

# Brexit into Uncharted Waters

## British Referendum Initiates Complex Exit Negotiations – and Perhaps Renewal of the European Union

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**The British vote to leave takes the European Union into new legal and political territory. With application of Article 50 of the Treaty on European Union on the cards for the first time, it is already clear that leaving is not simply the reverse of joining, neither procedurally nor politically. The remaining EU-27 will need to develop an “exit doctrine” defining the rules for dealing with the United Kingdom as soon as it officially announces its intention to leave. Article 50 leaves ample political options for shaping the highly complex processes for releasing the United Kingdom from membership, reshaping its relationship with the Union and revising the treaties for an EU-27. Already crisis-stressed and disorientated before Brexit, the Union needs a renewal of integration, starting with the member states and their role in the EU system.**

It is not without irony that Britain is the first country to leave the European Union. It was also the most prominent participant in the first enlargement of the European Communities in 1973, after twice unsuccessfully applying for membership in the 1960s. Enlargement meant considering the “in/out” question in detail for the first time (also in relation to association requests from Greece and Turkey), and required the EEC to spell out its principles for accepting new members and define the modalities for concrete accession negotiations. The accession articles in the EEC and Euratom treaties – like Article 50 today – set only a general framework that had to be filled out politically. The association option was similarly undefined. The “enlargement

doctrine” developed by the six founding states exists to this day with minor modifications. Now the European Union needs a comparably clear doctrine to deal with countries wishing to leave. Regardless if and when London actually triggers Article 50, the contours of an “exit doctrine” are already beginning to emerge.

### The Right to Leave

The option to withdraw from the Union was not formalised in EU law until 2009, in the Treaty of Lisbon. In underlining the voluntary nature of EU membership, Article 50 of the Treaty on European Union (TEU) contradicts the political foundation of European integration – the concept of the

European Union as a permanent legal union of states and citizens. Under Article 50, any EU state may notify the EU of its intent to withdraw from the Union. Like the application to join, this notification is a fully sovereign and unilateral decision of the respective state, which is entitled to expect the request to be honoured. The Union has no legal option to force a member out or to trigger Article 50 if the UK wants to wait, only the possibility to suspend certain membership rights (including voting rights in the Council) in response to a “serious and persistent breach” of EU values. Brexit will mean applying Article 50 for the first time, seven years after its introduction – dashing hopes that it would remain merely symbolic.

### **The Objective**

Neither side – EU-27 or United Kingdom – is as clear about the goals of the British withdrawal process as in the negotiations leading to accession. In the latter case, enlargement doctrine and practice demanded that the new member accept the EU’s *acquis in toto*, moderated only by limited transitional periods. All that was needed was to regulate the modalities of acceptance, but not the substance of the relationship. When the remaining twenty-seven members negotiate with the United Kingdom over its departure the constellation is unlikely to be so one-sided. While the purpose of Article 50 is to release the former member from the treaties through a withdrawal agreement, both sides are likely to be interested in avoiding a complete and total rupture.

At the same time, the shape of any new arrangement with the United Kingdom as future non-member remains unclear. Will trade arrangements be reduced to a bare-bones free trade area with new non-tariff barriers and limits to trade in capital and services? Or should the Union grant the UK full access to the single market with its four freedoms, and if so, under which conditions? The relevance of existing arrange-

ments for cooperation and integration of third countries below the threshold of membership also remains unclear. Examples include the European Economic Area (EEA), the bilateral agreements with Switzerland and the comprehensive free trade agreement with Canada (CETA), as well as the association agreement with Ukraine and the customs union with Turkey. For the withdrawal agreement it should suffice for the twenty-seven to agree that the separation occurs with the intention of replacing membership with some form of association. They will also then have to define the conditions the British must satisfy for that to occur.

### **Three Separate Agreements**

The European Union now has to set in motion three new agreements: (1) the withdrawal agreement with the United Kingdom, (2) an agreement regulating relations with the non-member United Kingdom, potentially a form of association under Article 217 of the Treaty on the Functioning of the European Union (TFEU) or an international agreement under Article 218 TFEU, and (3) revision of the treaties following the departure of the United Kingdom under the procedures of Article 48 TEU, in order to remove all protocols relating only to the United Kingdom. The latter represents an additional hurdle, because altering the treaties requires unanimity of the member states and the approval of the European Parliament to avoid calling a Convention for these technical changes, and ratification by all twenty-seven member states according to their own constitutions.

Unlike the act of accession, a withdrawal agreement in accordance with Article 50 cannot itself include treaty amendments; these would occur in a separate step. Such a procedure fundamentally offers an opportunity to make other minor changes to the treaties – without having to hold the Convention that would normally precede the conference of representatives of the govern-

ments when amending primary law. Especially in politically turbulent times, complications can be expected from countries seeking opportunities to negotiate reductions in the *acquis communautaire* and strengthen national veto options. Thus from the EU perspective it would be advisable to coordinate actual withdrawal and treaty revisions so that both come into force at the same time, to avoid a limited revision being instrumentalised to open up the treaties across the board.

### **Withdrawal Agreement and New Relationship**

Tying together the withdrawal agreement and the new arrangements will be politically tricky. The withdrawal agreement is already likely to involve ideas as to how the EU-27 and the United Kingdom wish to shape their future relations. Rigid insistence on a sequence where the withdrawal agreement has to be in place before negotiations on the new relationship start is not an option, as Article 50 states that the withdrawal agreement should take account of “the framework for [the withdrawing member’s] future relationship with the Union”. While that provision may make sense in the abstract, it raises political and practical difficulties if interpreted as conditionality.

With experience showing that negotiating a probably very comprehensive association agreement with the United Kingdom will take years, the EU should interpret the “framework” referred to in Article 50 to mean only a rough outline. Another factor is that the withdrawal agreement must only be approved by the European Parliament, whereas redefining the relationship will most likely require a mixed agreement ratified by the national parliaments.

The United Kingdom remains a member of the European Union until the withdrawal agreement comes into effect. The Union must avoid anything that gives London additional incentives to delay its – chosen but likely painful – withdrawal in order to enjoy the fruits of membership for as long

as possible (“the best of both worlds”) and to secure optimal new terms for itself. This is why EU representatives stress that there can be no one-sided gradual withdrawal from the duties of a member state, because the United Kingdom’s rights also remain undiminished until the date it leaves. The United Kingdom remains bound by the duty of sincere cooperation, and subject to the jurisdiction of the European Court of Justice. But with Scottish separatism and internal frictions within the Conservative and Labour parties likely to colour British strategy and tactics, it is easy to imagine tensions with London arising in the European Union’s everyday business. Whether to include or exclude the United Kingdom in ongoing and new EU legislative activities will also be a relevant question. Pragmatic political solutions are required to give those affected legal security.

In the course of negotiations over the two agreements, it will become apparent that the simple referendum question “remain or leave?” was self-deceptive and misleading. For both sides want aspects of economic cooperation to continue after the United Kingdom leaves. Given that Article 50 states that “[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement”, a further element of the exit doctrine should be to clarify that a partial withdrawal (in the sense of graduated membership) cannot be the outcome of the exit talks. The danger of overloading the withdrawal agreement is already great. But the European Union would absolutely paralyse itself if it were to put the idea of associate membership on the table in the exit talks – as former British MEP Andrew Duff did some years ago. The European Union’s “Article 50 doctrine” should insist that such innovations are only addressed in separate negotiating contexts, if at all.

As yet it is neither clear what the United Kingdom wants, nor what the European Union is willing to accept. London is certainly the *demandeur* as far as the new arrangement is concerned. Placing condi-

tions on future access to its internal market is not a punishment imposed by the Union but a necessary consequence of the British decision to leave. Europe's citizens and economic actors will have costs to bear, and it will not be possible for everything to remain largely as it was. A country that declines the responsibilities of membership cannot enjoy the same rights as members. A discussion can be expected among the member states as to whether to grant the United Kingdom a soft landing or to take a hard line "pour encourager les autres". The exit talks would be easier and the prospects of a soft landing better if the United Kingdom had taken the time to explore the possibility of joining the European Free Trade Association (EFTA) for example. It could potentially have joined the EEA's EFTA pillar or made proposals for a new third pillar.

Further elements of an exit doctrine are thus seen emerging. Firstly, the European Union should not formally tie the withdrawal agreement to the treaty regulating the new relationship. Secondly, it should restrict the withdrawal agreement to the immediate requirements for removing a country from the Union. Thirdly, it should insist on preserving the *acquis*. The EU-27 should also rapidly agree on their conditions for granting Britain continuing access to their internal market. At the same time, the Commission should present a framework for the withdrawal agreement that outlines which matters need to be negotiated – and thus also defines what matters may be left to the agreement governing the new relationship.

### **A Long Road Out**

Under Article 50 the treaties cease to apply two years after the affected member state's notification of its wish to leave. This sunset clause is intended to prevent prevarication and delaying tactics. In practice, however, even longer negotiations can be expected, proceeding in three phases.

We are currently in the first phase, after the referendum but before notification

under Article 50. Given that the two-year period for negotiations begins with notification, London will choose the time to its advantage. The new UK Prime Minister Theresa May has already signalled that this notification will not come before the beginning of 2017 and may be delayed even further. In the interim, the British can be expected to probe the Union's unity, and its resolve to abide by its refusal of informal talks.

Phase two begins with notification. At this point, Brussels will know that London really intends to leave, and is not seeking special talks outside of Article 50. Now the Union will need to quickly name its chief negotiator and clarify its internal procedures in order to ensure that it can act collectively in explorations and talks. The twenty-seven EU leaders meeting informally in June already noted this, and thus defined a further element of the exit doctrine. Germany could be particularly tempted to enter into separate bilateral talks, because London regards Chancellor Angela Merkel's government as its most important partner in the Union. In order to restrict tactical manoeuvring on both sides it is thus imperative to clarify the ground rules; that means London triggering Article 50. Legally and politically there should be scope for London to reverse its decision at any point before the withdrawal agreement is in force and withdraw its notification, for example after new elections or a referendum over the withdrawal agreement.

In the second phase the withdrawal agreement must then be negotiated within two years. An extension of the deadline is possible with the approval of both sides, which in the case of the EU-27 must be unanimous. Two years is an extremely short window for such talks. But none of the member states – the United Kingdom included – would prefer an abrupt and unregulated separation over a negotiated departure. In view of the unsettling effect on business and financial markets, both sides are also likely to be interested in transparency over the exit doctrine and

the timetable, in order to keep the process predictable. In the European Union's political calendar the next elections for the European Parliament represent the latest date by which Britain's exit should be completed. That would mean by the first half of 2019 – which would be difficult if the UK has not triggered Article 50 by spring 2017.

While the United Kingdom leaves the European Union as soon as the withdrawal agreement comes into force, that does not mean that the talks are over. In the third phase the new relationship will have to be defined in all its details. Comparable treaties have required years of negotiation followed by sometimes prolonged ratification. So it may be a long time before relations between the European Union and the United Kingdom have been completely and properly reordered.

### **Negotiating Parties**

The European Union of twenty-eight continues to exist until the United Kingdom leaves, formally with full British participation. Only for the purpose of negotiations will there be an EU of twenty-seven, where the United Kingdom is not represented in the Council and the European Council (but remains in the European Parliament and the Commission). The British have already withdrawn from their planned Council Presidency in the second half of 2017.

In the EU-27 the threads of the negotiations will come together in the European Council, which will set the mandate for the negotiations over the withdrawal agreement. The agreement itself will be negotiated and concluded by the Union, in other words by the Council, Commission and Parliament. Under Articles 218 and 238 (3b) TFEU, the Council takes this decision by a larger than usual qualified majority (at least twenty member states representing at least 65 percent of the population of the remaining twenty-seven member states). Individual states may thus still be outvoted. The Commission (or in the case of foreign and security policy the High Representa-

tive) presents recommendations to the Council, which then approves the negotiating mandate and appoints the chief negotiator.

The chief negotiator need not automatically come from the Commission or the member state holding the rotating Council Presidency. It would make sense to form a permanent core team around the President of the European Council, in order to involve the national leaders, and the Commission to represent general EU interests, in close coordination with representatives of the European Parliament. The status of the Commission as the guardian of the treaties would suggest assigning it a strong role. It would examine the legal impact of British withdrawal for the Union. The repercussions on individual member states may differ, for example in relation to market access or budget questions. The task of exploring the member states' positions and arriving at a joint negotiating platform will fall to the Commission. The Council will establish a special committee for the talks, which are also likely to be a permanent item on the agenda of the European Council.

### **Coming Full Circle on Both Sides**

Is the European Union losing Britain for lack of flexibility? One could argue more credibly the other way around that the Union's flexibility has ultimately failed to pay off. If it had followed Britain's preferred principles, the Union would today be limited to a free trade area lacking the political institutions to establish the framework for the single market, while including Turkey. The United Kingdom joined as a full member and exerted decisive influence on the first treaty change, the Single European Act of 1987. But since 1992 London has incrementally distanced itself from full membership, in order to reconcile political integration with its concept of an enhanced free trade area. Prime Minister John Major returned from Maastricht celebrating "game, set and match for Britain", with

opt-outs for social charter and single currency and a ban on the F-word (“federal”). Since then the United Kingdom has manoeuvred itself steadily to the margins and de facto partial membership – but under the privileged condition of full participation in decision-making. Yet even this intermediate status ultimately failed to persuade the population to vote to remain. Whatever its post-exit status, the United Kingdom will no longer have a seat at the table and its influence will be considerably diminished.

Matters have thus come full circle for both, the United Kingdom and the European Union. The British joined the then EEC in 1973, under the false premise of belonging only to the Common Market and evading the compulsions of political integration. Britain has now corrected that misunderstanding, and this could turn it into a pole for like-minded countries within and outside the Union. The consequence could be a regrouping of European states along the question of sovereignty, with some seeking to form the Europe of integration while others – like in the 1950s – pursue intergovernmental cooperation. After a long period of enlargement the European Union shrinks visibly for the first time (leaving aside the departure of Greenland in 1985). In the long run, however, Brexit bears the potential to boost the course of integration towards consolidation of membership, concentration on core tasks and renewal of political integration.

### **Political Renewal of the Union**

Brexit hits the European Union during a phase of weakness, with political and social grumblings in many member states. This narrows its options and ability to systematically tackle the structural deficits that have emerged, such as within the monetary union and the Schengen system. Without judicious political guidance the British withdrawal process could spark a conflagration of fragmentation and disintegration.

The discussions already under way in various configurations within the EU-27 serve largely to explore political sensitivities in the member states and identify concepts and approaches, rather than representing fixed subgroups in a new power structure. That is the context for the meeting of foreign ministers of the six EU founding states in Berlin the weekend after the referendum, for the German foreign minister’s meeting with his colleagues from the Visegrád group, and for the German Chancellor’s discussions with the French President and the Italian prime minister the day before the first summit without the British prime minister on 28/29 June 2016. However, the leading group that should assemble around Germany and France needs to extend beyond the founding states. Other potential members could include Finland (from the north) and the Czech Republic (for the Visegrád states). The task of this group would not be to manage the exit talks, but to politically reinvigorate the Union. That is the background to the announcement of the twenty-seven heads of state and government that the strategy and reflection process will extend at least until the sixtieth anniversary of the Treaties of Rome in March 2017.

It will be important for the European Union to switch quickly to a Union of twenty-seven with an ambitious programme of renewal. For that reason it should already – in parallel to the first phase of the exit talks – initiate the necessary steps to improve refugee and asylum policy, strengthen coordination of economic policy, and expand the security union. The economy, and above all the internal market, will remain the pacemaker of political integration. Motivation for realising a European or multinational border and coast guard and other elements of a security union is most likely to come from interest in preserving the four freedoms of the internal market. The renewal agenda needs to be initiated before 2017, when elections are due in three founding states: Germany, France and the Netherlands.

This not a struggle over “more” or “less” Europe that would do nothing but further paralyse the European Union. Practical steps are needed, making full use of the existing possibilities of the treaties. Member states seeking to obstruct joint solutions – whether supranational or inter-governmental – should expect to witness the application of qualified majorities and enhanced cooperation. A range of different speeds must be expected, and potentially also change in areas such as monetary union or Schengen. The possibility of one or other member seeking to copy the British example, or at least threaten to do so for internal or European policy aims, cannot be ruled out. But aside from Germany and France no other EU member wields a potential threat like the United Kingdom’s. The European Union will therefore have to demonstrate that it is immune to blackmail. And that means systematic application of Article 50.

### **Germany in the EU-27**

Germany’s role in the EU-27 will be even more central than in the Union to date. This spotlights the question of German leadership. For Germany, voluntary integration in the European Union remains key to guarding its political and economic interests and exerting influence on the regional and global order. Germany may weigh up its interests over specific questions, but its fundamental choice will not waver. The benefits of membership are so obvious that Germany should be prepared to make even larger political and financial investments. For example, it would be desirable for Berlin to at least tolerate redistributive components and elements of Keynesian policy in the Eurozone. If Germany is to secure what has been achieved in the EU-27, it must do more than act as “status quo power” (“Beharrungsmacht”: Peter Becker), important as that role may be.

Brexit’s impact on the EU budget are not yet foreseeable. It has yet to be decided how the shortfall caused by loss of the British

contribution will be made up, nor whether the distribution rules will change. With respect to the next financial framework post-2020, Germany should be prepared to negotiate at a more fundamental level in relation to spending priorities, the budget ceiling and alterations to the own resources system. Berlin can also inject movement into the European Foreign and Security Policy, to strengthen the centralisation process already initiated with the European External Action Service and the High Representative and make the European Union – collectively or led by a directorate – a more viable external actor. After the British referendum German Foreign Minister Frank-Walter Steinmeier and his French counterpart Jean-Marc Ayrault published a paper naming important priorities in this connection, including improving strategic analysis capacities, civil and military crisis management and a European Semester on defence capabilities.

### **The Legitimacy Deficit**

The Brexit vote has reignited the debate about the European Union’s deficits and perspectives. With Germany and France the federalist and Gaullist options will survive. But even these two crucial members do not on their own possess the political strength to answer fundamental questions such as whether the Union should move further towards a parliamentary or a presidential system of government. Proposals to directly elect the Commission President or introduce a division of powers on the national model are therefore half-baked and dangerous. Institutional reform should proceed incrementally in the foreseeable future, for example in the context of the special structures for the Eurozone. The EU system is still feeling its way and needs the possibility to correct its course.

The European Union’s legitimacy deficits could be reduced if its performance record were better. It must prove that it contributes to employment, economic growth and internal security, and that this output is

recognised by member states, political parties and citizens. The pro-European parties also need to address the politicisation of EU issues in national arenas and tackle the debate over alternative policies, both between one another and vis-à-vis anti-European and Eurosceptic anti-establishment parties. Elections in several member states in 2017 will force parties to take positions on questions relating to the European Union, for example in asylum and refugee policy or freedom of movement in the internal market.

The concrete discussion needs to be conducted in the member states where politics comes closer to the citizens than in the civil society forums organised by the Brussels institutions. It is not only the European Union's ability to solve problems that has fallen into disrepute in recent years, but its very political order. A tone of belittlement if not denigration of the European Union as a democratically legitimised frame of action has crept into political and media discourse. Yet if the remaining twenty-seven ask the Monty Python question – what did the European Union ever do for us? – the answer can be found in the very real worries now troubling the British: who will compensate the loss of regional development funding, what will happen to access to the Spanish health system, and how can British students continue to participate in the Erasmus programme? The key to restoring confidence and support for the EU system lies with the member states and their domestic policies. Negative examples include deliberate rule violations by individual governments, a plebiscite-backed refusal to implement (as in Hungary) and Commission partiality, for example in the monitoring of national budgets.

Germany's national political debates must also do a better job of highlighting how international factors play into acute problems and where the possibilities and limits lie when political challenges are addressed at the national, European or some other level. In this context it is also time to tackle populist slogans promising

to “take back control”. Such claims played a role in the British leave campaign, as well as in the German refugee debate. In this controversy national governments – not least the German – must explain to their populations what effects the European Union has and does not have on its member states, how sovereignty may be strengthened if pooled at the European level, what options and resources they want to give the EU, and which they do not.

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ISSN 1861-1761

Translation by Meredith Dale

(English version of  
SWP-Aktuell 42/2016)