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Open Europe

Getting Out Quick and Playing the Long Game

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Both write in a personal capacity and the views expressed herein do not necessarily reflect those of Open Europe or of the UK in a Changing Europe.

Summary

A ‘three step’ Brexit solution, including an ambitious transitional arrangement, is key to meeting the aspirations of the British people and reaching a mutually beneficial long-term relationship with the EU.

This would see the UK leave the EU towards the end of 2018 and enter a transitional arrangement, possibly lasting until 2024, which would offer the time and space needed to more coolly and calmly negotiate a long-term agreement. The outcome of the EU referendum laid down the general parameters required for such a transitional agreement:

1. Parliamentary sovereignty should be restored. All EU law would be transposed into British law and a ‘Petitions Committee’, comprising a variety of representatives, should be empowered to hold hearings on whether an EU law should be repealed or amended on the basis of a petition from a certain threshold of British citizens or companies. The UK should no longer be subject to the formal force of the EU Court of Justice’s judgments.
2. Crucially, this committee should involve not only the ‘usual suspects’ from stakeholder society - though devolved administrations, local government and key interests should be involved. It should also reach out to groups that are not usually involved in exercises such as this but who turned out in force to vote in the referendum.
3. A joint UK-EU commission could assess whether countermeasures were appropriate if judgments or interpretations by British regulatory bodies departed from EU law. These countermeasures could have consequences for UK exporters’ access to EU markets.
4. Free movement of EU citizens cannot carry on in its current form. A compromise would be only to grant residence to those who have an offer of a full time job and a new income threshold for those seeking to bring their families to the UK, as is the case for UK nationals seeking to bring in a non-EU spouse.
5. The UK should no longer formally contribute to the EU budget. The UK’s net contributions could be replaced by direct UK bilateral support to the poorer EU member states.
6. Scotland and possibly Northern Ireland will need a closer relationship with the EU than other parts of the UK. This could involve keeping EU law in place in Scotland, including free movement of person, in return for participation in the work of the Committee of Permanent Representatives (COREPER) in Brussels.

The hurdles to such a transitional agreement should not be underestimated. Nevertheless, it could appeal to EU partners since it secures a quick Brexit and allows a high degree of economic predictability while negotiating a longer-term deal. Within the UK, such an arrangement would allow the broadest possible participation in the process of untangling the UK from EU law and responsiveness to unpopular EU laws, whilst securing an orderly exit.

Introduction

After the vote, the decisions. Britain has voted to leave the European Union, but what, precisely, does ‘leaving’ mean? And how can it best be accomplished? These are the issues set to dominate the practical agenda of politics for months, if not years, to come.

It would be nice as, Tony Blair remarked in the Telegraph, for Brexit negotiations ‘to proceed with calm, maturity and without bitterness’. An amicable solution, acceptable to all, would represent the best of all worlds at this febrile moment in European history. For one thing, the risks of a disorderly Brexit - with no deal on future arrangements, and conceivably no agreement on how to tie up loose ends - would be damaging for all. Obviously the UK would suffer badly from such an outcome, but would other member states, confronting at best anaemic growth, and overwhelmed by both an unprecedented influx of migrants and the potential of further crisis in the Eurozone really want to damage their own economic prospects through a failure to secure a deal? What is needed to chart a long term future for the UK’s relationship with the EU is calm, sober reflection, not knee jerk reactions with half an eye on domestic public opinion.

In what follows, we suggest an approach which, we think, maximises the chances of arriving at such a deal. We argue in favour of the UK leaving the EU relatively quickly, whilst simultaneously signing with its partners a transitional arrangement which, while allowing the time and space to negotiate a longer term settlement, would also go some way towards addressing the numerous fractures the referendum has revealed within British society.

We do not here propose anything in the way of a final ‘deal’ between the UK and the EU. What we do argue, though, is that it is only by taking the time to ensure that any such deal is both carefully thought through and representative of what different parts of British society want that any such outcome can both ensure a mutually beneficial relationship with the EU and a stable settlement at home. Our suggestion of a transitional arrangement will provide the time and space necessary to think through the longer term arrangement whilst ensuring that all relevant domestic interests are taken into account.

Hurdles

Of course, the obstacles standing in the way of the kind of medium term outcome we suggest are significant. And they reside both at home and in the rest of the EU. First, there is the question of what Britain actually wants – that famed ‘national interest’ of which so much is made. Yet whose views to take into account? There were clearly many stripes of leaver during the referendum debate. They ranged from the nativist, conservative types interested in significantly reducing migration, to the liberal cosmopolitans, who see Britain’s future as being more, rather than less internationalist. From those obsessed with deregulation and cutting Britain free of costly EU regulation, to those who see the EU as a capitalist conspiracy aimed at undermining the rights of workers.

Reconciling the view of those who see Brexit as a way of encouraging non-EU migration and those who see it as a way of pulling up the drawbridge will take some doing. And there will be specific decisions to be made that will necessitate hard choices. EU law significantly affects about one third of British laws. Identifying those to be scrapped may well prove inflammatory. Articulation of a single national position on anything will doubtless produce a long list of losers.

More broadly, the referendum exposed a stark division between what may be termed stakeholders and wider society. The former is that constellation of voices and interests which engage easily with Whitehall and Westminster. Both prior to and during the referendum, it has shown itself remarkably satisfied with what the European Union does. The referendum illustrated not only that these stakeholders are not representative of much of society but that there has been a failure by political institutions to take wider concerns into account. Any post Brexit settlement must engage with this division. Experience suggests that it is highly unlikely that a single, centralised institutional process will be able to do this effectively. If years of effective lobbying has unduly favoured stakeholder society, the referendum has eclipsed its interests and swung the pendulum the other way.

Second, Britain must negotiate with European partners who have their own domestic agendas and constraints to contend with. Everyone may agree that free trade is good for economies as a whole. But that has not stopped powerful vested interests in continental Europe from smelling a Brexit opportunity. Why, they argue, offer market access when refusing to do so might allow us to attract dissatisfied businesses? While this may lead to a smaller overall pie, it is the share a country or an industry gains that tends to dominate political discussion. Already we see overtures being made to City firms, and it is inconceivable that the same will not occur in other key sectors such as automobile manufacturing.

Then there is the politics more generally. And, of course, then there are elections. The two most powerful states in the EU - France and Germany - face general elections next year. This, combined with a new Prime Minister in the UK anxious to prove herself will hardly make for a calm or considered atmosphere for negotiations. Meanwhile all member states have domestic constituencies to appease, increasing the chances of short termism and reducing the chances of arriving at a mutually satisfactory long term deal.

As a consequence of these pressures, attempting to formulate a list of British interests to be protected in negotiations covering the sweep of EU activities, to be completed within the two years allowed under the article 50 process, seems optimistic to say the least.

The three steps

There are many complexities and uncertainties standing in the way of any attempt to sign a definitive arrangement governing relations between the United Kingdom and the European Union. Better, then, to carry out the process sequentially. We propose an alternative, more practical strategy, comprising a three step process.

Step one would be for the United Kingdom to leave the European Union in December 2018. Between now and then, negotiations under the rubric of Article 50 could be carried out, resolving the hangover of membership - what happens to EU institutions in the UK, to UK staff in the EU institutions, to budgetary programmes and the like.

However, rather than reverting to a WTO-type relationship while a longer term settlement is agreed, the first few years post Brexit should be governed by a transitional arrangement, possibly lasting until 2024, which would be agreed under Article 50.¹ This would provide time for post-exit commercial, financial and political relations to bed, and, more importantly, a chance for parliament and Whitehall to ascertain what the different parts of UK society want in those fields currently governed by the EU. Obviously, negotiations on a more definitive arrangement will continue, but the pressure will be off, tempers can cool, and markets can be reassured by transitional arrangements.

Step two would be the transitional arrangement itself. Given the above, this would be self-consciously negotiated on the basis that it relies on incomplete information. It can, at best, be guided only by certain parameters - those which emerged from the referendum campaign. Like the result or not, the referendum was one of the largest exercises in popular democratic engagement in British political history, and the results must be viewed accordingly.

¹ Article 50 TEU is the formal procedure through which the United Kingdom negotiates its terms of withdrawal from the European Union.

We believe the following to be the key messages to have emerged from the referendum.

- Free movement of EU citizens cannot continue in its current form. There are questions to be addressed about both its scale and the balance of EU nationals entering low-skilled and high-skilled employment.
- A formal membership or association fee can no longer be paid to the EU. Arguments about the size of the UK budgetary contributions ignored a deeper truth into which the Vote Leave claims tapped. In a world of limited money for public services, voters do not think they should pay for the EU.
- The primacy of EU law has to end. ‘Take Back Control’ had at its heart the idea that Parliament can override and repeal disliked EU laws.
- Alongside this, the United Kingdom should not be subject to any supranational machinery.
- Scotland and possibly Northern Ireland will need a closer relationship with the European Union than other parts of the United Kingdom.
- Whatever its level, the substance of much EU law has to remain. Vote Leave made a commitment not to row back on EU labour laws. Equally, the commitments to protect beneficiaries of EU grants means, in practice, that much EU agricultural law will have to be retained. There also seems a consensus that the rights of EU citizens resident in the United Kingdom should remain untouched. For the foreseeable future, the vast majority of EU citizens resident in the United Kingdom will, therefore, benefit from free movement. The narrowness of the result and the divisions within Vote Leave over this also suggest, at the very least, the need to maintain access to the single market. This means that, at least under the transitional arrangements, much EU single market law will have to be retained.

There is no denying that it will be difficult to formulate a position which reconciles the tensions between these different elements. The polarisation within British society will result in very different value being attached to individual parts of the settlement. Furthermore, there is the EU context. The EU 27 will, rightly, wish to protect their own interests. Our continued mutual dependence, not to mention our reliance on their support for any deal, entail that it is not only desirable but also prudent that solutions are put forward with which they can live.

A transitional arrangement

What, then, would be the nature of any such transitional deal?

First, parliamentary sovereignty would be at its heart. Parliament would be free to repeal or amend EU law from the beginning of the transitional period. An obvious political benefit domestically - in contrast to an arrangement that passed via European Economic Area (EEA) membership towards something looser, as suggested by some - is that parliamentary sovereignty would be restored earlier than would otherwise be the case.

We do not think that sufficient. We pointed out the gap between stakeholder society and the rest of society. There is a danger that simply relying on parliament to pass the odd statute repealing the odd EU law will simply lead to a return to business as usual with vested interests limiting any change. The referendum also suggested a significant gap between the views of British citizens and political parties on the European Union. There must, therefore, be stronger inclusionary procedures.

We would, therefore, suggest the establishment of a Petitions Committee, comprising a variety of representatives, who would be empowered to hold hearings on whether an EU law should be repealed or amended on the basis of a petition from a certain threshold of British citizens or companies. Annually, a recommendation would be made to parliament on which EU laws should be changed or repealed.

It is crucial that the process of taking representations go beyond the 'usual suspects'. The EU referendum was notable for many things, not least the fact that many people who do not normally vote in general elections came out to express a preference. Whilst Theresa May has spoken about including the Scottish, Welsh and Northern Irish governments in the process of negotiating with the EU, it is crucial that local government in England, and civil society more broadly have the opportunity to be heard.

Subject to the above, there should, secondly, be a general commitment on the part of the United Kingdom to observe EU law unless good reasons can be made for not doing so during the transitional period. This commitment would not be one to apply EU law in the United Kingdom. The referendum made clear this was to stop. Instead, all EU law would be transposed into British law. And British law would be interpreted in the light of EU law. This commitment would involve a number of things.

- It would require the United Kingdom to commit carry out an assessment of the impact of any amendment or repeal of EU derived law on EU citizens and to seek to minimise such impacts. EU citizens and member state parliaments should be able to participate in any hearings and be provided with reasons why Parliament chooses the route it does.
- It would require a procedure to be established whereby the United Kingdom notify other EU States of any changes so that these have good time to prepare. Part of this will involve some form of joint commission tasked with assessing necessary and proportionate where British measures affect their economic interests.
- Judgments or interpretations by British regulatory bodies which departed from EU law would also be communicated to this joint commission so that it could assess whether countermeasures were appropriate.

Thirdly, the preliminary reference system and formal force of Court of Justice judgments would be dispensed with. Equally, the Commission would no longer be able to take the United Kingdom before the Court of Justice. It is, however, important that there are credible mechanisms to ensure that both the United Kingdom and the European Union observe their commitments. There is a double British interest in this. The most obvious is that if the European Union refuses to apply EU law to British traders or UK citizens they will lose benefits to which they are entitled. The other is that if EU regulatory authorities are not convinced that there is stringent oversight of EU standards in the United Kingdom, they will be particularly exacting in checking whether UK traders meet these standards when they enter the EU. This can lead to additional costs or to traders over-implementing EU law in order to secure access.

Allowing States to take each other to arbitration has worked badly in other regional trade arrangements. We, therefore, suggest the creation of an independent regulatory agency, to whom citizens of both the European Union and the United Kingdom can refer. This would be tasked with drawing up reports of non-compliance by either party which would be submitted to the joint commission outlined above. Prior to formally adopting a report, there should be informal negotiations between the agency and the party concerned to see if a solution can be found. We would next suggest that if a report is formally adopted by the agency, there should be a presumption that it should also be adopted by the commission. This presumption could only be rebutted by the commission acting unanimously - otherwise, each party could block any finding of non-compliance. For those concerned about the supranational qualities of this procedure, it is worth reiterating that it is always open to the United Kingdom to derogate from EU law, albeit subject to the possibility of countermeasures.

Fourthly, insofar as the United Kingdom complies with EU law, EU law entitlements should be granted to British citizens and companies. It is worth being clear here about what precisely this will entail.

The British government has said that it does not want to part of the single market but wants access to the single market. Access implies no tariffs on trade and would presumably also allow British companies which comply with EU regulatory standards to trade in the EU.

The rationale for this is clear, if flawed. As not all British companies trade in the European Union, the vast majority of these would not have to apply EU law as UK law repealed it. However this is to understate the problems involved in distinguishing between goods intended for the EU and other markets and the complexity of supply chains, amongst other things.

Moreover, regulatory convergence is not sufficient to secure full market access. Many fields of EU law rely on the provider of a good or service going through a recognised authorisation procedure applied to either the exporter/provider or the particular good or service supplied. Examples include the passport strategy in financial services, mutual recognition of professional qualifications, licencing procedures in audiovisual and many transport services. Similarly, automobiles and pharmaceuticals rely on accredited approval processes. The problem is that such approval processes are only recognised if they are EEA ones. To secure anything comparable, the UK government will have to commit to much more EU law than is currently envisaged by some who believe we can still have access to the single market

The other significant policy which needs to be addressed immediately is free movement of persons. This poses a challenge, as the EU Institutions and all other EU States have made access to the single market conditional on accepting free movement of persons. A possible compromise may be found in the language of the German government which mentions only accepting the principle of free movement, suggesting that not all its legal detail need to be followed.

It could be argued that the principle of free movement requires only granting residence to those who have an offer of a full time job. In addition, those who wished to bring their families to the United Kingdom may only do so if, like British nationals bringing non-EU spouses, they earn a minimum income. The granting of free movement rights to those looking for work or part-timers involved some of the more adventurous interpretations by the Court of Justice, and, prior to 2006, EU workers could only bring their family to another State if they could provide suitable housing. This would have the probable effect of substantially cutting EU migration.

Fifthly, the United Kingdom should not contribute to the EU Budget in net terms. This does not mean that it should stop participating in EU programmes during this transitional period. Attempting to recreate the CAP system in such a way that no farmer loses would be fiendishly complex. Similarly, European research funding cannot be replaced by British funding, as it could not provide the international networks secured by the former.

How would this be paid for? A possible means of selling this to the UK public is that the UK would continue paying into the EU Budget as before. However, any difference between what the UK put in and what UK citizens and interests got out would be refunded to the UK. The overall payment to the EU would therefore be zero. This may, however, not be completely sellable to the EU member states. They might point out that a sizeable part of the EU Budget - for instance that used for development aid - does not go to any Member State, and that Norway has to pay for access to the single market. A possible solution would be to allow for the provision of UK bilateral support to the poorer member states in lieu of a formal budgetary contribution, as is done by Norway.

Sixthly, there is the question of Scotland. If Scotland wants a tighter relationship with the European Union, there could be a commitment not to repeal any EU laws insofar as they affect Scotland.² Scotland would, of course, have to apply all EU laws as EU law, including free movement of persons and fisheries, and contribute to the EU Budget. This is of course constitutionally possible. In return, Scotland could be granted a seat on the Committee of Permanent Representatives, the (non-voting) body which prepares Council of Ministers meetings, thus allowing it some influence in EU law-making. Free movement could be secured by the Scottish Parliament being made responsible for the issue of National Insurance numbers which would have validity only in Scotland. Equally, citizens on the electoral roll in Scotland could be granted documents additional to their passports which could serve to secure them free movement in the rest of the European Union.

Finally, albeit that the United Kingdom would follow the EU common commercial policy there would have to be an understanding that the United Kingdom would be free to negotiate trade agreements with non-EU States during this period. The idea would be that these come into force at the end of the transitional phase. Again, such a seamless shift would minimise disruption all round, ensuring the smoothest possible transition from full membership to complete non-membership. Once again, there has been talk about quick negotiation of a number of free trade agreements with the speed with which Chile negotiates them taken as a model. However, the United Kingdom is a large economy.

² There is the risk with this approach that, over time, there would be costs resulting from different rules and product standards in Scotland and the rest of the UK. A joint committee between Scottish Parliament and Westminster might have to be established to minimize these.

And many of these agreements will have to have much more extensive provision on free movement of services than most free trade agreements in force today by dint of the United Kingdom's reliance on this. It will take time, we believe, and it makes sense that bad agreements are not negotiated as they would leave a lingering legacy.

Could this fly?

Ultimately, of course, the proof of the pudding lies in the eating, and any deal, long or short term, needs to secure the agreement of the relevant players.

For the British, a transitional deal along the lines we suggest here secures parliamentary sovereignty sooner, greater democratic engagement beyond the usual political elites, significant reductions in EU migration, particularly low-wage migration, access to the single market, and a possible reduction of constitutional tensions within the United Kingdom.

The real problems, however, lie elsewhere, and particularly with securing sufficient support for such a deal among Britain's partners. Yet we would argue that our proposal entails a number of advantages for the European Union.

First, it secures a quick Brexit. A quick, neat, short term solution would surely be better for all concerned than protracted and potentially acrimonious negotiations as each aspect of EU legislation was scrutinised. This quick Brexit not only allows the obstructive British presence to be disentangled from EU decision-making rapidly, but means attention and resources can be focussed on more pressing questions such as the crises surrounding Italian banks, and the Iberian peninsula's public finances.

And it may spare other member states political problems of their own. Long, leaked negotiations about the value of every EU legal instrument may well provoke debates within their own countries about the value of EU law. Furthermore, the experience of negotiations with Greece suggests that European publics do not like the Union when they perceive it is exercising a punitive role, no matter how much frustration there may currently be with the British.

Third, it allows for the maintenance of good relations with the British, for a high level of predictability about when the United Kingdom will depart from EU law, and for continued access to the British market. The United Kingdom will be the EU's second largest export market after the United States and a source of competition to the European Union, whatever the result. If a punitive settlement is imposed, London might resort to an array of policies - fiscal, regulatory competition or aggressive use of the exchange rate - which would impact on the competitiveness of its partners. A mutually acceptable deal could forestall such a beggar-thy-neighbour approach.

Fourth, a quick transitional deal would ensure a period of economic stability at a moment when the euro area is threatened by a new banking crisis. A reversion to a WTO solution would inflict pain on all. There is significant EU investment in the United Kingdom. In 2014, it accounted for a stock of £496 billion. To be sure, the United Kingdom would lose most if that flow slowed or reversed. Yet a bad settlement would also inflict costs on those EU investors. For the lucky, there would be relocation costs. For those unable to relocate, there is the risk of a good investment turning the other way. And, of course, UK citizens and companies invest heavily in the European Union with the stock amounting in 2014 to £474.5 billion. It makes little sense to damage this source of investment. Indeed, the whole idea of the EU's plan for a Capital Markets Union was to secure investment from sources other than Europe's undercapitalised banks. If that is the strategy, why scrap one attractive vehicle for realising it?

The settlement on free movement of persons also has obvious advantages. Free movement of persons would continue as before in a part of the United Kingdom, namely Scotland. Furthermore, the vast majority of EU citizens who were ever going to work in the United Kingdom, namely those already resident there, would be granted permanent residence - something that EU law does not offer them at the moment, and which a number of other member states would value. To be sure, future part-time workers and those looking for work will no longer have a right to residence. Similarly, families will not be able to join future employees in the United Kingdom who do not have the requisite income levels. This is significant. However, is it significant enough to scupper all the above?

And crucially, the kind of process we are suggesting seems eminently preferable to all other alternatives. Either we attempt to thrash out a long term deal quickly, with the danger that key interests are ignored, with significant political consequences down the line. Or, we can leave the Union without a deal and face the considerable economic dislocation that reversion to a WTO type arrangement would imply. Our proposal will provide the time and space needed to ensure a calm and rational negotiation process, during which interested parties can be fully consulted, and, which, in our view, stands the greatest chance of culminating in a mutually acceptable, politically sellable, and mutually beneficial deal.

Even then, however, negotiation of the long term deal will, of course, be far from straightforward. What we are proposing is a mechanism to make that process as inclusive, as effective and as painless as possible.