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Commentary

Britain in Brussels after the Referendum: Insider or Outsider?

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Abstract

For the first time in its history the European Union (EU) is faced with the prospect of losing one of its member states. Article 50 of the Treaty on European Union lays down the formal provisions that have to be respected to manage such a loss but it is silent on the precise status of the departing member state during that period. In practice, following the 23 June referendum, the United Kingdom has become both an insider and an outsider. It will be negotiating its departure with the 27 other states, seeking to define its future position as a non-member and yet until that departure has been ratified, it will remain legally a full member of all EU institutions, with the corresponding rights and duties. This commentary will consider the impact of this unique intermediate position on the role of Britain and its behaviour in Brussels. It will suggest that it will inevitably find itself in an ever weaker position, no longer enjoying the trust and confidence afforded to other states within the EU. The give and take of bargaining and compromise that marks out the way the EU operates will be rapidly superseded by the less forgiving, more confrontational world of interstate bargaining.

To the disappointment and dismay of the member governments of the other 27 member states, Britain voted in a referendum to leave the EU on 23 June 2016. No state had ever decided to withdraw from the Union before (Greenland, which left in 1985, was and remains a part of Denmark) and many feared that the success of the Brexit campaign might encourage other countries to hold similar referenda, putting the whole structure of EU cooperation at risk. However, the more immediate effect was the transformation of the UK's position in Brussels: it became both an outsider and an insider at the same time. It continues to be represented in all the institutions, to be bound by EU law and to participate in policy discussions. And yet all other member states are aware that this situation will only last for a limited period up until the UK's departure and therefore are inclined to consider it already in important respects as an outsider. This commentary will suggest that the structure of Article 50 of the Treaty on European Union (TEU) and the way the EU institutions function will make this insider/outsider status an uncomfortable place where the UK's influence will necessarily weaken as it ceases to be seen as part of the Brussels world. The consensual politics of the EU will be rapidly exchanged for a role as a third country bargaining with the EU27.

THE STRUCTURE OF ARTICLE 50

After the referendum, attention turned to the mechanism for withdrawal laid down in the so far unused Article 50 TEU. It is an article which combines a degree of clarity that was lacking before the Lisbon Treaty came into force (before 2009 there was no specific provision for leaving the EU) with a substantial number of areas of uncertainty, in part perhaps due to the expectation of many that it would never need to be used. Overall, its impact is to favour the remaining states over the one that is departing in the course of the withdrawal negotiations.

What of the areas of clarity? First, it specifies the timetable that needs to be respected. The two sides have two years to negotiate the withdrawal agreement from the moment that the departing state notifies its intention to withdraw, unless the European Council decides unanimously to extend the period, in agreement with the state concerned (Article 50(3)). The uncertainty as to whether

such a unanimous extension can be obtained provides a strong incentive for the departing state to reach agreement in that time. Second, it explicitly differentiates the role of the departing state from that of those that remain. In particular, it makes plain that the departing state shall not participate in the discussions of the European Council or the Council where the remaining member states are agreeing their position for the negotiations or deciding whether to extend the period for the negotiations (Article 50(4)). Outsider status is thereby given formal recognition. This is in marked contrast with the situation where a member state votes against a Treaty change or an Association Agreement, as with the Netherlands and the rejection by referendum of the agreement with Ukraine. And third, it lays down the conditions for approving the withdrawal agreement. It will require qualified majority support inside the Council and consent from the European Parliament (Article 50(2)). Unlike a Treaty change it does not need to be ratified by all the member states, in accordance with their respective constitutional requirements. Hence the Community institutions are given a privileged position in the process that the departing state needs to be aware of in the course of the negotiations.

However, the degree of clarity provided by Article 50 should not be exaggerated. As so often, much remains unsaid and will be determined in the course of applying the article. First, nothing is prescribed as to when the departing state should notify the European Council of its intention to make use of Article 50. When he presented the deal he had reached with the rest of EU in the House of Commons in February, David Cameron had suggested that in the event of a No vote the article would be invoked 'straight away' (Cameron 2016), effectively starting the two year negotiation period in June 2016. His successor Theresa May took a different position, arguing that her new government needed time to agree on its approach to the negotiations and suggesting that she would not invoke Article 50 before the early part of 2017. This change provoked some dismay from other member states who wanted the issue to be dealt with as soon as possible and could see the temptation of delaying the decision further until after the German and French elections of 2017. However, the apparent advantage for the UK government cannot be separated from its need to satisfy the domestic constituency that wants a quick departure and fears that the issue could be subject to an indeterminate delay. In formal terms, therefore, the decision over the start of formal negotiations is one for the British government alone but it is a right of limited value. Once it has been exercised (and Theresa May confirmed at the Conservative Party Conference that it would be exercised by the end of March 2017), the two year deadline and, in particular, the unanimous decision required to extend it, give a clear negotiating advantage to the other member states.

Second, Article 50 does not specify whether there can be any informal contacts between the UK government and the other member states as well as the European institutions before the formal notification of withdrawal. Immediately after the referendum, the Commission President, Jean-Claude Juncker, issued written instructions to his fellow commissioners, their chiefs of staff and directors-general not to enter into any negotiations with the UK government, not to travel to the UK and not to answer questions on the Brexit process in any EU or other forum (Eder 2016). The 27 other member states made the same basic point when they met on 29 June, stating in the conclusions of an informal meeting of the European Council that 'there can be no negotiations of any kind before notification [of the intention to withdraw] has taken place' (European Council 2016). On the one hand, the 27 expected the UK to reveal what it wanted from the negotiations before discussions could begin, on the other, they needed to be free to negotiate amongst themselves as to how they would respond to British demands. Most obviously, there is the issue of whether the UK wants to remain a full member of the Single Market and if so, whether it is willing to accept the four freedoms, including free movement. The negotiation will be very different if Britain decides it will

seek to go it alone outside the Single Market, a prospect that appears more than likely following Theresa May's speech at the Conservative Party Conference.

Third, Article 50 does not offer an overview of all the elements of British withdrawal. It points to two different agreements, namely the arrangements for withdrawal and the framework for the UK's future relationship with the Union. The latter will be negotiated in detail once Britain has left but the wording of Article 50(2) makes plain that it has to be taken into account during the negotiations on the former. In other words, the character of the withdrawal agreement will be different depending on what UK/EU relations are expected to look like afterwards. Will there, for example, be continuing participation in any EU bodies, such as the European Investment Bank (see Unwin 2016) or Europol (see Paravicini for discussion on the continuing role of the UK in relation to Europol)? The complexity of this process is made clear by Charles Grant in an Insight piece for the Centre for European Reform (Grant 2016). He calculates that there are at least six kinds of agreement that the UK will have to complete as part of redefining its position in the world. The agreement on withdrawal is in this sense a relatively small part of the jigsaw puzzle but one that cannot be easily separated from the rest. The burden of all these negotiations will fall very firmly on British shoulders.

Lastly, there is no indication as to whether a withdrawal notice can be revoked: Article 50(5) only speaks of a state that has withdrawn reapplying. Such a revocation before the process has run its course may seem remote at the present time but there is nothing in the Treaties that specifies what would happen if, for example, the agreement to withdraw was rejected by the UK Parliament. Indeed, there is no indication as to the impact of the European Parliament's rejecting the agreement and there being no unanimity in the European Council to extend the negotiating period. Would Britain find itself outside the EU with no structure to govern its relationship with the other states? Such a theoretical possibility underlines the prospective weakness of the UK position in the negotiations ahead.

INSIDE THE EU INSTITUTIONS

Both by what it says and by what it does not say, Article 50 puts the United Kingdom at a structural disadvantage once it has indicated its formal intention to withdraw. That disadvantage is all the clearer if we look more closely at the way in which the EU institutions operate. The British presence in those institutions has already been compromised and is likely to become more difficult in the months and years ahead.

The sudden announcement by Jonathan Hill two days after the referendum result that he was going to resign as the UK's European Commissioner illustrated very clearly the dilemma faced by anyone of British nationality inside the Brussels structure. His statement that he did not feel it was right for him to carry on with his work as the commissioner in charge of financial services was controversial. As Britain remains a full member of the EU and has yet to indicate its intention to leave, there was no formal need for him to resign. And yet he recognised that whatever the formal situation, he would find it difficult to stay in post without others considering that his nationality made it effectively impossible to adopt a European approach to his work, particularly as the financial sector is one that impinges so specifically on British interests.

The British government could have declined to replace Hill but such a decision could have generated uncertain consequences, not least potential legal challenges to decisions taken by a Commission of fewer than 28 Commissioners. However, the government wished to maintain its position as an

insider and so decided to nominate a career diplomat, Julian King, as the last British Commissioner. He received the 'Security Union' as his portfolio, an area with potentially just as much scope for conflict with the United Kingdom. At his hearing that took place at the European Parliament on 12 September 2016, King's argument that he would support the European rather than the national interest was still sufficiently convincing for his appointment to be supported by a large majority in the Parliament (394 in favour, 161 against, 83 abstentions). However, it remains to be seen how effective he will be and whether it will be possible for him to be both inside the Commission where his room for manoeuvre is limited by the obligation to report to a Vice-President and outside, for example in Council negotiations where the support of the UK is likely to be highly conditional and other states may not entirely trust the positions that he presents, however good his presentational skills.

The question of trust extends much lower in the Commission as Juncker acknowledged by writing an internal memo to all 1,164 officials with UK nationality the day after the referendum. He sought to reassure them that he would do all in his power to protect their positions and to reciprocate the loyalty that they had displayed to the institution. He put it thus: 'You left your national 'hats' at the door when you joined this institution. That door is not closing on you now' (in Simon 2016). How this promise will work out in practice is hard to tell. It will surely be difficult for UK officials to enjoy the same kind of career progression as other nationals, even if they are able to remain in the Commission. And it will be even more difficult to guarantee that they will enjoy their pensions under the same conditions as apply at present if they retire to the UK. Indeed, despite its relatively minor budgetary importance, this was identified very quickly as a potential flashpoint in the withdrawal negotiations (Barker and Brunsden 2016).

The British position is still more exposed in the other political institutions where UK interests are more clearly visible: the European Council, the Council of Ministers and the Parliament. In all three, we are witnessing a significant shift in behaviour as the UK assumes the insider/outsider role.

The effect has been most evident in the European Council. Immediately after the referendum on 29 June 2016, a first informal meeting of the heads of state and government was held without Britain. One of its main purposes was to reaffirm the unity of the 27 and to call on the British to notify the others of its intention to withdraw as soon as possible. However, it also explicitly made it clear that the 27 would continue to meet without the UK on occasions separate from normal European Council meetings. A specific conclusion was that they would meet again in Bratislava and a second informal meeting duly took place on 16 September (with further meetings envisaged for 2017). This second meeting went beyond expressions of regret, adopting a Roadmap for the future of the EU. Whatever the difficulties of implementation, it was manifestly more than a collection of pious wishes. It included, for example, a commitment to strengthen EU cooperation on external security and defence, a subject that had always been taboo for successive UK governments. Michael Fallon, the Defence Secretary, made it clear that the British government would veto any attempts to create anything that might look like an EU army (in Rettman 2016). This was not a new position but it means something different now that the UK is proposing to leave the organisation. It no longer has the means to block such a development in the medium term and also has to consider the impact of such a veto in the short term given the need to negotiate withdrawal on the best possible terms. In other words, the sense of a veto changes once you are no longer fully an insider.

It is not difficult to imagine that the number of informal European Councils without the UK present will increase at the expense of those where it is. Even when it is present, it is much less likely to be able to influence the direction of the discussion. The recognition of this change of status has

effectively taken place already in the Council of Ministers, where the day to day bargaining on policy takes place. On assuming office in July 2016, Theresa May made it clear immediately that the UK would no longer wish to assume the Presidency of the Council in the second half of 2017. The response of the Council was swift and brutal. Within a matter of days, on 26 July 2016, it adopted a Decision to modify the order of the Council Presidencies up to the year 2030 (Council of the European Union 2016). As a result, Estonia will now take over the vacant slot created by the British decision and the order has been adapted to allow Croatia to have the six month responsibility of the Presidency in 2020.

The impact of this change is greater than might appear. It is an explicit statement by Britain that it no longer wishes to maximise its ability to shape the Council agenda in the way that chairing the Council enables any state to do. It also means that other states will look at the United Kingdom in a different way when it comes to the search for common positions on legislation. The complexity of the situation is underlined if we consider what will happen whenever there is a vote under Qualified Majority rules. Whatever position the UK takes, it will have an important impact on the outcome: it cannot remain neutral. A positive vote will enhance the possibility of obtaining a qualified majority, just as a negative vote will make it easier to reach a blocking minority of four states, making up 35 per cent of the total EU population. Moreover, abstention is no solution to the neutrality dilemma: it effectively amounts to exactly the same thing as a negative vote, hindering the formation of a qualified majority of 55 per cent of the states voting. Following the behaviour of the UK government in the Council using Votewatch will assume a new significance for researchers in the coming months.

A good example of the difficulties ahead can be gleaned from the Bratislava roadmap which supports the creation of a Travel Information and Authorisation System (ETIAS) for visa-exempt travellers entering the EU. As UK citizens might be required under this system to request in advance permission to enter the EU and even to pay for the privilege, one can imagine that the UK would wish to influence the terms of the proposal in the Council. However, all the other states would be well aware of this fact and might therefore be inclined to resist any proposals made to water down the proposal from a state whose status is about to change. Being a full member of the Council will no longer mean what it did before the referendum.

The same is true for British Members of the European Parliament, particularly for those who are office holders, either as committee chairs or rapporteurs. The immediate response to the referendum vote in the Parliament was a widespread call for such office holders, notably the chairs of the Internal Market and Civil Liberties committees (Vicky Ford and Claude Moraes), to stand down (in De La Baume 2016). The idea that their role was somehow compromised was given backing by the initial decision of Ian Duncan, a Conservative MEP responsible for emissions trading to give up his rapporteurship (a decision since revoked), though others such as Richard Corbett, rapporteur on the revision of the Rules of Procedure, resisted pressure from within their committees to stand aside.

It will be possible to follow the nomination of rapporteurs over the coming months and to verify whether the political groups decide not to nominate new UK rapporteurs and also to see whether there is a change in the allocation of chairmanships as between nationalities when the mid-term review of these positions takes place in January 2017. It seems hard to imagine that the UK will retain the number of posts as office holders that it has held in the past, particularly as individual MEPs quite reasonably start to consider their futures outside the institution. Richard Howitt, the second longest serving British MEP, who announced his departure in early September 2016 to take up a new position promoting global corporate responsibility, will undoubtedly be the first of many

members (and the assistants working with them) who will want to find new work. The impact of such an exodus on the influence that UK MEPs will be able to exercise will be considerable.

At the same time, the work of the Parliament continues and the political groups will want to maximise their chances of winning votes and of influencing Council behaviour. Any thoughts of inviting British MEPs to abstain from voting on legislation dissipated as members realised that, for those procedures where Parliament needs an absolute majority to amend or reject Council's position, it would be tantamount to giving a block of 73 votes to the Council. Moreover, what if some British MEPs agreed to refrain from voting but others did not? Specific political groups would be disadvantaged and so all groups continue to want to ensure that British MEPs vote and respect the group line. This may assume a particular importance in the context of the vote that the Parliament will have to take on the withdrawal agreement between the EU 27 and the UK. The Parliament has nominated Guy Verhofstadt, leader of the Liberal group and former Belgian Prime Minister, as the person responsible for following the negotiations with the UK. He has already made it clear that he expects the deal to be made in time for the 2019 elections to take place without UK involvement. If he failed in this attempt and then expressed strong reservations about the deal, would he find an unlikely ally in the form of UKIP members, reluctant to accept the compromises that are likely to be necessary if a deal is to be reached? As the influence of British MEPs over day to day legislative issues diminishes, so the importance of the Parliament in relation to the final separation is likely to grow significantly.

CONCLUSION

If the analysis of this commentary is correct, then once the formal notification of withdrawal has been submitted, the British government can expect its influence inside the European institutions to diminish quickly. Article 50 will give the advantage to the EU 27 and the workings of the different institutions will marginalise British concerns. It will make something of a mockery of the claim that the UK remains a full member of the EU until it leaves. The UK will find it extraordinarily difficult to exercise the kind of influence that it enjoyed as a full member before the referendum. No-one will wish to listen seriously to its concerns as they will inevitably be tainted by the thought that they are linked to its future role outside the EU. Rather, the UK will enter the world of interstate bargaining where essential outcomes are determined by relative strength. Only a confirmed optimist can imagine that these outcomes will be favourable to the UK.

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