

Brexit Editorial, Volume 24, Issue 1 (March 2018)

1 AGREEMENT ON THE FIRST PHASE

Mrs May's self-induced enfeebled position was brutally exposed on 4 December when what appeared to be an agreed package for the terms of an agreement for Brexit was scuppered at the celebratory lunch with the Presidents of the European Council and Commission. The prolonged dispute over financial terms which had prevented a successful outcome to the sixth round of discussions on 10 November was not the sticking point. Nor was it the role of the Court of Justice (CJEU) in adjudicating on the rights of EU citizens in the UK post Brexit. It was on the traditional graveyard of English and British politicians (metaphorical and literal): Ireland. Specifically, the objections of the Democratic Unionists (DUP) of Northern Ireland (whose *raison d'être* is union with the UK) and their opposition to the terms relating to the border between the Republic of Ireland and Northern Ireland. With ten seats at the Westminster Parliament the DUP is the largest elected party in Northern Ireland although there is no present government in Northern Ireland under devolution. This depends on a shared power arrangement with the Irish nationalists and this arrangement has broken down since January 2017. Mrs May depends upon the DUP votes to keep her in power in Westminster¹ assisted by the fact that Sinn Féin MPs elected from Northern Ireland adopt an abstentionist policy vis à vis the Westminster Parliament.

In a phone call received by Mrs May at the lunch the leader of the DUP, Arlene Foster,² opposed any terms of an Article 50 agreement that made the exit of Northern Ireland from the EU different to the terms for Brexit for the other countries of the UK. Specifically, under pressure from the Republic of Ireland, the UK signalled that there would be 'regulatory alignment' – convergence – for cross-border trade over that border. For Arlene Foster, this could only spell 'regulatory divergence' between Northern Ireland and the mainland of Britain. Although 'alignment' and 'divergence'

¹ The pact between the UK government and the DUP was unsuccessfully challenged in the Administrative Court in London: *R (McClean) v. First Secretary of State and HM Att Gen* [2017] EWHC 3174 <http://www.bailii.org/ew/cases/EWHC/Admin/2017/3174.html> (accessed 8 Dec. 2017).

² Foster is not a Westminster MP but a member of the Northern Ireland Assembly.

were not spelt out, for Foster this entailed not only economic isolation, but political isolation that could pave the way to constitutional change, i.e. a united Ireland.

Not for the first time Mrs May had her back against the wall. The hard line Brexiteers in the Conservative Party – it is historically the Conservative and Unionist Party – immediately rallied to Foster's support. The dilemma for Mrs May is how this border question may be resolved in order to proceed with heads of an agreement under Article 50. Media reports were rife that the real insight from this episode revealed that the UK is seeking to engineer a soft Brexit for the UK allowing as flexible border arrangements as possible with carve-outs for the UK. How realistic this is we have to wait and see. It runs counter to EU policy – the cake and eat it syndrome. A general UK move towards 'regulatory alignment or convergence' would not leave the DUP and those they represent feeling isolated in the UK. And Mrs May is only too aware of the cross-border cooperation on the island of Ireland that is a central plank in the peace process in Ireland under the Good Friday agreement of 1998.³ It is essential in agriculture, utilities and the environment amongst many other pivotal areas. There has been a notable ratcheting up of national rhetoric on both sides of the Irish border and some were quick to see Ireland as precipitate in its announcement on the morning of 4 December of a 'done deal'. Rhetoric can soon descend to inflammatory invective and worse. The intervention of US presidents has been essential in the past in healing wounds and urging peace in Northern Ireland. One cannot expect such intervention from the present incumbent president especially after the very public dispute over anti-Islamic racist tweets by Donald Trump and public censure from Mrs May.⁴

A soft Brexit, however, is anathema to the Brexiteers in the Conservative party who are dedicated to a hard Brexit i.e. no regulatory convergence and a clean break. Regulatory 'baggage' from the EU they believe would stymie a new Britain's efforts to broker trade deals with countries outside the EU. One senses their belief that no amount of self-immolation is too expensive a price for the UK to pay to exit the Union. Furthermore, the prospect, albeit briefly glimpsed, of a special arrangement for the Northern Irish position was immediately seized upon by the Scottish first minister as an arrangement that would suit Scotland post Brexit. She was immediately joined by the first minister of Wales, and by the mayor of London asking for a similar arrangement for London. A UK of 'bits and pieces'.

Despite apparent reservations from Foster, on 8 December the Commission announced in a communication based on a joint statement that sufficient progress had been made on the three areas above to recommend to the European Council an

³ G. Anthony, Ch. 3 in *Britain Alone!* (P. Birkinshaw & A Biondi eds 2016).

⁴ Trump's tweets involved postings from an extreme right wing and discredited body in England, Britain First.

advance to the second phase of negotiations on future relationships.⁵ The frenetic pace of negotiations is reflected in the Commission statement. There is clearly a good deal of discussion ahead on the Irish border. The communication notes:

Whilst the United Kingdom remains committed to protecting and supporting continued North-South cooperation across the full range of contexts and frameworks, including after withdrawal, the common understanding provides that the United Kingdom aims to achieve this protection and the avoidance of a hard border through the overall EU-United Kingdom relationship. *This intention seems hard to reconcile with the United Kingdom's communicated decision to leave the internal market and the Customs Union.* (page 9 emphasis added).

Paragraph 49 of the joint statement proclaims that in the absence of agreed solutions the UK will maintain 'full alignment' with the rules of the internal market and customs union.

The communication outlines the role of the CJEU as the final arbiter of the interpretation of EU law on the rights of EU citizens to which UK courts and tribunals will have 'due regard'. The UK courts and tribunals may refer questions on interpretation of the EU rights to the CJEU, having due regard to whether relevant case law exists, for litigation brought within eight years from the application of the part on citizens' rights – departure day. Judicial exchanges of 'case law between courts, regular judicial dialogue, as well as the possibility for the United Kingdom Government and the Commission to intervene in relevant cases before the Court of Justice of the European Union and before United Kingdom courts and tribunals respectively *should be foreseen* (emphasis added)'. The implementation and application of citizens' rights will be monitored by the Commission in conformity with the Union treaties. To this end a national independent body in the UK will ensure reciprocity and mirror the role of the Commission. It will receive complaints and initiate appropriate applications to the UK courts on behalf of EU citizens resident in the UK. This aspect will be reflected in the withdrawal agreement and will be present in the second phase of discussions (pages 6–7).

For the financial settlement 'a fair methodology' had been agreed 'to calculate the obligations to be honoured by the United Kingdom in the context of its withdrawal' (page 10). Contribution to the budget and budgetary commitments will last until 31 December 2020. Continuing commitments will carry on after that date.

⁵ *Communication from the Commission to the Council (Article 50) COM (2017) 784 (8 Dec. 2017)*, https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf (accessed 8 Dec. 2017). The joint statement and Joint technical notes are available on https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en. The report on the Department for Exiting the EU site is: <https://www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu> (accessed 8 Dec. 2017).

Agreement had been reached ‘in principle’. The withdrawal agreement still requires to be drafted. As paragraph 5 of the joint statement says: ‘Nothing is agreed until everything is agreed’. This has been a preliminary stage leading to much more challenging and detailed negotiations. This communication represents a considerable compromise on behalf of the UK and stands in stark contrast to the ‘hard Brexit’ and ‘no deal’ utterings of the Brexiteers. Some common sense seems to have prevailed at last. The communication addresses numerous other items to which the next editorial will return. There is still a long, arduous distance to travel. But it is progress.

One must reflect on post Brexit: with no UK judge or advocate general on the CJEU, with no UK representatives in the institutions and no voice in EU law-making, and in a context of regulatory alignment with the EU, what is the point of leaving the EU?

On 13 December, the European Parliament overwhelmingly voted in favour of progressing to the next phase of negotiations.

At the summit on 14–15 December, the 27 leaders of the EU member states agreed to accept the recommendation from the Commission and allowed negotiations to advance to the second phase.

2 LEGISLATIVE PREPARATION

Meanwhile, the EU Withdrawal Bill which has been discussed in earlier editorials, is trundling its way through the House of Commons. It will then go to the Lords. The number of proposed amendments has grown to 378 by late November and 75 new clauses. The Bill itself is only 62 pages in length.⁶ Immediately before the Bill was introduced the government promised to allow scrutiny, debate and a vote on the terms of the deal which goes further than a previous undertaking.⁷ The undertaking did not prevent the Commons passing an amendment to the Bill by a majority of four (which included Conservative rebels) against the government making a vote by Parliament in legislation a pre-requisite to approval of the divorce settlement. An earlier proposed amendment included a clause insisting on Parliamentary approval before repeal of the ECA 1972 and exit from the EU unless and until a new treaty establishing a future relationship between the UK and EU has been agreed and ratified by the UK Parliament. Just what detail of a ‘future relationship’ will MPs get from the Article 50 agreement? This speaks only of ‘the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. The government

⁶ https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/amend/euwithdrawal_daily_cwh_1113.pdf (accessed 8 Dec. 2017).

⁷ Davis informed the select committee on 25 Oct. 2017 that a Parliamentary vote may not come until after the agreement is concluded.

has undertaken that the departure agreement and any transitional agreement will be set out in legislation.

The government are also writing in the date and time for departure into the Bill as 11 pm 29 March 2019. The clause was initially approved but may be amended to allow an extension of time. October 2018 has been announced by M. Barnier as the deadline on all talks, including any transitional phase, and a concluded Brexit agreement. Barnier believes the UK must depart before EU Parliamentary elections in May/June 2019. Readers should recall that the Brexit agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

In addition to the withdrawal bill the trade secretary Liam Fox has tabled a Trade Bill in preparation for Brexit.

3 LACK OF STRATEGIC PREPARATION AND A TRANSITIONAL PERIOD

The lack of preparation and vision for the UK's economic and financial future post Brexit is becoming only too clear. The secretary for Brexit, David Davis, informed the Brexit select committee in evidence that fifty-eight sectoral impact assessments on essential parts of the economy post Brexit did not exist.⁸ This seemed to contradict an earlier statement by Davis and a Parliamentary vote to produce the reports. His previous statements had been misinterpreted and no detailed impact assessments existed, he claimed. The committee split on party lines in refusing formally to censure Mr Davis. In evidence to the Treasury committee on the same day the Chancellor of the Exchequer stated that there had been no serious discussion by the Cabinet of the 'end state' vision for Brexit.⁹ The House of Lords select committee on the European Union has published a report on the damaging and disruptive economic and legal uncertainty following Brexit if no agreement is reached.¹⁰

Mrs May announced that a transition period of membership following Brexit was her government's policy.¹¹ A transition period was necessary, it was argued, to prepare

⁸ 6 Dec. 2017. He produced over 800 pages of general indicators. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/departments-for-exiting-the-european-union-sectoral-analyses/oral/75186.html> Qus 2–7 (accessed 8 Dec. 2017).

⁹ 'The Cabinet has had general discussions about our Brexit negotiations, but we have not had a specific mandating of an end-state position.' <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/budget-autumn-2017/oral/75188.html> Qu 302 (accessed 8 Dec. 2017).

¹⁰ HL 46 (2017–2019) *Brexit: Deal or No Deal*, <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/46/46.pdf> (accessed 8 Dec. 2017).

¹¹ <https://hansard.parliament.uk/Commons/2017-10-09/debates/B119A163-5708-4B76-847A-0F8AFE4CD5F9/UKPlansForLeavingTheEU> (accessed 8 Dec. 2017).

for a new trade relationship with the EU. The government appear to have compounded two elements in ‘transition’: a ‘standstill agreement’ and an implementation agreement.¹² The latter cannot take place until the future trade relationship is established and that cannot take place, the EU insists, until the Article 50 agreement is concluded. There will have to be compromise here because a trade deal could take several years to negotiate before agreement and ratification. In response to questions in Parliament, Mrs May replied that the ECJ may well have jurisdiction over the UK in a transition period and this would cover laws we agreed to before departure and the length of the EU legislative process would mean any new proposals after Brexit to which the UK had not agreed were unlikely to be law before the end of the transition period. This does not answer the question.¹³ Nor has the government acknowledged the legal complexity of a transitional period and whether Article 50 provides a firm legal base for the continuation of EU law.¹⁴

The Commission communication of 8 December notes that the transitional arrangement would be for a limited time and be based on Article 50. It ‘could also provide bridges to the future relationship’ (page 15). In such a potential transitional period, the *entire* *acquis* of EU law ‘would continue to apply in the United Kingdom. Any such transitional arrangements would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.’ (page 15)

4 CONTINUING INFLUENCE OF EU LAW

Previous editorials have already outlined how EU law may influence UK law after departure. The communication based on the joint Commission/UK statement has been outlined above. If one examines the Data Protection Bill presently before the House of Lords this influence is manifest. First of all the bill stipulates most UK data processing will be subject to the EU General Data Protection Regulation (GDPR). The GDPR will also apply to certain non EU areas of processing. The EU Law Enforcement Directive (LED) will cover data processing for law enforcement purposes. Processing covered by national security, which the Bill assumes is outside EU competence,¹⁵ will be consistent with the new Council of Europe Convention on data processing. In terms of general processing under the GDPR the regulation will be directly applicable in UK law until 29 March 2019. Thereafter (subject to any extension) the GDPR will apply as UK law under the enacted EU Withdrawal Bill. Judgments from the CJEU on the GDPR (and LED) will be considered as explained in previous editorials under clause 6 of the EU Bill.

¹² N. 10 above, paras 128 et seq.

¹³ N. 11 above, col. 53.

¹⁴ N. 10 above, paras 131–132.

¹⁵ Art. 4(2) TEU.

Trans-border flows of data to the other Member States may well require consistency with those judgments. The former Attorney General Dominic Grieve (Conservative) has amongst several amendments tabled one that would include the Charter of Fundamental Rights with EU provisions brought into UK law under the Bill. Several crucial judgments have been made under the CFR in the CJEU on data protection.¹⁶

5 MISCELLANEOUS POINTS

The Social Mobility Commission resigned in early December. The Commission is a government advisory body on social mobility ie economic improvement in England and assisted in Mrs May's objective of achieving greater fairness and justice in society after the EU referendum result in June 2016. The Commission's board resigned en masse because Brexit had absorbed all government resources and left no space for translating kind sentiments into reality, the chairman explained. Of sixty-five social mobility blackspots the Commission identified sixty that had voted for Brexit.¹⁷ One wonders what economic benefit those areas will receive from Brexit.

The media reported how a Conservative MP had asked for information from vice chancellors about Brexit modules and professors teaching those modules at UK universities. Chris Heaton-Harris, Conservative MP for Daventry and a staunch Eurosceptic, wrote to vice-chancellors at the start of October asking for the names of any professors involved in teaching European affairs 'with particular reference to Brexit'. Allegations of McCarthyism were rife in certain parts of the media but it was a poorly explained and gauche action by the MP.

The Editor.
15 December 2017.

¹⁶ Case C-131/12 *Google Spain*; Case C-362/14 *Schrems*; Case C-203/15 *Tele2 Sverige AB* and Case C-698/15 *Tom Watson*.

¹⁷ <https://www.gov.uk/government/publications/social-mobility-index-2017-data> (accessed 8 Dec. 2017).
Report: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/662744/State_of_the_Nation_2017_-_Social_Mobility_in_Great_Britain.pdf (accessed 8 Dec. 2017).