

Brexit: When the music has to stop

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PARTY TIME

The party conference season has not quelled Britain's mounting crisis over Brexit. Rather the contrary. Each conference served to reinforce the party stereotype. Taking the political class as a collective, no onlooker could be left enriched by the talent on display. When in the final act Theresa May pranced on to the stage of the Conservative conference to ABBA's Dancing Queen, an *Economist* journalist tweeted "British politics is an absolute freak show". He was not wrong.

What do the conferences tell us about the disposition of the House of Commons as it faces up to some crucial votes? The Liberal Democrats (12 MPs) want to overthrow the result of the 2016 'In/Out' referendum whose holding they had themselves promoted. Vince Cable, Lib Dem leader, will oppose the Withdrawal Agreement he has not seen: instead, he promotes another referendum – a 'people's vote' - to 'exit from Brexit'. He wants an extension of the Article 50 process to allow for this. Caroline Lucas, the Greens' sole MP, also takes this line.

The Scottish Nationalists (35 MPs) are less categorical. Nicola Sturgeon, SNP leader, warns against no deal but continues to sit on the fence about her parliamentary tactics and is wary about another referendum. The Welsh Nationalists (4 MPs) follow suit.

The position of the Labour party (262 MPs) is a wonder to behold. After lengthy conference contortions to disguise deep splits in Labour ranks, their final position is to be against Mrs May's deal, against no deal and against Remain. They might or might not support a second referendum. In a potentially significant move, however, Jeremy Corbyn admitted that if the government moved to stay in the EU customs union he might revise his blanket opposition to the deal.

For their part, the Tories (317 MPs) made no attempt to hide their divisions, with Boris Johnson campaigning to 'chuck Chequers' and oust its prime minister perpetrator. He even argues for an extension of Article 50 in order the better to plot. The Brexiteers oppose a second referendum because they might lose it. Theresa May also opposes another referendum - what she cleverly calls "a politicians' vote" - on the grounds that the people have spoken once and commanded her government to deliver Brexit. She stubbornly refuses to rule out no deal, although she warned her conference that there is "no perfect Brexit". She can say that again.

The government is supported ostensibly by ten British nationalists ('loyalists') from Northern Ireland's Democratic Unionist Party. But they are right-wing Brexiteers and cannot be entirely relied upon to back the Withdrawal Agreement in the long-expected 'meaningful vote'.

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MEANINGFUL VOTE

To win Mrs May needs 320 votes.² At this stage it is impossible to predict if she has them. What is clear after the conference season is that no parliamentary leader will be able to corral all his or her MPs to vote in one direction. Several MPs on both the Remain and Leave sides of the argument have said they will not follow their party whip; others may abstain from voting at all.

Confusingly, while starkly opposing positions have been taken for and against the so-called 'Chequers deal', it is not that which will be brought before the Commons for a vote. What will be tabled is a compromise package deal reached between the EU and the UK government made up of two parts, the Withdrawal Agreement and the Political Declaration on the future relationship.

The 'meaningful vote' will be take it or leave it. For both procedural and political reasons it is highly unlikely that the Commons will at that stage be able to qualify its approval or disapproval (except *in abstracto* by abstaining).³ The 'people's vote' brigade will have a later, better chance to advance their cause by amending the EU Withdrawal Agreement Bill (WAB). But the government will only introduce the WAB if it has won the earlier 'meaningful vote'. Furthermore, any amendment to WAB that has the blunt effect of obstructing Brexit is unlikely to be admissible under parliamentary rules. Even were the Commons (or the Lords) to vote successfully to insert a second referendum into the WAB process, parliament would then find it impossible, on the evidence of the party conferences, to agree on the question to be asked in the poll.

A similar predicament would arise if the Article 50 talks failed to reach a deal at all or if the deal reached were then to be rejected by the Commons in the meaningful vote. Although the government would have to make a statement to the House before the end of January, the prospect of MPs in disarray finding a consensus on an alternative prospectus is slim indeed. The government in those circumstances would almost certainly have to resign, and a chaotic general election would ensue. Consistent opinion polls suggest a dead heat between Labour and Conservatives, postulating a new House of Commons that could not sustain an effective government.

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SHOWDOWN AT SALZBURG

The EU clock, meanwhile, continues to tick towards midnight on 29 March. The Union will not agree to extend the Article 50 deadline merely to indulge the second referendum campaigners or the anti-May plotters. Practical and legal considerations aside, the EU leaders are very sensitive to the charge that in extending Article 50 they would be guilty of seeking to prevent the UK from leaving — the very opposite of the intention behind the drafting of Article 50. It would be helpful if EU leaders were to confirm their commitment to the scheduled timetable. It is a pity that they missed their opportunity to do so at their informal summit at Salzburg on 20 September.⁴ They also failed to send a positive signal about the possibility of extending the transitional period.

A common criticism of Theresa May is that she never listens properly to what she is being told. At Salzburg Donald Tusk, President of the European Council, took care to ensure that she heard from him why the integrity of the single market had to be protected. He repeated his blunt message to the press, and Mrs May flounced back to London to declare a crisis.

Mrs May needs to sharpen up her emotional intelligence and, at home and abroad, make the best possible case for moving forward on the basis of compromise in search for the less than perfect Brexit.

The element of crisis at Salzburg might have helped the Prime Minister through the Tory party conference, but it also provoked other cabinet ministers — notably Britain's latest version of Foreign Secretary — into mounting fatuous, contemptible and wholly counterproductive attacks on the EU. Mr Tusk's job is to ensure calm deliberation at the European Council meeting on 17-19 October. He remains unapologetic about Salzburg:

“Unacceptable remarks that raise the temperature will achieve nothing except wasting more time. What needs to be done is maximum progress by the October European Council. I was party leader myself, for fifteen years, and I know

what the rules of party politics are. But now, once the Tory party conference is over, we should get down to business.”⁵

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MODIFYING THE CUSTOMS PROPOSALS

Which elements of Chequers and the subsequent White Paper need to be changed? First, the British must ditch their proposal for a Facilitated Customs Arrangement. It is unworkable, at least in its present form. There are legal and practical problems in delegating to the UK the EU's customs control and tax collection, and the costs to business would be large. In its place, the UK has resurrected an earlier proposal — namely, that it remain in the EU's customs union beyond the transitional period in order to ensure that business only has to adjust once to a new customs relationship. This temporary arrangement could be delivered through a customs union between the UK and the EU based on a shared external tariff and without customs processes and duties between the UK and the EU. The arrangement, and the guarantee of the Irish 'backstop', would remain in force until such time as a new, permanent customs cooperation agreement had entered into force.

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The EU wishes to ensure that the UK's proposed temporary customs arrangement will not become a permanent fixture, allowing the British to enjoy the fruits of the internal market without respecting all its disciplines. Formulae are being discussed to ensure that the overriding objective is the accomplishment of a final Association Agreement which guarantees a new balance of rights and obligations that encourages commerce while constraining British free-riding. Safeguard clauses will be included to ensure that either the UK or the EU may take proportionate action to redress any imbalance arising.

THE IRISH QUESTION

Such an arrangement would help to resolve the difficulty over the Irish border. In her angry statement reacting to Salzburg (21 September), the Prime Minister seemed to

give the DUP an effective veto over any new regulatory and customs arrangements between the UK and the EU.

But Mrs May misinterprets the Good Friday Agreement, which gives oversight of customs matters to the intergovernmental North-South Ministerial Council (of which the Irish government is a member) and not to the Executive and Assembly at Stormont. Her error does not matter for the moment because neither Sinn Fein nor the DUP is brave enough to resurrect their attempt at power sharing in the devolved administration before Brexit Day on 29 March. The Irish government is rightly concerned, however, that London may collude with the DUP later in the Brexit saga when the long-term Association Agreement has to be agreed and ratified.

Many at Westminster have never bothered to understand the constitutional nature of the pooling of sovereignty with the Irish Republic that the 1998 Belfast Agreement determines. So they fail to see that the Irish peace process does not belong unilaterally to the UK, and neglect the fact that the EU itself is a guarantor of the process and will fight hard not to squander it. Last December's Joint Report stipulated that no new regulatory barriers would be imposed on trade between Great Britain and Ireland unless they were consistent with the Good Friday Agreement. The EU's chief negotiator Michel Barnier has been trying to de-dramatise the issue, suggesting ways to make customs controls on goods and agri-products flowing East to West across the Irish Sea effective but not obtrusive. As these regulatory checks are already routine, strengthening them would not seem to raise constitutional issues.

In December 2017 Mrs May accepted in principle that the Irish backstop is a precondition of any Withdrawal Agreement. The backstop is the legal guarantee that if the UK and the EU fail to negotiate a new Association Agreement, the terms of the Good Friday Agreement will continue to be honoured. Mrs May accepted the Joint Report under some duress to progress to the next stage of the Article 50 talks she had triggered, but she immediately raised political objections to the implementation of the backstop in practice.

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We have come now to the point where, to complete the Article 50 process, Mrs May must face down the DUP MPs at Westminster. Mr Barnier and Leo Varadkar, Irish Taoiseach, are working hard to be persuasive, but they have few votes in the Commons. The UK Parliament will finally have to accept that the collapse of Article 50 and a chaotic no deal would mean the re-erection of a hard

and dangerous Ulster border which would not only ruin the fragile economy of Northern Ireland but could also pitch the island of Ireland into a forced reunification in the worst possible circumstances.

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SERVICES AND MOBILITY

The UK is proposing to align voluntarily with some but not all of the EU *acquis* in order to gain access to the single market. The EU fears that the British are planning to undercut European social, technical and environmental standards and gain unfair competitive advantage. The combative tone of the Tory party conference has heightened those fears. Labour's policy of wanting the benefits of the customs union without the burden of internal market rules, especially free movement of people, is less aggressive but scarcely more helpful. If the EU is to be persuaded to accept the British proposal for a common rulebook for goods and agri-products, the UK will have to agree to widen the scope of those common rules to include social, consumer and environmental standards.

London also needs to offer more on services. Since it is people who provide services, more freedom to carry services across the Channel, and a more liberal attitude on both sides to the establishment of service companies, would open the way to agreeing an ambitious 'labour mobility framework' (as Chequers describes it). This solution would be short of the freedom of movement of persons so integral to the EU's single market, but it would ensure that EU citizens and their families could still expect employment and decent treatment in the UK. If it maintains its Brexit policy of planning to treat workers from the EU in the same way as it treats workers from the rest of the world, British citizens working in the EU can expect real difficulties. The application of restrictions on EU citizens moving to the UK will be met reciprocally by EU states, to the detriment of all.

The inclusion in the Association Agreement of a clause similar to that in the European Economic Area treaty providing for emergency controls to stem immigration would be sufficient to justify the UK government's claim that they had at last 'controlled' immigration.⁶ In any case, public opinion in Britain seems less alarmed about immigration today than it was in 2015-16 at the height of the Syrian crisis. Fewer EU citizens are attracted to working in Britain because the pound has lost 15% of its value since the referendum. And now British employers

are complaining about a growing skills shortage in many, if not all sectors of the economy: London commuters angry about the delay in the completion of Crossrail need look no further. The Conservative government's new proposals to ration immigration by skills and salaries already look out of date.

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GOVERNANCE NEGLECTED

Throughout the Article 50 talks there has been too little focus on governance – that is to say, how the Withdrawal Agreement and the future Association Agreement are to be run. As a general rule, the British have never taken to the EU institutions: accusations of bossiness and intrusion are used by Brexiteers to vindicate their referendum victory. Jean-Claude Juncker and Michel Barnier are the butts of frequent insults in the London popular press. Against this background, it is hardly surprising that the EU negotiators do not trust the UK government. British protestations that the UK can be relied on to respect the EU *acquis* where relevant are wholly inadequate.

It is true that the EU Withdrawal Act 2018 aims to retain EU law in the UK (as long as it is not altered unilaterally by Westminster), but EU law will be preserved without the primacy and direct effect that it enjoyed while the UK was still a member state. The proposed Joint Committee envisaged both for the transition period and as part of the future Association Agreement goes some way to mitigate EU fears. But British ministers are still reluctant to acknowledge, in private or in public, that future joint governance arrangements will mean respect for regulatory surveillance by the Commission and, ultimately, adherence to the jurisprudence of the European Court of Justice in matters of EU law. One can only lament the little progress made in preparing the EU and UK legal systems for their impending separation and their eventual resettlement in a new joint court structure.

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Nor has the UK made much progress in putting in place the new regulatory apparatus that will be required

to be monitored and trusted, sector by sector, by the Commission and the Court of Auditors. Viewed from Brussels, the playing field across the Channel looks distinctly bumpy. Confidence building measures are badly needed. Here the transition period comes into play. It must be used not only for the negotiation of the new comprehensive Association Agreement but also to prepare the UK domestically to operate as an EU associated country.

At present, and to the alarm of business, Whitehall is struggling to cope with the transformation of the British state that is required by its new status in Europe. It is not enough for companies to change their business models to adapt to the new situation. Government too must prepare new ways and means to ensure satisfactory and verifiable regulatory equivalence with the EU *acquis* for rules of origin, industrial processes, product standards and data protection. If the Commission is to be persuaded to out-source regulatory checks to British customs and excise officials, not least for Irish Sea traffic, it will require powers to investigate and verify conformity with single market norms.

We can be reasonably confident that the Withdrawal Agreement, which is a weighty and technical treaty, will succeed in extricating the EU and the UK from their mutual rights and obligations by 29 March 2019.

CAN THE DEAL BE DONE?

The scramble is on to reach agreement on all outstanding issues in time for next week's European Council with a probable special summit across the weekend of 17-18 November. The deal will not be perfect. There will be trade-offs. There can be ambiguity. Nevertheless, we can be reasonably confident that the Withdrawal Agreement, which is a weighty and technical treaty, will succeed in extricating the EU and the UK from their mutual rights and obligations by 29 March 2019. It will seal the deal on the Irish backstop. It will provide for an extendable transition period.⁷

More interesting is the accompanying Political Declaration on the future relationship. There is an important debate to be had about the legal status of this document. I have made the point previously that it is wrong to dismiss it as 'non-binding'. But what is vital in the next few days is that the Political Declaration paints a clear and positive picture of a future dynamic Association Agreement. Merely trotting out EU legal orthodoxy will be sterile. Repetition of the EU's cardinal principles for the negotiation of free trade agreements will be inadequate.

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No partnership works well if it is static. While divergence is the order of the day today, it might not be so for ever. New challenges, for instance in the digital economy or energy field, will require renewed conversation between London and Brussels. The European Union itself, especially shorn of British inhibitions, may take critical constitutional steps in the federal direction that will prompt a reconfiguration

of its neighbourhood policy.⁸ Security threats from Russia, not least, and instability in the transatlantic relationship are problems shared by the UK and the EU: joint undertakings, impossible today in the context of Brexit, might very well become obvious and practicable tomorrow.

The Political Declaration is a memorandum of understanding about a deep and special partnership. It can be an attractive document, helping to dispel the gloom and despondency which has fallen on this Brexit business. It should guide the EU member states and its institutions into agreeing on a mandate for the negotiation of the Association Agreement. It might secure at Westminster the beginning of a bipartisan consensus about Britain's future as a European country.

¹ Parliament has ensured that the government will not be able to ratify the Withdrawal Agreement until Parliament has passed a motion to approve it, along with the Political Declaration on the long-term UK-EU relationship (section 13 of the EU Withdrawal Act 2018). It has also insisted that primary legislation is needed to implement the Withdrawal Agreement.

² The House has 650 members, but the Speaker and his three deputies do not vote (except to break a tie) and the 7 MPs from Sinn Fein do not take their seats. Sylvia Hermon is a moderate Independent MP from Northern Ireland who will probably incline to support the Withdrawal Agreement.

³ See *The Brexit Endgame: a guide to the parliamentary process of withdrawal from the EU*, The UK in a Changing Europe, 29 September 2018.

⁴ For analysis of the Chequers agreement and the White Paper, see my previous paper *Brexit: Beyond the transition*, EPC Discussion Paper, 21 August 2018.

⁵ Press conference after a meeting with Leo Varadkar, 4 October.

⁶ Article 112 of the EEA Treaty. See Jean-Claude Piris, *Why the UK will not become a member of the EEA after Brexit*, E!Sharp, September 2018.

⁷ See Tobias Lock and Fabian Zuleeg, *Extending the transition period*, EPC Discussion Paper, 28 September 2018.

⁸ The constitutional debate has already opened up with an eye on next year's elections to the European Parliament and Commission. See especially <http://www.spinelligroup.eu/2018manifesto> and <http://bruegel.org/2018/09/one-size-does-not-fit-all/>

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