"Brexit means Brexit"... But a Period of Transition would be Sensible

Jean-Claude PIRIS

On 23rd June 2016 the British expressed their wish for the UK to leave the European Union. After six months, the government had not yet sent the EU its intention to withdraw. The direction the UK would like to take to rebuild its relations with the Union after its withdrawal is unknown.

The neologism "Brexit" refers to the UK's withdrawal from the EU: that country will cease to be an EU member State when the EU Treaties are no longer applicable to it. The withdrawal of a member State is explicitly allowed by article 50 of the TEU, which stipulates the procedure to be followed. Withdrawal shall happen on the day when a "withdrawal agreement" with the EU setting out the arrangements for this withdrawal shall enter into force, after having been concluded by both parties, the EU and the UK. Failing that, the withdrawal will automatically happen two years after the British government notifies the Union of its intention to withdraw. The British Prime Minister has promised to provide that notification by the end of March 2017. If this is the case, Britain would then leave the EU around the 1st April 2019[1].

Withdrawal will obviously not mean an end to relations between the two entities, either in trade or other areas. However, in order to avoid too much disruption in their economic relations, a treaty establishing a framework for these relations should be concluded between them. The more ambitious this treaty, the closer their relations will remain, and the *softer* the withdrawal. Conversely, the more modest the treaty, the *harder* the withdrawal will be. But the EU has the legal power to negotiate such a treaty only after the UK has become a third country: its withdrawal has to occur first.

1. The European Council could unanimously decide, in agreement with the UK, to extend this period. However, this is improbable, given that the elections of the Members of the European Parliament must happen in May 2019 and the next Commission (of 27 members) chosen while taking into account the results of these elections.

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Some in London think that Britain should leave the EU earlier, without trying to negotiate, or in any case, without waiting for the two years as stipulated in article 50. This would be an infringement of its legal obligations in EU law and in international law. It seems unlikely, as it would cause legal chaos for States, economic operators and private parties, given the uncertainty of applicable rules. This catastrophic scenario will not be mentioned again, although it cannot be completely ruled out, since the British public opinion is still badly informed about the consequences of the withdrawal, despite them being known prior to the vote[2].

The Withdrawal Agreement based on article 50 TEU

Negotiations based on article 50 will start after notification, thus in April 2017. Article 50 provides for a two year time span. Actually, the period available will be shorter, since a few months will be needed both at the beginning (assessment of the notification, adoption of European Council's guidelines and of Council's negotiation directives to the Commission) and at the end for procedures enabling the entry into force of the agreement (approval by the European Parliament and authorisation for ratification by the British Parliament).

The withdrawal, in principle in April 2019, will have some immediate effect: the UK will become a third State vis-à-vis the EU. Its nationals will leave the Union's institutions and organs: the Commissioner, MEPs, judges, members of the Court of Auditors and of the Central Bank's organs, the government representatives at the European Council, at the Council and in their preparatory and consultative organs. The seats of the European Agencies established in the UK (Medicines Agency and the Banking Authority) will have to be transferred.

As for the EU law currently applicable in the UK (the thousands of pages of the "acquis communautaire"), the repeal of the European Communities Act 1972 and the replacement of all EU law by British law is impossible in a short period of time. The government has announced how it intends to deal with the issue. The only solution, quite paradoxically, is to re-adopt all of this law and transform it into British law. This will not be an easy task, since EU Directives are sometimes linked and interdependent. The measures containing or referring to EU mechanisms (comitology, reference to powers of EU Agencies, to procedures of authorisation or information, to warning procedures between Member States) will have to be deleted. The transposal of administrative cooperation or legal instruments between States into British law will have to be avoided[3]. "Sanitised" EU laws will then be adopted as British law. In the future, the British authorities will modify this former EU law, as any national law.

2. See for example, Jean-Claude Piris, European Issues, Robert Schuman Foundation, "If the UK leaves the EU: Legal Aspects and Effects of Possible Options", 6th May 2015 and "Brexit or Britin: is it really colder outside?", 26th October 2015: Centre for European Reform, 12th January 2016: "If the UK votes to leave: the Seven Alternatives to EU Membership", *Financial Times*, 12th January 2016: *Brexit is the easy bit*.
3. For example the "Brussels Regulation" on mutual acknowledgement of civilian and commercial judgments.

However new policies will have to be drawn up by the UK to replace some of the Union's policies, which it currently implements (trade, customs, agricultural, fisheries and competition policies) or to supplement the tasks undertaken by EU Agencies that are not open to third countries (such as the Medicines Agency). This will not be easy but should be done quickly.

The agreement based on article 50 will have to set the arrangements for the withdrawal, but cannot modify the EU Treaties[4]. Hence it will have to settle questions regarding citizens of the Union who are established in the UK and British citizens living in the Union, with the latter losing the advantages linked to Union citizenship. It will have to settle the issue of legal procedures already initiated, but not finalised. The parties might decide that these procedures, such as European arrest warrants, infringements of competition rules and of State aid, will follow their course. It will be impossible to start any further procedures after the withdrawal. It could be decided that the rights acquired by an establishment comprising access to self-employed activities or a banking passport, etc … might continue to be valid, but it will be impossible to create any new rights.

A possible request by the British to take part in the work undertaken by certain EU Agencies[5], such as Europol or the Air Safety or Maritime Safety Agencies would be negotiable. The agreement might provide for Britain to participate like Norway or other third countries. This means making a financial contribution, applying the corresponding EU law, and not taking part in the decision making. The agreement might allow the UK, under the same conditions, to continue to take part in European Programmes, notably in scientific research. As to the issue of EU civil servants of British nationality, it is an EU competence.

The settlement of the UK's budgetary obligations promises, as in any divorce, to be the most difficult and bitter[6] (multi-annual commitments, structural funds, agricultural subsidies, civil servants' retirement pensions, research projects and other ongoing programmes, etc...).

The Withdrawal Agreement Cannot Determine the future Relations between the Union and Britain

The legal reasons

The EU is based on the rule of law. According to the principle of conferral (articles 4 and 5 TEU), it can only act under the powers granted to it by the Member States in the EU Treaties. It must act within the limits of these powers

4. From the point of view of EU law it is an agreement concluded by the Union as such. It is not subject to the ratification of the 27 and it is not an act of "primary law". The few necessary modifications to the EU Treaties will be made on the basis of article 48 TEU (probably by the simplified procedure): modification of articles 52 TEU and 355 TFEU, suppression or modification of a few Protocols referring to the UK (n° 5, 15, 19, 20, 21, 30).
5. Executive Agencies are not open to third countries.
6. On 12th October 2016 the *Financial Times* assessed the total of this bill at £ 20 billion. On 19th December 2016, it spoke of a total that could rise to € 60 billion i.e. around £ 50 billion.

and on the basis of the specific procedures provided for in each case by the applicable provisions of the Treaties (legal bases).

Article 50 TEU allows the Council, with the approval of the European Parliament, and voting with the enhanced qualified majority described in article 238 §3 (b) TFEU[7], to conclude with the withdrawing State (which shall not participate in the vote) an agreement on the "arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". Article 50 does not confer on the Union, deciding according to the procedures it sets, the competence to negotiate and conclude a treaty with the State concerned on their future relations, whether on trade or other matters.

It will be legally necessary, in order to define the legal base on which a treaty between the EU and the UK on their future relations will be negotiated and concluded by the Union, to refer to articles 216 to 219 TFEU giving to the EU the power to negotiate and conclude "international agreements". Depending on the aim and content of the future treaty with the UK, it will have to be concluded, after consultation or approval of the European Parliament, by the Council, acting by the ordinary qualified majority or unanimously. If the future treaty were ambitious, unanimity would be required (article 218 §8, al. 2 TFEU, and articles 31 and 37 TEU on foreign and security policy). If the treaty were to go beyond the Union's competences (mixed agreement) it will also have to be concluded by the 27 Member States. This could take time.

The period following withdrawal and prior to the entry into force of an EU-UK trade treaty

During this period, the external trade of the UK, given the absence of any trade agreement[8], will legally and automatically be subject to the WTO's rules, from the first day of the withdrawal. Whilst waiting for the conclusion of a treaty on trade, the UK will have access to the EU internal market under the same conditions as any third country that does not have a preferential agreement with the EU. This will lead to damaging consequences for the British economy. Indeed, around half of Britain's foreign trade (goods, merchandise and services) is with the other 27 Member States, without any customs duties, or charges having equivalent effect, or technical obstacles, except for certain services that are not yet covered by the rules establishing the internal market. The UK will also lose the benefit of the Free Trade Agreements (FTA) concluded by the Union with around 60 third States.

Trade relations between Britain and third countries, including the Union, will be governed by the basic WTO rule: the most favoured nation clause[9]. The EU will have to apply its common customs tariff to British imports (CCT). The

7. The votes of at least 20 members of the Council, whose population represents around 290 million people.
8. According to article 3 (1) TFEU, "the Union shall have exclusive competence" in the area of the "common commercial policy."
9. Article 1 of the GATT.

CCT is not high on average (around 3%), but the average is not meaningful. For example the CCT is around 10% on cars, car engines and spare parts, which is a major market for the UK. For an extremely competitive market a 10% customs duty can change trade flows. Likewise, the third countries that have concluded FTAs with the Union will apply their customs duties on British imports. For its part the UK will have to define its customs tariffs to replace the CCT. It will have to negotiate its trade policy with the members of the WTO (135 and the EU), since, not being a member of the Union, it will no longer be covered by the EU *specific lists of commitments*[10].

After its withdrawal, the United Kingdom will legally be able to initiate trade negotiations with the EU and third countries, but in practice it will not be able to do everything at the same time. It does not have an adequately qualified administration since, being a member of the Union, it did not have to negotiate trade treaties. The time necessary to negotiate a substantial trade treaty with the EU is estimated at several years (between four to ten years). To avoid the clause of the most favoured nation, such a treaty shall have to respect the exemptions allowed in WTO's article XXIV §5(b). It will have as its aim to achieve, within a sensible period, a free trade area or a customs union.

The time which will be required for the UK to establish contractual relations with its main trade partners is difficult to assess. It will depend on the number of negotiators recruited and trained, and on the time taken to conclude, as a priority, a trade treaty with the Union. If the trade treaty with the Union takes around five years, ten more years would probably be needed before two thirds of Britain's foreign trade would be covered by agreements.

After the UK's withdrawal, would a treaty allowing its participation in the EU single market be possible?

From an economic point of view, the best solution would be a treaty enabling the country to continue enjoying full access to the single market[11]. This would provide it with a status similar to that of the three EEA-EFTA countries (Iceland, Liechtenstein and Norway) which are parties, with the Union as well as its 28 Member States, to the EEA agreement[12]. Britain would continue to enjoy

10. Any new WTO member must commit to respect the Organisation's general rules and to establish its own lists of specific commitments, both regarding goods and services . In the present case the UK will be considered a new member when it withdraws from the Union, since it will no longer be legally bound by the Union's specific lists. It will have to draw up and negotiate its own lists of specific commitments. The specific commitments of a new member become legally binding once accepted by the WTO. They have to be applied in the respect of the clause of the most favoured nation, except if they correspond to the specific exemptions foreseen by WTO (customs union or free trade area). These lists are negotiated with all of the WTO's members before each new accession and require long and difficult negotiations.

11 This hypothesis should not be confused with that whereby the UK, without concluding an agreement with the Union, would however decide to continue applying, in certain or many cases, the rules set by the Union for its domestic market. The UK, like many third countries, would do so without any legal obligation, if it finds this positive for trade purposes. Its trade would be facilitated only to a certain degree.

12. The EEA Agreement entered into force in 1994. Some think that the UK, after having left the Union, might continue to participate in the single market as a member of the EEA. This is legally incorrect: see the EEA Agreement, articles 2(c), 90, and 126(1).

access to most of the single market (including financial and transport services, but not agricultural and fish products). It would, with the 30 EEA Member States, share the four freedoms (goods, persons, services and capital). It would take up and apply EU law applicable to the single market without taking part in its adoption. With the agreement of the three EEA-EFTA States, the UK would be subject to the EFTA Surveillance Authority and its Court of Justice. It would also have to make a budgetary contribution[13]. Economically, the negative repercussions of withdrawal, both for the UK and for the 27 EU members, would be reduced to a minimum.

But the British government decided that this would not be an actual withdrawal ("Brexit means Brexit"). It interprets the referendum as a ban on Britain continuing to accept the founding principles of the single market: the four freedoms including the free movement of persons (article 26 TFEU), the obligation to respect EU law for the single market, the primacy of this law over national law, the respect of the EUCJ judgments. The single market is a whole, with its four freedoms (its goals) and the means to achieve them: the primacy of EU law as interpreted by the EUCJ. The credibility of the single market, for economic operators, investors and States, requires that all economic operators are subject to the same rules, interpreted in the same way. States cannot pick and choose amongst rights and obligations.

This is not an issue about the Union being tough or not. This derives from the logic of the internal market. Even if the current political context in its Member States were different, the EU would keep its constant line of conduct in its relations with third countries. The UK should and will be treated like any other comparable European third country, without discrimination[14]. If it wants to break from the very essence of the Union, it cannot participate to the single market. This is why it is said that both sides are preparing for a "hard Brexit".[15]

The likely option is that of a free-trade agreement

Free-trade agreements (FTA) can be more or less substantial: the most ambitious recently signed by the EU were with Canada and Singapore. They plan to achieve free trade for most goods, within a reasonable period of time, but provide hardly any liberalisation for services. They provide neither for free movement of people, nor any budgetary contribution, neither primacy of EU law, nor the EUCJ's jurisdiction. An EFTA might be concluded as such (based on article 216 TFEU), or inserted into an association agreement with the EU (article 217 TFEU), whose scope would be wider and might include provisions on environment policy, foreign and defence policy, judicial and police cooperation, etc....

13. Norway's contribution is € 390 million per year from 2014 to 2021.
14. For many reasons, Ukraine is not a comparable country to the UK.
15. See Charles Grant, CER, 21st November 2016 : "Brussels prepares for a Hard Brexit", and Stefano Micossi, CEPS, 25th November 2016, "Soft Brexit is not an Option".

Whilst Waiting for the Entry into Force of an FTA , a Period of Transition would be highly Sensible

If a period of transition of a few years were to be agreed, the effects of the withdrawal would not happen in one go and would thus be less brutal. This would enable economic operators and States to adapt to the shock. It is one of the issues to be discussed with the withdrawal agreement based on article 50. That agreement could indeed contain such provisions :"an agreement (…) setting the arrangements for its withdrawal, taking account of the framework of its future relationship with the Union."

Two options might be possible.

The first option for a period of transition: a continued British participation in the single market

What would the conditions be for the UK to participate in the single market for a few years?

It will not be acceptable to the EU for the UK to continue benefiting from the single market, even for just a few years, without accepting all its aspects. The single market is a whole. The same rules must be applied by all participants to all economic operators. Moreover, the issue of the free movement of people is so sensitive that the 27 will not accept – even for a few years – the concession made to David Cameron in February 2016, a concession which ceased to exist on the day of the referendum. The UK would therefore have to accept the four freedoms without exception. It would also have to continue respecting EU law concerning the single market, its primacy over national law and its interpretation by the EUCJ, as well as the jurisdiction of that Court for settling disputes on the application of EU law.

Such an arrangement has been dismissed by the British government for future permanent relations with the Union, but the issue of "a few years" is different. The British withdrawal, once final, once the "framework for its future relationship with the Union" (article 5 § 2) approved[16], a transitory period would be extremely advantageous to the UK. It would offer economic operators the necessary time to adapt to a new situation. It would give its government the right and time necessary to negotiate trade agreements with the Union and with its other external partners. It would give it time to settle the prickly issue of the control procedures to be established on its land borders: between Gibraltar and Spain and between Ulster and Ireland[17].

A period of transition would also be beneficial for the EU, albeit less than for the UK. It would have an interest in creating good conditions for its future relations with the UK. Its attitude on this point will possibly depend on the atmosphere of the negotiations, notably regarding budgetary issues.

16. Either concluding no agreement with the EU, and applying general WTO rules, or concluding a FTA with the Union.
17. Article 352 TFEU provides that the EU Treaties do not apply to British zones of sovereignty in Cyprus.

As for possible requests for British exemptions during the transition period, these would hardly stand a chance of being granted by the Union. The latter will reject any measure giving the country a privileged position in comparison with the remaining 27 Member States. The UK will have to apply all legislation concerning the single market during the transition period. An extension of the benefits of the single market beyond this period would not be allowed. Institutional exceptions would not be accepted. Hence, Britain would not have any observer status in the Council during discussions over decisions that it will have to apply during the transition period. This was not granted to the EEA-EFTA countries, whilst they take up and permanently apply all EU law on the single market.

Can some adjustments be discussed, as long as this does not trigger any request from one of the 27 Member States? This might prove difficult. Could the UK ask not to have access to the single market on agricultural and fish products, since the Union accepted it for the EEA-EFTA States? This might not be politically acceptable to the 27 EU States without an agreement on the continuation of fishing rights in British waters. But the two measures might be linked together. Could the country ask to discontinue applying EU policies in areas that are not directly linked to the single market? This could for example refer to some measures under Titles I, II, IV, VII, X, XV of the third Part of the TFEU, but it is difficult to set out limits. The same would apply to transport and energy. It would be easier to "isolate" the issue of the Area of Freedom, Security and Justice (Title V of the third Part of the TFEU) and the Common Foreign and Security Policy (Title V of the TEU), but this would not be a priority for the British.

The second option for a period of transition: a customs agreement

The UK might ask to remain in a customs union[18] with the EU, thereby avoiding the controls of rules of origin and having partial access to the single market without benefiting from the single market in the area of services, including financial services. This would facilitate the issue of controlling goods on the border between Northern Ireland and the Republic of Ireland.

There are two possible models: in both, the UK would no longer be obliged to negotiate immediately with the members of the WTO. It would continue to be linked by the Union's TDC. It would not therefore be free to set its customs duties, but it would be freed of the customs formalities and the control of the rules of origin which for example constrain the EEA States, which are not in a customs union with the EU:

– The "Customs union model": like Turkey, the UK would be free to negotiate trade agreements with third countries on condition that the TDC is respected, whilst being obliged to respect obligations contained in the agreements concluded by the EU with third countries and without being able to benefit directly from their advantages;

18. The WTO does not allow a customs union which would be limited to some economic areas.

– The "Customs territory model": the UK might ask to be part of the EU's customs territory and thus continue to benefit from the EU common trade policy; it would not be able to negotiate trade agreements with third countries, but would benefit directly from the agreements concluded by the Union, while respecting WTO rules.

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The European Union has no interest in "punishing" the United Kingdom, which will always be one of its closest allies and trade partners. It must deal with it in an open and non discriminatory manner. If the UK desires a period of transition, the EU should be open to that wish.