

Briefing

February 2017

FUTURE OF INTER-INSTITUTIONAL/ CONSTITUTIONAL ISSUES IN LIGHT OF BREXIT

1. BACKGROUND

The referendum, held on Thursday 23 June, to decide whether the UK should leave or remain in the European Union resulted in a complete setback for the Prime Minister David CAMERON. Leave won by 51.9% to 48.1%, with a turnout of 71.8%, more than 30 million people voting. This unexpected result led to the resignation of Mr. CAMERON on the day after. The new Prime Minister, Theresa MAY, the former home secretary, promised then to respect the will of the people, though the referendum is not legally binding. If Theresa MAY triggers the article 50 by the end of March the UK is expected to leave the EU by the summer of 2019. Meanwhile, a new government department has been formed by the veteran Conservative MP David Davies, the former defence secretary Liam Fox and the former London's mayor, Boris Johnson - the *Three Brexiteers*. All of them supported the leave campaign and are now in charge of the negotiations with the EU that will establish a new settlement for the relations between the UK and the EU.

Migration was an essential issue in the referendum and given how politically contentious the issues of immigration and EU free movement have become over the months before the voting, it is likely to be one of the most tense area of post-Brexit policy. Immigration from other EU member states tripled between 1995 and 2015, especially after eight East European countries joined EU in 2004, mostly immigrants from Poland. Many people were concerned that these issues reduce the pay and job changes of the UK born with the extra competition. The refugee crisis increased this perception, though it has nothing to do with the EU membership since the UK is not the Schengen area.

The UK's economy appears to have weathered the initial shock of the Brexit vote. However the uncertainty about the future might be holding the real impact of leaving the EU. Both sides want trade to continue, particularly those who depend on trade of goods and services, such as those in the City of London. For the latter, a comprehensive free trade deal would give better access to the single market. However, are the other 27 member states willing to grant access to their market to the City? By sticking to a «Brexit means Brexit» speech, MAY left a debate on what it would mean in practice, especially on the two key issues: how British firms do business in the EU and what curbs are brought in on the rights of EU nationals to live and work in the UK.

Unravelling 43 years of treaties and agreements covering thousands of different subjects was never going to be simple. It is even more complicated by the fact that it has never been done before and negotiators will, to some degree, be making it up as they go along. Moreover, the post-Brexit trade deal is likely to be the most complex part of the negotiation because it needs unanimous approval of 30

national and few other regional parliaments across Europe, some of whom may want to hold referendums or find benefits for themselves for their accordance.

Last but not least, Scotland, Wales and Ireland. The leave result was seen as democratically unacceptable in Scotland, being taken out of the EU when all their constituencies voted to remain. And leaving is also believed to have a profound impact in Northern Ireland, threatening the whole island to vote on reunification. There are matters that should not be jeopardized, especially when one wants to settle a new international positioning for the country.

2. THE WHITE PAPER

The day after parliament voted to give Mrs. MAY the power to trigger article 50, the government presented MPs with its formal policy paper supposedly setting out how the UK proposes to leave the EU. This white paper essentially builds and expands on May's Lancaster House speech of last January, with a list of objectives, many of which may not necessarily be easy to achieve. Both surprisingly and remarkably is the statement where it is said the British parliament has not always felt like it was sovereign throughout the UK's EU membership, though it was. This state of mind is useful to understand the feeling of much of those who more closely dealt with EU's outcomes.

The paper confirms that «wherever practical and appropriate» the same rules and laws will apply in the UK on the day after it leaves the EU as did before. It also confirms the government's intention to take control of their own laws, meaning the end of the jurisdiction of the European Court of Justice and establishing a new mechanism for resolving future disputes between the EU and the UK. On Immigration and reciprocal citizens' rights, the white paper goes no further than May's speech. It says safeguarding their status is a main concern, particularly on easy access to healthcare by UK nationals living in the EU, a key concern of many pensioners. On controlling immigration, the government is considering very carefully the options they have. Business and communities should expect a phased process of implementation, to give them time to plan and prepare for the new times ahead. On EU citizens living in the EU, the government has declined to give a firm guarantee about the status of EU nationals currently living in the UK, saying this is not possible without a reciprocal pledge from other EU members about the millions of British nationals living on the continent.

Aiming to secure the freest trade possible in goods and services with the EU, outside the single market, and via an wide-ranging free trade agreement, and staying outside the customs unions, so it can negotiate its own trade deals, the government is not seeking to adopt existing models used by other countries, but to take elements of the single market in certain areas. And yet ambitious, it might sound very much like cherry-picking to EU leaders. From the EU side, leaders have only expressed a clear interest in mutual cooperation arrangements.

In addition, Britain will also leave the Euratom treaty, negotiating a new relationship though. UK's future status with EU agencies regulating areas such as medicines, food and safety and financial services will also be part of dialogue. The government will wish to retain and develop existing cooperation in initiatives like Europol, the European arrest warrant, among others.

The government should bring forward a separate white paper on the great repeal bill, which was first announced by Mrs. MAY in her Conservative party conference speech last year to remove the European

Communities Act of 1972 from the UK statute book and convert the body of existing EU law into domestic law.

3. THE PROCESS OF BREXIT

Once article 50 has been triggered, the UK will have two years to negotiate its withdrawal. But no one can really know how the Brexit process will work. The Article 50 was only created in late 2009 and it has never been used. Some suggested it could take up to six years for the UK to complete exit negotiations, but there is no guarantee of it. In addition, the terms of Britain's exit will have to be agreed by 27 national parliaments and a few other regional ones, a process which could take some years. Thus, EU law still stands in the UK until it ceases being a member, and the UK will continue to abide by EU treaties and laws, but not take part in any decision-making.

Long story short: The UK should invoke the article 50 in the end of March, but legal challenge may set it back; Then the 27 EU countries meet to discuss withdrawal; the negotiations begin between the EU and the UK; A draft deal is put to European Council, that will need approval from at least 20 countries representing 65% of EU's population; It has to be ratified by the European Parliament; If there is no agreement to extend negotiations then the EU treaties cease to apply to the UK after two years; After the UK leaving the EU, the UK parliament must repeal the 1972 European Communities Act and replace with new agreement.

4. CONCERNS ABOUT SCOTLAND, WALES AND NORTHERN IRELAND

The division between domestic and foreign policy has become increasingly blurred, for both the UK and the devolved administrations. While foreign policy remains reserved for the UK government, some policy areas with external dimensions have been devolved to Scotland, Wales and Northern Ireland, such as agriculture, fisheries, the environment and trade. Under current legislative arrangements, after the UK leaves the EU some of these powers are expected to return directly to the devolved administrations, which will then have more autonomy in the policy areas.

Concerning Ireland, the government should work with the devolved administrations on an approach to returning powers from the EU that works for the whole of the UK and reflects the interests of Scotland, Northern Ireland and Wales, not going into specifics. No decisions currently taken by the devolved administrations will be taken away from them, particularly to the Isle of Man, Channel Islands and Gibraltar, all of which have unique relationships with the EU. On the isle of Ireland and the common travel area with the UK, the paper notes the UK and Irish economies are deeply integrated and says the government will work to develop and strengthen those ties after Brexit, pursuing to retain as seamless and frictionless a border as possible, wanting Irish and UK citizens to be able to continue to move freely north-south and east-west, while protecting the integrity of the UK's immigration system, however not saying how.

The institutional arrangement for decision-making between the UK and devolved governments - the Joint Ministerial Committee - is not suited to developing a joint position on leaving the EU. Those governments do not feel that are being included as partners around the decision-making table, due to the weak agenda-setting powers, frequency and duration of the meetings, plus, they have different priorities for the Brexit negotiations, and different resources available to address these concerns.

To varying degrees, the devolved administrations are seeking to develop an international profile distinct from the UK's one. Scotland has developed a para-diplomatic presence in Brussels and European capitals. Since the referendum, it has built on its pre-existing strategy to represent its interests and preferences to actors outside the UK on matters such as the single market, free movement of people and fisheries. Wales has an established presence in Brussels and made institutional changes within its government and National Assembly for such para-diplomatic activity, including the creation of an External Affairs Committee. Northern Ireland has two major obstacles to direct interaction with the EU: limited resources to approach the major task of creating a para-diplomatic presence, and the divided nature of its constitutional government poses particular challenges to developing a coherent external image.

5. CONSEQUENCES OF BREXIT FOR BRITAIN AND THE EUROPEAN UNION

Since the Danish electorate rejected the Maastricht Treaty in 1992, referenda on European integration have often had elite-defying consequences. The Brexit is the most significant expression of this so far in Europe's history, except perhaps the rejection of the Constitutional Treaty.

From the legal point of view, the UK remains a full member of the Union, and that the political and economic consequences of the Leave vote will only be fully assessed in a still uncertain future when negotiations between the EU and UK are at an advanced stage. The clarification of the political situation in the UK, with a new prime minister and the serene and reassuring declarations by the Commission and European leaders about finding a mutually beneficial relationship, seemed to have appeased the economic and political state of affairs, for the moment. Whilst giving up to the Single Market, Mrs. MAY was confident in reaching the «freest possible trade in goods and services», an ambitious Free Trade Agreement. However, all major national and international organisations, in particular the IMF and OECD, published reports on the possible economic and financial consequences for the UK of a Brexit vote. Almost all of them forecasted a negative economic outlook in the case of an effective withdrawal of the UK from the EU. The OECD warned of a «Brexit tax» should the UK leave the EU.

Legally the UK remains fully and for all purposes an EU Member State. Nothing has changed with the referendum outcome and, most probably, little will change in the following years. Not only will European citizens in the UK continue to enjoy the same protection as before the 23 June 2016, but also, for instance, all the structural and investment policies will continue to be implemented as agreed, and Europol will continue to have UK police officers working in the offices of its headquarters in The Hague. The same goes for all the policies or institutions and agencies. Any exceptions to this rule are of a political rather than legal rationale having to do with their institutional impact, such as the resignation of Commissioner Hill or the decision of the UK government to relinquish, for evident reasons, the rotating Presidency of the Council of the EU.

Despite what is stated above, and in the light of the decision of not holding the EU Council Presidency, similar decisions may be taken as regards nominations to top jobs or even the recruitment of UK nationals as officials. In any event, from the constitutional point of view, nothing in the Treaties would seem to allow discrimination against UK or EU citizens, including European officials, before the withdrawal agreement comes into force.

Could the MP's block an EU exit? Could the necessary legislation pass the Commons, given that a lot of MPs were in favour of staying? The referendum result is not legally binding, the parliament still has to pass the laws that will get Britain out of the 28 nation bloc, starting with the repeal of the 1972 European Communities Act. The withdrawal agreement also has to be ratified by Parliament - the House of Lords and/or the House of Commons could vote against ratification, according to a House of Commons Library report. In practice, Conservative MPs who voted to remain in the EU would be whipped to vote with the government. Any who defied the whip would have to face the wrath of voters at the next general election. One scenario that could see the referendum result overturned, is if MPs forced a general election and a party campaigned on a promise to keep Britain in the EU, got elected and then claimed that the election mandate topped the referendum one. Two-thirds of MPs would have to vote for a general election to be held before the next scheduled one in 2020. Nevertheless, this scenarios can be seen as farfetched.

One assumes that the bill will pass through all its parliamentary stages in both houses in time for the prime minister to inform the European Council at its meeting on 9-10 March that she is at last invoking the Article 50. So as to lay down conditions on the parliamentary process and to stipulate some red lines on the content of the Brexit negotiations. However it is unlikely that they will succeed in constraining the government's freedom of action. The British people decided to leave the EU; the government has taken them at their word; and the parliament is side-lined.

Concerning the reversal of the Article 50 invocation, there's nothing in the Treaties to say otherwise. But whether or not the European Council and the Parliament accept a reversal of Brexit is another matter and would depend entirely on the legal and political environment felt at the time. The EU27 shall never allow an attempt by a reluctant UK to procrastinate. If they are soft now on the matter of the beginning of the Article 50 talks, strengthen up their stance later as the Brexit process nears its conclusion might be a dangerous error. If there is to be an Article 50 treaty in a couple of years' time it will be a compromise acceptable to both the UK and the EU and the withdrawal treaty itself should be mostly technical. If an agreement is reached, there will be no pride but rather relief that a deal has been agreed at all, that a new partnership between the UK and the EU can at that stage begin to be engaged. Failure to conclude the Article 50 treaty would cause the EU treaties simply to cease to apply to the UK. Although the House of Commons has the constitutional right to a negative vote that would reject the treaty, it cannot doing so revert to the *status quo ante*. The Article 50 gives both sides two years to conclude their negotiations. Is a withdrawal agreement can be reached within the two years, it will be implemented. If not, «Europe says goodbye and Britain slides off the cliff edge».

For further readings:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571404/IPOL_STU\(2017\)571404_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571404/IPOL_STU(2017)571404_EN.pdf)

<https://www.chathamhouse.org/publication/devolved-external-affairs-impact-brexit>

http://www.epc.eu/documents/uploads/pub_7417_brexitlauncharticle50.pdf

<https://www.ceps.eu/publications/after-brexit-it%E2%80%99s-brave-new-world>

http://bruegel.org/wp-content/uploads/2017/02/Bruegel_Policy_Brief-2017_01-090217.pdf

https://www.ceps.eu/system/files/KL_Brexit%20is%20an%20issue%20for%20Europe.pdf