the gap between old membership and new association. Transition will have to be long enough not only for the UK to disentangle itself from the EU's international treaties but also to build the structure and implement the procedures that will govern the new relationship.

Unfortunately, debate in Britain about options for the future continues to be lamentably vague and ill-informed. Nobody in Whitehall dares answer detailed questions about the nature of a prospective association agreement. In particular, the institutional implications of the future partnership seem to be a taboo subject. Although government and opposition at Westminster now agree that the UK should ask for a transition period of at least two years, reflecting as much as possible the status quo, very little is said about how the Article 50 withdrawal agreement should be implemented in practice. The British government has made few constructive proposals to the EU side on these matters. This oversight obliges the Commission and Council to fall back on conservative interpretation of rigid rules, giving them no option but to prepare to treat the UK after Brexit like any other third country.

EU guidelines

It is worth rehearsing the formal positions taken by both sides to date. Responding to Mrs May's Lancaster House speech of January and her Article 50 letter (29 March), the European Council said it "welcomes and shares the UK's desire to establish a close partnership" after Brexit.¹ Its guidelines (29 April) went on to

establish terms and conditions – namely, that "any free trade agreement should be balanced, ambitious and wide-ranging" while falling short of single market membership. The new agreement "must ensure a level playing field, notably in terms of competition and state aid", and include safeguards against unfair competitive practices through tax, social, environmental and regulatory measures. The future framework must ensure the EU's financial stability and respect its regulatory and supervisory regime, including "appropriate enforcement and dispute settlement mechanisms that do not affect the Union's autonomy, in particular its decision-making procedures". The EU "stands ready to establish partnerships" in matters of internal and external security.

The second phase of the Article 50 talks will identify "an overall understanding on the framework for the future relationship", and the EU stands ready to "engage in preliminary and preparatory discussions to this end". Then:

"To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

So it is wrong to characterise the second phase of the Brexit negotiations as being the commencement of trade talks, which will only come later once the UK's future location has been identified and agreed. As things stand, Phase II of Mr Barnier's mandate will allow him merely to engage in "preliminary and preparatory discussions" in order to ascertain an "overall understanding" of the future relationship.

However, in light of the predicament into which the talks are now plunged, that mandate is inadequate. In December the European Council should supplement its old guidelines with a firm decision to design arrangements for a transition towards a future association agreement. The leaders need to confirm that such transitional arrangements will be an integral part of the Article 50 secession treaty. The length of the transition period should be set at a minimum of two years on a renewable basis until such time as the new association agreement, with robust governance structures, enters into force.

Governance according to the EU

The Article 50 treaty will keep some parts of the Treaty on the Functioning of the European Union in play during the transition period. Indeed, that is predestined in the British government's EU (Withdrawal) Bill which speaks of 'retained' EU law. This EU legacy law will not have direct effect in the UK but the British government and parliament will ensure that such law will be applied effectively post-Brexit.

As far as the EU is concerned, the transitional period will be a virtual extension of the status quo with the European Commission and Court of Justice (ECJ) continuing to exercise oversight. The EU's initial position is further explained in a succinct Commission position paper on Governance (28 June).² This spells out how the Article 50 secession treaty – "withdrawal agreement" – will establish institutional arrangements for its management, implementation and enforcement, plus dispute settlement mechanisms.

With specific regard to citizens' rights, the agreement will provide for the "same legal effects" in the UK as those currently prevailing under EU law, and the UK must enact legislation to ensure this. To protect the rights of EU citizens, and in so far as the secession treaty specifies the continued direct application of EU law in other areas, the Commission will continue to enjoy full powers of supervision and the Court of Justice will continue to have jurisdiction with respect to the application of the terms of the Article 50 agreement.

A Joint EU-UK Committee will be set up with the following duties:

- (1) to manage the implementation of the agreement;
- (2) to deal with unforeseen circumstances (of which there will be many);
- (3) to fillet new EU law that may affect the provisions of the agreement;
- (4) to deal with matters arising from the fact of growing political divergence;
- (5) to "perform any other task conferred on it" by the agreement.

It will be up to the Joint Committee to attempt to resolve disputes before they get to the point of litigation. In the case of continuing differences, both parties jointly, or either party after a three month period will be able to bring the matter before the ECJ for arbitration. The Court will be empowered to impose penalties or suspend part of the agreement (other than citizens' rights) in order to ensure compliance. British courts must continue to respect EU law and the jurisprudence of the Court, and the UK government will continue to enjoy the same procedural rights at the Court as it does now (absent the membership of a British judge).

Governance according to the UK

On 26 June the British Home Office issued a paper on safeguarding the rights of EU citizens that was contrary to the Commission's position.³ The white paper declared that British courts would be solely responsible for upholding the provisions of the Article 50 secession treaty with respect to EU citizens living in Britain. The European Court of Justice "will not have jurisdiction in the UK".

A convoluted "future partnership" paper on governance appeared from London on 23 August.⁴ The document asserts that it is not necessary for a single body to be responsible both for enforcement and dispute resolution. The UK's aim is to "respect the autonomy of EU law and UK legal systems while taking control of our own laws". The secession treaty will be recognisable in international law. The UK will legislate where necessary to give effect to its terms in domestic law. Arguing that the UK will be a third country as far as the EU is concerned, the government points to existing dispute settlement mechanisms under EU free trade agreements, such as with Canada or Ukraine, where the ECJ does not have direct jurisdiction. It also notes that the EFTA court applies EU law on behalf of the ECJ as far as the three non-EU signatory states of the European Economic Area are concerned.

The UK believes that both the withdrawal agreement and the final partnership can be enforced quite happily in the UK by the British courts acting alone. The fine reputation of Britain's judiciary should be enough of a guarantee to EU citizens that they have nothing much to worry about.

Its 23 August paper admits that a new dispute resolution mechanism, as befits the deep and special partnership, will be needed for disputes arising *between* the UK and the EU – but not for the application of agreements *within* either the UK or EU jurisdictions. These disputes, the paper concedes, could arise after scrutiny by one party of how the agreements are being implemented internally by the other. But the paper then descends into discursive mode, taking note of the Joint Committee and alternative arbitration models without coming to any conclusion about the government's own preference. Much of the paper was clearly written to inform ministers of the subject matter in hand and was not intended in itself to progress the EU talks.

Acutely defensive on the question of ECJ supervision, the British paper observes (wrongly) that neither in the EEA agreement nor under the EU's other free trade agreements can one party refer a matter unilaterally to the Luxembourg court for a binding interpretation of EU law. References to the ECJ in these cases, it claims, are made only by joint agreement of both parties or by virtue of a decision of an arbitration panel "or similar vehicle". Falling back again on the argument that the UK will be an ordinary third country once it leaves the EU (in spite of the deep and special partnership the UK is seeking to invent), the paper also observes that the ECJ's competence to impose sanctions for non-compliance with EU law is exceptional in terms of international agreements. Softer remedies, such as the suspension of part of the agreement or

compensation payments, should be adopted in the case of a new EU-UK agreement. However, on no account will the ECJ be allowed direct jurisdiction in the UK.

As with most of the UK government's position papers, their effort on governance was poorly received in Brussels. Theresa May's more emollient speech in Florence (22 September) was in part a recognition that the EU's criticism was justified. So it is puzzling that the UK has still offered no substantive amendment to the EU's governance proposals. For example, surely it would make sense for London to propose that the scope of the Joint Committee should be widened and deepened, as follows:

- (1) to oversee the protection of citizens' rights (thereby nullifying the need for direct jurisdiction of the ECJ);
- (2) to coordinate the application of the withdrawal agreement with the implementation of the British EU (Withdrawal) Act, in order to avoid legal and regulatory gaps;
- (3) to help the general public with enquiries about the operation of the withdrawal agreement.

Association agreements

Alas, it is self-evident that the British government has not yet come to a settled view about the kind of association it wants with its erstwhile EU partners. The options are limited; none are simple; all have implications for relations with third countries; and all will involve the UK in on-going institutional and budgetary relations with the EU.

Canada, as we know, has just struck a minimalistic trade deal with the EU, but this would be very inadequate from a British point of view. The UK seeks much higher access to the internal market than Canada. A simple non-tariff EU trade deal on goods with the UK would limit commerce, disrupt industrial supply chains and impair mobility. And a trade agreement with the UK whose terms were very much more favourable than those granted to Canada or Japan or any other third country with which the EU has a free trade agreement would trigger most favoured nation clauses under WTO rules. So something more comprehensive and close, involving substantially all trade, is needed for the UK, Brexit notwithstanding.

The UK has ruled out membership of EFTA and the EEA on the grounds that it would involve the free movement of people, would require conformity with the EU's trade policies and would be seen at home as an abject failure to 'take back control' from Brussels. Norway and Iceland could also be expected to object to the British muscling in on a carefully calibrated agreement which works just well for them. And the European Union agrees that, given the circumstances, the UK cannot join the EEA. The EU also refuses to contemplate for Britain the kind of messy and unstable deal that it now has to tolerate with Switzerland. Nonetheless, any association agreement Britain strikes with the EU will contain several elements drawn from the Swiss and Norwegian experiences.

In fact, it is the Ukraine association agreement of 2014, based on Article 217 TFEU, which provides the most useful template for the design of an association agreement with the UK.⁵ At its heart is a deep and comprehensive free trade area for goods, along with a customs agreement. But the Ukraine is not a party to the EU's customs union, common commercial policy or external tariff regime. Ukraine has to respect three of the four principles of freedom of movement, but not the fourth, for people. Mutual recognition of services and mobility of labour is subject to sectoral negotiation. At first, Ukraine's participation in the EU's internal market is necessarily limited and subject to strict conditions, but it is encouraged to grow incrementally, step by step, as the Ukraine conforms to EU standards and trustworthy governance develops.⁶ Under a Ukraine-type association agreement effective collaboration would be possible in the field of foreign policy, security and defence, as well as fighting crime and terrorism, on a strictly intergovernmental and not supranational basis.⁷

In terms of institutions, there is an EU-Ukraine annual summit meeting, a regular association council at ministerial level, and various technical committees whose job is to approximate Ukrainian law with the EU acquis. The association council supervises and monitors the application of the agreement and takes binding

decisions to settle disputes or to update and amend the lengthy regulatory annexes.⁸ A joint parliamentary committee comprises MEPs and members of the Rada. A joint civil society platform is run on the EU side by the Economic and Social Committee.

In the case of serious disputes, an arbitration panel is established of three persons – one from the EU, one from Ukraine plus a neutral chair from a third country. The arbitration panel must refer questions of interpretation of EU law to the European Court of Justice for a binding ruling.⁹ A similar arrangement for a joint tribunal is made under the European Economic Area agreement.¹⁰ The EFTA court may trigger a reference to the ECJ for a binding decision.¹¹

While the Ukraine association agreement is an interesting precedent – we know how to do it – the analogy with Britain should not be pressed too far. The aim of the Ukrainian deal is to encourage convergence on the EU *acquis* and to enhance political cooperation. The purpose of a British deal will be to manage divergence from the *acquis* and to downgrade political cooperation. Yet the current deep integration of the British and EU economies means that in terms of institutions the UK's agreement with the EU will have to be much more capable than is the case with Ukraine. In particular, the City of London, which will retain some financial institutions of systemic importance to the EU, will need to connect closely with the EU's banking union.

Systematic collaboration is also foreseen, at least by the UK, in policing, criminal and civil justice matters, while security and defence cooperation imply a tight regime. Security cooperation is an imperative for Mrs May.

But across the gamut of UK-EU relations questions of governance will be of paramount importance. Ironically, it may be only once they have left the EU that the British come to understand the closeness of their relationship with it.

Inescapable truth

The inescapable truth is that Britain and Europe are destined to remain deeply intertwined after Brexit. The UK will not be just any other third country, but the Union's most privileged partner. It is in the Union's interests, therefore, to help this stricken British government to find its bearings and, in so doing, shape a future association agreement that is mutually beneficial. For Britain and Europe both, the new-found land of Brexit is uncharted territory. It would be best, in these circumstances, if we explore this *Terra Nova* together.

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

Endnotes

- 1 <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/>
- 2 https://ec.europa.eu/commission/publications/position-paper-transmitted-eu27-governance_en
- 3 <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>
- 4 <https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>
- 5 *Official Journal* L 161, 29-05-2014.
- 6 The first fruits of the association agreement were seen in 2017 when an EU regulation lowered tariffs on several industrial goods and widened access to Ukraine's farm exports.
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R1566&qid=1509869829526&from=en>
- 7 Norway also has side agreements with the EU on security and defence matters, including participation in the European Defence Agency and in certain CSDP missions. According to Theresa May, the UK wants a much stronger security partnership with the EU27 than the Norwegian model.
- 8 Having delivered its transitional function, the Joint Committee would morph into the general secretariat of the new association agreement.
- 9 Article 322 of the EU-Ukraine Association Agreement.
- 10 *Official Journal* L 170, 11-06-2014.
- 11 Protocol 34 of the EEA Agreement.

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