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Brexit: The transition period

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On 23rd June 2016, the British voted by a legally consultative referendum that their country should leave the European Union. On 29th March 2017, the government led by Theresa May notified the EU of the UK's intention to withdraw ("Brexit"). Since then, establishing and preserving the government's unity has been and remains difficult, both in regard to the meaning to give to "Brexit" and to the kind of relations that the country would like to have in the future with the EU. This political division has delayed negotiations and continues to weaken the UK's position.

From a legal point of view, article 50 of the Treaty on European Union (TEU) provides for the negotiation of an agreement with the EU to settle the arrangements for the withdrawal. The withdrawal will be effective from the date of entry into force of this agreement, or two years after notification, which for the UK means on 29th March 2019. It is to be noted that this date would enable the organisation of the European Parliament elections at the end of May 2019, and then the appointment of a Commission comprising 27 Members, without Britain's participation.

From an economic point of view, a bilateral trade agreement should be concluded between the UK and the EU so that relations are not overly disrupted –they will in any case be affected, whatever happens –. However, the negotiation of such an agreement will only be legally possible after the UK has become a third State. After that, some years will be necessary for its negotiation and conclusion. Hence, without a transition period, Brexit will have all its effects at the end of March 2019, notably regarding the UK's external trade.

AN AGREEMENT BASED ON ARTICLE 50 OF THE TEU WILL SET THE TERMS OF THE UK'S WITHDRAWAL

Article 50 provides for a period of two years after notification to conclude the withdrawal agreement between the UK and the EU. With or without this agreement, the withdrawal will normally occur on 29th March 2019 and will have immediate effect: the UK will become a third State. Its citizens will leave the Union's institutions and other bodies. The seat of the European agencies established

in Britain will be transferred. The country will no longer be obliged to implement

European law and will no longer benefit from the advantages of a Member State, such as full access to the internal market and the advantage of EU agreements with third countries. Its trade will be subject to the World Trade Organisation's (WTO) general rules, which will cause problems for its exporters.

As for EU law currently in force in the UK ("acquis communautaire"), the repeal of thousands of EU legislative acts and their replacement by British law is impossible in such a brief period. The only solution, paradoxically, is to re-adopt all EU law, transforming it into British law via a new bill. This is an enormous and difficult task that requires the adaptation of each regulation and directive individually before they are adopted. In the future the competent authorities will be able to modify this former European law that will have become British. The procedure of how to do this is the subject of a tough institutional debate in the UK. Moreover, new policies will have to be drawn up by the UK to replace some of the Union's policies that it implements at present (among others: trade, customs, agriculture, fisheries, competition, et c), or to take up the tasks of the EU agencies that are not open to third countries (such as the European Medicines Agency).

Both sides had agreed to consider, before trying to draw up a framework for their future relations that substantial progress will have to be made on the three most sensitive areas:

-a) issues regarding the rights of EU citizens established in the UK and British citizens living in the UE-27, the latter losing the advantages

associated with EU citizenship;

-b) the settlement of the UK's budgetary commitments: multiannual commitments, structural funds, agricultural subsidies, retirement pensions of officials working in the institutions, research projects, ongoing programmes, etc.;

-c) the question of the border controls between Northern Ireland (a part of the Ulster), which will leave the EU and the internal market with the rest of the UK, and the Republic of Ireland being a member State of the EU. This is a crucial issue, as all border controls have been lifted and their return could be politically dangerous.

The European Council that met on 14th and 15th December 2017 deemed that significant progress had been made regarding these three questions and that work could start on the framework of future relations. The first two of the above issues have mainly been settled. However, the third one is not settled at all, given the ambiguous terms used by the UK to describe the possible solutions and their practical feasibility.

THE WITHDRAWAL AGREEMENT CANNOT ADDRESS FUTURE TRADE RELATIONS BETWEEN THE UK AND THE EU

The European Union is founded on the Rule of Law. According to the principle of conferral of powers (articles 4 and 5 TEU), it only has the powers conferred upon it in the Treaties. It can act only within the limits of these competences and on the base of the procedure provided for in each case by the relevant articles in the Treaties ("legal bases"). As to Article 50 TEU, it allows the Council, with an enhanced qualified majority vote without the UK's participation, and with the approval of the European Parliament, to conclude with the withdrawing State an agreement on "the arrangements for its withdrawal, taking account of the framework of its future relationship with the Union". This article does not confer on the Union the competence to conclude an agreement with a former Member State, which will soon become or has already become a third country, on their

relations, including on trade. The legal base on which an agreement on future relations will have to be concluded by the Union must be found in articles 216 and 219 of the TFEU on "international agreements". In the event of an agreement going beyond the Union's remit (mixed agreement), the most plausible hypothesis, this would also have to be agreed by each of the 27 Member States, which would take a few years.

During that period, after the withdrawal but prior to the entry into force of a trade agreement with the European Union, the UK will be in a disadvantageous position. Its external trade will be subject to the WTO's general rules. Whilst waiting for the conclusion of an agreement with the Union, the UK will have access to the internal market under the same conditions as those third countries which do not have an agreement with the EU. Thus, half of Britain's external trade (goods and services) are with the other 27 Member States, now without customs duties, or any charge having equivalent effect, or technical obstacles, will be affected. The UK will also lose the advantage of the Free-Trade Agreements (FTA) concluded by the Union with about 60 other countries. The EU will apply its common customs tariff (CCT) to British imports. The CCT is not high on average (around 3%) but this does not mean anything. Hence, the CCT is around 10% on cars, car engines and spare parts, which is a major market for the UK. This being a competitive market, a 10% duty would modify trade flows. The CCT is also high on certain agricultural and food products. Like-wise, third countries that have concluded FTAs with the EU 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): because it will no longer be a member of the Union, its lists of specific commitments will no longer cover it.

If there is no transition period, the UK could initiate negotiations with the EU and third countries, immediately after the withdrawal, but

it will not be able to do everything at the same time, and it will take time. It does not have an adequately trained civil service, since being a Member of the Union it has not negotiated in this area for a long time. The time necessary to negotiate a substantial agreement with the Union is estimated at several years. The time necessary for the UK to establish contractual relations with its other main trading partners will be longer. Third countries, whatever their relatively modest exchanges with the UK, will want to know the UK's future links with the EU before committing themselves. If the agreement with the EU takes about five years, it will require about ten more before two thirds of Britain's foreign trade is covered by preferential agreements. Whatever the future relationship with the EU, the conclusion of an FTA ("Canadian option", the most likely) or the UK's membership of the EEA ("Norwegian option"), it will have to trade during at least a few years without any trade agreement (cliff edge), even with the EU-27.

WAITING FOR AN EU-UK AGREEMENT, A TRANSITION PERIOD WOULD PERMIT TO AVOID A CLIFF EDGE.

A transition period would delay the effects of the withdrawal, by providing economic operators and the British Government with time to adapt to what will be a shock. The British government asked (rather late in the day) for a transition period to be given. On 29th January 2018, the EU Council adopted negotiation directives addressed to the European negotiator, Michel Barnier^[1]. The negotiation of the conditions of this period can start soon. Given the deadlines and the need to bring uncertainty to an end, this should be rapid. However, certain questions must be settled.

Legal aspects

The European Union cannot act without competences conferred upon it: a legal base in the Treaties. The Court of Justice (EUCJ) can cancel an EU decision concluding an international

agreement that is incompatible with the Treaties. The first thing to see is whether article 50, which includes no explicit measure in this regard, will legally allow the Union, if it wants to politically, to grant a transition period to the UK. The answer is not obvious, since it means creating a third State status subject to the same obligations as the Member States, likewise the jurisdiction of the EUCJ, with it enjoying some of their advantages, notably access to the internal market. Most legal experts, including the author of the present paper, deem that the agreement based on article 50 can provide transitory measures. This is the interpretation to give to these words: "setting out the arrangements of its withdrawal, taking account of the framework of its future relationship with the Union."

Having said this, this interpretation does not give unlimited powers to the institutions. Hence it would be contrary to the principle of the EU's autonomy of decision-making to grant the said third State the right to take part in the Union's decision-making process and to its citizens the right to be members of an institution. It would be legally doubtful to provide an excessively long or unlimited transition. However, it should be possible to include in the agreement that the UK, which will be subject to the EUCJ's decisions and to possible legal acts by other EU institutions, will have access to the EUCJ under the same conditions as the Member States (article 263, second sub-paragraph, TFEU).

Duration

From an economic point of view, the ideal situation for the UK would be for the transition to cover the entire period running from the date of its withdrawal to that of the entry into force of a trade agreement with the EU. However, given the date of the end of the present multiannual financial framework, i.e. 31st December 2020, the Union is suggesting a duration of 21 months, from April 2019 to December 2020. The British Prime Minister hopes for a longer period, "of about two years", but she has not yet succeeded

1. Document XT 21004/18
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in unifying her government regarding this, or about the nature of the future relations with the Union to be negotiated during this period. Given the tasks to be completed in the UK, one might imagine that a two-year period, renewable once, would be adequate.

Content of substance

The UK will be bound by the same legal and budgetary obligations as the Member States, except that its quality as a third State will not allow it to take part either in the institutions or the decision-making.

It would be logical that the UK should be granted the right to take full part in the internal market during the transition period. Some British politicians would like derogations, notably regarding the free movement of people. Hence on 30th January 2018 the Prime Minister criticised the EU's request, whereby the guarantees granted by the UK to the Union's citizens moving to Britain would be extended until the end of the transitory period. But it is probable that the European Union will not accept the UK taking advantage of the internal market, without accepting all of it. The internal market is a whole and all participants must implement the same rules. Moreover, the issue of the freedom of movement is so sensitive that the 27 other States will not accept any concession on this point.

The UK will thus have to accept the four freedoms without derogation. It will have to continue to respect European law regarding the internal market, its primacy over its national law, its direct effects and its interpretation by the EUCJ, as well as the jurisdiction of the Court to settle any possible differences with the Union over the interpretation or application of this law.

Of course, these elements have been precluded by the British government for the establishment of permanent future relations with the Union, but the issue of an interim period of a few years is different. Once the British withdrawal has become final, once the "framework of its future relationship

with the Union" (article 50, § 2) agreed, a transition period would be advantageous to the UK. It would help its economic stakeholders to adapt. It would give its government the right and the time necessary to complete the revision of its national law, to negotiate a trade agreement with the Union (but not with third countries), to settle the issue of the controls to establish on the land borders between Cyprus and the British sovereign bases there, between Gibraltar and Spain and especially between a part of the Ulster and the Republic of Ireland. It would also give it the necessary time to create or recreate certain agencies or administrations, for example foreign trade or customs, to recruit the necessary staff, to build the necessary infrastructures near the ports, etc.

For the EU, a transition period would be less advantageous economically, but it would also be in its economic interest, and would furthermore allow the creation of good conditions for its future relations with the UK in the areas of defence, foreign policy and the fight to counter terrorism. Some adjustments of a more "technical" nature might be discussed, on condition that they do not trigger counterclaims on the part of the EU-27. But this might be difficult. Could the UK ask not to participate in the fisheries policy, as expressed publicly by one British minister? It is likely that this would be politically unacceptable for the EU-27. In all events any request for derogation would entail difficult negotiations, because it would probably be followed by counterclaims by the EU-27. Hence, and given the little time available, the "Full Monty" seems preferable because of its simplicity: the same obligations as a Member State in all areas, including EURATOM and the European Agencies. Moreover, it would facilitate the tasks of the administrations and jurisdictions in the 27 Member States, in the UK and in the EU.

Institutional aspects

The institutional issues are significant, because they are high profile and politically highly

sensitive. It follows from the Treaties that a third State, like the UK during the transition period, can neither participate in the decision-making process of the European Union, nor have its citizens be members of the EU institutions. The UK will draw up requests in this area, if we believe internal criticism whereby the country would become a "Vassal State of the Union" during the transition. Hence it has already said that it hopes to have a right to scrutiny over legal acts adopted during the transition that will be applicable to it, whilst it will no longer be taking part in discussions and the adoption of these acts.

The Union's initial response has been negative. However, partial responses might be possible on the sine qua non condition that they challenge neither the Union's decision-making autonomy, nor the Court of Justice's exclusive competence. The fact that the UK might refer to the EUCJ, which should be explicitly provided for in the withdrawal agreement, would be a first and significant guarantee for the UK.

The British wish to be granted the possibility to be present and speaking in the preparatory organs of the Council (COREPER and working groups) during the period of transition is excessive. Because of its generality, such a right would be contrary to the decision-making autonomy of the EU. The EU would point out that this is not granted to the EEA-EFTA countries, whilst these countries permanently take up and implement all EU legislation regarding the internal market. This being said, the situations are not identical, since the countries in question have specific means to express their point of view before taking up an EU text in EEA law. Likewise, it would be wrong to compare the British situation during the transition period to that of the candidate countries for EU membership during the period from the date of signature of their membership treaty to that of its entry into force after ratification. During this period, the countries that are still "candidates" have an observer status including at the European Council and at the Council. But the present case of a withdrawal would follow the exact opposite

path. As a principle, it will be impossible for British representatives to be invited to any meeting at political level, excluding exceptional cases on foreign policy meetings, as is the case for foreign leaders being invited for one item on the agenda.

However, the Council has provided in its negotiation directives that British civil servants might possibly be allowed to be present (obviously without a right to vote) during the meetings of some preparatory bodies of the Council. A decision should be made on a case by case basis. That could be the case when the decision to be discussed would focus on individual acts that would be addressed to the UK or to British physical or moral persons, or when the presence of British officials would be deemed necessary and in the Union's interest, particularly regarding the effective implementation of the *acquis communautaire* during the transition period.

This opening will be more or less flexible in practice. It should allow the UK to enjoy the minimal transparency necessary during the preparation of legal acts that it will have to implement during that period.

Likewise, it might be agreed that the Commission will sometimes consult British civil servants during the processes of consultation and of comitology. The Commission made a declaration on this point during the adoption of the negotiating directives on 29th January 2018.

Regarding decisions on fishing quotas, a specific consultation procedure should be agreed, as it is provided for explicitly in the negotiating directives.

Finally, the EU might accept, without any great risk, for the UK to start informal discussions with third countries and their future trade relations, on condition that the common customs union and EU trade policy were legally fully respected until the end of the transition period.

Damages caused by an excessively rapid Brexit could and should be limited. An agreement over an adequate transition period will be vital in this regard. A common decision over a transition

period should be agreed rapidly, if possible during spring of 2018, so that uncertainty can be brought to an end and progress allowed to be made. Informal negotiations over future trade relations might then start. The ideal situation would be a trade agreement between the EU and the UK to be signed on the day the transition period comes to an end. This, notwithstanding that such an agreement would be either distinct from other future bilateral cooperation agreements (foreign policy, security policy, other bilateral co-operations), or inserted with those in a wider Association Agreement. This signature would enable a decision over the provisional, immediate

application of measures regarding trade relations before all sides ratify the agreement (see article 218, paragraph 5, TFEU).

Unfortunately, given the time that has already been lost in the negotiations, an ideal solution like this one cannot today be regarded as the most probable...

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