



After Brexit:

A New Association Agreement Between Britain and Europe

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Summary

The British people have voted for their country to leave the European Union. So leave it will. As Prime Minister Theresa May so lucidly puts it, “Brexit means Brexit”. That much is clear. Yet the scale of risk for the British state and its people is still unclear. For the rest of Europe the strategic rift with Britain will have major long-term consequences.

Luckily, although Brexit is a huge reversal of fortune for the European Union, it has a constitutional device for dealing with the rift – Article 50 – about which much has been said and written, not all of it accurate.

This essay looks at the situation in more detail from both the British and European angle. First, it examines why the EU allows one of its member states to leave it and how Article 50 will work in practice. Second, it explores the options for a new relationship between the United Kingdom and the EU, and make a recommendation on what this should be. Third, it argues that Brexit offers the chance of a fresh start for both Britain and Europe.

About the Author

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George Hodan

PART 1: ALL YOU NEED TO KNOW ABOUT ARTICLE 50

Article 50 in theory: origin and rules

The founding fathers of the European Union were building for the future. The early treaties spoke of 'destiny henceforward shared' and 'ever closer union'. The European Community (then Union) was designed to widen its membership and deepen its integration simultaneously, in parallel. Despite a number of political setbacks and economic difficulties, each successive treaty conferred new competences on the European Union and accorded its institutions new powers. Although Norway and Iceland baulked at membership, the rest of the continent has sought to join the EU, succeeded in joining, or still seeks to join. Enlargement is one of the EU's fundamental missions, projecting and sharing its values of peace, liberal democracy and the rule of law to southern and eastern Europe. EU membership remains open to any European state that can match and promote its values (Article 49 TEU). The way the EU has conducted its enlargement policy over 40 years, growing from six member states to 28, is generally thought to have been a great success.

It was in that spirit of optimism that the Convention of 2002-03, which had been established to write a new constitution for the enlarged Union, decided to make a provision for a member state to secede. The first proposals for a secession clause came from the federalists in the Convention.¹ They argued that as the EU was about to make a decisive step forward in a federal direction it was expedient, as well as democratic, to let any current member state which chose not to accept the federalist advance to step aside without causing an insuperable obstacle to the wishes of the integrationist minded states. The idea of a safety valve attracted the eurosceptics in the Convention, many of them from central and eastern Europe who were not fully reconciled to sacrificing their national sovereignty to Brussels having just regained it from Moscow. The Germans were at first very much opposed to the inclusion of a secession clause until the Convention decided to concede to a British request that the constitution should allow not only for the powers conferred on the Union to be increased but also for competences to be repatriated back to member states.² The UK itself preferred to have a provision for the formal voluntary withdrawal of a state in order to preclude the possibility of the peremptory expulsion of a state found to be in error by its partners. It was left to Valéry Giscard d'Estaing himself, president of the convention, to add the stipulation that the withdrawal agreement had to be concluded within two years. Article 50 is the result, finally entering into force as part of the treaty of Lisbon in December 2009.

Article 50 of the Treaty on European Union

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the union shall 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. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

1. Namely, Andrew Duff CONV 234/02, 03-09-02 and Robert Badinter CONV 317/02, 30-09-02.

2. A concept now enshrined in Article 48(2) TEU.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Article 50 in practice and why it should be triggered sooner than later

None of the authors of Article 50 can ever have expected it to be used. But, as we know, on 23 June 2016 the British people voted to leave the EU, and this hitherto rather obscure article hit the headlines. During the referendum campaign, Prime Minister Cameron had promised to trigger Article 50 immediately in the event of a vote to leave. However, another promise broken, in fact he did not do so. At his last appearance at the European Council before leaving office in disgrace, Cameron merely confirmed to his colleagues what they had surely already read in the newspapers: that the UK was going. This fell short of the formal notification of the UK's intention to withdraw. But the European Council took immediate note of Brexit and, once Cameron had left the meeting, the 27 remaining leaders issued the following declaration:

"1. We, the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, deeply regret the outcome of the referendum in the UK but we respect the will expressed by a majority of the British people. Until the UK leaves the EU, EU law continues to apply to and within the UK, both when it comes to rights and obligations.

"2. There is a need to organise the withdrawal of the UK from the EU in an orderly fashion. Article 50 TEU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK's intention to withdraw from the Union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place.

"3. Once the notification has been received, the European Council will adopt guidelines for the negotiations of an agreement with the UK. In the further process the European Commission and the European Parliament will play their full role in accordance with the Treaties.

"4. In the future, we hope to have the UK as a close partner of the EU and we look forward to the UK stating its intentions in this respect. 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. Access to the Single Market requires acceptance of all four freedoms.

"5. The outcome of the UK referendum creates a new situation for the European Union. We are determined to remain united and work in the framework of the EU to deal with the challenges of the 21st century and find solutions in the interest of our nations and peoples. We stand ready to tackle any difficulty that may arise from the current situation."

Although many heads of government have made other statements since, both off the cuff and considered, it is this statement of 29 June that remains orthodox. Central to the thesis of the leaders is that **Article 50 is the only legal way out of the European Union; that the withdrawal agreement will be tough but fair; that until the UK regains the third country status it enjoyed before 1973 there can be no other Anglo-EU treaty signed; but that some durable settlement of Europe's British problem (and of Britain's European problem) based on a new relationship should be possible.**

It transpires that the accusation made by the remain campaign in the referendum that the leavers had no coherent alternative prospectus to EU membership was absolutely correct. What few had imagined possible, however, was that the British government also had made no contingency plans whatsoever for a No vote. So it is understandable that the new prime minister needs a bit of time to prepare herself and her party and everyone else besides before she invokes Article 50. Nevertheless, while a short reflection period can be tolerated, even welcomed, on both sides of the Channel, the suspicion lurks in Brussels that the UK will not really make up its mind about its future relationship with Europe unless and until Article 50 is triggered.

On 2 October the prime minister revealed that she intends to invoke Article 50 before the end of March. That is a welcome announcement and should go some way to dispel legal uncertainty. Ideally, she needs to send her letter to Donald Tusk, president of the European council, in time for it to be discussed at the next 'informal' meeting of the 27 heads of government scheduled for Valletta on 3 February.

One hopes that both sides will be ready to make swift progress in the negotiations. Prevarication will further damage investor confidence in the British economy. The risk of nationalist infection spreading from Britain elsewhere across Europe will grow as long as the EU remains destabilised by Brexit. Difficult elections in the Netherlands, France and Germany are already scheduled for 2017, and others might intercede in Italy, Greece and Spain. At home, the ire of the Brexiteers, both within and without the Conservative party, will be aroused if it is suspected that Theresa May is reneging on her pledge to pull the UK out of the EU. And lastly, faced with procrastination on the part of the UK, some of its erstwhile 27 partners will be sorely tempted to replace regret and civility for revenge and hostility. Nobody has quite forgotten Great Britain's reputation as *la perfide Albion*. Some see Brexit as treason, and fear that the British have bundled the EU into an existential crisis. At their second summit meeting, in Bratislava on 16 September, the 27 leaders found it necessary to remind themselves: "Although one country has decided to leave, the EU remains indispensable for the rest of us".

The idea therefore, peddled by some British remainers, that the invocation of Article 50 can best be left until after the formation of the new German government in November 2017 is simply preposterous. Brexit is not a unilateral event, of interest exclusively to the British, but a major crisis for the whole of the European Union: Article 50 is designed not only to extricate the UK from its membership commitments but also to limit collateral damage to the rest of the Union. Other matters press upon the agenda of the remaining EU – not least the continuing instability of the euro, refugees, illegal immigration, terrorism and insecurity to the east – for which Brexit is nothing but a huge distraction.

How to trigger Article 50: why the legal challenge for a parliamentary vote will not make any difference

The prime minister, in her capacity as a member of the European council, is empowered with direct effect by EU law to trigger Article 50 as long as Britain's decision to withdraw has been made in accordance with Britain's own constitutional requirements.

A number of lawyers, representing certain British nationals and other EU citizens resident in the UK, are litigating in the English high court against the invocation of Article 50 by the prime minister alone. The nub of their argument is that it would be an abuse of the prime minister's powers under delegated royal prerogative to treat such an important constitutional matter as an administrative step, without the say-so of the Westminster parliament (or at least of the House of Commons). Although they may be talking democratic sense, their legal case looks less than robust, resting as it does on the assertion that the referendum, albeit statutory, was merely 'advisory' and that the principle of national parliamentary sovereignty will be jeopardised by such a superogatory exercise of executive authority as the invocation of Article 50.

For one thing, the EU Referendum Act that introduced the Brexit referendum, passed by MPs at second reading on 9 June 2015 by 544 votes to 53, made no reference to a later, confirmatory vote of the Commons. No threshold for turnout or qualified majority hurdle was established in the legislation. The referendum was not subject to electoral fraud; voter turnout, at over 72 per cent, was in fact higher than that of the 2015 general election; and the margin of victory, at nearly four per cent, while not overwhelming was at least decisive. When MPs from all parties sanctioned the device of the In/Out referendum they were effectively bypassing parliamentary sovereignty. The commitment to let the people decide was also in the Tory party election manifesto, and was often repeated – without obvious objection from any other political party – in the run up to the referendum by David Cameron.

"of the House of Commons' 650 constituencies, 421 voted to leave the EU on 23 June"

In any case, the UK supreme court will decide in December on the matter of what are the UK's constitutional requirements for the invocation of Article 50. Whatever the legal outcome, one doubts that it will make much material difference. Of the House of Commons' 650 constituencies, 421 voted to leave the EU on 23 June. Only the bravest of pro-European MPs, like Kenneth Clarke, will be ready to countermand the expressed will of their own electorate by denying Theresa May the right to get going on Brexit.

Furthermore, as and when she does, May will be merely notifying her government's intention to withdraw the UK from the EU. The actual withdrawal will come only later, probably in two years' time, either at the entry into force of a successful withdrawal agreement or, in the case of no agreement, when the EU treaties shall simply cease to apply to the UK.

The prime minister has decided to axe the European Communities Act 1972 as an early guarantee that the UK is headed out of the EU. It is important to note, however, that the UK's accession to the EC in 1973 was done by royal prerogative and not by act of parliament: the EC Act merely gave legal effect to the treaty of accession. Conversely, simply to repeal the 1972 Act will disrupt the operation of UK membership (in breach of EU law), but it will not be enough by itself to withdraw the UK from EU membership. A new treaty is needed to secede just as it was to accede – and that is the Article 50 agreement.

How Article 50 will work: decision-making and issues to discuss

The authors of Article 50 have been criticised for being unclear. Article 50 is a *lex specialis*, and its procedures are abnormal in that it (a) kicks out the seceding member state from the start, (b) gives a specific role to the European council (to receive the notification and to issue guidelines), (c) confirms a decisive role for the European parliament, and (d) allows the council to conclude an agreement by qualified majority vote rather than unanimity. Otherwise the normal procedures for the conduct of international negotiations will apply, as laid down in Article 218 TFEU. So the European council, having received the formal notification from London, acting by consensus without the participation of Theresa May, will issue guidelines to the commission, and authorise it to prepare a negotiation mandate. The council will agree the mandate by QMV and appoint its own special committee to liaise with the commission and monitor operations.

There has been some idle press speculation about a turf war between the commission and Council over who should be in charge of Brexit. Didier Seeuws has been appointed by the European council as their leading official; Michel Barnier has been appointed to head the commission's negotiating team; the European parliament has nominated the Liberal leader Guy Verhofstadt to be its Brexit negotiator. All three men are experienced and diligent – and, again contrary to some media comment, none is Anglophobe.

Within two years, if all goes well, the commission will propose to the Council that the agreement shall be concluded. At that stage the European parliament, which will have involved itself as closely as possible in the negotiations, will be asked to give its consent to the agreement, acting by simple majority vote (including the votes of British MEPs).³ To close the agreement, the Council will act by super QMV (minus the Brits) – needing the consent only of 20 of the 27 states. At that point, the Westminster parliament will certainly get to vote on the withdrawal agreement either in terms of a negative resolution or, less likely, in the form of a legislative act.⁴ Deliberately, however, separate ratification by the national parliaments of the remaining member states is not foreseen. No one state will be able to hold the others hostage.

It is important to note that the withdrawal agreement will deal with those things that have to be dealt with in order to relieve the UK of its rights and obligations under membership. It will not re-open Cameron's abortive 'renegotiation' of February 2016.⁵ It will stick to fairly technical matters, some of them complex, but none intractable. The items will include the UK's contributions to and payments from the EU budget, the acquired rights of EU citizens living in the UK and the hopefully reciprocal rights of British nationals resident in the EU, the status of British officials in the EU institutions (and their pensions), the withdrawal of British MEPs and of British judges at the European court of justice, and the location of EU agencies in the UK. Transitional measures will be required, for example to allow current litigation at the court of justice or a European arrest warrant to be concluded without disruption, or to extend sanctions.⁶

"if political will prevails, there is no reason why the technical side cannot be concluded well within the two-year period"

The trickiest problems will arise over money. The simplest solution is for the UK to stay part of the current Multi-Annual Financial Framework (MFF) that runs from 2014-20 and to meet accordingly all its current commitments, payments and receipts until the end of that period. That would avoid the EU having to rejig the whole structure of the budget, and would allow HM Treasury a smoother period of transition before it has to pick up support for Britain's farmers, universities and local authorities. The UK, of course, will not take part in the revision of the MFF for 2021 and beyond. The European parliament, in particular, will be preoccupied by the budgetary issues, although another

3. The modalities of parliament's involvement in normal international negotiations are laid down in an Inter-Institutional Agreement, Official Journal, L 304, 20-11-10.

4. Since the Constitutional Reform and Governance Act 2010, the House of Commons has the power to block any international treaty.

5. See Andrew Duff, Britain's special status in Europe: A comprehensive assessment of the UK-EU deal and its consequences, Policy Network, March 2016.

6. Notably, the European Banking Authority, the European Medicines Agency and the Chemicals branch of the European patents court.

of its concerns will be what to do with the 73 spare seats vacated by the British when the next elections come round in May 2019.⁷

There are certain to be unexpected problems thrown up in the course of the Article 50 negotiations, but if political will prevails, there is no reason why the technical side cannot be concluded well within the two-year period.

Framework for the future: towards a transition period

Above and beyond the technical stuff, Article 50(2) says that the agreement shall be concluded “taking account of the framework for [Britain’s] future relationship with the Union”. This is more delicate – and of critical importance. It implies that there should be paragraphs in the agreement that point the way towards a fresh relationship. The greater the level of political consensus between London and Brussels on what that relationship should be, the more the withdrawal agreement can put flesh on the skeletal framework for future relations. We examine the options below in Part Two, and make a recommendation. But the format of those paragraphs could range from the merely rhetorical (‘close partner’ as of 29 June, ‘core partner’ as with the USA, or even ‘privileged partnership’ as, at times, with Turkey) to the very precise (for example, membership of the single market via the European Economic Area or customs union), even with a timetable.

“The greater the level of political consensus between London and Brussels on what that relationship should be, the more the withdrawal agreement can put flesh on the skeletal framework for future relations.”

A big issue arises with regard to the transition period between exiting the EU under Article 50 and the entry into force of a new political agreement under another legal base. Interim solutions and temporary measures – such as maintaining the customs union for a given period – will have to be considered. Alternatively, it could be agreed that the entry into force of the Article 50 agreement (that is, true Brexit) should be delayed until such time as the new arrangements are put in place. Article 218(5) allows for the provisional application of an international agreement – a legal device which might suit very well, for example, a decision to cleave to the current EU budget programme until the end of the current MFF. It will be quicker to abolish the UK’s rights than to disentangle its obligations. In any event, expect a passerelle or bridge to be invented to ease the pain of disruption on both sides and to avoid legal vacuum and regulatory gaps.

Until the nature of Britain’s future relationship with the EU is clarified, the UK will not be able to proceed to fillet systematically the more than 1200 EU directives and regulations that apply to it at present, deciding which to keep, which to amend and which to ditch. As the British government has recognised, the European Communities Act 1972 cannot be repealed before the Article 50 agreement has entered into force. In any event, the filleting exercise is likely to preoccupy both the Westminster and devolved parliaments for some time. One complication is that while EU directives are already transposed into UK law, the recently more frequently used EU regulations are not so transposed: new UK primary or secondary legislation will therefore be needed where the substance of any EU law is to be kept.

In addition, the UK will need to repeal fairly quickly both the European Parliament Elections Act 2002, in order to prevent the British voters from the burden of electing more MEPs, and the European Union Act 2011, in order to suppress for ever Britain’s chronic itch to have referendums on Europe.

7. See Andrew Duff, The silver lining to the Brexit cloud, Euractiv.com, 31-08-16.

The government machinery in Whitehall, meanwhile, will have to expand substantially to take over the regulatory responsibilities and trade negotiations that have been farmed out for many years to the commission in Brussels and its agencies.

What happens if there's no agreement?

Three scenarios are germane to a failure to reach agreement under Article 50. The first would be if the UK (still at this stage a member state) or one or all of the EU institutions felt impelled to appeal to the European court of justice in Luxembourg against a draft Article 50 agreement (Article 218(11)). In those circumstances, were the court to find that the draft was not compatible with the EU treaties, either the agreement or the treaties themselves would need to be revised. In both cases, Brexit would be unavoidably delayed, possibly for years.⁸

A second scenario arises in which the UK simply changes its mind about Brexit and has to ask its partners – doubtless with profuse apologies – to revoke the earlier notification of its intention to leave. The European council (possibly with the intervention of the court of justice) would have to agree that the change of heart had been made according to the UK's constitutional requirements. Presumably, this would imply either a vote by a new House of Commons after a general election and a change of government – or, less likely, a different outcome of a second referendum.⁹ But a revocation of secession is perfectly possible under Article 50, just as a revocation of accession is possible under Article 49.¹⁰ Contrary to general knowledge, the EU works to a culture of common law in which that which is not prohibited under its treaties tends to be permissible. And the goal of the Union is integration, not disintegration.

The third scenario is the bad one in which there is simply no agreement on the testy technical matters and no perspective of agreement on a new trade treaty. The two-year period for the Article 50 negotiation can be extended but only by unanimity among the 27 (plus the UK). Any request for an extension would be a hostage to fortune, provoking every other state to demand concessions.¹¹ In the context of deteriorating relations, there would be no extension. The UK needs to know that the rest of the EU is already fed up of having to do special deals for the Brits: nobody in Brussels is willing to contemplate another negotiation with the UK that has few prospects of a happy ending. That being the case, one day in early 2019 British membership of the EU will be brought to a stop. As Theresa May says, “Brexit means Brexit”.

8. Beyond recourse to the European court of justice under Article 218(11), a British court might well feel obliged to turn to Luxembourg for a preliminary ruling under Article 267 on a complicated issue of EU law – for example, concerning a legacy issue of EU citizenship. There might also be attempts by individuals or corporate entities to appeal to the CJEU under Article 263.

9. However, because the coalition government introduced fixed-term parliaments there cannot be an early general election unless Labour MPs vote for one. Labour's policy on Brexit lacks clarity. The Liberal Democrats, meanwhile, threaten another referendum on the outcome of the Brexit deal. The next regular election is scheduled for May 2020.

10. Iceland and Switzerland have changed their minds about joining the EU in mid-application. Norway has twice concluded an agreement to join but failed to ratify.

11. For example, from Spain over Gibraltar.

PART 2: THE FUTURE RELATIONSHIP

Unavailable and sub-optimal options

There has been, and continues to be much debate, most of it confused and confusing, about Britain's options as an ex-EU member.¹² The Brexiteers in the British cabinet talk of new trade deals as if they are merely a matter for unilateral decision, wishfully thought. Boris Johnson, foreign secretary, talks cheerfully of 'jumbo trade deals' with anyone he meets. Here he is speaking to the media after his first Council meeting in Brussels on 18 July:

"We are very keen to see the EU develop and go forward, and all we would say is that there are kind of docking stations and doorways open for further UK involvement down the track"

Make of that what you will. Liam Fox, another Brexit minister, seems to labour under a persistent delusion that the UK, freed of EU ties, will be able to do whatever it wants, like a stropky teenager leaving home. But the fact is that WTO rules circumscribe tightly the UK's freedom of manoeuvre and that any new trading agreement with the EU will be a tough negotiation. Britain's position is complicated by the fact that its trade with the EU is asymmetrical: whereas about 45 per cent of Britain's goods and services are traded with the EU, only eight per cent of EU exports go to Britain. So getting a new agreement is less essential for the EU than it is for the UK, not least because no third country will be willing to sign up to a new trade deal with Britain while its relationship with the EU remains obscure. Falling back on WTO rules with no free trade agreement means that the EU would impose the same tariffs on British goods as it applied to the US or China, while the UK would be trying to renew its WTO schedules with 163 other countries.

As far as the EU 27 is concerned the parameters for the new relationship will be drawn carefully. On the one hand, as Angela Merkel has repeatedly stated, the UK will not be offered a better deal as an ex-member state than it has had as a full member state. She will not want to give the British a deal that would tempt others to follow their example. The UK cannot expect to have rights without obligations. It will not therefore be allowed access to the single market unless it accepts the free movement of labour. Freedom of establishment and competition in services, which the British are good at, comes with labour mobility: it is people who provide services.

"British domestic politics effectively rule out the Norwegian option"

The optimum solution for the sake of British commerce is membership of the European Economic Area, thereby retaining the UK's membership of the single market. As the EEA is not in the customs union, its members can pursue independent trade policies with the rest of the world. One assumes that the EEA option would be acceptable to the EU 27, although **Norway**, currently the main pillar of the EEA, will be anxious not to allow the UK a better deal than it has itself. In any case, however, British domestic politics effectively rule out the Norwegian option. Not only would membership of the EEA carry a considerable contribution to the EU budget but it would also involve the continued freedom of movement of people. EEA members have to accept EU law, including state aid and competition policy, but have no part in making it: far from 'taking back control' from Brussels, membership of the EEA would represent for the UK a complete surrender of national sovereignty to the EU institutions, as well as subjecting itself to the EFTA court which follows the jurisprudence of the European court of justice.

12. Of the vast literature on the subject, one of the most pertinent papers is by Andrew Tyrie MP, Giving meaning to Brexit, Open Europe, 4 September 2016. The most candid assessment of Britain's plight has come from the Japanese government, Japan's Message to the United Kingdom and the European Union, <http://www.mofa.go.jp/files/000185466.pdf>.

Turkey was given membership of the EU customs union as an incentive to develop its potential as a candidate country. Turkey accepts the EU's common external tariff regime and in exchange its goods enter the EU without difficulty. The drawback for Turkey – and even more so potentially for the UK – is that it cannot conduct much of an independent trade policy, and has even been rebuffed from taking part in the EU's own trade negotiations, for example with South Korea and TTIP. Turkey's efforts to upgrade the customs agreement to embrace services have not so far been successful. Its relegation to what it considers to be a second-class status is one of the main causes of the present, fairly disastrous relationship between Ankara and Brussels.

"A reasonable solution on behalf of the UK would be to combine membership of the customs union, like Turkey, with market access for financial services, like Switzerland"

Switzerland is another place which has a messy relationship with the EU. A referendum in 1992 refused to join the EEA. Nor is Switzerland a member of the customs union. Instead, the Swiss have to manage upwards of 150 sectoral agreements with the EU. The EU tries to insist that the Swiss recognise the jurisdiction of the European court of justice and accept the free movement of people criterion which comes as part and parcel of access to the single market. These complex arrangements were jeopardised by another referendum in 2014 which rejected free movement. Intensive efforts continue to find a compromise between Bern and Brussels.

A reasonable solution on behalf of the UK would be to combine membership of the customs union, like Turkey, with market access for financial services, like Switzerland. This would avoid the great disruption and high tariffs that the UK will incur if it falls back on WTO rules. But the Brexiteers, including the prime minister, would have to concede to the commission powers to police the equivalence of British practice with the EU single market regime and to the court of justice jurisdiction over much of UK commerce. Moreover, unless there is genuine political rapprochement with the UK, reaching agreement on such a **Swiss-Turkish compromise** deal with all 27 states could be a tall order.

Some attention has been paid to the EU's recent Comprehensive and Economic Trade Agreement with **Canada** (CETA). This is a useful model in that its apparatus to ensure technical equivalence can be replicated in the case of the UK, notwithstanding the fact that the UK is already far more integrated with the EU single market than the Canadians ever will be. Trade in services barely features in CETA, which would not suit the UK. One notes that the agreement has sparked an extraordinary reaction in several member states, notably Austria, whose political parties and eurosceptic lobbyists have decided to pitch themselves against free trade and globalisation. The commission seems to have conceded that CETA is a mixed agreement, combining both EU exclusive competence and competences shared with member states. That being the case, it requires ratification not only in the European parliament but also in the national parliaments of the member states. CETA remains unratified still.

Most of those who welcome Brexit appear to believe that the UK should leave both the single market and the customs union. Such a rupture means the inevitable erection of new customs controls at British ports and at the Ulster land border with Ireland. It also implies that the City of London will lose its automatic passport rights to operate its financial services within the eurozone. In the absence of new free trade deals, higher tariffs on British imports and exports are inevitable, although the impact of tariffs will be less than the erection of non-tariff barriers and the imposition of quotas under WTO rules. Action to manage the new situation and to mitigate its effects is urgent. Delay will be costly, not least in terms of British jobs and tax revenue as firms pull out of London for destinations within the eurozone, notably Dublin, Paris and Frankfurt.

The Ukraine Association Agreement precedent

One option that offers an existing template for a resolution to the problem of British EU trade is the Association Agreement signed in 2014 between the EU and **Ukraine**, which has come into force provisionally.¹³ This is a large and complicated document, running to 486 clauses, 43 technical annexes and three protocols over 2100 pages.¹⁴ At its heart is the creation of a Deep and Comprehensive Free Trade Area (DCFTA), but the agreement also covers political cooperation and establishes an institutional relationship between the EU institutions and the Ukrainian government. From the EU's point of view the Association Agreement has a definite strategic purpose, intended to strengthen the western orientation of Ukraine as a counterweight to Russian influence, both legal and illicit. It duly encountered a ferocious backlash from the Kremlin, contributing to a coup d'état in Kiev, Russian annexation of the Crimea and incursion into the Donbas region, all of whose longer-term consequences are unknown. The EU has also established similar agreements with Georgia and Moldova, though with less drama.¹⁵

“At its heart is the creation of a Deep and Comprehensive Free Trade Area (DCFTA), but the agreement also covers political cooperation and establishes an institutional relationship between the EU institutions and the Ukrainian government”

The Ukrainian DCFTA is ambitious. It creates the framework for the opening of markets via regulatory alignment, sector by sector, and by the reduction and eventual elimination of tariffs, quotas and non-tariff barriers. Based on WTO rules, the DCFTA establishes anti-dumping measures, standardisation of technical rules, and the simplification of customs procedures. Unlike classical free trade agreements, the DCFTA provides for the freedom of establishment in services as well as non-service sectors: once Ukraine implements the EU's *acquis communautaire*, firms will be able to operate in Ukraine and across the single market according to level playing fields in financial services, telecoms and transport. With the exception of the defence sector, Ukraine will be treated as an equal player in respect of public procurement – an unprecedented level of integration for a non-EEA, non-EU state. The EU's internal rules will also apply to intellectual property rights, and there will be a gradual approximation at EU standards of competition policy and state aid rules. The DCFTA covers trade-related energy issues, labour standards and sustainable development, with monitoring arrangements in place. A mediation and trade dispute settlement machinery is established of three judges (one EU, one Ukrainian, one neutral).

The political chapters of the Association Agreement reiterate the EU's values and principles. They provide for increased cooperation leading to convergence in the field of foreign, security and defence policies. Arrangements are also made for cooperation in migration, asylum and border management, paving the way for visa liberalisation; the parties commit to joint efforts to combat international organised crime. The institutional chapter provides for an annual EU-Ukraine summit meeting, a ministerial Association Council meeting in flexible configuration, and technical committees. The Association Council is empowered to adapt the annexes to the Agreement, acting by consensus. Parliamentary and civil society elements are included.

A British Association Agreement?

The United Kingdom, of course, is not the Ukraine. Yet there is much to be learned from the precedent of Ukraine's recent association with the EU that could ease the path to a durable and workable arrangement to suit both the EU the UK. For one thing, Ukraine remains free to make its own trade deals with third countries. Furthermore, only three of the four principles of free movement

13. The hurdles the Ukraine Association Agreement has had to pass before seeing the light of day deserve a separate essay. The most recent obstacle is an absurd referendum on the matter held in the Netherlands in April 2016 that returned a negative verdict. The Dutch government is paralysed about how to react.

14. Official Journal, L 161, 29-05-2014.

15. The three association agreements are very well documented and analysed by Michael Emerson and his colleagues at CEPS, freely downloadable at www.ceps.eu and also available in hard copy from Rowman & Littlefield, 2016.

apply to the Ukraine agreement: there is no general freedom of movement of people permitted or envisaged. The agreement does not postulate Ukraine's future membership of the EU.

Were the UK to follow where Ukraine has pioneered, it would not need to adapt, as the Ukraine must, in order to absorb the EU acquis. But it would be necessary to establish a high degree of technical cooperation, as with CETA, to ensure that the UK and EU do not diverge far from each other in the future. In exchange, the UK would enjoy much higher access to the single market than Canada will manage under CETA (though somewhat less than Norway). Crucially, access to the single market would be possible in the services sector, especially if the UK opts to continue to adhere to the terms of the EU services directive and subsequent relevant legislation. It should be fairly straightforward within the framework of a DCFTA for the UK and EU to negotiate an Agreement on Conformity Assessment and Acceptance (ACAA) in industrial goods. The UK would be able to buy its way into participating in selected EU programmes, notably those concerning education and science R&D. It would continue to use the European Investment Bank. It would be able to re-join the single sky regime in civil aviation. Decisions would be needed about the degree of continued British engagement with the EU's evolving energy and environment policies, especially where cross-border and international issues are concerned such as the emissions trading scheme, but cooperation and compliance would certainly be possible under the terms of an association agreement.

Using the legal base of Article 217 TFEU, a new treaty between the EU and the UK would imply no more than "an association involving reciprocal rights and obligations, common action and special procedure". It would be negotiated under the provisions of Article 218, and negotiations can start in parallel with the Article 50 exercise but cannot be concluded while the UK remains a member of the EU. Unlike the earlier Article 50 agreement, the second treaty will require the unanimous agreement of the 27 states plus the endorsement of their national parliaments.¹⁶

"the fact that the Ukraine Association Agreement exists would make it difficult for the EU 27 to reject a comparable deal with the UK"

The EU likes to put its international agreements into tidy envelopes, and the fact that the Ukraine Association Agreement exists would make it difficult for the EU 27 to reject a comparable deal with the UK. The institutional and budgetary arrangements implicit in an association agreement would need careful definition, but nobody sensible in Britain should object to future intergovernmental political cooperation with the EU, and pragmatic UK participation in certain EU programmes would be of clear mutual benefit. In addition, the UK, like Ukraine, should apply to join and strengthen several EU agencies, including Europol and Eurojust. British ministers and officials would do well to make a priority of their engagement in the institutional machinery of an association agreement. A joint parliamentary committee of Westminster MPs and Members of the European parliament would have to be treated seriously. The agenda of all such meetings should be wide ranging, including macro-economic policy, internal and external security policy and European strategy in global institutions such as G7 and G20.

Core partnership?

The new treaty between the UK and EU would have two main purposes: the first is to protect, so far as is possible, the best of the political legacy from 45 years of British EU membership; the second would be to allow for the UK-EU relationship to evolve on a mutually agreed basis in order to meet changing circumstances as they arise, and to do so without requiring another vast and disruptive constitutional upheaval.

16. One would hope the Anglophile Dutch would resist the temptation to have a referendum - as they did not in the case of Ukraine.

Both parties will be anxious to have their inevitably close interdependence recognised in terms of international law. It will be in Britain's national interest to see that it is not perpetually isolated and excluded from having any influence in mainland European affairs. Equally the EU 27, in the drafting of an association agreement, will seek to ensure that Great Britain is prevented from returning to its historical continental policy of divide and rule.

In its revised Global Strategy, adopted in June, the European council singled out the USA as a 'core partner'.¹⁷ Traditionally, the Americans have been much stronger supporters for European integration from outside the EU than the British have been from the inside. Yet the EU 27, without sour grapes, should accord the UK that same privileged partnership after Brexit.

Although the prospect of an association treaty with the EU may enrage hard-line Brexiteers, there is indeed even a historical precedent for such a thing. In December 1954 the UK negotiated an association agreement with the new European Coal and Steel Community. Signed by Duncan Sandys and Jean Monnet, that agreement gave the UK access to the integrated coal and steel market of the Six and established both technical and political institutions to manage the cooperation; but it also gave an important political signal that despite the UK's idiosyncratic approach to European integration, cross-Channel pragmatic cooperation mattered. The ECSC Association Agreement lasted until the UK joined the European Community as a full member in 1973.¹⁸

Today the UK faces a similar strategic dilemma as it did in the immediate post-War years. How should Britain order its relationship with mainland Europe as it struggles at home to prevent the constitutional crisis caused by the Brexit vote from turning into economic catastrophe? All the options available are problematic, and Theresa May's government will be desperate to avoid an invidious choice between them. We recommend that she seek a new association agreement with the EU, a political treaty that establishes at its core a deep and comprehensive free trade area. Although it is not a matter of cut and paste, the Ukrainian model provides a useful template.

17. https://europa.eu/globalstrategy/sites/globalstrategy/files/eugs_review_web.pdf

18. For more, see Andrew Duff, 'Intimate and Enduring': Britain's first association agreement with Europe, Euractiv.com, 01-09-16. Stiftung, 2013.

PART 3: EUROPE BEYOND BREXIT

Back to the future of Europe

The United Kingdom having escaped the European Union by dint of Article 50, and with a new UK-EU Association Agreement in place, it will be time for the remaining member states of the Union to undertake a much-needed and long-awaited general revision of the treaty of Lisbon.

Treaty revision is always unpopular, but it will be inescapable if only to expunge references to the United Kingdom in Articles 52 TEU and 355 TFEU and in other institutional clauses. In addition, the many Protocols and Declarations that have established over the years the numerous British opt-outs from sectors of integration will have to be amended or deleted. That purging exercise should at least have the merit of reminding the EU 27 that they are at last freed from the British drag anchor.

“The Union needs an ambitious programme of action to re-establish its raison d’être. Taking centre stage, however, must be what needs to be done to consolidate the Economic and Monetary Union”

What use will the now smaller EU make of its liberation from the British? The first chance for a decent reassessment of the state of the Union will be the commission’s White Paper which is promised for March 2017. As few aspects of the *acquis* are untouched by the risk of disintegration, Brexit induces a wider remit for the White Paper than was originally envisaged. The Union needs an ambitious programme of action to re-establish its *raison d’être*. Taking centre stage, however, must be what needs to be done to consolidate the Economic and Monetary Union. Deeper fiscal integration of the eurozone requires treaty change, as everyone knows. Although this is not the place to rehearse the argument for taking a decidedly federal approach to the constitutional development of the Union, the retirement of the UK from the scene will make possible what has been previously impossible. These constitutional moments are rare: 20 years on from Giscard’s Convention there will be another. Best not to miss it.

If by then a UK Association Agreement is in place and the shock of Brexit is receding, the new Convention should consider whether to install in the EU treaty a new category of formal affiliation to the Union short of full membership. Such a new class of associate membership, entrenched in the EU’s constitution, might become an attractive long-term and settled prospect for the UK and for other European states, including Norway, Iceland, Turkey, Ukraine – and even Switzerland.¹⁹

Plugging the security deficit

Brexit weakens European security. Although the focus short term has been on the future trading relationship between the UK and the EU, the urgent need to reinforce the transatlantic alliance provides the fundamental strategic context for an EU-UK Association Agreement. Immediate attention needs to be paid to the EU’s relationship with Nato. As the EU’s only surviving nuclear power, France has a special responsibility to show a capacity for leadership in European affairs that has eluded it in recent years. How the UK manages its relationship with France in the UN Security Council may prove to be its key to exercising influence at the European core.

A basic decision for the British government is whether to compensate for its loss of political clout in the EU by working harder to strengthen the European pillar of Nato. This would need London to drop

19. For an example of how this might work, see The Spinelli Group, *A Fundamental Law of the European Union*, Bertelsmann Stiftung, 2013. See also Jean-Pisani Ferry et al, *Europe after Brexit: A proposal for a continental partnership*, Bruegel, August 2016.

the false argument, much beloved by the Brexiteers, that the growth of an EU defence dimension jeopardises Nato. The future security of the west, not least facing a recidivist Russia, is likely only to be ensured by the growing together of EU and Nato.

Only if the British accept that logic will they be in a position to continue to contribute to UN-led efforts in nuclear non-proliferation, or in combating maritime or cyber insecurity. Fighting terrorism, illegal trafficking, piracy and other manifestations of international organised crime cannot be effective if undertaken by Britain alone resting on its laurels having 'taken back control' of its own affairs from the EU.

"There are several ways in which the UK, under the terms of an association agreement, could contribute to and profit from the EU's increasing security efforts"

There are several ways in which the UK, under the terms of an association agreement, could contribute to and profit from the EU's increasing security efforts. It could ask to engage with the European Defence Agency, which has the potential to bring both industrial and security benefit. It should establish liaison with any new operational HQ that emerges from the EU's development of permanent, structured cooperation in military matters (fondly known in Britain's tabloid newspapers as the European army). The UK could opt to participate in certain of the EU's common security and defence policy missions. It should continue to offer its military resources to support collective maritime security and Frontex.

Throughout the security nexus, both internal and external, the UK must not be allowed to escape from the reality that intelligence sharing, joint analysis and common response planning with core partners, European and American, are indispensable preconditions for capacity building. If the UK government seeks to participate on a selective basis in EU security policies, it will have to learn to accept post-Brexit what it could not pre-Brexit – namely, that the EU's supranational authority has a legitimate even indispensable role to play in the field of police and justice policy.

Repairing the damage

Britain's decision to exit the European Union leaves its relations with the rest of Europe in bad disrepair. The negotiation of the Article 50 withdrawal agreement, including the definition of the framework for future relations with the EU, will be the first test of the political temper of both parties. The negotiation of a trade agreement and political cooperation treaty will be a second. Rebuilding trust on the basis of a new security settlement in Europe would be a third. Management of the British relationship as and when the remaining European Union decides to federate would pose the fourth big political challenge, all within the same decade.

Europe's leaders must now acquire unusual qualities of statesmanship if these challenges are to be met. A change of mood would help: constant woeful reiteration of 'crisis' is unhelpful. Regret Brexit as we might, the truth is that continued British membership of the EU on the previous basis was probably unsustainable in the long run. The United Kingdom has always been something of a deviant member state of the European Union.²⁰ For both Britain and Europe, Brexit throws up the opportunity for a fresh start on a more realistic basis.

In any case, we have no choice but to give it a try.

20. David Davis, Minister for Brexit, told the Conservative party conference on 2 October: "We have never really been comfortable being part of what is in reality a political project. We are now leaving that project. And this gives an opportunity, not just to clear the air, but to create a more comfortable relationship with our European neighbours that works better for all of us".