

Brexit by Design or by Default?

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1 BACKGROUND

On 23 June 2016 the United Kingdom (UK) voted to leave the EU¹, and on 29 March 2017 the UK Government notified to the European Council its decision to withdraw from the EU², thus setting in motion the 2-year time-frame provided by Article 50 TEU to negotiate its exit.³ However, the decision by UK Prime Minister Theresa May to call snap elections in June 2017, which resulted in a political boomerang, delayed the beginning of the withdrawal negotiations, which only got on their way in mid-summer 2017. The EU imposed successfully its strategy to divide the negotiations in two phases – with a first phase focused on settling the outstanding withdrawal issues, with discussions on the framework for future EU-UK relations postponed to a subsequent future. In particular, following the priorities set by the European Council⁴ and the European Parliament⁵, the European Commission Brexit Task Force – led by Michel Barnier – identified three main items for the first phase of the negotiations: 1) the protection of the rights of EU citizens in the UK, and conversely of UK citizens in the EU; 2) the resolution of the problem of the border between Ireland and Northern Ireland, with the aim to avoid to a return of a 'hard border' of the past; and 3) the settlement of the financial claims the UK owed the EU before leaving.

Talks between the two parties proceeded extremely slowly for much of the fall of 2017. With the exception of citizens' rights – which was the subject of an early agreement between the UK Government and the European Commission⁶ – most issues in the

¹ The Electoral Commission, EU Referendum Results <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

² See EU (Notification of Withdrawal) Act 2017

³ See Federico Fabbrini (ed), *The Law and Politics of Brexit* (OUP 2017).

⁴ See European Council conclusions (April 29, 2017) EUCO XT 20004/17.

⁵ See European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8_TA(2017)0102

⁶ See Theresa May speech at Florence (September 22, 2017).

About the Event

On September 6th, 2018, the DCU Brexit Institute partnered up with the MED to organise a full day event to assess the current state of the Brexit negotiations. In a panel debate, MPs from our network were able to exchange their views on the possibility of a no-deal Brexit, weighing in on different national perspectives. The event was closed by a keynote speech by Danuta Hübner, the Chairwoman of the European Parliament Constitutional Affairs Committee.

About the Author



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withdrawal talks remained outstanding. In fact, while Prime Minister Theresa May sought to chart an exit strategy, conceding that the UK had to pay a contribution to the EU as part of the withdrawal deal⁷, the UK Government faced major challenges in negotiating with the EU – not least because the preparation and capacity of the European Commission dwarfed those of the newly created UK Department for Exiting the EU, led by David Davis. Eventually on 8 December 2017 a major break-through occurred when the European Commission and the UK Government published a joint report, which outlined the consensus reached by the two negotiating teams on the terms of the withdrawal.⁸ This diplomatic deal also included a fudged solution to the problem of Northern Ireland, designed to prevent a hard border in the island of Ireland by maintaining regulatory alignment between the Republic and the North.⁹ On the basis of the joint report, the European Council in December 2017 concluded that sufficient progress had occurred in the first phase of the Brexit negotiations, thus opening the way to preliminary talks on the framework for future EU-UK relations.¹⁰

In early 2018, the EU and the UK negotiations engaged in a concerted effort to, on the one hand, turn the diplomatic joint report into a legally binding withdrawal

⁷ Ibid.

⁸ See Joint Report from the negotiators of the European Union and the United Kingdom Government (December 8, 2017) TF50(2017)19.

⁹ Ibid, par. 49-50.

¹⁰ See European Council conclusions (December 15, 2018) EUCO XT 20011/17.

treaty, and, on the other, identify the priorities for future EU-UK cooperation. On the first front the European Commission Brexit Task Force quickly came up on 28 February 2018 with a fully-fledged draft withdrawal agreement¹¹, 75% of which was swiftly agreed by the UK Government on 19 March 2018.¹² In particular, the UK Government accepted those sections of the EU draft withdrawal agreement concerning citizens' rights, the financial settlement and the transition period, which allowed the UK to remain part of the EU internal market and customs union for an extra 22 months after withdrawal, until 31 December 2020. Crucially, however, the UK did not approve the draft Protocol on Northern Ireland – which was designed to avoid a border between the Republic of Ireland and Northern Ireland by maintaining regulatory alignment between the latter and the EU – as well as the provisions on the governance of the agreement – which included provisions on the resolution of disputes by giving a role to the European Court of Justice (ECJ).

CHALLENGES

This produced a major stall in the negotiations, which carried-on for all the spring and summer 2018 – even though on 19 June 2018 the UK and the EU communicated that they had reached consensus on the text of another handful of minor and mostly technical provisions of the draft withdrawal treaty.¹³ In the absence of progress in settling the terms of withdrawal, however, also the discussions on the framework of future relations were affected, with talks on an ambitious EU-UK partnership covering trade, internal security, foreign affairs and sectoral cooperation being put on hold. Moreover, since both parties had made clear that they regarded the negotiations as being driven by the principle that “nothing is agreed until everything is agreed”¹⁴ the paralysis in the talks led to growing concerns that a ‘hard Brexit’ would materialize – with the UK leaving the EU with no withdrawal agreement, and thus no framework for future relations.¹⁵ In fact, in July 2018 the European Commission published a communications on preparedness and contingency planning in case of a no deal scenario,¹⁶ and in August 2018 the UK Government started releasing batches of technical notes to inform citizens and business on how to prepare in the case of no deal.¹⁷

11 See European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (February 28, 2017) TF50(2018)33.

12 See European Commission press release: “Press statement by Michel Barnier following the latest round of Article 50 negotiations” (March 19, 2018) STATEMENT/18/2161

13 See European Commission press release: “European Commission and United Kingdom publish Joint Statement outlining further progress in Article 50 negotiations” (June 19, 2018) IP/18/4217.

14 See European Council conclusions (April 29, 2017) EUCO XT 20004/17.

15 See Federico Fabbrini, “The Institutional Consequences of a ‘Hard Brexit’” report commissioned by the European Parliament Constitutional Affairs Committee, May 2018

16 See European Commission communication “Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019 (July 19, 2018) COM(2018) 556.

17 See UK Government Guidance “UK government’s preparations

The state of the withdrawal negotiations increased the turmoil in British politics and institutions. On 26 June 2018 the UK (Withdrawal) Act presented by the Government became law by the tiniest of margins, with the House of Commons overruling the House of Lords, which had sought to bind the UK in a customs union with the EU. However, the Conservative Party – just as the Labor Party – remained heavily divided on the costs and benefits of the respective Brexit scenarios. Following a series of speeches in which she had emphasized the inevitable trade-offs facing the UK, and accepted the need to compromise on a number of issues¹⁸ – including by accepting the jurisdiction of the ECJ in some areas – Prime Minister Theresa May took direct control of the negotiations on the UK side and on 6 July 2018 she sought to build consensus within her cabinet on a strategy to negotiate a future ambitious partnership with the EU.¹⁹ This however led to the prompt resignation of both the UK Secretary for Foreign Affairs and the Secretary of State for Exiting the EU – a rift further exposed when United States President Donald Trump praised the hard Brexiters, suggesting that the UK should just leave the EU and sue it.

The challenges that Prime Minister Theresa May met at home where matched by those she faced in Europe. This became visibly apparent in the informal meeting of heads of State and Government held in Salzburg, Austria, on 20 September when the Whitepaper²⁰ so advanced by the UK in July with such difficulty – which included a proposal to create a free trade zone for goods and agri-food products, with a single rulebook and a facilitated customs arrangement to minimize the border in Northern Ireland – were forcefully rejected by the EU. As the President of the European Council Donald Tusk explicitly states, the UK “suggested framework for economic cooperation will not work”²¹ – a position widely shared among EU leaders. The perceived EU rigidity prompted a vigorous response by UK Prime Minister Theresa May, and a little step back by European Council President Tusk himself, who later expressed his conviction that “a compromise, good for all, is still possible.”²² However, with only six months now to go before the UK exit day – 29 March 2019 – and with such a rift still to bridge between the UK and the EU, it is clear that the next few months will be hectic if an orderly withdrawal has to be achieved.

SCENARIOS

The state of the withdrawal process and its challenges was at the heart of a conference jointly convened by the Brexit Institute of Dublin City University and by the

for a no deal scenario” (August 23, 2018).

18 See Theresa May speech at Mansion House (March 2, 2018) and speech at Munich Security Conference (February 17, 2018).

19 See UK Government Chequers statement (July 6, 2018).

20 See UK Government Whitepaper, “The future relationship between the United Kingdom and the European Union”, July 2018

21 See statement of European Council President Donald Tusk (September 20, 2018) STATEMENTS AND REMARKS 519/18

22 See statement of European Council President Donald Tusk (September 21, 2018) STATEMENTS AND REMARKS 523/18.

Mercator European Dialogue Program, held in Dublin on 6 September 2018. The Conference was entitled “Brexit by Design or by Default?” and featured a panel of distinguished members of parliament from a plurality of EU member states – including the UK, Ireland, the Netherlands and the Czech Republic.²³ The conference was an opportunity to take stock of the (lack of) progress in the withdrawal negotiations during summer 2018 – and from this point of view vividly stressed how a ‘hard Brexit’ is increasingly a default rather than design prospect. In fact, as was pointed out by Ian Marshall (Member of the Irish Seanad) no one would have ever designed Brexit. Rather, as stressed by Anne Mulder (Member of the Dutch Tweede Kamer), because all EU member states are fully united behind Ireland’s position to avoid a hard border with Northern Ireland, the chances of a hard Brexit by default are increasing unless the UK accepts the backstop that the European Commission has put forward as part and parcel of the draft withdrawal agreement.

As explained by Vaclav Hampel (Chairman of the European Affairs Committee of the Czech Senat) national parliaments do not have any direct involvement in the Brexit negotiations, and will not have a voice in the ratification of the withdrawal agreement. In fact, as clearly stated by Danuta Hubner (Chairwoman of the European Parliament Constitutional Affairs Committee), only the EU Parliament and the UK Parliament will have a vote on the approval of the withdrawal treaty – if there is one. National parliaments could be involved in the ratification of a future partnership agreement between the EU and the UK – particularly if this goes beyond trade issue to also encompass matters connected to internal security and foreign affairs – but the development of a future cooperation between the EU and the UK is dependent on the conclusion of an orderly withdrawal.²⁴ Hence, as also stressed by Stephen Gethins (Member of the UK House of Commons), who criticized the lack of preparation of the UK Government before and after the 2016 Brexit referendum, if the UK leaves the EU with no deal, there is a risk that also the UK Parliament will be deprived of a meaningful say on the terms of withdrawal and future relations with the EU.

With the clock ticking, European Council President Tusk indicated that an exceptional EU summit could be called in November to finalize and formalize the deal – thus giving the EU and UK legislatures enough time to ratify the agreement before March 2019. Nevertheless, this remains conditional on maximum progress during October 2018 – and while the UK has now promised it will come forward with a proposal to settle the Northern Irish problem, the issue remains the biggest stumbling

block on the road toward a successful agreement. In this context, the good news is that both the UK and the EU remain steadfast in their commitment to preserve the achievements of the Belfast Good Friday Agreement of 1998²⁵ – which 20 years ago brought to an end years of inter-communal conflicts and started a peace process in Northern Ireland. The bad news, however, is that both a ‘no deal’ and a ‘bad deal’ would significantly damage that unstable equilibrium reached in Northern Ireland, casting a dark shadow on Europe’s future and raising new questions on what the ultimate prize of Brexit will be for the UK.

	Overseeing Negotiations	Approving Withdrawal Agreement (if there is one)	Approving Framework of Future Relations (if there is one)
EU Parliament	X	X	X
UK Parliament	X	X	X
Other National Parliaments			X
Role of Parliaments (European Parliament, UK Parliament, and national parliaments across other EU member states)			

²⁵ See European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8_TA(2017)0102 and Theresa May speech at Belfast (July 20, 2018).

Learn more about the Mercator European Dialogue, download reports and get in touch with other members at www.mercatoreuropeandialogue.org

²³ Chloe Papazian, Event report: Brexit by design or by default. Assessing the State of the Withdrawal Process (September 13, 2018) available on <http://dcubrexitinstitute.eu/2018/09/event-report-brexit-by-design-or-by-default/>

²⁴ Ian Cooper, The parliamentary dimension of Brexit (August 24, 2018) available on <http://dcubrexitinstitute.eu/2018/08/the-parliamentary-dimension-of-brexit/>



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