

Brexit: Losing control

Andrew Duff



Credit: Ludovic MARIN / AFP

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PURSUING RATIFICATION

Easter provided only a brief respite from Brexit. The crisis now continues, with escalating chaos in Britain and a breakdown of unity on the side of the EU.

At its meeting on 21 March the European Council considered a request from the British prime minister to extend the Article 50 timetable from 29 March until 30 June.¹ The heads of government rejected her request but agreed instead to an extension to 22 May, provided that the House of Commons had concluded its ratification of the Withdrawal Agreement by 12 April.² That did not work.

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Mrs May returned with a second request for an extension until 30 June.³ On 10 April, the European Council agreed to adjust the clock again, but not to stop it ticking. A flexible extension is now granted until 31 October “to allow for the ratification of the Withdrawal Agreement”. If ratification by both parties takes place earlier, the UK will leave the EU on the first day of the following month.

If the British parliament acts decisively and accepts the Withdrawal Agreement in May or June, the outgoing European Parliament will be recalled, somewhat reluctantly, to ratify the Brexit treaty. (A quorum of one-third of MEPs is required.)⁴ If nothing happens in London during this period, any ratification will fall to the new European Parliament which first assembles in Strasbourg on 2 July. The European Council will in any case take stock of the situation at its next formal meeting on 20-21 June.

MOCK ELECTIONS TO THE EUROPEAN PARLIAMENT

Unless the UK ratifies the Withdrawal Agreement by 22 May (in which case it leaves the Union on 1 June), the UK will hold elections to the European Parliament on 23 May.⁵ Three years after Britain voted to leave the EU, this may seem preposterous. But the European Council declined to stretch the Article 50 rubric that would have allowed the UK to derogate from EU electoral law in the pursuit of an orderly withdrawal.⁶

The new 2019 Parliament, therefore, will be composed of 751 members on the same basis as the 2014 Parliament, with an apportionment of seats between member states that includes several blatant breaches of the principle of degressive proportionality.⁷ If the UK ever leaves the Union, the House will be re-composed mid-term of 705 members, in a somewhat undignified fashion.⁸

If 73 British MEPs turn up at Strasbourg in July they will be a motley crew. Many will have been elected hurriedly on the basis of highly ambiguous mandates and scant scrutiny by the electorate. The elections will be treated as a proxy Brexit referendum.⁹ The squabbling Brexiteering parties will be fighting to finish the job of Leave, but without offering any serious prospectus for Britain after Brexit. The squabbling pro-European parties will campaign to stay in a ‘reformed’ European Union, but without giving any substance to the notion of reform.

Although MEPs elected from the UK will be effectively on probation, they will nonetheless be able to take part in all the important constituent votes that mark the beginning of the parliamentary term – notably the election of Parliament’s president, vice-presidents and committee chairs, and the election of the new Commission president (and approval of his or her programme), followed by the parliamentary auditions of the candidates for the Commission (including one hapless Brit).

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HOW A WITHDRAWING STATE SHOULD BEHAVE

British MEPs will not be touched by the injunction of the European Council that the British government is expected to behave itself during this period. In a significant elaboration of the Article 50 process, the heads of government asserted:

“The European Council takes note of the commitment by the United Kingdom to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation and expects the United Kingdom to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives, in particular when participating in the decision-making processes of the Union.”

Theresa May agreed to these rather humiliating terms, presumably safe in the knowledge that they were aimed not at her personally but at her successor as prime minister. No obvious sanctions exist at the hands of the European Council if the UK disregards these terms of engagement in its capacity as the “withdrawing member state”. To take the UK to the European Court of Justice for breaching the principle of sincere cooperation would, in such

circumstances, be bizarre.¹⁰ But it is obvious that were the British to deliberately pollute the on-going business of the EU 27, their chances of achieving a quick, decent and long-term association agreement with the Union would be much diminished.

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THE FOLLY OF ‘FLEXTENSION’

Donald Tusk, President of the European Council, takes pride in the concept of the flexible extension. If it had not been for the objection of Emmanuel Macron, indeed, the extension offered would have been twelve rather than six months. But what use will really be made of this flexibility? At present, the most likely scenario is continued political paralysis in the UK leading to a demand for a further extension of Article 50 in October. Other possibilities, not mutually exclusive, include:

- ▶ the election of a new Conservative prime minister after the more or less voluntary retirement of Mrs May;
- ▶ a surprise agreement between the Conservative and Labour leadership on a renegotiated Political Declaration in a soft Brexit direction;
- ▶ a clear preference indicated by the House of Commons for a softer Brexit, mandating the government;
- ▶ another general election leading to a majority or a coalition government;
- ▶ a second referendum decisively in favour of Brexit or not – as the case may be.

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Although he does not speak on behalf of a unified European Council, Mr Tusk boldly proposes that the UK should rescind Article 50 after holding a referendum. Other EU leaders are more reticent with their advice, waiting impatiently for the UK to expedite its decision to quit.

More prevarication means extra costs and investor uncertainty.

Guy Verhofstadt, the Liberal leader in the Parliament and Brexit coordinator, laments the loss of unity among the EU 27 and between the EU institutions. For him, the six-month extension imposed by the European Council releases the pressure on the British to reach an agreement but is too short a time to allow for a genuine reorientation of Britain’s European policy. Verhofstadt fears that toxic British politics will poison the new Parliament and Commission.

There are many, not least in business, who agree with Verhofstadt about the risk of further delay. Many businesses have already spent a lot of money in making contingency arrangements for the UK’s leaving the EU on 29 March. More prevarication means extra costs and investor uncertainty. And business seems to have a better grasp than politicians of the fact that extending Article 50 eats into the valuable transition period – guaranteed under the Withdrawal Agreement only until 31 December 2020.¹¹

Their decision to allow the British a flexible extension has put the heads of government in an invidious position.

Commission President Jean-Claude Juncker told the Parliament (16 April) that it is “not my working hypothesis” that the 31 October deadline will be further extended. But it is perfectly possible that the European Council on 17-18 October will be faced by a fresh demand from the British prime minister for a further extension.

THE EUROPEAN COUNCIL LOSES CONTROL

In truth, their decision to allow the British a flexible extension has put the heads of government in an invidious position. On the one hand, it is unwise, by granting ‘flection’, for the European Council to allow itself to be blamed for trapping the UK inside the Union against the expressed will of the British people to leave it.

That it only takes one head of government to veto a further extension of Article 50 does not mean that, come October, yet more procrastination will not be the preferred option.¹² Under the duty of unanimity, the European Council could tend to take the line of least resistance, especially as Presidents Juncker and Tusk will be readying to leave office.

On the other hand, no single leader, including President Macron, wants to stand accused of throwing the British out of the Union without a deal. Leo Varadkar, the Irish leader, will continue to fight against a no deal Brexit. The position of Chancellor Merkel remains decisive. The European Council's Brexit rain-check in June is critical: if by then nothing has moved in London to break the deadlock, the mood of the chiefs will harden, Angela Merkel among them.

The future of the European Union seems to be left entirely exposed to the alarming caprice of British politics.

It is hard to avoid the conclusion that the European Council has for the moment lost control of Brexit. It will be difficult to retrieve. The future of the European Union seems to be left entirely exposed to the alarming caprice of British politics. As Mr Juncker remarked, while the EU has established how Britain should withdraw, it now appears to be up to Britain alone to decide when it will do so.

MEANWHILE AT WESTMINSTER

While the European Council confirmed its absolute refusal to reopen the Withdrawal Agreement to placate the hard Brexiteers, it repeated its willingness to revise the Political Declaration on the future relationship with a view to a softer Brexit. In effect, the EU is offering the UK a very privileged partnership wrapped up in a dynamic association agreement designed to foster cooperation, manage conflicts and encourage convergence.¹⁵ Brussels is astonished that the prime minister cannot even oblige her own cabinet to rally round this package deal under the discipline of collective responsibility.

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The EU was encouraged, therefore, when a cross-party group of MPs, led by the veteran Tory Oliver Letwin, managed to seize control of the business of the House of Commons for a day or two.¹⁴ The time was used to mount a series of indicative votes to test options. While no option attained a majority of the House, the option of no deal was repeatedly and roundly defeated – and the arch-Brexiteers were

confounded. Options for outcomes that implied a rewriting of the Political Declaration in the direction of a customs union and even single market membership did well. This came as no surprise to anyone who had been paying attention.¹⁵

For example, on 1 April a resolution tabled by Kenneth Clarke, the father of the House, was only lost by 273 votes to 276. It sought to instruct the government to “ensure that any Withdrawal Agreement and Political Declaration negotiated with the EU must include, as a minimum, a commitment to negotiate a permanent and comprehensive UK-wide customs union with the EU”. It was a pity, then, that after a tied vote on 3 April the rebel MPs had to surrender control of the business of the House back to the government.

THE ATTORNEY GENERAL GOES TO BRUSSELS

The EU's constant reiteration of its invitation to improve the Political Declaration has been ignored by the prime minister. She has preferred to make unilateral British declarations intended to mollify the arch-Brexiteers in her own party and in the Democratic Unionist Party (DUP) of Northern Ireland. In this enterprise, largely focussed on the Irish backstop, Mrs May has fielded her melodramatic (but in EU matters unschooled) Attorney General Geoffrey Cox on missions to Brussels.

The astonishing, if brief, experiment in bipartisan politics at Westminster has not been wholly in vain.

Mr Cox's excursions have not been met with unalloyed success.¹⁶ Indeed, the most recent European Council saw fit to warn Mrs May that “any unilateral commitment, statement or other act should be compatible with the letter and the spirit of the Withdrawal Agreement and must not hamper its implementation”.

IMPROVING THE POLITICAL DECLARATION

Nevertheless, the astonishing, if brief, experiment in bipartisan politics at Westminster has not been wholly in vain. Members of the Labour shadow cabinet have been meeting since with certain government ministers in pursuit of a compromise.¹⁷ The exercise is supported by Jeremy Corbyn. Theresa May's position is, as ever, harder to read: whatever compromise emerges is bound to oblige her to modify her previous red lines with regard to a customs union, independent trade policy and freedom of movement. What is significant, however, is that the fury of the Conservative Brexiteers, volubly expressed, has not been enough to block the more pro-European Conservative ministers from continuing to commune with their Labour counterparts.

Some of us have argued that the first draft of the Political Declaration was too tentative in tone, ambiguous in meaning and negative in substance to orientate the UK and EU in a fruitful direction. Both the form and content of the final association agreement needs to be made more explicit. It is possible to rewrite the document in a manner that explains more clearly the relevance of the Irish backstop and its essentially transitional nature.¹⁸ The EU's more consensual language offered to the UK in December and January can be included in any new draft.¹⁹ As can the supplementary joint statement of March aimed at speeding up proceedings and allowing for the provisional application of measures intended to transcend the Irish backstop.²⁰

LABOUR-TORY TALKS

The talks between government and opposition have focussed on modifying the Political Declaration with the following range of possible objectives:

- ▶ to commit the UK to seek a new UK-wide customs accord with the EU that minimises border disruption, sustains industrial supply chains and ensures tariff and quota free trade in goods;
- ▶ to strengthen dynamic regulatory alignment with the EU acquis in labour, consumer and environmental policies;
- ▶ to seek wider UK engagement with relevant EU agencies, subject to trustworthy regulatory alignment;
- ▶ to clarify the future security partnership.

Orthodox EU opinion may be aghast at some aspects of the British negotiating position.

Mr Corbyn wants the UK to have “a say” in future EU trade talks and to attain a guarantee of reciprocal access to trade deals that is not, for example, currently offered by the EU to Turkey.²¹ The Commission may be asked to redress the asymmetry built into the EU's Turkish customs accord when it comes to crafting a bespoke deal for Britain. Both Mr Corbyn and Mrs May want to conform to the EU's common commercial policy in goods only, leaving open the possibility to negotiate international treaties on services, such as telecoms, transport, finance, investment, the professions, IPR and data. In return for concessions on trade in services, the UK will have to drop its rigid attitude to the mobility of EU workers.²² The prime minister has yet to acknowledge this.

The EU will continue to maintain its four principles of free movement. It will not tolerate the creation of

another Switzerland, free-riding on the back of the single market without adherence to the disciplines of the market place. But it is very much in the EU's interest to reach a sustainable accommodation with Britain, its largest strategic neighbour.

Orthodox EU opinion may be aghast at some aspects of the British negotiating position. The Commission might well object at offering the UK the same, exceptional and rather loose deal that was agreed for the Channel Islands in 1972.²³ Pragmatic voices will need to be heard in Brussels, on the understanding that the pull of a customs union type agreement with the UK will lead to closer market integration, involving British acceptance of EU state-aids, public procurement and competition policy. Theresa May's bid for “as frictionless a border as possible” deserves more than token respect – especially if seconded by Mr Corbyn.²⁴

Mr Corbyn should aim to ensure that the final deal is done before the June meeting of the European Council, in time to stop British MEPs from taking their seats.

One insider estimates that the Tory-Labour talks have about a 30% chance of succeeding in the next two or three weeks, although the trickiest customs union issue is being left until last. If they fail, both sides have agreed in principle to support the outcome of more indicative votes by MPs, ideally using a preferential system such as a single transferable vote (STV). This would clear the air and prepare the ground for the passage of the Withdrawal Agreement Bill which, under the terms of section 13 of the EU Withdrawal Act 2018, must be enacted before Brexit day.

For party advantage, the Labour leader may want to delay his agreement to the deal until after votes have been cast in the European elections. But Mr Corbyn should aim to ensure that the final deal is done before the June meeting of the European Council, in time to stop British MEPs from taking their seats.

A NEW PRIME MINISTER

Theresa May has already announced that she will resign shortly after delivering Brexit. This raises concern in Brussels and Westminster that she could be succeeded, as a senior EU official tells me, by “someone worse”. One way of constraining the next prime minister (and of corralling the EU 27) is to upgrade the legal status of the Political Declaration. Giving it greater clout would involve confirming its function as the draft mandate for the negotiation of the final association agreement, thereby rendering it soft law and politically binding. Kenneth Armstrong has made an elegant proposal for a new legally

binding protocol that could be attached to the Withdrawal Agreement to act as a legal bridge to the Political Declaration.²⁵

An alternative approach to upgrading the Political Declaration would be to downgrade it, or, more accurately, to detach it from the Withdrawal Agreement altogether. In this case, the Commons would only be asked to approve the legal treaty that extricates the UK from its obligations to the EU and to leave until later the matter of the final relationship. This manoeuvre could be achieved by amending the Withdrawal Agreement Bill. Revising the Declaration would then become the top priority of the transition period.

The EU would have no objection to this course of action if it facilitated the ratification of the Withdrawal Agreement, although the Declaration would then risk deprecations at the hands of the “someone worse” prime minister. And some MPs at Westminster would legitimately grumble at being asked to take the plunge at a blind Brexit.

THE REFERENDUM QUESTION

One cannot safely predict the outcome of all these efforts to free Brexit from its current impasse. One is scarcely on safer ground with respect to the political process which will conclude the saga.

Confusion of outcome and process greatly reduces the chance the Commons can reach a majority in favour of anything.

There are many Remainers in Britain, somewhat encouraged by the blandishments of Tony Blair and Donald Tusk, who believe without fear of contradiction that a second referendum would be bound to lead to the immediate revocation of Article 50. Opinion polls are much more nuanced, however.²⁶

During the indicative votes in the Commons, a motion was supported by 280 MPs which would “not allow” the ratification of the Withdrawal Agreement and Political Declaration “unless and until they have been approved by the people of the United Kingdom in a confirmatory public vote”.²⁷ Such confusion of outcome and process greatly reduces the chance the Commons can reach a majority in favour of anything. The confused aside, there are many MPs who want a deal but no referendum, and many others who want a referendum but no deal.

Moreover, there are important technical as well as political and constitutional arguments against pursuing another referendum. On the technical level, there is simply not enough time before

31 October for parliament, first, to approve and ratify the Withdrawal Agreement (with its implementation suspended pending a public vote), and then, second, to enact new legislation to organise the referendum, with adequate time allowed for the fighting of the referendum campaign. Deciding to hold a confirmatory referendum, therefore, would mean the UK asking the EU for a further, longer extension.

The UK Electoral Commission would insist that the conduct of the referendum was both free and fair. The Commons would need to agree on a binary question that did not effectively disenfranchise that large part of the electorate opposing not only the EU’s deal on offer but also the revocation of Brexit. Parliament could overrule the Electoral Commission, but not without litigation and public outcry.

THE REFERENDUM ANSWER

On a political level, the majority of MPs from all parties (except the SNP) are acutely sensitive to the fact that they promoted the 2016 referendum in the first place, pledged solemnly to respect its outcome and then, accordingly, voted to trigger Article 50.

One can be sure that another referendum promoted specifically to overturn the result of the first would deepen the divisions in the nation in terms of social class, generation and province. Those who claim that a ‘people’s vote’ would magically heal the rift across the country and settle the issue of Britain’s European policy once and for all are likely to be proved badly wrong. Brussels knows that unless the result of a second referendum were a massive majority on a high turnout for revocation, nothing very much would be settled at all.

Different results in the four nations of the United Kingdom, as we had in 2016, would quicken the debate about the breakup of the Kingdom, provoking a return to violence in Northern Ireland. While no political party would emerge unscathed by internal divisions during the referendum campaign, the Conservative and Labour parties would be shattered.

It would seem to be folly of the highest order, having made the big mistake of holding one referendum, to compound the error by holding another.

Indeed, is it realistic to imagine that the Conservative and Labour parties, having just ratified the Withdrawal Agreement in Parliament, would then go out to the country campaigning to reject it? And what would be the impact on the British system of parliamentary government were the people to pitch themselves directly against a deal just done by parliament?

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The concept of a 'confirmatory referendum' has superficial appeal, especially to MPs lacking the self-confidence to take the decision about Brexit on their own account. But having to resort to a referendum because parliament is weak is liable only to enfeeble further that parliament. A referendum which is merely opportunistic would transfer on to the shoulders of the British public that very same complex dilemma with which MPs themselves are unable to cope. Militants and extremists on either side of the Brexit argument would relish doing battle: the rest may watch in dismay as the country spirals out of control.

TAKING BACK CONTROL

Britain's national crisis is grave and worsening. Brexit by accident without a deal remains a real possibility. The Good Friday Agreement is in jeopardy. The electorate is deeply polarised. The government has no majority in parliament and the prime minister has lost control of her cabinet and party. The British economy continues to sink.

The European Union, poised to elect new leadership, is being destabilised by Brexit. Anxious to move on to tackle some big legislative and diplomatic issues, the EU is distracted from doing so. Having dealt efficiently with the first phase of Brexit, it now faces the possibility of years of wrangling with the British. The longer the Brexit crisis prevails the greater the cracks in the unity of the 27 member states and in the cohesion among the EU institutions.

Failure to reach an agreement before the summer will cause intractable problems on both sides of the Channel. An antagonistic, nationalist Britain will be an inhospitable place for EU citizens. A hobbled

European Union may find it impossible to cast off its wounded British limb.

Time and common sense are of the essence. The House of Commons has a huge responsibility in these circumstances to come together quickly on a decent compromise and to park for the moment its normal adversarial and opportunistic behaviour. The lunge to populism must be reversed.

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The elements of compromise on the Political Declaration are there. The Withdrawal Agreement does the job of extricating the UK from its membership of the Union in an orderly manner, minimising collateral damage. It provides a decent and flexible transition period. It offers the prospect of negotiating the best association agreement that the EU has ever struck with any third country.

Having tasted Brexit, in a number of years' time, it is quite likely – and would be utterly desirable – that the British people will have another look at membership of the European Union. One could have another referendum at that stage, but on triggering Article 49, not on revoking Article 50.²⁸ And by then Europe, having moved further in the federal direction, should be more able to cope with its wayward island neighbour.

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- ¹ May letter to Tusk of 20 March.
 - ² The European Council conclusions were crystallised in a European Council Decision of 22 March 2019 taken in agreement with the United Kingdom, extending the period under Article 50(3) TEU.
 - ³ May letter to Tusk of 5 April.
 - ⁴ Rule 168 of the Parliament's rules of procedure. About half of the old Parliament, having been re-elected, will be in Brussels for group meetings during June.
 - ⁵ The Withdrawal Agreement and Political Declaration are now published in OJ C 66 I, 19-02-19.
 - ⁶ The legal service of the European Parliament favoured a derogation as long as the UK left by 1 July. See also the Opinion of David Anderson QC et al, *Timing of Brexit: European Parliamentary elections*, 28 March 2019.
 - ⁷ Article 14(2) TEU.
 - ⁸ European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament, OJ L 165 I, 02-07-2018.
 - ⁹ See, for example, Timothy Garton Ash, *Britain will have its second referendum – on 23 May*, The Guardian, 18 April 2019.
 - ¹⁰ Article 4(3) TEU.
 - ¹¹ Although the Joint Committee may decide, before 1 July 2020, to extend the transition period once for either one or two years (Article 132 of the Withdrawal Agreement).
 - ¹² Article 50(3) TEU.
 - ¹³ Article 137 TFEU.
 - ¹⁴ 27 March, 1 April, 3 April.
 - ¹⁵ See, for example, my previous paper for the European Policy Centre, *Brexit: The Compromise*, 14 February 2019.
 - ¹⁶ See Cox's letter to the Prime Minister of 12 March, Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement.
 - ¹⁷ Mainly, for the Opposition: Keir Starmer, John McDonnell, Rebecca Long-Bailey, Sue Hayman; for the Government: David Lidington, Greg Clark, Philip Hammond, Michael Gove, and Steven Barclay.
 - ¹⁸ For my own 'texte martyr' see *New proposal for amending the Political Declaration on Britain's future in Europe*, European Policy Centre, 19 March 2019.
 - ¹⁹ Notably as set out in the exchange of letters between Juncker, Tusk and May of 14 January 2019.
 - ²⁰ Joint statement supplementing the Political Declaration setting out the framework for the future relationship between the EU and the UK, 11 March 2019.
 - ²¹ Corbyn letter to May, 6 February 2019.
 - ²² For a good discussion of these issues, see Sam Lowe, *Dreaming of life after Brexit*, Centre for European Reform, April/May 2019.
 - ²³ Protocol No 3 of the UK Accession Treaty and Article 355(5)(c) TFEU.
 - ²⁴ Mansion House speech, 2 March 2018.
 - ²⁵ Kenneth Armstrong, *An 'Implementation Protocol' to Unblock the Brexit Process: A Proposal for a Legal Bridge between a Revised Political Declaration and the Withdrawal Agreement*, University of Cambridge Faculty of Law Research Paper No. 9/2019, 19 February 2019.
 - ²⁶ See John Curtice, [Third Time Lucky – Perhaps?](#), 18 March 2019.
 - ²⁷ Moved by Peter Kyle, 1 April.
 - ²⁸ Article 49 TEU provides that any European state respecting the values of the EU may apply for membership..

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