

UK and EU - a perspective on the policy and political journey ahead

Introduction

I have been asked this morning to focus on a UK and EU policy perspective in the light of the upcoming notification of Article 50 of the Treaty on European Union. In doing so, it is worth pointing out that this address is not designed to be, nor will it be, a perspective piece on Ireland's interests and role in this process.

Britain and Europe

More than five decades ago when he remarked that 'Great Britain has lost an empire and has not yet found a role', the former US Secretary of State, Dean Acheson, sparked a transatlantic storm of controversy. The latest manifestation of this quest for a meaningful role is 'Global Britain', Prime Minister May's vision for the UK's future after exiting the EU. When the continent took its first post war steps towards greater European unity, Great Britain then had unparalleled standing, prestige and potential for influence. Churchill encouraged this development but enunciating three circles of influence; the transatlantic relationship with the United States, the Commonwealth and Empire and Western Europe, Britain stood aloof.

Both when outside and inside the EU and its predecessor organisations, British politics always has been deeply divided on the European question with splits in both the Conservative and Labour parties. These divisions have dogged successive Prime Ministers.

In 2011, the coalition government of Conservatives and Liberals passed the European Union Act requiring the holding of a referendum in the event that key EU treaties were amended in future. This abated but did not quell the storm of growing Euroscepticism led vociferously by sections of the British media and Tory Eurosceptics increasingly anxious about the rise of UKIP. To neutralise this threat in the May 2015 general election, Prime Minister David Cameron in 2013 promised to hold an 'in-out' referendum if returned to power. This was a political gamble, not a legislative necessity. Held on 23 June 2016, it backfired and cost David Cameron his job, his political career and his reputation.

The referendum vote revealed a kingdom disunited territorially, socio-economically and demographically. Britain had voted for a direction but not for a precise destination as regards its future relationship with the EU. For a number of months the mantra 'Brexit means Brexit' ambiguously covered the continuum between a soft and a hard Brexit. For the Prime Minister it signalled the intention to quit the EU without the option of a second referendum.

Prime Minister May's Negotiating Principles

Speaking in Lancaster House in January 2017, the Prime Minister and subsequently in a White Paper published in February the Government, set out twelve principles that would guide their approach.

In terms of future UK-EU relations these envisage:

An end to the jurisdiction of the Court of Justice of the EU in the UK;

The Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law;

No membership of the Single Market;

No 'huge sums' to be paid to the EU budget;

And a rejection of the tenets that underpin the Customs Union pertaining to the Common Commercial Policy and the Common External Tariff;

Taken collectively, these terms amount to what has been characterised as a hard Brexit. To fulfil these preconditions effectively would rule out any current form of EU relationship with third countries, such as those with Norway and Switzerland.

What Britain wants from the EU is:

The greatest possible access for goods and services to the Single Market;

On a fully reciprocal basis by means of a comprehensive Free Trade Area Agreement;

Britain also wants to be free to conclude its own Free Trade Agreements with third countries.

It should be noted that the greatest possible reciprocal access to the EU is what Britain has had for the past forty-three years but has rejected.

In terms of tone the Prime Minister was equally clear that 'no deal for Britain is better than a bad deal for Britain'.

From a Narrow Majority to a Hard Brexit

To understand how a positive but narrow majority to leave the EU translated into a hard Brexit position owes more to politics than economics. One could argue that the referendum itself was a political choice of placing party necessity above the national interest. Identity politics and an underlying English nationalism have been energised by the result to which they contributed. The conservative party, hopelessly divided before the referendum vote (reported by the BBC to have had up to 138 'leavers' in its ranks even as official government policy backed the remain side) is united for the moment around a harder line and enjoys the support of many Labour MPs whose party seems divided. A measure of the government's comfort zone is that amendments to protect the rights of EU nationals living in the UK and that Parliament would have 'a meaningful vote' on the final Brexit deal were comfortably defeated in both the Commons and the Lords earlier this month. UKIP's future may be uncertain but it remains vigilant and, through its former leader, vocal against any perceived backsliding.

The English media also plays a prominent role. In terms of content- analysis, six of nine newspapers showed a dominance of leave content during the referendum campaign. Since then, in November 2016, elements of the media attacked three judges of the High Court as 'enemies of the people' for deciding in a British court under the British constitution that the UK's sovereign Parliament should have a say before Article 50 was notified. Effectively, this put

anyone who might incline to a contrary view on notice that they too could be subjected to public abuse in the media if they stepped out of line.

The UK Legislative Agenda

One week in advance of the formal notification of Article 50 which will trigger Britain's withdrawal from the EU, in addition to what has been discussed above, what can be expected from the UK?

The Great Repeal Bill was announced to Parliament on 10 October 2016. This will repeal the European Communities Act 1972 but at the outset and, probably in many cases for good, paradoxically but pragmatically, it will retain the entire body of EU law on the UK statute book to be amended or repealed, as desired, at a later date. This is to guarantee continuity, clarity and certainty.

To date, five months later, no draft Bill and no White Paper has been published to facilitate discussion on the principles behind this proposed legislation but initiatives are expected soon. The Great Repeal Bill will need to be accompanied by an ambitious legislative programme to be set out in the next Queen's Speech, aimed at saving secondary legislation introduced under the European Communities Act which otherwise would lapse with its repeal.

For Brexit to work on the British side, it will require a large volume of legislation to be enacted within a very restricted timetable, having regard to its bicameral legislative process with multiple stages in law making.

Laws will be required to transfer into UK law EU regulations which have direct effect and which otherwise would lapse. All references to EU institutions and mechanisms will need to be replaced with references to UK institutions or ministers. New primary legislation will be needed for areas previously under EU competence, such as customs and immigration systems. Acts such as the European Parliament Act 2002 and the European Union Act 2011, requiring a referendum when EU treaties are amended, will need to be repealed. What can be done immediately and what awaits the results of negotiations with the EU needs to be identified.

Two matters of institutional and potential constitutional significance arise, namely secondary legislation and the role of devolved administrations in Northern Ireland, Scotland and Wales.

Amending, retaining or abolishing secondary legislation which runs to thousands of pages of statutes will require a judgement as to whether this will be done by government fiat in consultation with parliament or through a combination of both. There are fears this could lead to a power shift towards the executive branch of government at the expense of parliamentary sovereignty. This matter is not merely an abstract concept. Imagine that a current EU regulation of critical importance to a given sector or enterprise is amended opaquely in the corridors of Whitehall with no public accountability or oversight, what redress or voice would there be for those effected but excluded from any prior say?

Devolved Administrations

In spite of the existence of the Joint Ministerial Committee, chaired in plenary by the Prime Minister and attended by the First Ministers of Scotland and Wales and the First and deputy First Ministers of Northern Ireland (and the JMC sub-committee on EU Negotiations, chaired by the Secretary of State for Exiting the European Union) there is a complete lack of clarity about the role devolved legislatures will play in legislating for Brexit. Will devolved assemblies need to pass their own legislation to preserve EU law that has effect at devolved level and will their assent be required to UK-wide primary legislation that changes the powers of devolved administrations?

The answer to these questions touches both the current and future competences of devolved administrations in the UK.

Arguing that the Brexit vote and the subsequent decision to leave the EU's single market is a significant and material change in the circumstances that prevailed in 2014 the Scottish First Minister, Nicola Sturgeon, is seeking the authority to hold a second independence referendum insisting that its timing and procedures are matters for Scotland to decide.

As regards Northern Ireland, Prime Minister May has pledged to work to deliver a practical solution that allows the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system suggesting that: 'Nobody wants to return to the borders of the past, so we will make it a priority to deliver a practical solution as soon as we can'.

However, on the Customs Union, Britain's Brexit Secretary, David Davis, speaking before the House of Commons Exiting EU Committee in December 2016 said he did not envisage a special arrangement for Northern Ireland (and Gibraltar) that might keep the province inside the EU's Customs Union as part of the Brexit deal.

Global Britain and Far Away Fields

Aspirational rhetoric about Global Britain and its future potential is high on ministerial and Prime Ministerial talking points but should be treated with caution. Far away fields are always greener. Painting a picture by numbers illustrates the point. In addition to sorting out trade relations with the EU, which is by far the UK's most important market, it will need to renegotiate the fifty-three EU Free Trade Agreements from which it benefits. Taken together, only 15% of UK trade lies outside this EU orbit today.

Trade, investment, affiliate sales and in-sourced employment between the UK and USA already are among the most developed in the world. What gains, if any, which might be made under a new bilateral free trade deal, are at risk to be quite marginal given the unparalleled scale of current trade and investment relations.

As regards the Commonwealth it should be recalled that UK trade with the EU 27 amounted to 44% of exports in 2015 yet its share with the Commonwealth 51 was only 9.5%. Britain in 2015 exported fifty percent more by value to Ireland than China and almost four times as much to

Ireland as India. This reflects the gravity model of trade, where most trade is done with near neighbours. It would be unwise to assume gravity defying logic whatever future freedom is enjoyed by the UK to negotiate its own trade deals.

Much has been made by 'leavers' that the UK imported £89 billion more from the EU than it exported in 2015, a potential UK bargaining chip in future negotiations but Britain generated a £28 billion surplus in trade in services which is vulnerable to a loss of market access. Moreover, Britain's exposure to trade with the EU represents 12.8% of its GDP, while the EU 27 GDP exposure to UK trade is a much lower 3.4% on average, making UK living standards relatively more vulnerable to any failure to agree a new deal. Before a new deal can be concluded there has to be an agreement on the terms of withdrawal. This negotiation is what the Article 50 notification will trigger.

What Will the EU Do?

President Tusk of the European Council will forward Brexit Guidelines to the EU 27 diplomatic representatives within forty-eight hours of receiving the official British notification. A summit meeting will be convened on 29 April to set out the political and policy principles that will guide the negotiations. Although the EU mantra has been no notification, no negotiations, several formal and informal summits have taken place at which Brexit was considered and some initial negotiating signals emerged. These include: 'the hope to have UK as a close partner of the EU and the expectations that 'any agreement which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations' and that 'access to the Single Market requires acceptance of all four freedoms'.

The European Commission has been nominated as the 'Union Negotiator'. The Heads of State and Government have welcomed the nomination of former Commissioner, Michel Barnier, as the Chief negotiator. They also propose that the Union's negotiation team should include representatives of the rotating Presidency as well as of the President of the European Council. The European Parliament will be involved through attendance at Council preparatory meetings, through its President and its lead appointee Guy Verhofstadt MEP, the former Prime Minister of Belgium. Detailed work in supervising the negotiations will be done by the General Affairs Council of EU Foreign Ministers.

Mr. Barnier has indicated that withdrawal negotiations will need to be completed by October 2018 allowing the European Parliament consent procedure to be finalised in good time before the 2019 European elections. The UK also will need to ratify the outcome by whichever national procedures it deems appropriate. Since all this must be completed within two years, Barnier's view is that the actual time available for the negotiations could be as short as 16-18 months.

In his presentations to the European Parliament he has enumerated a number of principles to be followed in the negotiations.

The four freedoms must be indivisible;

Any transitional agreement must be unambiguously limited in time;

EU membership must always remain the most advantageous status;

Any new relationship must be based on a level playing field and on respect for the rules of competition;

The balance of rights and obligations agreed with other third states must be taken into account;

And close cooperation is desirable in the field of defence and security.

The Withdrawal Negotiations

The withdrawal agreement will conclude with a qualified majority vote of the Council (representing at least 72 % of the participating Member States, comprising at least 65 % of the population of these States). All but the withdrawing State get to vote. This means a majority of 20 out of 27 Member States suffices. The consent by simple majority of the European Parliament including the UK Members is also required.

The legal deadline for the conclusion of the agreement is two years after the withdrawal notification (29th March 2019) but the European Council can extend the negotiations in agreement with the negotiating Member State, by unanimity. In practice the UK is unlikely to want an extension which spills over into the holding of European Parliament elections in the summer of 2019 or the start of negotiations on the next Multiannual Financial Framework of the EU.

These negotiations will be concluded solely between the EU and the UK.

The withdrawal negotiations will need to address many issues, mostly budgetary and institutional, which are the most time sensitive to withdrawal. A non-exhaustive illustration of these follows:

UK disengagement from the EU budget, transitional and residual contributions due to the EU budget arising from financial commitments already given and the winding down of EU spending programmes in the UK;

The acquired rights of British nationals' resident in other EU Member States and of EU citizens living in the UK;

Preparations for the exit of British members from the European Parliament, the European Court of Justice, the Committee of the Regions, the Economic and Social Committee, the European Court of Auditors, the Governor of the European Investment Bank and other EU institutions;

The future of British civil servants in the EU and in particular in the European External Action Service;

The treatment of UK paid up capital at the EIB;

The relocation of EU agencies based in the UK such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the European Aviation Safety Agency

(EASA), the European Food Safety Authority (EFSA) and the European Banking Authority (EBA);

And the disentangling of the UK from international treaties signed by the EU.

The Framework for Future Relations EU-UK

This process is legally separate from the framework for future relations addressing all the sensitive issues related to mutual market access and trade. Since this will have an impact on the existing rights and obligations of all member states it will have to be concluded on a 27+1+1 basis involving the twenty-seven member states, the UK and the EU. Irrespective of the content, the process is complex and most likely will end up needing not just the assent of the European Parliament but also ratification by every national parliament of the EU 27. Hence the anxiety about the timescale involved and the presumption by many that this framework for future EU-UK relations cannot be expected to be concluded within the two-year timeframe of Article 50. Article 50.2 enjoins the Union to 'negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. This phrase – taking account of- is not an injunction to conclude both elements at the same time.

Undoubtedly, the greater and earlier the clarity on what precisely is proposed for the future, the sooner the matter can be closed. In any event a period, or differentiated periods, of transition will need to be negotiated to smooth the passage from the status quo to the new circumstances.

Politically, this means that both sides will need to negotiate on whether these steps should be consecutive or parallel. It suggests a supreme burden of negotiation and adjustment for all, but in particular for the UK.

One area where the respective negotiating teams should act without delay is to clear up all the questions related to the future status of EU citizens in the UK and of British citizens in the EU. It would be shameful to take fellow citizens as hostages, to be used as human shields in a bargaining process. Moreover, an early win of high visibility could set a positive tone for what inevitably will be very tough negotiations.

Lord Kerr of Kinlochard, retired Head of the UK Diplomatic Service and former Secretary General of the European Convention in 2002/3, pointed out in a recent speech in Glasgow that "Article 50 is not about trade, it is about divorce. It's about paying the bills, dividing the property. The money negotiation is going to be a very nasty negotiation". He expects that 'this calendar year will be mainly spent in a furious battle about money.'

Various estimates have been made of potential UK liabilities with a rich vein of work for both lawyers and accountants and a potentially endless supply of Brussels bashing stories for the British media. Politicians on both sides will need to strive to ensure that hardliners in both camps do not hijack this sensitive agenda. Estimates of up to €60 billion in residual UK liabilities have been suggested by some authors. This is a very large sum amounting to about 3% of UK GDP. If paid out over a decade it would look a more affordable 0.3% of GDP per

annum. It should be added that this sum remains speculative. While advice reported by the House of Lords argued that if the Article 50 negotiations broke down the UK would carry no further financial liability on crashing out of the EU as it reverted to WTO rules and tariff schedules.

If a deal on issues of trade access can be fashioned the possibility of some continuing UK contributions is not necessarily out of the question. Although on this and so many other issues the direction and tone of the debate post referendum in the UK has not been conducive to preparing the ground politically, or in message management for the media, to making compromises that are the essence of all successful negotiating strategies.

Since the UK accounts for 16% of EU GDP and 12 % of its population, has mature two-way supply chains and already has a full regulatory compatibility with the EU, trying to negotiate a one-of-a-kind deal, in principle, makes sense for both sides.

There will be real challenges in maintaining equivalence of standards and regulation, if and when, overtime the current status quo incrementally drifts apart. The EU could not contemplate placing itself at a disadvantage to a UK free to access its market but also at liberty to cherry pick alternative advantageous standards and regulations, such as state aids and competition policy for example. Likewise, self-excluded from formulating EU regulations, the UK is likely to be especially sensitive to being obliged to cut and paste evolving EU law as it pertains to trade relations and associated standards. Fashioning a compromise on this should be possible but not easy and will be bound to contain some clauses by way of sanction or market exclusion in the event of failure to uphold the bargain.

Since the UK is determined to end the jurisdiction of the Court of Justice of the EU (CJEU), this will require agreement on an alternative but robust dispute resolution mechanism. Such options are provided in Free Trade Agreements with other third countries such as the recent Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

It should be added that any of the EU institutions or members states under the Treaties would be entitled at the outset to test the compatibility of deals concluded with the UK before the CJEU independently of the UK's preference and practice.

Conclusion

This is the first act of post war European disintegration and so everything associated with it and flowing from it is unprecedented. With the fifth largest economy in the world by nominal GDP, a population of 65 million and a starting point of full regulatory compatibility; it should be possible to conclude an acceptable trading order between the EU and the UK in an appropriate time frame and with suitable transition periods. For Ireland, as an open trading economy, such an outcome and the certainty it would offer would be greatly in our national interest. That said, political forces either or both in EU member states and the UK could derail the process by seizing on issues that become totemic enough to risk blocking the whole enterprise. Complex negotiations will not take place in full public view but the public is entitled to and should insist on necessary transparency and parliamentary oversight both at European and national levels.

Thank you,

Pat Cox