



THE TWO-YEAR PERIOD FOR NEGOTIATING BREXIT CAN, AND SHOULD, BE EXTENDED

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I am delighted to be invited to speak at this important launch. I congratulate Skoda on the recent rapid growth in sales in the Irish market.

I would like to talk this morning about Brexit.

I believe that Brexit will do disproportionate damage to the motor industry, which is one of Europe's premier industries. It depends for its efficiency on complex supply chains, and these will be disrupted if the UK Government persists with its intention to leave the EU Customs Union and Single Market.

The risk of UK simply crashing out of the EU, remains high. The fact that Mrs May has had to postpone her planned speech on Brexit, points in that direction. So, does her slap down of Philip Hammond for saying that the changes in the EU/UK trade relationship would be "modest". That slap down is hardly consistent with her promises in regard to the Irish border, which still have to be converted into Treaty language.

The gap between popular expectations, and practical possibilities, remains dangerously wide.

The two-year time limit to conclude the negotiation of the terms for UK withdrawal from the EU is, as we are slowly learning, far too short.

The implications of UK withdrawal have not, even yet, been fully discovered by the negotiators on the either side. New complications and hypotheses are emerging every day. These arise because we are only now digging down into 40 years' worth of trade deals, memberships, and understandings, which the UK can only be part of, so long as it is in the EU.



It would be in the interest of Ireland if the UK were to decide either not to leave the EU at all, or, failing that, decides to rejoin the EU, on terms acceptable to Ireland.

How might this happen? This is the question I am attempting to answer in a paper to be published today by the Institute of International and European Affairs.

The UK hopes to leave the EU on 29 March 2019, but to continue to have access to the EU market for a two-year Transition Period, ending on 29 March 2021. This date was presumably chosen because it is before the scheduled date of the UK General Election.

I believe this Transition Period approach is a mistake. I believe it would be simpler and wiser for the UK and the EU to agree to extend the period for negotiation under Article 50 by two or more additional years. This can be done by unanimous agreement.

DISADVANTAGES OF THE PRESENT” TRANSITION PERIOD” APPROACH

At the moment, the UK is seeking a two-year transition period, after March 2019, during which, having left the EU as a member, it would still enjoy the benefits of membership of the EU Single Market, and Customs Union. Some in the European Parliament have said the longest Transition the UK might be granted is 3 years.

If this is conceded, the UK, for the duration of the Transition, would not then have any say in the making, and in the interpretation of the rules of the Single Market and Customs Union, with which it would have to comply. It would still be subject to ECJ jurisdiction, and would still be contributing to the EU budget, on the same basis as if it was a member.

The UK Prime Minister calls this proposed transition period an” implementation” period.

Businesses in the UK and in the EU, and particularly Irish businesses trading with the UK, would presumably be expected to be implementing changes in their business practice to accommodate themselves to the sort of arrangements that would apply, in March 2021, when the UK had actually left both the Single Market and Customs Union, as Mrs May desires.

The difficulty will be that no one would know for sure what to prepare for.

The Transition would be more of a Postponement than a Transition!

This is because the EU and the UK could only start substantive negotiations of the terms of a future UK/EU trade deal at the beginning of transition period, because the UK must first become a non-member of the EU, before it can negotiate a trade deal with the EU.

On the other hand, as a non-member and during the Transition Period, the UK would also have to negotiate replacements for the hundreds of Trade and other Agreements it has



with third countries as an EU member, which would cease once the UK had left the EU, on 29 March 2019.

Negotiating the terms of a Transition Period may prove to be very difficult, almost as difficult as negotiating a final agreement. Perhaps more, because there is no precedent to follow.

Of course, the political outlines of a possible trade arrangement with the UK might have with the EU would be referred to in the “Framework for a future relationship” that, under Article 50, should accompany the Withdrawal Treaty.

The Withdrawal Treaty itself, and presumably the Framework, can be agreed by a qualified majority in the European Council.

But a future trade deal with the UK would face more difficulty. Depending on its content, and whenever it is eventually finalised, it will almost certainly require the unanimous agreement.

If it covered services, many of which are regulated at national as well as EU level and which the UK wants included, it would have to get ratification from all the national parliaments.

So, any outline of the trade deal, promised in the Framework accompanying the Withdrawal Treaty, might not survive the substantive negotiation that would take place after the UK had already left the EU

The Framework to be full of good intentions, but not full of the sort of bankable legal commitments that businesses will need to make investment decisions.

So, two years may be too short a Transition period for business.

It will also be too short for trade negotiators, who say that a deal as complex, as the one the UK is seeking, would probably take 6 years to finalise, not just 2.

But, politically, a two-year Transition, may be as long as the UK can live with, because its government is in such a political rush to leave.

By the time of the next election, the Conservative Party will not be comfortable, if the UK is still in “transition”, implementing EU laws, contributing to the EU budget, and under the jurisdiction of the ECJ. So, it may be willing to pay a high price to finalise a Framework deal and end the Transition within the two years.

On the other hand, the likelihood is that, in those negotiating circumstances, the deal will be a “bad one” for the UK. But rejecting that “bad” deal will not be attractive either



because without a deal, the UK will be out of the EU, and will only be able to trade with the EU on “WTO terms”, which would be really bad for the UK, and appalling for Ireland.

All of this will be happening on the eve of the UK’s 2022 General Election.

In these circumstances the UK government might be tempted to look for an extension of the two years Transition and leave it to a post General election government to take the blame for an unsatisfactory Trade Agreement.

I believe one such time limited prolongation of the Transition Period, if requested by the UK, would be granted by the EU 27. But that would be it.

An indefinite prolongation, or a series of prolongations, would not be offered.

There is so much uncertainty surrounding the content and timeline of a UK/EU Trade deal that the Transition Period will not provide a reliable basis for planning by business.

All the same, the longer is the Transition, the better it will be for Irish business.

But a long Transition will be exceptionally difficult to sell in the UK.

It would offend against the principle of democratic representation. The UK would have to implement and abide by EU regulations, in the making of which it would have had no part. It would have no representation in the European Parliament, Council or Commission. Any financial contribution it might make during the Transition would be represented by some as “taxation without representation”.

So, I conclude that, as the UK explores the difficulties of its proposed Transition or Implementation Period, it may find itself forced to look at other options.

The only other option on offer is an extension of time under Article 50 (3)

EXTENDING THE TWO YEARS AS PROVIDED FOR IN ARTICLE 50

Article 50 (3) of the Treaties, under which UK withdrawal is being negotiated, says a country that has applied to withdraw from the EU and given notice of intention to do so under Article 50 (2) shall cease automatically to be a member

“ two years after the notification referred to in paragraph (2), unless the European Council, in agreement with the member states concerned, unanimously decides to extend that period”.

Extending the two-year period is a matter for the member states. There is no provision requiring the consent of the European Parliament to such an extension of the two years.



At the moment, there is no official sign that either the UK, or the EU 27, would contemplate using such an extension, or even talking about it.

It is too early. To do so would signal weakness, and would be a poor negotiating tactic.

But the provision for an extension of the two years was put there for a practical reason.

Even with the best will in the world, trade negotiations can take longer than all sides want.

There can be unexpected technical and legal difficulties.

General Elections and government formation delay can prevent decisions from being taken. Look at the example of Germany at the moment.

Rigid time limits can also be exploited by forces that have another agenda, and simply want to maximise chaos.

Politicians can even change their minds, but need more time, than is provided with in the two-year limit, to adjust the expectations of their supporters.

Time limits create a fevered atmosphere in which rational calculation becomes more difficult.

Time will have to allowed, at the end of the two year period, for ratification of the Withdrawal Agreement, and of the Framework for Future Relations by both the British and European Parliaments, and both may look for time for debate and deliberation on the merits of rejecting, or accepting, the proposed Treaty

Neither Parliament may wish to be confronted with a proposition, which says “take it or leave it, and do so now”.

Allowing time for Parliamentary ratification, on its own, might necessitate an extension of the two years.

An extension of the two year period, under Article 50 (3) would be different, in its effect, from an extension of the Transition period.

Under Article 50 (3), the UK would continue, for the duration of the extension, to be a full voting member of the EU, except on issues to do with Brexit.

It would still be a member of the ECJ and a British Judge would continue to sit there.

The UK member of the Commission would continue his important work in that capacity.



The UK MEPs would continue to sit in the European Parliament, although from 2019 there would be different MEPs from some of the constituencies.

The UK would continue to be bound by EU law, but that will also be case during a Transition. But in the Article 50(3) scenario, the UK would enjoy democratic representation.

In these senses, an extension under Article 50 (3) would be a better deal for the UK than a Transition Period.

But the Referendum decision to leave the EU would not yet have been implemented. It would still be under negotiation.

An extension of time under Article 50(3) offers a greater degree of certainty to business. The UK would definitely retain all the obligations and advantages of membership for the duration of the extension.

Article 50 (3) offers no guidance on, and does not limit, the period of an extension that could be granted. Nor does it place a limit on the number of extensions that might be granted.

Given that every EU state, and the UK itself, would have to agree, the likelihood is that the initial period of any extension could be quite short.

But if, during that extension, negotiations were going forward in a good and constructive spirit, further extensions could become possible

Under the Article 50 (3) approach, the UK would still be a member of the EU.

Thus, while it could agree a framework for its future relationship with the EU and this could cover trade matters, the UK could not negotiate and finalise a trade deal with the EU or anybody else.

That would be a big negative from the point of view of those in Britain who believe there are attractive trade deals waiting to be concluded.

But, on the other hand, the UK would continue to benefit from existing EU trade agreements, and the extra time would allow it to put much greater flesh and detail into the Framework for Future Relations with the EU, than will be possible in the time between now and March 2019.

I believe the two year time limits has created a fevered atmosphere in the negotiations. It has politicised them in a way that makes rational calculation of mutual interest more difficult.



An early agreement to a substantial extension under Article 50 (3) would remove this problem, and would give the negotiators more time and space.

I have the sense that some in the UK are open to this possibility, but there is little appetite for it in Brussels.

If the EU side were unilaterally to offer an extension of the time period, under Article 50 (3), that went beyond the time of the UK General Election, it would thereby place a heavier responsibility for a bad negotiating outcome on the current UK government.

The UK government might want to reject such an offer, but it might not be able to persuade the UK Parliament to agree.

This would not be easily done.

There is a feeling in some continental EU countries that the UK has already taken up too much of the EU's time. For example, the David Cameron's decision to prevent the Compact for the Fiscal governance of the Eurozone being incorporated in the EU Treaties, even though they had nothing to do with the UK, has left a very sour taste.

There is a fear that any extension of UK membership under Article 50 (3) could be exploited by the UK to block other EU reforms, and/or to improve the UK's position in the competition between the EU and the UK post Brexit.

Granting the UK, which had decided to leave and chose the timing of its Article 50 letter freely, an extension of the time limit, would be seen by many as encouraging other sceptical EU states to use the threat of withdrawal as a bargaining tactic, or a means of getting votes in Elections.

In this context, taking a tough line with the UK is not seen as "punishment" of the UK, as much as being "self preservation" by the EU.

An extension of time under Article 50 (3) would mean that UK MEP's would still be eligible to sit in the next European Parliament, at least until the extension period had expired and the UK was out.

A European Parliament Election in 2019 in the UK would allow the British people to debate the issue of UK withdrawal from the EU in a much more informed manner than was possible in the Referendum of 2016. The campaign, and the result, of the European Parliament in the UK in 2019 would give valuable guidance to negotiators.

It might confirm the decision to leave, or it might signal a willingness to change course.



Either way, under the Article 50(3) time extension scenario, this would happen before the UK had actually left the EU. So the outcome of a European Parliament Election, in the UK in 2019, would be politically meaningful.

If the result was decisive vote in favour of Remain candidates, the UK might have the option of withdrawing its Article 50 letter and staying on in the EU, under existing terms.

An extension of time under Article 50 (3) would facilitate a second Referendum, if that is what the British people want.

The choice would be much clearer than it was in 2016, because Britain would still be in the EU at the time of the Referendum. So, staying in the EU in existing terms would be the clear alternative to accepting the Withdrawal Treaty and accompanying Framework document that would be presented in the Referendum.

Reapplying to join under Article 49, which would be the only option if the change of heart took place after the UK had already left the EU would be much more difficult. It would mean a whole new negotiation and different, and less favourable terms of membership, for the UK.

On the negative side, UK MEPs continuing in the European Parliament after the 2019 Election could play the role of spoilers. They could ally themselves with nationalistic and anti system MEPs from other countries, who simply do not want the EU to succeed.

A disadvantage of a time extension under Article 50 (3) is that it would interfere with the plans of a number of European leaders, including the Taoiseach and President Macron, to allocate some of the seats to be vacated by UK MEPs, to MEPs who would be elected from a constituency of the entire European Union. In the European Parliament itself, work is already being done on the allocation of the vacated UK seats, and some existing member states could get more seats. Beneficiaries might be inclined to resist an extension of time under Article 50 (3), but the European Parliament's consent is not required. But keeping the UK in the EU is more important.

CONCLUSION

If an individual wants to withdraw from a contract, he can do so, but he would normally expect to have to compensate other parties to the contract for the damage his decision might cause. No consideration at all was given, during the referendum in 2016, to the impact UK withdrawal would have on other contracting parties, notably on Ireland.

For all these reasons, I believe the UK, and the EU 27, need to take time out to think about where we are going with Brexit. Two years is not enough.



The confrontational atmosphere, engendered by the artificial time limits in Article 50, prevents a quiet discernment of mutual interests. It imposes a dangerous straight jacket.

As I have shown there are advantages, but also profound difficulties, with all the options I have considered.

But, on balance, I believe the best way to reach a sensible outcome in the negotiation, that will do least damage to the political and economic relations between the UK and the rest of Europe, would be to forget about the Transition option, and agree a time extension under Article 50 (3).

That may not seem politically feasible at this stage, but I believe it will be seen in a different light by next October.

As I said earlier, if the EU side were to offer such an extension, at a moment when the full difficulty of the Transition option was becoming clear, it would change the dynamic in British politics.

If it rejected the time extension option in favour of the Transition option, the UK government itself would have to take the full responsibility

- + for entering what some Brexiteers have described as “Vassal status”,
- + for implementing rules they had no say in making, and
- + for entering a period in which the UK would paying into EU funds, with no say in how the money was spent.

The rush for an early Brexit, that motivated Mrs May to write her Article 50 letter before her government had done its homework, was driven by a deep fear among the architects of Brexit that, if they did not leave quickly, they, or their voters, might change their mind about leaving at all.

This is, quite literally, an irrational basis for deciding the future of Britain.

It is a deeply dangerous basis on which Britain would impose the costs of its mistakes on Ireland.

It will leave deep and lasting scars.

I believe that an extension of time under Article 50 (3) of the Treaty is the best way to minimise, and possibly to eliminate, the damage.