

Brexit Editorial, Volume 24 Issue 4 (December 2018)

Brexit is proving to be the most complex challenge in the UK's domestic and foreign policy since the Second World War. After that tragedy there was a sense of hope and constructive engineering of a new order involving novel alliances and frameworks of regional and global significance. Brexit has become a pre-occupation fomenting far more heat than light; far more passion than rationality; far more division than unity. Whatever the eventual outcome, the United Kingdom will have to make its way in the world. At this time, no-body has a clear idea what that way will be. The draft agreement with the EU under Article 50 was agreed on 80pc of the terms.¹ The European Union (Withdrawal) Bill was enacted allowing for the domestication of EU law post Brexit day. A government amendment passed as a concession to opposition in the Commons and Lords, provides, inter alia, for a resolution to be passed in the Commons approving the UK/EU withdrawal agreement and the future framework, so far as practicable, before the European Parliament approves the agreement. Failing this approval of the agreement by the Commons, a minister must make a statement stating how the government intends to proceed in relation to negotiations to withdraw under Article 50. The amendment allows the Commons to take note on the government statement and express its view, but not to 'take charge' in the event of a no-deal.

The Prime Minister had a full Cabinet meeting at the Prime Minister's country residence, Chequers, on 6 July. The meeting agreed to her proposals for a future relationship with the EU but within two days both the Secretary of State for Brexit and the Foreign Secretary resigned on the grounds that this was a plan they could not accept. The latter, in very bad taste, subsequently likened her plan to 'a suicide vest'.

Mrs May presented her plan to Parliament and a White Paper was published. On 24 July, a further white paper on *Legislating for the Withdrawal Agreement between the UK and EU* was published.²

¹ https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (25 Aug. 2018).

² Cm 9674. This spells out (para. 60) that the EU (Withdrawal) Act 2018 will be amended to make provision for the continuing effect of the European Communities Act 1972, and sovereignty of EU law, until 31 Dec. 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawal_agreement_FINAL_230718_v3a_WEB_PM.pdf (21 Aug. 2018).

1 PARLIAMENT AND THE WHITE PAPER

In her statement to Parliament,³ the PM stated that friction-free movement of goods was necessary requiring a free trade area to avoid customs and regulatory checks and to protect essential supply chains and to prevent a hard Irish border. This requires four steps. The first is a commitment to maintaining a common rulebook for industrial goods and agricultural products. The UK ‘would make an up-front sovereign choice to commit to ongoing harmonization with EU rules on goods, covering only those necessary to provide for frictionless trade at the border.’ This would not include services nor the common agricultural and fisheries policies. The UK would continue to play a strong role in shaping the European and international standards that underpin them, and there would be a parliamentary lock on all new rules and regulations because the direct effect of EU law would cease. The UK Parliament would be sovereign and the consequences of exercising the lock would be understood.

Secondly, the UK will ensure a fair-trading environment. There would be ‘strong reciprocal commitments relating to state aid’ and co-operative arrangements between regulators on competition, high regulatory standards for the environment, climate change, social and employment standards, and consumer protection.

Thirdly, a joint institutional framework would be required to provide for the consistent interpretation and application of UK/EU agreements by both parties. This would be done in the UK by UK courts and in the EU by EU courts, with due regard paid to EU case law in areas where the UK continued to apply a common rulebook. A joint committee of representatives from the UK and the EU would also contribute to ‘a robust and appropriate means for the resolution of disputes’. The framework would ‘respect the autonomy of the UK and the EU legal orders and be based on the fundamental principle that the court of one party cannot resolve disputes between the two’.

Fourthly, the Cabinet agreed to put forward a new business-friendly customs model – a ‘facilitated customs arrangement’ – that would remove the need for customs checks and controls between the UK and the EU because we would operate as if a combined customs territory. Crucially, it would also allow the UK to pursue an independent trade policy. The UK would apply the UK’s tariffs and trade policy for goods intended for the UK and the EU’s tariffs and trade policy for goods intended for the EU. There would be no additional burdens and a new technology would make UK customs systems as smooth as possible for businesses that trade with the rest of the world.

The PM added it was wrong to suggest the UK could not conclude trade deals after Brexit. ‘When we have left the EU, the UK will have its own independent

³ Prime Minister’s statement 9 July 2018 on Chequers Meeting Vol 644 col 707, <https://hansard.parliament.uk/Commons/2018-07-09/debates/DF149CD-3762-4293-82A3-ED03A0BA48D5/LeavingTheEU> (21 Aug. 2018).

trade policy, with its own seat at the World Trade Organization and the ability to set tariffs for its trade with the rest of the world'. We will be able to pursue trade agreements with key partners.

The proposal includes a far-reaching security partnership that will ensure continued close co-operation with our allies across Europe while enabling the UK to operate an independent foreign and defence policy.

The White Paper published several days after the Prime Minister's statement elaborated on her statement.⁴ This reiterated the commitment on the UK side to a 'deep' and 'sustained' relationship with the EU and called for 'pragmatism and compromise' on both sides. There are proposals for close regulatory arrangements on trade in services, digital and financial markets, although there will not be a common rule book in these areas as proposed in goods including 'agri-food' where there will be a 'free-trade area' with the EU. Trade in goods will be under a 'facilitated customs arrangement'. Free movement of persons will cease 'although the UK will remain an open and tolerant nation' (paragraph 75).

A great deal is contained on security cooperation and free flows of data as well as a future security partnership in Chapter 2. The UK has passed the Data Protection Act 2018 to implement the GDPR and Law Enforcement Directive. But there is a growing concern that if the UK is not granted 'adequacy status' for data processing and transfer it will lose its right to transfer data to and from EU states.⁵ Only a handful of third party states have such status.⁶ Given the existence of the UK independent Information Commissioner, the independent information tribunals and details of the DPA 2018 it is hard to imagine that the UK will not be given such status. The UK's ambition is to be in regulatory cooperation with the EU on data protection which is another matter.

Buried away in that chapter are two novel commitments to remain as a member of the ECHR (paras 2.5e and 2.3.19). This is a new position for the PM to adopt. She has long argued against our membership of the ECHR and against the Human Rights Act which implements much of the Convention.

The institutional arrangements are explained in Chapter 4 and will include a governing body of UK/EU ministers and a Joint Committee overseeing

⁴ *Future Relationship between the United Kingdom and the European Union* Cm 9593 (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724982/The_future_relationship_between_the_United_Kingdom_and_the_European_Union_WEB_VERSION.pdf (21 Aug. 2018).

⁵ Digital, Culture, Media and Sport Committee *Disinformation and Fake News Interim Report* HC 363, para. 30 (2017–2019).

⁶ The USA is not among these but US companies have to sign up to the EU/US Privacy Shield to transfer data to and from the EU. Access by US public authorities is covered. The shield is widely criticised as inadequate. The UK government has published guidance on data protection in the event of a no-deal Brexit: <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexiteal/data-protection-if-theres-no-brexiteal> (25/09/2018).

partnerships and cooperation. In the case of a common rule book for goods (which would be binding in international law and where there was an intent to commit to a harmonization with relevant EU rules) the Joint Committee or an independent arbitration panel would attempt to resolve any disputes. The UK would not contribute to the making of the rules but would be consulted. The rules would be implemented in UK law by domestic legislation (Chapter 4, paragraph 53). An intractable dispute on interpretation could be referred to the ECJ by agreement of both sides or by an arbitration panel. The Joint Committee or arbitration panel would have to resolve the dispute in a way that was consistent with the ECJ's interpretation. The UK could not make references to the CJEU under the terms of the EU (Withdrawal) Act 2018.⁷ Both sides would respect and take account of the case law of the other party. It is hoped that the new arrangements will return accountability to the elected representatives who make UK and devolved laws in London, Edinburgh, Cardiff and Belfast (page 97).

The White Paper is replete with hopes of regulatory participation in areas such as medicines, aviation and chemicals, alignment, cooperation, harmonization, phrases which have caused a back-lash by Conservative ministers and MPs wanting a clearer severance from the EU, who have been joined by Donald Trump. After the EU considers/approves the package, Mrs May will have to persuade her own party and Parliament to accept the proposals. Mrs May's proposals are seen by Brexiteer MPs as turning the UK into a 'vassal state' bereft of independence. This is the emotive language of rebellion. If Mrs May fails to persuade Parliament, resignation may be the only option for her.

Within days, one of the Prime Minister's key proposals of a customs arrangement was undermined in the trade bill before Parliament with an amendment that would be unacceptable to M. Barnier. Mrs May was forced to accept by Brexiteer MPs in her own party this amendment on the cross-border trade bill that would drive a gaping hole in her customs proposals. The government won the crucial vote, on what had become its amendment, on EU collection of tariffs on goods bound for the UK by three votes.

M. Barnier was not encouraging in his response to the trade relationship in the White Paper although there were more positive signs on future security relationships.⁸ If the EU is to accept such proposals there will have to be the most invasive of inroads into the *acquis communautaire* that has been developed since 1957. On that, the European Council, Council and Parliament, even if they were minded to agree with Mrs May, do not have the final say. The ECJ does (and see on future UK/EU agreements Article 218(11) TFEU). M. Barnier's deadline of

⁷ See P. Birkinshaw, in *Brexit, the Legal Implications*, Ch. 1, A Biondi, P Birkinshaw & M Kendrick eds, Wolters Kluwer (2018).

⁸ http://europa.eu/rapid/press-release_SPEECH-18-4704_en.htm, https://ec.europa.eu/commission/news/ambitious-partnership-uk-after-brexit-2018-aug-02_en (25 Aug. 2018).

early November 2018 for the conclusion of the withdrawal agreement presents a tight deadline for the resolution of the detail.

2 PROSPECT OF A 'NO-DEAL'

There then commenced an increase in the volume of Brexiteers declaring that the likelihood of a 'no-deal' departure was increasing. Press and media published stories of food and pharmaceutical stockpiling and there were official preparations for such a fiasco with the publication by the UK government of the first tranche of eighty or so technical notices advising on a no-deal departure.⁹ On the same day, the Chancellor of the Exchequer warned of adverse economic and fiscal consequences from a no-deal Brexit.¹⁰ The Confederation of British Industry spelt out the serious disruptive consequences of a no-deal departure.¹¹

It is a chilling prospect even to have to contemplate such a rupture, let alone experience it coming to pass. We seem to be in the hands of a small clique within the Conservative Party who wish for Brexit at any cost to the country. The tiny majority in the 2016 referendum is prayed in aid as a resolute justification for whatever chaos may ensue. Clearly, there are many who voted 'Leave' who will not change their mind under any circumstances. But the uncertainties and questions raised about the conduct of that referendum and foreign influences upon it, and personal data manipulation with the assistance of social media,¹² must leave this episode as a dangerous platform for such a complete reversal of the UK's future direction. The UK Electoral Commission has fined leave groups BeLeave and Vote Leave for irregularities in the referendum¹³ and a rather hopeful judicial review seeking to overturn the referendum has been launched by UK citizens resident in Member States.

To avoid a no-deal exit, there will have to be concessions on all sides (Remain/Leave/EU) around Mrs May's white paper. If Mrs May's White Paper is not to be the basis of a future relationship, we face an impasse. The European Research Group of Brexiteer Conservative MPs under Jacob Rees-Mogg intend

⁹ <https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal> (23 Aug. 2018). The EU Commission has published Brexit Preparedness Documents <https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/Brexit/European-Commission-Brexit-Preparedness/Brexit-Preparedness-Documents-Listing.pdf> (23 Aug. 2018).

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/735881/180823_CX_to_Chair_of_TSC_Nicky_Morgan_.pdf (25 Aug. 2018).

¹¹ *No Deal: the Facts* 8 Aug. 2018, Confederation of British Industry, http://www.cbi.org.uk/index.cfm/_api/render/file/?method=inline&fileID=62C791A9-1C39-42BF-AAA8E90E32D1A7F1 The CBI describes itself as the 'the UK's most effective and influential business organization' (25 Aug. 2018).

¹² See the UK Information Commissioner's *Investigations into the Use of Data Analytics in Political Campaigns* (July 2018) and *Democracy Disrupted; Personal Information and Political Influence* (Aug. 2018).

¹³ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0019/244900/Report-of-an-investigation-in-respect-of-Vote-Leave-Limited-Mr-Darren-Grimes-BeLeave-and-Veterans-for-Britain.pdf (20 Aug. 2018). See *R (Good Law Project) v Electoral Commission etc* [2018] EWHC 2414 (Admin).

to publish their own proposals based on a Canada plus trade deal. It is hard to see this achieving much support in Parliament. By mid-September nothing had been produced apart from some proposals for the Irish border. Michael Gove, one of the architects of Brexit, has suggested UK membership of the EEA on an interim basis.

3 FURTHER REFERENDUMS?

The escape route to avoid a hard Brexit, should the impasse continue, would appear to be either a further referendum (with what questions?) or a cobbled together transitional ‘as you were’ period requiring an extension of Article 50. Such a development as the latter may prevent a serious undermining of the economy and security, but it is neither a permanent nor a stable solution. So, what of a further referendum? Perhaps, with an electorate now better informed on both sides of the pros and cons of Brexit, another vote on EU membership would be desirable. The context has changed and the national mood may have changed from over two years ago based on fuller information. Democracy entails the right to change one’s mind and to express a new view. As I have written before in these columns this would meet with hostile, possibly violent, opposition.

Should the vote be ‘Remain’ by a narrow majority the Leave group will re-iterate similar arguments for yet a further remain/leave referendum. If the vote emerges again as a ‘No’ to membership of the EU, would it be advisable for a referendum to take place on what sort of exit should follow: a no deal exit or one based on the White Paper with the implications of both spelt out clearly in advance of the vote?

Mrs May has been adamantly against a further referendum. It would undermine her ‘Brexit means Brexit’ mantra. Assuming she conceded, Parliament would need to legislate for such referendums and the time involved in preparations would go well beyond 29 March 2019. There are MPs in the Labour party opposed to a new remain/leave referendum. An extension of the Article 50 timeframe will be inevitable requiring the unanimous agreement of the European Council of twenty-seven with the UK. Any extension will be up against the constraint of EU elections and will eat into the 31 December 2020 deadline for the end of a transition period.

This problem has become too big for resolution by another general election – the preference of the leader of the Labour Party. An election would be more likely to compound the impasse. Both Nigel Farage and Jacob Rees-Mogg have previously argued for further referendums – Farage specifically in the event of a narrow ‘Remain’ victory, Rees-Mogg as a possibility after negotiation of the exit terms. As Vernon Bogdanor has written, they cannot deny their opponents a similar opportunity.¹⁴ A further vote for ‘Remain’ may well lead to a violent

¹⁴ V. Bogdanor, *Brexit Broke Parliament; Now Only the People Can Fix It* The Guardian (23 July 2018).

back-lash. But it would reduce the serious risk of economic and security catastrophe of a no-deal. In terms of national (and European) welfare, what is the right thing to do must be done regardless of intimidation.

Against this background, on 10 September M. Barnier announced that he believed an agreement under Article 50 was achievable by November 2018. This will have to include proposals for a future relationship the details of which will then have to be negotiated, agreed and ratified. In his annual state of the Union address to Parliament in September, Jean Claude Juncker re-affirmed that a non-member cannot enjoy the privileges of a member. The President of the European Council conveyed a similar message at the informal meeting of the EU leaders at Salzburg. Mrs May's economic proposals risked 'undermining the single market' and were not acceptable in their present form. In a humiliating arena, she was advised to bring new proposals back within a month.

The Editor,
25 September 2018