

BRIEFING

A SERIES OF POST-REFERENDUM BRIEFINGS

August 2019

DRAINING THE 'DEAL' SWAMP

Where we are now

The Leave Alliance proposals put forward in the 2016 referendum seem more and more sensible. These proposals were for the UK to leave the political, judicial and monetary structure of the EU along with most of the common policies but to stay in the Single Market via the existing membership of the EEA and transit this to EFTA membership as well (Flexcit in short).

These proposals were based on the principle that the aim of the Leave movement should have been to carry out the process of withdrawing from the European Union.

Winning a referendum was part of that process but was not an aim in itself. It was merely a step along the road. To actually withdraw from the European Union required a clear aim of what was to replace the existing membership of the EU and a clear plan to move to that new position, preferably by agreement.

This would have been a pretty easy sell for the government if May had gone for these proposals. It would have pleased business, mollified the EU and seemed a plausible step by step strategy to the electorate.

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No secondhand car salesman 'argot'

The 'argot' of the secondhand car salesman in talking about 'deals' has only caused further confusion.

It has always been unclear what any 'deal' would be about. Would it be a revised Withdrawal Agreement or would it be an agreed framework for the future relationship (in principle anyway) on to which a Withdrawal Agreement could be attached?

The talk about 'deals' made it easier for the EU to assert that the proposed Withdrawal Agreement was a 'deal'.

Instead of talking about 'deals' or 'no-deal' the UK government should have critiqued and withdrawn its assent to Mrs. May's Withdrawal Agreement on two diplomatic/political grounds.

Article 50 of the Treaty makes it clear that any Withdrawal Agreement depended on 'the framework for the future relationship' and the Political Declaration (coincidental with the Draft Withdrawal Agreement) did not establish this framework.

The Political Declaration was "*vague to the point of vacuity*" as Sir Ivan Rogers asserted. There was no framework in it to which a Withdrawal Agreement could be structurally attached. ("*taken account of*" according to Article 50)

Therefore, the Withdrawal Agreement without a proper 'framework' was a non-runner in legal and constitutional terms. It was not an arrangement which complied with Article 50 of the Treaty.

Sir Peter Marshall

The contention that Mrs. May's Draft Withdrawal Agreement fell within Article 50 was wrong. While I have always regarded the Draft Withdrawal Agreement as defective for that reason, I am glad to see a Sunday Times' Article (18th August 2019) by Sir Peter Marshall (former Permanent Representative to UN) which takes exactly the same view.

He addresses the main point, that the arrangements of the purported Withdrawal Agreement did not adhere to the legal provisions of Article 50 and all talk of 'deals' is merely obfuscation.

Sir Peter Marshall also notes that the European Council has usurped power which in Article 50 is actually the power of the Council of Ministers.

The Article in the Sunday Times is retyped below.

The Money

The second critique is that Mrs. May's Withdrawal Agreement contained a financial settlement which lacked any formal Accountant's Report. There were a considerable amount of uncertainties in the financial settlement, especially in the area of Liabilities and Contingent Liabilities. Michel Barnier would not commit himself to the opaquely calculated £39 billion cost put forward by the UK government. So, on this issue, the UK government was not wrapping up an agreed figure with the EU but was unilaterally putting forward unprofessional and opaque

calculations of financial Liabilities which naturally made for voters' uneasiness about what were the real costs.

As pointed out in our campaign literature before 2016, the financial dangers of EU membership lurk in the balance sheet area. This was explained in our 2016 paper, ['UK Membership of the EU. The Threat to the UK Balance Sheet'](#). The Eurozone is in fundamental disequilibrium and the UK must exit its exposure to EU Liabilities and Contingent Liabilities. These threats were not clearly analysed nor dealt with.

There are many other objectionable features of Mrs. May's Withdrawal Agreement flowing from the failure to establish a framework for the future relationship. Indeed, these features were inserted to make up for the lack of a defining future framework. It is not just the Irish backstop.

What about the Transition?

If the UK agrees Mrs. May's Withdrawal Agreement (even if slightly amended on the Irish backstop by the Johnson government), it still needs a clear aim and a clear plan to achieve withdrawal. The Draft Withdrawal Agreement is put forward as a solution but, in fact, it only incorporates a transition period ending on 31/12/2020 (although it could be extended). Therefore, even if a revised Agreement is agreed, the UK government will almost immediately be faced with having to make a decision on what its ultimate aim for a future relationship actually is. It is buying very little time. Despite all the talk about 'deals' the real negotiations have not started.

A weaker position

Once a Withdrawal Agreement is ratified, the UK will be in a much weaker position.

It will have agreed to the false interpretation of Article 50 by accepting a Withdrawal Agreement without a meaningful agreement on the future framework.

It will have agreed to opaque, unprofessionally calculated financial claims by the EU and still not have achieved the real exit from EU Liabilities and Contingent Liabilities.

It would be stuck with the transitional arrangements unless it asserted no-deal on 31st December 2020 but having cast aside the foundation of its legal position based on Article 50 as well as having agreed to unsound calculations of financial Liabilities.

The 'catastrophe' of 'no deal'

I think most analysts have decided that, following 'no-deal', imports would not be a problem. The real 'catastrophe' might be a fall in UK goods exports to the EU27.

I think this is a real problem, and much has already happened as EU27 companies look for suppliers in the Single Market simply to avoid any problems for themselves. So even an about turn to Remain would not alleviate this problem completely. Indeed, Remainers are quite naïve to think that trade patterns and quantum will revert to previous levels.

What next?

The EU27 will start the next phase, assuming 'no-deal', with a failed Withdrawal Agreement, no cash from the UK and the Irish position unresolved.

Faced with the UK abandonment of the Withdrawal Agreement what will the EU27 do? They really wanted the cash and they really wanted (reasonably) to protect Ireland. The UK could make some imaginative unilateral offer on Ireland

As for the British government, it must surely learn from the mistakes of Mrs. May in not establishing its aim and plan as well as doing elementary work, such as evidencing the financial calculations of withdrawal.

It is necessary to stop talking about 'deals'. 'Deals' may be appropriate for resolving minor problems at the end of negotiations. They are completely inappropriate when considering 'the grand strategy' of the future political, monetary and judicial relationship with the States of the EU.

Deals: A warning from the past

One of the most famous deals made in recent British history was the 'back of an envelope' - actually a napkin - where Winston Churchill in 1944 at the Kremlin outlined to Stalin his proposals on 'spheres of influence' in post-war Eastern Europe. These proposals were known as the 'percentages' deal but were a disaster. First disclosed in Churchill's own War memoirs, [those who are interested in how the deal-making approach could run out of control can find more of the history here.](#)

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Peter Marshall

It casts itself as the good guy, but the EU's aim has been to humiliate and cheat

Circumstances and antiquity have contrived to immerse me for much the greater part of the past 70 years in the problems and opportunities of multilateral diplomacy and negotiation. In the June 2016 referendum I voted "remain" as the lesser of two evils. I joined in respecting the result of the referendum, not only because it was the will of the majority, but also because I recognized that history could well judge that this was the right long-term decision. We do not really belong inside any elaborate European continental construct. As Clement Attlee, when asked whether or not the UK was part of Europe, put it succinctly: "We're semi-detached".

Theresa May's letter of March 29 to President Tusk, "triggering" the withdrawal process in accordance with article 50 of the Lisbon Treaty, was as forthcoming, open-minded and constructive as one could wish. The response, in the shape of the guidelines adopted on April 29, 2017, by the "European Council (Art. 50)", that is, without the UK, was appalling: in its negative introspection and general perversity, it is without precedent in the annals of democratic discourse. Any hope that the negotiations would be conducted in a positive spirit was extinguished from that moment.

What ensued could not be called "negotiation". It was "capitulation by stages". Concessions were willingly made on the UK side. Our partners have departed not one significant whit from the guidelines. They regarded our leaving as an existential threat to the EU. The EU's priority, we were told, "will be to minimize the uncertainty caused by the decision of the UK for our citizens, our businesses and member states".

Our partners were not disposed to accept that the best way of achieving this was to agree at the outset the framework for our future relationship. Our departure would then have looked like a plus for us, and might have given other member states unwelcome ideas.

To get their way, the European Council in effect hijacked the negotiations. Thus they distorted the process for withdrawal laid down in article 50. Article 50(2) instructs the Union to "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".

The guidelines, in contrast, insisted on the "phasing** of the negotiations: they declined to "take account of the framework for the future relationship" until the withdrawal arrangements, including the "divorce bill", had been all but settled. The inevitable consequence was that we were unable to conclude the agreement, but only to negotiate it.

The backstop is the direct result of sequencing. It would never have arisen if account had been taken of our future relationship alongside the withdrawal negotiations.

Our partners also loaded the dice against us. Article 50(2) specifies that the European Council shall provide guidelines in the light of which "the Union shall negotiate and conclude an agreement with that State. [The agreement] shall be concluded on behalf of the Union by the Council" (not the European Council, comprising heads of government, but the body a rung below known as the council of ministers).

But they were not having that. The guidelines announced that the European Council "will remain permanently seized of the matter". The whole withdrawal process was thus further prolonged by its subjection to the European Council's ponderous timetable.

Even though in flagrant breach of their treaty obligations, our partners have managed to establish around themselves an aura of injured innocence, and around us an aura of moral delinquency. Vociferous, none-too-scrupulous remainder campaigning on this side of the Channel has been of great assistance to the EU.

It became obvious within a few months that our partners were acting in sustained bad faith. Disaster loomed. On November 13, 2017, I wrote to M Barnier, the EU chief negotiator, setting out in detail the case against them. Logical minds working from false premises, unfailingly arrive at erroneous conclusions. The second sentence of the conclusions of the Special European Council (Art. 50) on April 10 this year is a classic: it reads as follows: "They [the EW27 leaders] agreed to an extension to allow for the ratification of the withdrawal agreement."

That means that, having seen a British prime minister sacrifice herself in a vain attempt to satisfy their intransigence, our partners still insist that there is no alternative to our embracing this inequitable, illogical and illegal text, although it has already been rejected three times by the House of Commons.

Hijacks, if they are to be successful, depend on the entity targeted eventually giving in, in one way or another. The UK has no intention of obliging.

Where there is no agreement, article 50(3) comes automatically into play: "the treaties shall cease to apply to the state in question", unless the European Council unanimously decides to extend the period of negotiation. We do not therefore leave: we are ejected.

Whose responsibility, then, would it be to decide there was no agreement, with all that that could imply? Article 50(3) is silent on the point.

However, responsibility for concluding the agreement on behalf of the EU, as already noted, rests with the council of ministers, operating on a qualified majority voting basis, "after obtaining the consent of the European parliament".

It follows that the council of ministers, which would have concluded the agreement if that had been possible, have the responsibility for determining that there is failure to agree. But on what grounds would they make such an unwelcome determination? How could they avoid examining, and explaining publicly, why there has been failure? EU bad faith and illegality would be ruthlessly exposed.

The way out of the blind alley into which the 27 heads of government have allowed themselves to be led is to involve the council of ministers forthwith. They can, indeed must, take a fresh look.

The task now is to ensure the whole world understands the score, notably in the context of the forthcoming meeting of the G7 in Biarritz on August 24-26. Presidents Tusk and Juncker will represent the EU. The official announcement to that effect notes that "the G7 summit will be an opportunity for the EU to defend the rules-based order and its organisations as the best approach for global governance".

On the contrary: the best approach, nay the essential approach, for global governance is to practise what you preach, and to respect other people, not to humiliate and cheat them.

Sir Peter Marshall is a former permanent I representative to the United Nations and was Commonwealth deputy secretary-general, 1983-88

Read Sir Peter's letter to Michel Barnier at [thesundaytimes.co.uk](https://www.thesundaytimes.co.uk)

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