



Stocktaking after Theresa May's Brexit speech in Florence

Key point – the transition, key omission – the future relationship

Michael Emerson

Summary

Prime Minister Theresa May's speech in Florence on September 22nd was intended to be a milestone in the Brexit process, aimed at getting agreement with the EU to open negotiations over the future relationship, going beyond the current first phase that concerns only the withdrawal agreement. The main new content was a proposed transition period (yet to be negotiated) that would follow the formal withdrawal expected on 29 March 2019, under which much of the status quo for the UK as member state would be continued for 'around two years', giving more time for the negotiations over the future relationship. Since the transition would see continued budgetary contributions, this was an elegant way of partially defusing the very difficult matter of the financial settlement.

On the other hand, the speech provided very little insight into what kind of future relationship the UK would like, beyond saying that neither the 'Norwegian' nor 'Canadian' model would work. This lack of detail seems to indicate that the government has not yet been able to make up its mind, with various disagreements within the cabinet reported in the press. The present paper therefore sets out in some detail the questions that the UK must answer if the negotiations on the future relationship are to progress, or even begin. The final question of whether there is to be tariff-free trade, with or without budgetary contributions, will only become clearer in the light of the overarching plan and logic that may emerge, containing both general principles and operational details on how far the UK will continue to comply with EU law, sector by sector. Without this, no deal will be struck and a very hard Brexit will prevail. Meanwhile the transition period of 'around two years' could see the uncertainty over the future relationship continue until 2021 or even longer. How this might affect the final outcome is unknown. As a former British Prime Minister once famously said: "a week is a long time in politics".

Michael Emerson is Associate Senior Research Fellow at CEPS. Thanks for helpful comments to Steven Blockmans, Daniel Gros, Anne Harrington and Guillaume Van der Loo.

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key omission – the future relationship

Michael Emerson

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1. Four components

Theresa May's speech on 22 September 2017 in Florence had four components.

The first component, evident at the beginning and at the end, consisted of warm diplomatic language about *our common history, values and challenges*. The symbolism of the Florentine Renaissance, which did so much to shape European civilisation and identity, was duly noted. Expressed with such conviction and sincerity, listeners from other continents could be forgiven for asking why on earth is the UK leaving the EU. But no answer was given, only that 'the people' had thus decided.¹

A second component referred to a *deep and special economic partnership*. The benchmark statement was that this should be neither Norway/EEA, which would be too much, nor Canada/CETA, which would be too little. So it should be something in between. But where in between? The speech said that it should be "better, creative and practical", which is unobjectionable but hardly informative.

The third component called for a *bold new strategic security treaty*, which would bundle together matters of defence and development aid with cooperation over human rights, data protection, terrorism and criminality, including law enforcement and criminal justice. Some of this could be handled with a relatively soft framework for cooperation, but other parts involving law and justice will require strictly enforceable agreements.

The fourth component was about a *transition period*, whose length will be determined in the light of progress in negotiations, but would probably be "around two years". This would retain the maximum of the status quo, to avoid that there would be two sets of changes to negotiate and implement, first for the transition after March 2019, and then again for the final arrangement. The key commitment made here by the Prime Minister was that the 27 member states should not face higher budgetary contributions in the current multi-year financial period as a result of the UK's withdrawal. This implies payments on the order of £9 billion per year in 2019 and 2020, although no numbers were proffered by the Prime Minister.

¹ As for the political symbolism, there might also have been a suitably diplomatic mention of an ironic coincidence; this autumn is the 40th anniversary of the First Jean Monnet Lecture in Florence on 27 October 1977, by Roy Jenkins, President of the Commission, which triggered renewed interest in Economic and Monetary Union.

This blending of the transition period with a partial fixing of the budget problem turns out to be quite an elegant way to partially defuse the highly inflammable matter of money. It is therefore advanced as a breakthrough commitment, possibly even sufficient to allow the EU side to move on to the second phase of the negotiations. Mr Barnier has already said that the speech was ‘constructive’, but more detail is needed.

So let us suppose that the second phase of the future relationship is to be opened. What are the primary questions the UK has to address in setting out its position?

2. Somewhere between Norway and Canada, or between Switzerland and Ukraine²

Let us now consider the future relationship between the EU and the UK, which Theresa May clarified only a little in her speech in Florence. The Norwegian model is rejected because it is too close to being controlled by the EU. Canada is rejected because it makes no use of the UK’s existing integration into the EU’s economic and legal order: Canada is purely “international”, and not at all “European”.

Some desiderata were put forward by the UK: there should be no tariffs on goods, high standards of regulation and a strong dispute settlement mechanism other than reliance on the Court of Justice of the European Union (CJEU). We can take from other statements that access to the markets for goods, services and capital should be “seamless and frictionless as possible”, but outside the customs union and single market and notably without free movement of labour. And there was no hint of continuing budgetary contributions beyond a fair share for example for scientific and educational programmes.

Are there precedents for something like this, to help speed up the process? Actually there are two such precedents: Switzerland and Ukraine, both nested in the region between Norway and Canada. Of the two, Switzerland is closer to Norway than is Ukraine, which in turn however is less akin to Norway than Switzerland but much closer than it is to Canada. The Prime Minister has advocated a “bespoke” arrangement, on the grounds that no existing model is adequate. Yes, the outcome for the UK will no doubt differ from any of these four precedents, but as references they can be hugely helpful as shorthand names for exceedingly complex matters. Otherwise one gets bogged down in endless shopping lists of directives and regulations, where one cannot see the wood for the trees.

Switzerland has been considered attractive by some commentators in the UK, because it started with a rejection of the European Economic Area (i.e. ‘Norway’), and went on to become something of a ‘bespoke’ model, consisting of as many as 137 specific bilateral agreements accumulated over two decades. In reality, however, it is a very complicated close brother of Norway. Crucially it involves alignment on almost the same mass of single market legislation, comparable budgetary contributions and virtual coverage of all four freedoms. Switzerland

² These country names are shorthand for Norway’s membership of the European Economic Area (EEA), Canada’s Comprehensive Economic and Trade Agreement (CETA), Switzerland’s 137 bilateral agreements with the EU, and Ukraine’s Association Agreement (AA) and Deep and Comprehensive Free Trade Area (DCFTA) with the EU.

voted in a referendum in 2014 to quit the free movement of persons, but when confronted with the prospect of a breakdown in relations with the EU, it arranged a very soft compromise, which the EU has accepted. But the EU has for its part already given notice to Switzerland that its model is unsustainable, being too ad hoc and complicated. It needs to be brought back closer to Norway, with clearer legal homogeneity and a stronger role for the CJEU. For the UK, it means that the EU will not accept a plethora of separate sectoral agreements this time round. Rather, it will insist on a single comprehensive treaty with a balanced trade-off between rights and obligations.

Ukraine is committed to replicating a large but somewhat selective mass of single market legislation, but crucially omits the free movement of persons, has a dispute settlement mechanism that relies very little on the CJEU, and involves no budgetary payments to the EU (on the contrary, in fact, the EU makes payments to Ukraine). Some features are clearly inappropriate or irrelevant for the UK (e.g. the gradual approximation to EU law and budget receipts). But otherwise it is looking a lot like what the UK seems to want, and may even be too good to be true. Indeed, the EU will predictably say that this model is only on offer to a weak post-communist transition economy, and not an advanced, rich one like the UK.

The search for a suitable 'bespoke' model for the UK is thus narrowed down. It starts with having to be somewhere between Norway and Canada, since neither is acceptable to the UK. However, the ground between these two is occupied by this other pair, Switzerland and Ukraine. But neither of these two models would be entirely acceptable to the EU. And so the search moves on to considering the ground somewhere between Switzerland and Ukraine. At this point, the discussion has to move on to the next deeper level of the major sectoral building blocks of the conceivable 'bespoke' model. And here there is a long list of major questions that the UK must answer for the negotiations to become truly engaged on the future relationship.

3. The conceivable content of the future EU-UK relationship

For the EU, the possible content of the future relationship could well follow a familiar structure. The list of chapters could be similar in its agreements with neighbouring states, and common references to EU law, while details of timing and selectivity would vary. This is why the Prime Minister's continuing insistence on a 'bespoke' agreement is both right and wrong: right because details will be specific and unique, but illusory because for the EU the likely agenda is structurally set in law and practice. A list of the inevitable main questions on which the UK must to make up its mind is set out in the box below.

The UK wants to retain "the most seamless and frictionless possible" access to the EU market, while still leaving the customs union and the single market. Given the UK's major objective to remove itself from the jurisdiction of the CJEU, those outside the British government's negotiating team cannot understand what game the UK is playing. As a 44-year old member state, the UK knows perfectly well how the EU operates under the rule of its law. Its civil servants presumably understand that "seamless and frictionless" access to the EU market is simply not possible from outside the customs union and single market.

The EU therefore waits for the UK to clarify its real intentions, which are obviously subject to different preferences among ministers and within the main political parties. External observers note the delicate movements of language on the British side about degrees of direct or indirect recourse to the CJEU.³ The UK paper on dispute settlement has a perfectly good review of the range of legal mechanisms present in the EU's international trade and economic cooperation agreements: in Canada's CETA there is no reference, Norway sees a hybrid case where access to the single market is subject to a special EFTA court, and other hybrid cases such as Ukraine mix international arbitration procedures with some references to the CJEU. The hybrid cases retain at least a residual bottom-line reference to the case law of the CJEU.

The legal regime governing the future UK-EU relationship is thus a major condition of how far it might retain single market access. The UK has to specify both which EU regulations and directives it commits to keeping, and what type of legal mechanism it proposes to use for enforcement.

But there is the further very delicate matter of how far or whether the EU will insist on continuing budgetary contributions from the UK. Norway and Switzerland pay, but Canada and Ukraine do not. The difference hangs of course on whether – or not – full single market access is provided. The UK is officially silent at the moment on this question, although many voices in the UK reject the idea of continuing budgetary payments.

How should the negotiation process go towards resolving these huge uncertainties? The next step will surely require the UK to systematically answer the 20 questions listed in Box 1 (which is only a selection of the major items), including in each case how close it wishes to remaining 'in' and what legal mechanisms it is willing to contemplate.

Box 1. 20 questions about the future EU-UK relationship

- 1. Tariff-free trade.** Clearly sought by the UK, and is also in the EU's interest, but what conditions will the EU set (e.g. continuing compliance with other items below, and/or continuing budget contributions)?
- 2. Customs union.** The UK will quit the customs union, but in a recent paper opens up ideas for remaining nearly 'in', or selectively 'in'. For the EU, a country is either 'in' or 'out' of the customs union.⁴
- 3. External trade policy.** In quitting the customs union the UK will be free to make its own trade agreements with third countries, but its first concern will be to minimise losses through exclusion from the EU's very extensive set of free trade and preferential agreements with as many as 100 countries, many small ones. How far will the UK try to clone these existing agreements?⁵

³ Steven Blockmans and Guillaume Van der Loo, "[Brexit: Towards an 'EFTA' like dispute settlement mechanism](#)", CEPS Commentary, CEPS, Brussels, 31 August 2017.

⁴ Jacques Pelkmans, "[The Brexit Customs Vision – Frictions and fictions](#)", CEPS Commentary, CEPS, Brussels, 22 August 2017.

⁵ It is clear that external trade policy will have to be a major exception to the idea of a transition period that would retain as much as possible of the status quo. This is because third parties beyond the EU and UK are involved, and

4. Single market. The UK says it will also quit the single market, but what that means in practice will only be seen in the answers to many of the questions that follow. It is not a black and white question.

5. Industrial product regulations and standards. The UK will presumably want to retain maximum compatibility with the EU and continue membership of pan-European organisations that define thousands of such standards (CEN, CENELEC). However, border controls to check conformity may become necessary, unless the UK negotiates sectoral Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs), designed by the EU for neighbouring non-member states.

6. Food safety. The UK has to decide whether to continue with the 300 EU regulations governing food safety in their entirety. If it were to become selective, EU market access could be prejudiced (viz. chlorinated chickens, GMOs).

7. Financial markets. The uncertainty factor is already provoking relocation from the City to the eurozone. The UK must urgently specify whether or how far it intends to remain compliant with EU law and assess the extent of the damage from incomplete compliance.

8. Civil aviation. The UK will want to stay in the Single European Sky and negotiate a legally binding Civil Aviation Agreement, for which various dispute settlement mechanisms exist as precedents.⁶

9. Road transport. Restrictive quotas apply to non-member states, for which border controls cause serious delays (even for Turkey in the customs union). This area portends difficult negotiations for the UK.

10. Telecommunications, digital, roaming. Given that the UK has been in the lead in developing EU telecoms regulations, continued compliance would seem likely. But the abolition of roaming charges within the EU would cease to apply, in the absence of a tricky negotiation.

11. Energy. The EU has created a special European Energy Community, which binds neighbours strictly and legally into the EU's regulation of energy markets and networks. Does the UK want to be 'in' or 'out' here, or remain attached in some way to the even more ambitious Energy Union?

12. Environment. The UK has already said it will continue broadly with EU environmental regulations, but how far and with what legal certainty?

13. Climate policy. The UK was a key driver behind the EU's emissions trading scheme. Will it negotiate a deal to stay 'in', or quit?⁷

14. Labour market law. The UK has said it would continue to comply. For the EU this is surely one of the conditions for tariff-free trade, and so the legal robustness of this commitment will have to be clear.

15. Competition and anti-subsidy policy. Both the UK and the EU are vitally concerned to have a level playing-field policy. If the UK is to continue to follow EU policy, the legal basis and dispute settlement mechanism will have to be robust.

obtaining their agreement to a transitional maintenance of the EU's free and preferential trade agreements would introduce an impossible complication into the process.

⁶ For a detailed presentation of different legal enforcement schemes, see Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*, Brill Nijhoff, 2016, pp. 349-356.

⁷ Milan Elkerbout, "[Brexit and Climate Policy: Political choices will determine the future of EU-UK cooperation](#)", CEPS Commentary, CEPS, 15 July 2016.

16. Intellectual property rights. The UK will presumably want to remain within the provisions of EU law, which are much more substantial than those of the WTO. If so, how will it arrange this legally?

17. Public procurement. The UK has no problem with EU law in this area, which is far more developed than that of the WTO. Continued access to the EU market will require compliance with the directives and agreement on dispute settlement.

18. Criminality, terrorism and justice. The UK seeks a strategic agreement here, starting presumably with the 30 items of EU law that the Home Office opted into under Theresa May's watch, with subsequent developments driven by common anti-terror priorities. Legal enforcement mechanisms are vital here.

19. EU agencies. Non-member states are eligible to join up to 20 agencies, many of real interest to the UK: Europol, Eurojust, European Defence Agency, European Aviation Safety Agency, European Environmental Agency, etc. How many of these will the UK want to stay in, with what legal implications?

20. EU programmes. Non-member states are eligible to join 19 programmes, including some in which the UK already wants to stay as a paying member (e.g. Horizon 2020 for scientific research and Erasmus for higher education). In how many other programmes will it seek continued membership?

In the process of responding to these questions, the UK is warned in advance about the EU's objections to 'cherry-picking'. The Prime Minister's desire for a 'bespoke model' that is 'best for Britain' sounds better in London than in Brussels. Does the UK want to simply identify the things that it likes best, one by one, and blithely skip over what it likes less? That sounds very pragmatic, but is precisely the feature of the Swiss model that the EU has had enough of. The EU will want a single comprehensive and internally consistent treaty. The final questions of whether there is to be tariff-free trade, with or without budgetary contributions, will only be assessed in the light of the overarching plan and logic, containing both general principles and operational details, sector by sector. Without which no deal will be struck and the UK crashes out.

On Day 1 of withdrawal, the Great Repeal Act will assure 100% continued compliance with EU law. But any deal with the EU will require clarification about which chapters, and individual directive and regulations, the UK will want to remain compliant with. If the UK makes no such commitments, preferring to retain freedom to diverge wherever and whenever it wants, then there would also be no basis for a deal. The Ukraine model, however, could come in handy in the event of such a scenario. Each sectoral chapter of its Association Agreement and DCFTA describes common objectives in ways that one can imagine the UK and EU doing perfectly well together. The main treaty text of each chapter is accompanied by an annex that lists the EU regulations and directives with which Ukraine agrees to comply, mostly taking these laws in their entirety, but in some tricky cases identifying only those articles that apply, or may be excluded. The key political point here of potential interest to the UK is that while the main text of the treaty is really fixed, and can only be changed through very arduous ratification procedures, the annexes can be amended by simple mutual agreement of the two parties in their 'cooperation council' and its committees. This facility could be highly relevant to the UK's

initial post-Brexit situation, where it starts by being in full compliance with EU law, but wishes to take its time in working out what it wants to retain or delete. One can readily imagine a process in which a future UK-EU Cooperation Council reviews UK requests to delete items of EU law, alongside EU requests to add new legislation. The EU for its part might assess UK requests for amendments to the annexes on the basis of whether it materially affects (or not) its major concern for a fair and level playing field for trade and competition.

4. Why leave?

In the course of the huge debate within the UK since the invoking of Article 50, many arguments have become clearer, but most point in the direction of remaining and not of leaving.

The two most prominent arguments in the referendum campaign concerned immigration and 'taking control', the latter meaning above all escaping the jurisdiction of the CJEU.

On immigration the Brexit campaign has already largely 'succeeded', even before leaving, in resolving the perceived problem of excess immigration from other EU member states. The 'unwelcome sign' has been loudly posted on the 'brand UK'. Actual net immigration from the Central European countries that joined in 2004 has fallen precipitously, to the point that several sectors in the UK are now reporting serious labour shortages – from agriculture to the National Health Service, and others. This 'unwelcome' branding will persist, since there are many other attractive old EU member states to go to. The need for a new bureaucracy of control is evaporating. The Swiss compromise on immigration, which rests only on a requirement for employers to try and take on existing Swiss residents as a priority, could for example be acceptable to the EU if followed by the UK.

The scare story in the referendum about millions of Turkish immigrants expected to follow Turkish accession is seen to have been a big lie. As also the big budgetary gains for the National Health Service, proclaimed by Boris Johnson, is seen to be deception, which he sustains to this day as Foreign Minister.

The phobia over the European Court of Justice resonates only as an ideological obsession of (how many?) Tory MPs and editors of the tabloid press. Ask the people what offence the Court has done against them. No idea. Only thing, some may remember the case of a radical Islamic cleric Abu Hamza whose deportation was blocked in 2012 by the European Court of Human Rights, which of course was not the EU's doing at all. More fundamentally the CJEU's judgements are mainly about enforcing a level playing field in the single market, which has been the UK's highest priority. Further still, the UK justly prides itself for being an above-average EU member state in terms of respecting the rule of EU law. This means that the Court more often hears cases of cheating by other member states, than it has cause to discipline the UK.

The UK's negotiating position is now contorted over how its courts might 'take account' of the case law of the CJEU, but without its 'direct' effect, leaving open it seems its 'indirect' effect, which to the man in the street sounds like an obscure matter indeed⁸.

A more strategic argument is that the EU is heading towards a federal Europe. Quite apart from the fact that the UK like any other member state can veto such developments, it is not alone. Try selling a federal Europe in the Netherlands these days.

The true strategic argument is that the UK has succeeded over the years in fashioning its own EU policy cocktail, being very much engaged in the things it likes (single market and foreign policy orientations) and keeping out of the things it does not like (euro and Schengen). So indeed, why leave?

5. Last chance to 'Exit the Brexit'?

This slogan has sprung to life over the summer and is visible in street demonstrations.

But how can it be engineered politically? Not easy to say. But with the transition concept now officially proposed, some scenarios are becoming clearer.

The question turns on the timing of a conceivable second referendum. This would have to happen very early in 2019, before the March 2019 deadline, with the question asking whether to proceed on the terms so far visible in the negotiations, or to 'Exit the Brexit'. This in turn raises the question whether the Article 50 declaration could be revoked, which is a legally controversial matter. Various leaders, from Tusk to Macron and Merkel, however, have hinted that they could go along with this.

After March 2019, the UK is 'out', even if the transition maintains a functional status quo for 'around two years', i.e. quite likely longer. If sometime then, public opinion moved strongly against Brexit, what could be done? In this situation it is clear that the UK would have to re-apply for membership, an act so humiliating that it unimaginable. However, if the transition had really maintained the status quo, it would not be complicated technically or legally to slip back in. But even so, the EU itself will have moved on by then, and many would be loath to start discussions all over again with this difficult member state. However implausible this re-entry scenario may seem, it is clearly worrying some leading Brexit advocates, such as Foreign Minister Boris Johnson and others who have been arguing hard in the cabinet for a short and strictly time-limited transition; the Prime Minister, however, was persuaded to include in her speech the much looser formula of "around two years", depending on circumstances.

⁸ Blockmans and Van der Loo, op. cit.

6. Conclusions

The Prime Minister's speech in Florence may have been enough to justify the request for the negotiations to move on, if still insufficiently for Mr Barnier, to the second stage of the future UK-EU relationship.

But if the UK wants to move on to the second stage, it will straightaway have to flesh out its proposal for the deep and special partnership, saying clearly and in detail how close it wishes to remain to the single market – something it has so far been unwilling or unable to do.

The most important tangible point in the Florence speech was the proposal of a transition period to last “around two years”, during which a virtual functional status quo would persist. This would include ongoing budgetary contributions, which would defuse to some degree the difficult question of the financial settlement.

Precisely how long the transition might possibly last beyond the two years is said to depend on the progress of negotiations, which is one way of admitting that the future relationship will not be known by March 2019. On the contrary, the potential time horizon for negotiating the future relationship could now stretch from the end of 2017 until 2021. While both parties will want to avoid a seemingly endless negotiation, this time frame is quite in line with the EU's experience with many complex international agreements.

Brexit remains deeply controversial in a bitterly divided UK, and even among cabinet ministers, with the ‘Exit the Brexit’ slogan visible now in some street demonstrations. A second referendum before March 2019 is mooted by various commentators, but how this might be engineered politically remains an enigma. However, if withdrawal happens in March 2019, it will then be virtually irreversible, while the shape of the future relationship could remain wide open as negotiations stretch on into the transition period. Yet Brexit advocates in the cabinet still seem sufficiently worried about the risk of reversibility that they have been pushing hard, without complete success, for a short and strictly time-limited transition. And, as a British Prime Minister once famously said, “a week is a long time in politics”.



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