

Pathway to Brexit

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More than five decades ago when he remarked that «Great Britain has lost an empire and has not yet found a role», the former US Secretary of State, Dean Acheson, sparked a transatlantic storm of controversy. It was the painfully inconvenient truth at the heart of his observation and not any inaccuracy that aroused such emotion. The latest manifestation of this quest for a meaningful role is ‘Global Britain’, Prime Minister May’s vision for the UK’s future after exiting the EU. When the continent took its first post war steps towards greater European unity Great Britain then had unparalleled standing, prestige and potential for influence. Churchill encouraged this development but enunciating three circles of influence; the transatlantic relationship with the United States, the Commonwealth and Empire and Western Europe, Britain stood aloof.

Both when outside and inside the EU and its predecessor organisations British politics always has been deeply divided on the European question with splits in both the Conservative and Labour parties. These divisions have dogged successive Prime Ministers.

In 2011 the coalition Government of Conservatives and Liberals passed the European Union Act requiring the holding of a referendum in the event that key EU Treaties were amended in future. This abated but did not quell the storm of growing euroscepticism led vociferously by sections of the British media and Tory eurosceptics increasingly anxious about the rise of UKIP. To neutralise this threat in the May 2015 general election, Prime Minister David Cameron in 2013 promised to hold an ‘in-out’ *referendum* if returned to power. This was a political gamble, not a legislative necessity. Held on June 23rd 2016, it backfired and cost David Cameron his job, his political career and his reputation.

The *referendum* vote revealed a kingdom disunited territorially, socio-economically and demographically. Britain had voted for a direction but not for a precise destination as regards its future relationship with the EU. For a number of months the *mantra* «Brexit means Brexit» ambiguously covered the continuum between a soft and a hard Brexit. For the Prime Minister it signalled the intention to quit the EU without the option of a second *referendum*.

Lancaster House Agenda

Speaking at Lancaster House in January 2017 Prime Minister May, and subsequently in a White Paper published in February the Government, set out twelve principles that would guide Britain's Brexit approach.

In terms of future UK-EU relations these envisage:

- An end to the jurisdiction of the Court of Justice of the EU in the UK;
- The Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law;
- No membership of the Single Market;
- No 'huge sums' to be paid to the EU budget; and
- A rejection of the tenets that underpin the Customs Union pertaining to Common Commercial Policy and the Common External Tariff.

Taken collectively, these amount to what has been characterized as a hard Brexit. To fulfill these preconditions effectively would rule out any current form of EU relationship with third countries, such as those with Norway and Switzerland, the Customs Union with Turkey or more recently a rejection by the UK of a Canada-EU style comprehensive economic and trade agreement.

What Britain wants from the EU is the greatest possible access for goods and services to the Single Market, on a fully reciprocal basis by means of a comprehensive Free Trade Area Agreement. Britain also wants to be free to conclude its own Free Trade Agreements with third countries. It should be noted that the greatest possible reciprocal access to the EU is what Britain has had for the past forty-four years but has rejected in the *referendum*.

As regards tone the Prime Minister at Lancaster House was 'equally clear that no deal for Britain is better than a bad deal for Britain'.

Hard or Soft Brexit?

To understand how a positive but narrow majority to leave the EU translated into a hard Brexit position owes more to politics than economics. One could argue that the *referendum* itself was a political choice of placing party necessity above the national interest. The Conservative parliamentary party, hopelessly divided before the *referendum* vote¹ found a fragile but not uncontested unity around a harder line. The Labour party with its own internal divisions at first facilitated this hard Brexit perspective. A measure of the Government's comfort zone is that its Article 50 Bill comfortably cleared Parliament in March 2017, with amendments to protect the rights of EU nationals living in the UK and the need for Parliament to have 'a meaningful vote' on the final Brexit deal comfortably defeated in both the Commons and the Lords.

¹ Reported by the BBC to be 138 MPs even as the official government posture was in favor of remaining in the EU.

No attempt to explain or understand the hard Brexit choice can be comprehended without reference to the role of the *media*, especially the print *media*. Largely pro EEC at the time of the UK's first and only other European *referendum* (1975), the *media* turned increasingly sour and hostile towards Europe over the past several decades. Mrs. Thatcher's Bruges speech (1988), successive and deeply divisive EU Treaty debates in the House of Commons, the political shockwaves that followed Black Wednesday (1992)² when the UK crashed out of the European Exchange Rate Mechanism and the rise of anti EU parties, first the Referendum Party and later UKIP all fanned the anti-EU flames. The virulence of Eurosceptic UK *media* sentiment intensified. This earned the label of that 'feral beast' from Tony Blair after he left power. The 'feral beast', combined with a native and proud English nationalism wanting to take back control, anti-immigration sentiment, identity politics, anti-elite populism, nostalgia, acute euroscepticism and not a little political opportunism triumphed in the *referendum* campaign.

In terms of content-analysis, six of nine newspapers showed a dominance of leave content during the *referendum* campaign. Since then, in November 2016, elements of the media attacked as 'enemies of the people' the three judges of the High Court in London for deciding in a British court under the British constitution, hearing a British case, that the UK's sovereign Parliament should have a say before Article 50 was notified. While logically being totally inconsistent with the idea of taking back control, the intended message of this attack was different. Effectively it put on notice anyone deemed to be potentially soft on Brexit that they too could be subjected to public odium and abuse in the *media* if they stepped out of line.

UK Legislative Plan

The Article 50 notification officially marking the United Kingdom's intention to withdraw from the EU was lodged on March 29th 2017 nine months after the UK *referendum*. Seventy days after the notification Prime Minister Theresa May lost her majority and much of her authority. An opportunistic general election proved to be a costly gamble. The Prime Minister lost reputation and standing but retains a fragile hold on power, for the moment, thanks to the ten votes of Ulster's Democratic Unionist Party's MPs. She recently personally suggested that she would remain in office until the next scheduled British general election in 2022. Fear of a Tory civil war on Europe, matched by a fear of gifting power to a resurgent Labour party led by Jeremy Corbyn in an early election, combine to keep her tenuous hold on power, which was further exacerbated when the Prime Minister delivered a faltering performance in her closing address at the Conservative party's annual conference.

² September 16th 1992.

In June 2017 at the State Opening of Parliament the Queen's speech set out the Government's legislative agenda, for the coming years. It was dominated by Brexit related proposals. The Bill to repeal the 1972 European Communities Act and end the jurisdiction of the European Court of Justice is the most significant. It will copy all EU laws into UK law but expect considerable legislative debate on the extent of executive power to change regulation by secondary legislation, the proper oversight role for Parliament regarding such changes and the eventual implications for devolved powers in Northern Ireland, Scotland and Wales.

Seven other pieces of legislation are proposed in anticipation of exiting the EU. A Bill will legislate on immigration for the end of free movement from the EU and make the status of EU nationals and family members subject to UK law. A Fisheries Bill will provide for the UK to take on responsibility for «access to fisheries and management of its water». An Agriculture Bill will 'provide stability' for farmers and ensure an 'effective system' of support to replace the Common Agricultural Policy. A new nuclear safeguards regime will be required after the UK leaves EURATOM, with new powers for the Office for Nuclear regulation. There also are measures foreseen to allow for a standalone domestic customs regime, giving the UK the scope to make changes to VAT and excise rates currently determined by the EU. This will pave the way for an 'independent trade policy' and a proposal to enable the UK to implement non-UN sanctions on its own or with allies.

The Government's legislative programme remains vulnerable to Tory defectors voting with the opposition not to mention the capacity of the House of Lords potentially to slow legislation down considerably. However, since Brexit fault lines cross both main parties in the UK the Government also potentially can rely on some margin of comfort from Labour MPs voting across party lines. This happened on the first reading of the EU Withdrawal Bill in the House of Commons in September 2017 when seven Labour MPs defied their party whip and supported the Government.

The Clock is Ticking

For the EU this is an unprecedented and regrettable first act of disintegration whose countdown has begun. At midnight on March 29th 2019 the United Kingdom, most likely, will stand on the threshold of a transition period marking its passage from European Union membership to third country *status*. Alternatively, by the improbable unanimous agreement of the EU 27, it could extend the period of withdrawal negotiations. Or, finally, talks, having crashed and burned, the UK will trip over a cliff's edge into the hardest exit option of all for all, no deal.

The clock is ticking. The exit negotiations themselves and their formal approval by the EU and the UK must be concluded by March 29th 2019.

The time necessary to obtain the consent of the European Parliament, the vote by a qualified majority of the European Council and formal UK approval

must be factored into this tight timeline. This suggests that the negotiations will need to have concluded not later than the end of 2018 to facilitate the necessary procedures. Whether a mutually satisfactory conclusion is reached or not the Treaties shall cease to apply to the UK with effect from midnight March 29th 2019, except to the extent that a negotiated transition period provides for their continuing effect for an agreed and limited period of time.

A deadline extension, though legally theoretically possible through unanimity by the European Council, is politically out of the question. For the British Government it would unleash fury from within its own ranks and political and media uproar. The absurdity of possible contemplation of holding European Parliament elections or being drawn reluctantly into the next medium term financial framework negotiations in the EU through lingering but ongoing membership obligations after the end of March 2019 would stretch the credibility of all involved beyond breaking point.

If there were no agreement the UK would trip over a cliff edge and would need to adopt a WTO tariff schedule for the conduct of its international trade, the worst of all possible starting future options for all parties involved.

If the British *mantra* for months was «Brexit means Brexit», its EU equivalent was «no notification (of Article 50), no negotiations» but behind the scenes the Union's institutions were not idle and in the course of April 2017 publically revealed their hand. The EU wants an orderly withdrawal; an agreement based on a balance of rights and obligations; is against 'cherry-picking' and sector-by-sector approaches and proposed the sequencing of negotiations. The EU will act as one in EU-UK negotiations. This drama will be in two acts, the leaving part and the future relations part, linked but separate, and based on different Treaty legal bases.

Article 50 – Act One

Act one is grounded in Article 50 of the Treaty on European Union. Closure of this procedure requires the consent of the European Parliament and a qualified majority vote of the European Council. Article 50 is about divorce but not about the details of future trade relations. Article 50.2 enjoins the Union to «negotiate and conclude an agreement with that (exiting) State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union». This phrase – «taking account of» – is not an injunction to conclude both elements at the same time.

The Article 50 process will play out in three inter-related parts, the timing of whose transition from one phase to another will be subject to political decision by the European Council depending on progress made in the course of the bilateral EU-UK negotiations.

The first phase relates to the disentanglement of the UK from the rights and obligations of membership. Specifically, making a judgement on what constitutes sufficient progress will hinge on the outcome of negotiations on three elements:

- The reciprocal rights of citizens of the 27 EU member States living in the UK and conversely of UK citizens in the EU 27;
- The honouring by the UK of its outstanding EU financial obligations;
- The special circumstances of the island of Ireland, the Peace Process and the border.

The second phase of the Article 50 negotiations, after the European Council has deemed that sufficient progress has been made, will turn attention to identifying the framework for the future relationship and on agreeing transitional arrangements that are clearly defined, limited in time and subject to enforcement mechanisms. As currently defined the Union's negotiating mandate throughout both of these phases insists that EU regulatory, budgetary, supervisory and enforcement instruments and structures would apply. This includes any negotiated transition period.

These negotiations will be conducted as a single package with nothing agreed until everything is agreed. Negotiations on the framing of future relations will encompass more than just trade and will consider a partnership in security and defence and the fight against terrorism and crime. All negotiations must be concluded and duly ratified by the EU and the UK by the end of March 2019.

The phrase disentanglement, in addition to including citizens' rights, the financial settlement and the special Irish circumstances, covers a multitude such as:

- The exit of British members from all EU institutions including among others the Parliament, Commission, Council, Court of Justice, Court of Auditors, the European Investment Bank and the European External Action Service;
- The relocation of the European Banking Authority and the European Medicines Agency;
- The treatment of the paid up capital of the UK in the EIB;
- The withdrawal of the UK from the Euratom Treaty;
- The orderly disengagement of the UK from international treaties signed by the EU;
- Fisheries Policy and territorial waters;
- Dispute settlement mechanisms regarding the application and interpretation of the withdrawal agreement.

This illustrative list speaks to the momentous scale of the task in hand.

Article 218 – Act Two

Act two will be grounded in Article 218 of the Treaty on the Functioning of the EU. A future comprehensive free trade agreement with the UK can only be finalised when the UK exits and becomes a third country outside the EU

in 2019. The Commission negotiates on a mandate agreed by Council. Approval requires the consent of the European Parliament and a qualified majority vote of the Council. If the agreement covers areas of national and not exclusive EU Treaty competence, a so-called mixed agreement, then the unanimous agreement of member States would be required triggering ratification by national Parliaments. This happened with the recent Comprehensive Economic and Trade Agreement with Canada. Who ultimately gets to vote likely will be as much a political as a legal issue.

A transition process always has been a necessity to bridge that period between the closing of the Article 50 procedure and the finalisation of the Article 218 deal on future trade. Even if negotiations were completely smooth the timeline is not. After a European Parliament vote and a European Council QMV on Article 50, not later than March 2019, there will be a renewal of the EU institutions following parliamentary elections. It would follow that this effectively postpones any votes necessary to ratify a new trade deal with the UK that by then will be a third country. The framework and headline issues can be anticipated under Article 50 but the fine tuned detail will take more time and will be subject to separate ratification votes. This Article 218 process has not been to the forefront of public consciousness given the density of the political and negotiating issues surrounding the currently more visible Article 50 procedure.

Since the EU and UK start with full regulatory compatibility this should be more straightforward than other such deals. However, it will be complicated by 'level playing field' issues regarding competition and State aids, safeguards against unfair competitive advantages through future fiscal, social or environmental dumping. How to handle regulatory divergence over time and agreeing on dispute resolution mechanisms, if the UK insists on no role for the Court of Justice, will add to the complexity of the negotiations.

Any member State or EU institution has the right to challenge the outcome of any of these negotiations for Treaty incompatibilities before the Court of Justice of the EU.

A Dawning Reality

The General Affairs Council (the EU Foreign Ministers) on May 22nd 2017 authorized the opening of negotiations, nominated the Commission as the EU negotiator and adopted the negotiating mandate. The GAC will continue to monitor and assess progress.

Though initially contested by the British side, the idea of phasing the talks based on a judgment of 'sufficient progress' was accepted at the opening round of negotiations on June 19 2017. Terms of reference were agreed. Negotiating groups have been established for citizens' rights, the financial settlement, other separation issues and in addition a dialogue on Ireland - Northern Ireland has been launched under the authority of the Coordinators.

Negotiations will take place every four weeks unless decided otherwise by mutual consent. Both sides have published a series of working documents and will continue to do so to inform public opinion. To date the EU side has been both consistent and coherent in its negotiating posture.

The UK was ill prepared for a Leave vote and had to scramble to develop its institutional and political response. It is hard to avoid the conclusion that at the outset the scale of the task in hand was underestimated and that public and business opinion in particular had never been sensitised to the costs and compromises involved in quitting the EU. One insider in a position to know was Sir Ivan Rogers, Britain's Ambassador to the EU, who quit in frustration early in 2017. He urged his fellow UK civil servants to challenge «ill-founded arguments and muddled thinking» and to ensure that «you will never be afraid to speak the truth to those in power».

Prime Minister May stunned Westminster when in April, just weeks after notifying Article 50, she announced a snap general election. She placed herself at the heart of the general election campaign promoting «strong and stable leadership» for Britain. She gambled and she lost. As a result her post election cabinet rolled over its pre electoral Remain and Leave diversity.

This division dominated the UK's summer political headlines on whether or not to propose a transition period. There was mounting frustration on the part of the EU and its Chief negotiator, Michel Barnier, at the painfully slow progress of talks whose hard stop deadline is fixed and known. By way of reasserting some authority and seeking to change the tone of the process, Theresa May delivered a much anticipated speech in Florence.

She sought to reassure her listeners suggesting that: «We may be leaving the European Union, but we are not leaving Europe» adding that: «Our commitment to the defense – and indeed the advance – of our shared values is undimmed». This reversed a lingering doubt about such engagement being conditional from her Lancaster House speech. She signaled that the UK wants to move on from the purely withdrawal aspects of the talks with the EU «to talk about our future relationship», recognizing in public for the first time «that we can't leave the EU and have everything stay the same. Life for us will be different». The Prime Minister suggested «our task is to find a new framework that allows for a close economic partnership but holds those rights and obligations in a new and different balance. But [...] we do not start with a blank sheet of paper». She acknowledged that: «To make this partnership work, because disagreements inevitably arise, we will need a strong and appropriate dispute resolution mechanism» and asserted: «It wouldn't be right for one party's Court to have jurisdiction over the other».

The determination to leave was confirmed unambiguously: «The United Kingdom will cease to be a member of the European Union on March 29th 2019. We will no longer sit at the European Council table or in the Council of Ministers, and we will no longer have Members of the European Parliament». However, a transition period was sought «during the implementation period

access to one another's markets should continue on current terms». And: «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». On money the Prime Minister insisted: «The UK will honor commitments we have made during the period of our membership. And as we move forwards, we will also want to continue working together in ways that promote the long-term economic development of our continent».

The tone of the Florence speech was generally welcomed in EU circles, with Michel Barnier describing it as «a step forward» but stressing that Brussels would have many questions for the British side about the «concrete implications». What the speech underlines is a dawning reality that Britain, in seeking to accelerate consideration of future relations, has woken up to the urgency to get real in terms of managing national expectations and its negotiating strategy with the EU.

No sooner had this new policy line been clarified than the Secretary of State for Foreign and Commonwealth Affairs, Boris Johnson, challenged the Prime Minister's narrative. The transition period he argued should last «not a second more» than two years, that Britain should not accept new European Court of Justice rulings during the transition, that no payments to access the single market should be paid after the transition ends and the UK should not shadow EU rules to maintain such market access. This is as much about bland ambition as Brexit but in terms of potential disruption no less potent for that, whether the author of these remarks is in or out of Government.

The UK's lead public servant in charge of negotiations, Olly Robbins, left his job as head of the Department for Exiting the EU to set up what has been described as a «rival Europe unit»³ in Downing Street. He reportedly is seeking to 'poach' former colleagues from David Davis' Department and from the UK permanent representation in Brussels. It appears that Government, the Conservative party, Parliament and public administration in the UK are all in a state of flux. It is an inauspicious basis on which to prepare for and conduct such unprecedented negotiations against a tight deadline.

Conversely, the level of consensus to date in defining the EU's negotiating mandate, the conduct of negotiations and the inter-institutional harmony, as exhibited by European Parliament resolutions and Council conclusions, suggests that EU coherence places it in a much stronger bargaining position. Mrs. May's Florence speech softened the tone but has not shifted the substance of the negotiations.

Meanwhile, if indeed the wind «is back in Europe's sails», to quote President Juncker's state of the Union speech of 2017, the EU will have no wish to run aground on Brexit or its transitional arrangements. Some UK

³ Financial Times, October 7 2017

voices in opposition to Brexit and some from the past, such as Tony Blair, suggest circumstances could arise where an accommodation might be found to keep Britain on board. The European Union and its member States most likely will hold to the line that exit means exit and that divorce brings closure to the more intimate benefits of the former marriage.

The Sceptered Isle

Britain's official narrative of its place in the EU has been and remains one of transactional detachment. «We come to the European Union with a frame of mind that is more practical than emotional» in the words of David Cameron at Bloomberg when he launched his 'in-or-out' *referendum* proposal in January 2013. Or, more recently, as remarked by Prime Minister Theresa May at Florence: «And perhaps because of our history and geography, the European Union never felt to us like an integral part of our national story in the way it does to so many elsewhere in Europe». This theme of self-interested detachment is particularly British but not necessarily uniquely so.

The emphasis on pragmatism and detachment masks an underlying political neurosis that has dogged every British debate on European integration from the outset. Far from being a detached and cool Britannia, emotion and passionate intensity about Britain's place at home and in the contemporary world have constantly lurked just beneath the surface of her European debates. As other States grew into and through European integration, many in Britain felt it constituted a form of national contraction and decline to be an EU member State, «the end of a thousand years of history»⁴.

In its most recent manifestation, under the cloak of: «Global Britain and taking back control» the 'sceptered isle' and its leading Brexit exponents perceive themselves again to be stepping forward to assert Britain's transcendent greatness on the world stage. Time will tell whether for Britain this will be a post EU global paradise or a retreat from having been an imperial island to diminished insularity. If things go sour 'Johnny Foreigner' can no longer be blamed.

Whether Britain's imminent departure will usher in an era of easier EU consensus building is an open question. Those who took comfort from the UK's presence and policy stances will be obliged more openly to reveal their true preferences. As electoral and other events have shown in recent years what might be described as the EU's awkward squad is by no means entirely confined to «England's green & pleasant land».

⁴ The leader of the Labor Party in 1962, Hugh Gaitskell, in a passionate speech to his party's annual conference, remarked to tumultuous applause that membership of the EEC could mark «the end of a thousand years of history».