

EDITORIAL COMMENTS

Theresa's travelling circus: A very British entertainment trips its way from Florence to Brussels

The Brexit circus continues to rattle along its merry way. And to be fair: it is producing some passable jokes. “An Englishman, a Scotsman and an Irishman walk into a bar. The Englishman wants to go. So they all have to leave.” “‘How many Brexiters does it take to change a lightbulb?’ ‘Hold it right there! – we never said there were actually going to be any lightbulbs!’”¹ But squeezed between the daily schedule of lame comedy routines, fantasy trade negotiations and imperial battle scene re-enactments, there are also some more sombre moments of reflection – when the main protagonists seem to grasp, however fleetingly, the true profundity of the consequences of the choices they are making.

One such moment centred on Prime Minister Theresa May's speech in Florence on 22 September 2017, which was widely billed as a serious attempt to break the apparent deadlock then surrounding the UK-EU withdrawal negotiations.² Certainly, both Michel Barnier and Donald Tusk have publicly welcomed its constructive tone and claimed that May's intervention injected fresh impetus into the ongoing “first phase” talks concerning the priority separation issues arising from the UK's fast-approaching departure from the Union.³

However, whatever impetus May could generate was clearly not enough to make any decisive breakthrough in either the fourth or fifth round of negotiations in Brussels.⁴ Inevitably, therefore, nor was it able to persuade the European Parliament, the Commission negotiator, or the European Council itself, that sufficient progress had been achieved so as to justify proceeding in

1. Borrowed and adapted shamelessly from <www.indy100.com/article/here-are-our-favourite-jokes-about-brexite-because-everyone-really-just-needs-to-laugh-W1EBv521SW>.

2. Available at <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-co-operation-and-partnership-between-the-uk-and-the-eu>.

3. E.g. Barnier, Statement of 22 Sept. 2017 available at <europa.eu/rapid/press-release_STATEMENT-17-3427_en.htm>; Tusk, Remarks of 26 Sept. 2017 available at <www.consilium.europa.eu/en/press/press-releases/2017/09/26-tusk-remarks-may-london/>.

4. E.g. see Barnier, Statements of 28 Sept. 2017, available at <europa.eu/rapid/press-release_SPEECH-17-3547_en.htm>, and 12 Oct. 2017, available at <europa.eu/rapid/press-release_STATEMENT-17-3921_en.htm>.

parallel to the “second phase” talks – as so desperately desired by the UK Government – on preliminary and preparatory discussions about a potential future relationship in fields such as trade, security and defence.⁵ And all that despite some last minute diplomatic acrobatics from May and from David Davis (Secretary of State for Exiting the European Union).⁶ Instead, the UK will have to console itself with the EU27’s decision to do the obvious – to begin their own internal preparatory deliberations about what a future partnership with the UK might look like – and seek now to make better progress on the key separation issues, with a view to securing a more favourable outcome at the next high-level review, due to take place at the European Council meeting in December 2017.⁷

Moreover, May’s own efforts to set a more positive tone for these difficult and sensitive negotiations are constantly undermined by the deep divisions among her Conservative Party colleagues and the consistent tendency, if not systematic tactic, to throw the blame for every conceivable setback or obstacle – no matter how obvious, inevitable or self-inflicted – upon the EU. It was entirely predictable that Foreign Secretary Johnson would continue to question and undermine May’s authority.⁸ Nor was it much of a surprise to hear International Trade Secretary Fox, who had recently claimed that UK-EU trade negotiations should be “the easiest in human history”,⁹ suggest that the main obstacle to their success was “the European elite [wanting] to punish Britain for having the audacity to use [its] legal rights to leave the European Union”.¹⁰ How dare the democratically elected leaders of 27 sovereign European States comply with the UK’s own demand to be treated, no longer as a valued member of their close community of nations, but simply in accordance with the ordinary principles and realities of international law and relations!

Perhaps more unexpected and certainly more disappointing is to hear even supposedly more reasonable ministers such as Chancellor Hammond

5. See European Parliament, Resolution on the state of play of negotiations with the United Kingdom (3 Oct. 2017); Barnier, Statement of 12 Oct. 2017, cited previous footnote; European Council, Article 50 TEU Conclusions (20 Oct. 2017).

6. To see the fruits of such labour, consider e.g. the Joint Statement by Jean-Claude Juncker and Theresa May of 16 Oct. 2017, available at <europa.eu/rapid/press-release_STATEMENT-17-3969_en.htm>.

7. European Council, Article 50 TEU Conclusions, cited *supra* note 5, para 3.

8. For a few typical examples, consider e.g. <www.theguardian.com/politics/2017/sep/26/boris-johnson-theresa-may-brexiteer-freedom-movement-transitional-period-florence>; <www.theguardian.com/politics/2017/sep/27/boris-johnson-defies-pms-brexiteer-strategy-with-call-for-short-transition-period>.

9. See <www.theguardian.com/politics/2017/jul/20/liam-fox-uk-eu-trade-deal-after-brexiteer-easiest-human-history>.

10. See <www.theguardian.com/politics/2017/oct/22/britain-not-bluffing-on-no-deal-brexiteer-says-liam-fox>.

referring to the EU as “the enemy” of the UK.¹¹ Nor can it help matters when the UK’s lead negotiator suggests, in Parliament, that the deliberate tactic of the EU27 is simply to manipulate the timing of the withdrawal talks so as to squeeze as much money as they possibly can from the UK.¹² Such inconsistency and malignancy at the very centre of government does little to build the sense of mutual respect and trust which is crucial to the success of any major international negotiation – a lesson that “Global Britain” may yet regret not having learned more quickly and more effectively as it prepares to make its own way in the big wide world.

That said: the Florence speech certainly merits closer inspection, since it contains some revealing insights into the UK Government position as well as certain new ideas which look set to feature prominently in the forthcoming negotiations – including ideas about which EU legal scholars should have much to contribute.

An admission of strategic failure – judged by the UK’s very own standards

First and foremost, the Florence speech was an implicit admission of failure: the clear and profound failure of the UK Government’s core negotiating strategy, judged by nothing other than that Government’s very own White Paper from February 2017.¹³ Thus, the UK concedes that the timing and sequence of negotiations lies entirely within the gift of the EU27: the UK does not hold all the cards after all.¹⁴ May admits that there is no prospect whatsoever of reaching a comprehensive package covering both withdrawal terms and future relationship, as the Government has consistently proposed, within the ludicrously short period of the next 12 months. And although May still employs the language of an “implementation period”, it is clear that this now means something very different from what was intended in the February White Paper: this is no longer about the careful phasing in of a new partnership agreement that has already been finalized; it is about begging for more time while the UK tries to prevent a disruptive and damaging exit for

11. See <www.independent.co.uk/news/uk/politics/brexit-philip-hammond-eu-enemy-europe-tory-government-chancellor-negotiations-latest-a7999121.html>.

12. See <hansard.digiminter.com/Commons/2017-10-17/debates/33F0A459-B60E-41EF-931F-51756CFFAF94/EUExitNegotiations#contribution-0BEABEDE-8ED2-4CFF-AB97-52F142570F21> at Column 736–737.

13. HM Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417).

14. Something which should have been clear, as if it were not so already, from the very opening of the negotiations: see Terms of Reference for the Article 50 TEU negotiations as agreed on 19 June 2017, available at <ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>.

which it is evidently ill-prepared. To that extent, the Florence speech should of course be welcomed: it marks a first attempt to recalibrate the UK's negotiating strategy along more realistic lines.

Modest but insufficient progress on the priority "first phase" separation issues

Secondly, however, on the key separation issues which are currently the focus of the "first phase" negotiations in Brussels, the Florence speech said relatively little – and subsequent events do not seem to have moved the situation on much further either.

On the question of Northern Ireland, May said nothing new in Florence. The negotiations themselves continue to make progress, but mostly at a relatively high level of abstraction: for example, when it comes to agreeing the overarching principles and objectives that should underpin the parties' approach to safeguarding the Good Friday peace settlement and to maintaining the Common Travel Area between the UK and Ireland.¹⁵ But on the most legally and logistically difficult question – the impact of UK departure from the Customs Union upon the land border between Northern Ireland and the Republic – the EU continues to await more credible detailed proposals from the UK side.¹⁶ And indeed: aside from some novel technical revolution capable of transforming customs cooperation across the globe, it remains difficult to see how May intends to fulfil her stated objective of avoiding *any* physical infrastructure at the border, while still respecting the legitimate fiscal and regulatory interests of the distinct customs territories that will lie on each side of that frontier.

On the treatment of current migrant EU27 and UK citizens, May made an explicit attempt in Florence to break the ongoing deadlock – followed up by her "personal letter" to EU27 nationals living in the UK, on the eve of the European Council meeting in October 2017.¹⁷ But let's recall that May already spent many months, before handing in the UK's formal notification of withdrawal, claiming that she wanted to safeguard existing citizens' rights – and suggesting it was only the obstruction of certain other countries which prevented a quick deal from being reached.¹⁸ Yet when the EU made its offer

15. As acknowledged by the European Council, Article 50 TEU Conclusions, cited *supra* note 5, para 1.

16. As opposed to the proposals contained in the UK's Position Paper on Northern Ireland and Ireland (August 2017).

17. Available via <www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>.

18. E.g. as in HM Government, Paper cited *supra* note 13.

to guarantee fully the status and rights of current migrant citizens,¹⁹ the UK responded with a proposal that fell far short of that standard in a whole variety of respects.²⁰ Now May has said it again in Florence: she wants migrant citizens to carry on living their lives as before. But there was little concrete in her speech to bridge the gaps that continue to separate the UK and EU positions: even after the fifth round of negotiations, differences remain concerning tricky issues such as future rights to family reunification, the exportation of certain social security benefits, the additional administrative procedures which EU27 citizens will be expected to undergo within the UK, the precise legal status that any agreement on citizens' rights will eventually enjoy under UK law and, of course, the applicable governance structures – including not least the appropriate role of the Court of Justice.²¹

On this last point: the UK continues to insist that withdrawal will mean the end for any direct jurisdiction by the Court within or over the UK. In Florence, May instead suggested that the UK courts should nevertheless be able to take into account ECJ rulings, so as to help ensure the consistent interpretation of any withdrawal agreement provisions concerning citizens' rights which derive from EU law. That suggestion has been hailed in some quarters as if it were a significant concession – yet it barely goes further (if at all) beyond the general principle of judicial interpretation which had already been suggested by the UK Government in the European Union (Withdrawal) Bill currently working its way through Parliament.²² After all, under the Bill, the UK courts would basically be obliged to treat pre-withdrawal EU case law as if it still enjoyed the same precedential status as judgments of the UK Supreme Court;²³ and while the UK courts would no longer be strictly bound by any post-withdrawal EU case law, they would still be entitled to have regard to any new ECJ judgments if they were to consider it appropriate to do so.²⁴ What precisely is the UK Government offering, whether in the Florence speech or

19. Commission, Position Paper on Essential Principles on Citizens' Rights (12 June 2017).

20. UK Government, Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU (June 2017).

21. See Joint Technical Note on citizens' rights after fourth round of UK-EU negotiations (28 Sept. 2017), available at <ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en>; read together with Barnier, Statement of 12 Oct. 2017, cited *supra* note 5.

22. We refer here to the text as proposed on 13 July 2017, but given the huge number of proposed amendments by MPs, as well as the opposition of the devolved authorities in Scotland and Wales, it is anticipated that the Bill will only be adopted (if at all) in a substantially revised form.

23. Though with certain limitations, e.g. as regards case law which refers to the Charter of Fundamental Rights (see Clause 5 of the Bill); or as regards the general principles of Union law (see Schedule 1 to the Bill).

24. See Clause 6 of the European Union (Withdrawal) Bill.

since then, that would add up to a stronger guarantee for citizens' rights than the general approach the UK proposes to adopt for itself in any case?

On the vexed question of the UK's financial settlement: the Florence speech did make some real progress, insofar as May explicitly promises that the UK will honour the commitments it undertook as a Member State and pay its fair share for future cooperation programmes. That should give some useful political impetus to the negotiations, which now need to agree a precise methodology for calculating the financial settlement, paving the way to reach some provisional sum, that can then be adjusted in light of the overall withdrawal agreement.

However, the domestic UK politics surrounding any "divorce bill" are now so poisoned as to make the situation critical. The UK Government is patently reluctant to put any firm negotiating position down on paper, in detail and in public – even though the lack of any such concrete proposals from the UK side is evidently to blame for holding up serious progress. Surely May needs to learn an important lesson which her predecessors singularly failed to grasp until it was too late: the ideological Europhobes in her party (and beyond) are not interested in compromise and they will never be satisfied by any deal she might strike. On the contrary, they are looking for any excuse to derail the entire process – and in the question of money, they believe they have found the perfect issue to stir up the sort of populist resentment they need to exploit as fuel for their own political ends. One can only hope that May has some reserves of determination left to resist them.

So: we have concrete but insufficient progress on the priority "first phase" withdrawal issues. And as anyone who follows the two sides' position papers will already know: from contracts for the supply of nuclear materials, to the handling of pending applications for intellectual property protection, and questions about the storage and handling of personal data – the range of additional issues that still need to be discussed and settled is mind-boggling.²⁵

A bespoke, unique, unprecedented future relationship... yes, but what is it you actually want?

Thirdly, the Florence speech addressed the UK's vision of its future relationship with the EU. Here, May was quite right to contradict some of the consistent propaganda used by many of the leading Leave campaigners to mislead and confuse UK citizens: for example, the idea that membership of the European Economic Area can offer all the benefits without suffering any

25. Consider the Commission position papers already available via <ec.europa.eu/commission/brexit-negotiations_en>.

of the burdens (when the reality is that it would mean the UK transforming itself, in a most perverse manner, from leading rule-maker to passive rule-taker);²⁶ or the lie that the Single Market is no better than other international trade agreements (when the reality is that even a relatively advanced trade deal, like that between the EU and Canada, is but a pale shadow of the Single Market itself).

Instead, the Florence speech reaffirms the Government's aspiration that the UK wants its own bespoke, unique and unprecedented relationship. Fair enough: wouldn't anyone? The problem is that (besides emphasizing repeatedly the centrality of future cooperation specifically in the fields of trade and security) the UK has still given almost no palpable indication of what this would actually mean and how it might really operate. On its face, May seeks explicitly to stamp out the Boris Johnston conceit-deceit that the UK can somehow have its cake and eat it. But upon closer inspection, this still feels like exactly what the UK is asking for: little need change in our mutual relations, indeed cooperation can become even closer than it is today, but without the UK having to play by the same rules or be bound by the same obligations as anyone else. And that fantastical delusion is evident not just in the Florence speech: the same is true for most of the "future partnership" papers published by the UK Government over the past several months.²⁷ The basic message in each case feels the same: we are leaving, but the benefits of membership are so great that we do not want or cannot afford to lose them, so please can you (the EU) come up with some creative and innovative ways for the UK to leave, but still keep all those benefits? Be warned: history will judge you harshly if you fail! Such an approach might play well to a domestic audience, not least in creating useful foreign scapegoats for when things do not go quite as the UK Government might have envisaged. But in the real world of international law and relations, it is simply not a credible or sustainable position.

Transitional arrangements: a question not just of politics but also of law

Fourthly, we come to an element of the Florence speech that is genuinely a new and significant departure in UK Government policy: May's reconstituted

26. A point already made, e.g. in HM Government, *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (March 2016), pp. 16–21.

27. E.g. Future Partnership Papers on future customs arrangements (Aug. 2017); enforcement and dispute resolution (Aug. 2017); the exchange and protection of personal data (Aug. 2017); providing a cross-border civil judicial cooperation framework (Aug. 2017); collaboration on science and innovation (Sept. 2017); foreign policy, defence and development (Sept. 2017); security, law enforcement and criminal justice (Sept. 2017).

proposal for an implementation period between the date of UK withdrawal and the birth of a new future partnership with the EU. To be clear: the UK is not asking for a prolongation of formal EU membership through the mechanism/s explicitly provided for under Article 50 TEU; the UK has also ceased pretending that its implementation period should merely entail the phased entry into force of a (non-existent) final deal. Instead, May is suggesting that the withdrawal agreement – in addition to dealing with current migrant citizens, Northern Ireland and the divorce finances etc. – should provide for a post-withdrawal transitional period of around two years, so as (put bluntly) to cushion the UK from the worst effects of the abrupt departure which is otherwise heading its way.

But it remains difficult to pin down precisely what the UK has in mind here. For example: what would be the scope of any transitional arrangement? As usual, even in this context, May mentions only trade and security. Is this meant to imply that any deal should not be designed to cover continued cooperation also in other fields, such as the environment or scientific research? We might like to assume that May indeed envisaged a somewhat broader scope of continuation for EU law in relation to the UK – but the issue awaits significant clarification from London. In any event, the Florence speech also explicitly suggested some important deviations from the status quo: for example, the ability for the UK to ignore the Union's exclusive competences in the field of external relations, so as to enter into formal trade negotiations with third countries, even if the entry into force of any such new deals would be delayed until the UK's transitional period with the EU had expired. Perhaps more importantly, May has since clarified – in a statement to the House of Commons on 9 October 2017 – that although EU nationals might continue to arrive in the UK during any transitional period, they would have to be registered and would become subject to a new (albeit as-yet-undefined) UK immigration regime, rather than benefiting from any continuation of the EU's rules on the free movement of persons.²⁸

Or again: what would be the basis for continued cooperation? May suggests that the EU's current rules and regulations should provide the framework for her transitional period. But would that include, for example, a clear obligation for the UK also to amend its domestic legislation to fit with any future changes to EU law which might be agreed during the transitional period? And as we all know: cooperation is not built merely on rules and regulations; it is also built on a complex network of institutions and processes – political, administrative and judicial – which make the whole system work in practice. So: what governance and enforcement structures does the UK have in mind? May

28. Available at <www.gov.uk/government/speeches/pm-statement-on-leaving-the-eu-9-oct-2017>.

recognizes there would be no more seats at the top table at the European Council, or in the Council, and no more MEPs in the European Parliament. But otherwise, the Florence speech gives little away, beyond suggesting that the role of the Court of Justice could be replaced with some new dispute settlement mechanism (albeit again of an undefined nature) sooner rather than later.

In any case, knowing more precisely what the UK has in mind would only amount to the first step. The next question is: would the EU be prepared to accept the UK's proposals, at a political level, bearing in mind the guidelines laid down by the European Council in April 2017?²⁹ For example, although it is clear that the primary driver for a transitional period on the UK side is the dawning realization within Government of the woeful state of their own withdrawal preparations, the EU27 guidelines make clear that the test for any transitional period begins with whether it would be in the *Union's* own interests to have one. Moreover, the EU27 have indicated that a transitional period only makes sense if it is leading from one state of being (EU membership) to a reasonably clear, even if not yet fully crystallized, vision of some alternative destination (the future third country relationship). As we have seen, the UK has still not proposed an alternative destination at anything other than the very highest level of abstraction.

In addition, the April 2017 guidelines state that any transitional agreement must involve a balance of rights and obligations, respect the integrity of the Single Market and, if based on a prolongation of Union law, incorporate the Union's existing instruments and structures – be they regulatory, budgetary, supervisory, judicial or related to other means of enforcement. That will focus attention on any UK demands to exempt itself from certain existing fields of cooperation or constraints on its freedom of action; and also raise sensitive questions (for example) about the continuing enforcement powers of the Commission and the full jurisdiction of the Court of Justice. Certainly, the European Parliament has already expressed the view that any transitional period should be based on the continuation of the whole *acquis communautaire*, thus precluding the UK from imposing (for example) any new conditions on the free movement of persons.³⁰ That already seems to put the two sides on a direct collision course for any future transition negotiations.

All of which leads on to a question of at least equal importance: will it be possible to square the UK's proposals with the EU position, not just politically but also legally? After all, the European Council's guidelines from April 2017

29. European Council, Guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017).

30. European Parliament, Resolution cited *supra* note 5.

explicitly provide that any transitional arrangements should be considered only to the extent that they are “legally possible”...³¹

In principle, Article 50 TEU provides that the Treaties shall cease to apply to the UK upon its withdrawal. On its face, that suggests any transitional arrangement cannot be based upon a direct prolongation of the application of the Treaties, to a territory that has become a third country, just as if it were still a Member State. The withdrawal agreement would instead have to provide for the construction of a parallel system of cooperation which seeks (as far as possible) to replicate the rules, rights and obligations provided for under the Treaties (if only for a fixed period of time) in the entirely different context of international relations between the Union and its Member States (on the one hand) and a third country (on the other hand).

In that regard, it is true that the Council has endorsed the view that Article 50 TEU gives the Union an exceptional power to negotiate the terms of withdrawal – exceptional at least to the extent that it empowers the Union alone to reach agreement with the UK, on behalf of the remaining Member States, even as regards issues which would normally be seen as falling within national competence – thus seeking to avoid any possibility of the withdrawal agreement being treated as a mixed one, requiring individual national ratifications, in addition to the Union level endorsement explicitly provided for under Article 50 TEU itself.³² Yet even an exceptional power cannot be unlimited – particularly when it comes to assessing the substantive scope and contents of any withdrawal agreement for their compatibility with the Treaties. After all, any EU constitutional lawyer would expect the withdrawal agreement – transitional provisions included – to respect the fundamental principles and parameters laid down in the Treaties when it comes to defining the nature and limits of the Union’s own competences.

That task should be relatively easy in those situations where continued UK participation in particular EU policies or measures would anyhow be possible in accordance with the avenues already open to third countries under the relevant instruments of primary or secondary Union law (e.g. the award of equivalence / adequacy decisions in fields such as financial services or data protection); or would at least lie within the Union’s gift to offer any third country in accordance with the standard competence principles governing external relations as provided for under the Treaties (such as the possibility for third country courts to seek binding interpretative guidance from the Court of

31. See para 6 of the Guidelines cited *supra* note 29.

32. Council, Decision authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017).

Justice through their own preliminary reference-style procedure).³³ But beyond that: what if the UK were to ask for special privileges that would not normally be open to any third country under the standard framework of Union law? Consider, for example, the entirely plausible prospect of a request by the UK (post-withdrawal, for a transitional period) that its authorities may continue to participate in Union level networks or agencies – whether for the exchange of information, the allocation of jurisdiction, the mutual recognition of standards, or the enforcement of decisions – where membership and its attendant benefits are reserved for the Member States alone?

For those purposes, the mere fact that Article 50 TEU has been recognized as an exceptional competence, specifically insofar as it allows the Union alone to finalize an agreement covering issues that also fall within Member State power, appears entirely irrelevant. After all, the Member States could not use their ordinary national competences to change the system or content of the Union's own competences as laid down under the Treaties, so their consent (express or implied) to the possibility of sole Union external action even as regards matters that would normally be considered to fall within national competences, within the specific context of withdrawal, cannot have any effect on the substantive scope or content of the Union's own powers as regards matters falling within the Union's own regulatory fields of responsibility.

So the prospect of an ambitious and far-reaching transitional deal could pose not only difficult political questions, but also important legal challenges: just *how* exceptional can the Article 50 TEU competence *really* be? One can already hear the calls for clarification by the Court of Justice – albeit tempered by the realization that judicial action could be difficult to square with the strict process now unfolding pursuant to Article 50 TEU... Certainly, for reasons of law as much as of politics, including constitutional principles as well as technical detail, negotiating a sophisticated transitional regime could well involve many of the same tricky questions and potential obstacles as the final future relationship itself.

In any case, we should also bear in mind other potential limits to the effect or utility of any EU-UK transitional arrangements. For example, it seems difficult to understand how a transitional deal which is clearly based on the transformation of the UK into a third country could – in and of itself – help solve the excruciatingly complex problems surrounding the UK's future status in relation to existing international agreements contracted either by the

33. In accordance with the case law on the autonomy of Union law, e.g. Opinion 1/91, *EEA Agreement*, EU:C:1991:490; Opinion 1/92, *EEA Agreement II*, EU:C:1992:189; Opinion 1/00, *European Common Aviation Area*, EU:C:2002:231; Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123.

EU or by the EU acting together with its Member States. At best, the prospect of transitional provisions might influence the immediate political environment in which a hefty programme of case-by-case legal analysis and diplomatic negotiation must now be undertaken.

And for our finale: juggling with fire while blindfolded on a trapeze over a crocodile pit...

To conclude: May's Florence speech represents a modest step towards the real world after over a year of living in a parallel universe. But as events continue to demonstrate with almost painful clarity, the underlying problems in the UK position remain the same: a deeply divided country, with a deeply divided government, as yet lacking any credible plan for dealing with the situation, with the Article 50 TEU clock continuing to tick.

Events may yet take a(n even more) dramatic turn. The degree to which the UK (on the one side) is a hostage to its own ideological red lines and Europhobic bogeymen, while the EU27 (on the other side) are determined to stick to their phased approach to progressing the negotiations, has already substantially raised the prospects either of the talks failing to proceed beyond a minimal technical agreement covering basic separation issues; or of negotiations simply breaking down altogether, thus forcing each side to face the ensuing storm as best they can on a unilateral basis. In that regard, it is interesting to note that proposed amendments to the European Union (Withdrawal) Bill might well see the UK Parliament seeking to reserve to itself an express power to veto withdrawal, if the Government fails either to negotiate an acceptable deal or to bring back any agreement at all.³⁴ That would in turn raise the question: does the UK feel sufficiently constitutionally at ease with itself to change its mind through parliamentary legislation alone; or would the impact of the 2016 referendum remain such that only a reversal of public opinion as expressed in a second plebiscite would feel politically legitimate? And if the UK did eventually change its mind, that would of course only lead to more questions – not least whether the EU27 would by then even be prepared to accept such a change of heart; if indeed the rest of the EU is legally entitled to have any say at all, over what might well be seen (and again, tested before the Court of Justice) as the rightful prerogative of a withdrawing State unilaterally to rescind its own Article 50 TEU notification.

But for now: the Brexit circus continues to rattle along its merry way. And its most bizarre joke? It is the clowns who are asking to see magic conjuring

34. Available via <services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

tricks from their bemused spectators – the same spectators who never even wanted to watch this grotesque carnival in the first place. Oh, those British – so *drôles*...