



ABS POLICY PAPER No. 5

BREXIT: the transition period

Paper written by Jean-Claude PIRIS (former head of the legal services of the European Council), adapted and edited by Alexander Christiani

February 2018

From a legal point of view, article 50 of the Treaty of the European Union (TEU) provides for the negotiation of an agreement with the EU to settle the arrangements for the withdrawal.

The date of the withdrawal, the 29th March 2019 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.

With or without this agreement, the withdrawal will normally occur on 29 March and will have immediate effect: the UK will become a third State. 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 rule.

As for the EU laws currently in force in the UK ("acquis communautaire") the repeal of thousands of EU legislative act and their replacement by the British law is impossible in such a brief period. The only solution, paradoxically, is to re-adopt all EU laws transforming it in to 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. The procedure on how to do this is the subject of a tough institutional debate in the UK.

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 basis of the procedure provided for in each case by the relevant articles of the Treaties ("legal bases"). As to Article 50 TEU, it allows the Council, with an enhanced qualified majority vote without the UK's

page 2

participation, and with the approval of the European Parliament, to conclude with the withdrawing State an agreement on "the arrangements for its withdrawal, taking into account of the framework of its future relationship with the Union". This article does not confer on the European 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. 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.

If there is no transition period, the UK could initiate negotiations with the EU and third countries, immediately after 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 the other main trading partners will be longer.

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. 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

As said, 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

page 3

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 measure.

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.

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 Member 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 rights to take full part in the internal market during the transition 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.

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 relationship with the UK in the areas of defence, foreign policy and the fight to counter terrorism.

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 citizen 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

page 4

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. 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. It might, however, 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. 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 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, par.5 FTEU)

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.
