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Five takeaways from analysing Brexit

by Federico Fabbrini

Academics from across Europe came together at Dublin City University to debate Brexit. The conference on “The Law & Politics of Brexit” analysed the withdrawal of the United Kingdom from the European Union. What are the challenges? What took the experts by surprise? And what do we need to look out for in the future?

The challenge: Negotiating the divorce and a new relationship

A major challenge identified by speakers concerns the process through which the United Kingdom (UK) leaves the European Union (EU) and establishes future relations with it. On 29 March 2017 UK Prime Minister Theresa May notified the decision to leave under Article 50, officially starting the two-year withdrawal process. However, tensions between the UK and the EU are already plainly visible. While the UK aims to negotiate simultaneously the terms of both the divorce and any new partnership with the EU, the European Council has made crystal clear that preliminary talks on the framework of any future relations will start only when progress in the divorce proceedings has been made. As Uwe Puetter (Professor of European Governance at Central European University)

noted, on the EU side the European Council is firmly in control of the process, and has instructed the European Commission to undertake the negotiations with the UK on behalf of the EU. On the UK side, meanwhile, Prime Minister May decided on 18 April 2017 to call a snap general election in early June with the purpose to consolidate her parliamentary majority given the tough negotiations ahead. Many contentious issues will need to be resolved during the negotiations, including how much money the UK will have to pay before leaving the EU and what rights to grant to EU citizens residing in the UK and vice versa.

Moreover, as explained by Paul Craig (Professor of English Law at the University of Oxford), several legal questions are already clouding the outcome of the negotiations: He anticipates

possible litigation on whether the UK Parliament should be entitled to approve the final terms of the withdrawal agreement, or whether the UK may even be allowed to revoke its notification of withdrawal further down the road. However, given Mrs May's decision to call a general election that she may almost certainly win with a bigger majority than now, such a revocation seems possible in law but highly unlikely in politics.

The surprise: A potential answer for the Northern Irish question

One noteworthy point emerging from the debate concerns the Northern Irish question. As Charles Flanagan (Minister of Foreign Affairs and Trade of Ireland) stressed in his opening speech, after Brexit a key concern is to find a solution to the problem of the only land border between the UK and the EU: between Northern Ireland and Ireland. In fact, the 1998 Good Friday Agreement which put an end to decades of sectarian conflict in the North and started the peace process rests on the concept of open borders within the island of Ireland. The decision of the UK to leave the EU – including the single market and customs union – threatens that equilibrium, by opening worrying prospects of a hard border between the Republic and Northern Ireland.

However, several speakers emphasized how a practical solution for the Northern Irish problem could be reached. Giorgio Sacerdoti (Professor of International Economic Law at Bocconi University) explained that the Global Agreement on Trade & Tariffs of 1947 (the GATT or predecessor of the World Trade Organization) recognizes a so-called “frontier traffic exception” which would allow the lifting of custom controls between Northern Ireland and Ireland. Moreover, John Doyle (Professor of International Conflict Resolution at Dublin City University) pointed to the model in place in Cyprus that rests on the Protocol of Accession and the so-called “Green Line Regulation”: Goods produced in Northern Cyprus can enter the Republic of Cyprus without custom duties and automatically circulate within the EU single market. While the application of these solutions to Northern Ireland would require political consent from both UK and EU, all speakers underlined that decision-makers in London and Brussels are well aware of the sensitivity of the Northern Irish question. This warrants cautious optimism on the prospects for finding a pragmatic solution.

Five takeaways

1. The UK and EU disagree on both substance and process of the negotiations: London wants to negotiate withdrawal in parallel with talks on new relations with the EU. Brussels insists preliminary discussions on future relations can only start when there has been sufficient progress in the divorce proceedings.
2. Legal precedents to address the problem of a hard border between Northern Ireland and Ireland are in place: WTO rules allow for frontier traffic exceptions and the EU has special rules for trade between Northern Cyprus and the Republic of Cyprus.
3. British exit from the EU may fundamentally alter the UK's own constitutional set-up among its four nations. In particular, it may strengthen the case for a second independence referendum in pro-EU Scotland.
4. Opinions differ sharply on whether the EU should be tough or tender in the Article 50 talks. While the UK may, as a former member state of the EU, merit special treatment/status, allowing it to keep some of the benefits of membership post- Brexit, this could spark moves to quit the EU elsewhere.
5. UK withdrawal changes the political dynamics and economic incentives within the EU-27. Moreover, Brexit requires the 27/EU institutions to agree treaty changes to adapt and reform the Union. While this may offer an opportunity for substantial constitutional changes such as political and/or fiscal union, the question remains: can the EU27 proceed as one or is multi-speed integration the better option.

The consensus: The impact of Brexit on the UK's constitutional settlement

A wide consensus emerged among participants on the fact that Brexit will substantially affect relations between the four nations of the UK: England, Scotland, Wales and Northern Ireland. As is well known, while the UK as a whole voted in June 2016 to leave the EU, a significant majority in Scotland and Northern Ireland voted to remain. Therefore, the secession of the UK from the EU may in turn lead to secessions within the UK itself.

As Stephen Tierney (Professor of Constitutional Theory at the University of Edinburgh) underlined, Brexit can be understood partially as the result of the increasingly demotic process at play in England: The UK is a highly asymmetric system, since England accounts for almost four fifths of the entire UK population. This situation has historically influenced devolution: while since the late 1990s power has flowed from London toward Edinburgh, Cardiff and Belfast, England has never received the equivalent degree of constitutional autonomy, and recognition, within the UK due to its size. Indeed, if a specific devolved Parliament for England (akin to the Parliament of Scotland or Welsh Assembly) had been established this would have entirely overshadowed Westminster in size and powers.

Brexit can, therefore, be seen as the reaffirmation of England's preponderance within the UK – a process which may, however, bode ill for the 1707 Union between England and Scotland. As explained by Sionaidh Douglas-Scott (Anniversary Professor of Law at Queen Mary University London), Scotland has repeatedly sought to carve out a special status for itself. In particular, the Scottish government suggested that the Greenland-Denmark solution could serve as a model (“reverse Greenland”) to keep Scotland within the single market even after the UK has left the EU. However, the UK government has largely ignored and rejected the Scottish government's proposal – and the growing frustration in Scotland vis-à-vis the Brexit strategy pursued in Westminster may consolidate the trend toward a second Scottish

independence referendum that might reverse the results of the one staged in 2014.

The disagreement: Should the UK be treated gently or harshly?

An intense discussion took place on how the EU should approach the UK after withdrawal – whether it should treat it ‘gently’ or ‘harshly’ so to speak. Kalypso Nicolaidis (Professor of International Relations at the University of Oxford) claimed that after Brexit the UK will represent a new and special category of state: a former EU member state. In her view, this should justify some flexibility and special accommodation on the EU's part. Similarly, Catherine Barnard (Professor of EU Law at the University of Cambridge) maintained that the four freedoms of the internal market are not as indivisible as the EU claims: hence, although signalling political obstacles, she suggested that a trade deal allowing the UK to access the EU internal market in goods and services could still be possible.

“Brexit arguably represents the most significant political event in Europe since the fall of the Berlin Wall. A full exploration of its constitutional implications for both the UK and the EU is thus fully warranted.”

Federico Fabbrini

Nevertheless, this view was strongly contested as contrary to the interests of the EU, and the ultimate goal of the European project. Marlene Wind (Professor of EU Politics at the University of Copenhagen) argued that any bespoke solution allowing the UK to enjoy the benefits of membership without paying the costs for them would undermine the EU ideal and represent a model for other states to follow. As she explained, euroscepticism in Europe has diminished post-Brexit as citizens have started to appreciate the value of EU membership. But, if à la carte solutions are permitted, similar demands may be voiced elsewhere in the EU, pushing other member states to withdraw from the EU. Similarly, Stefani Weiss (Director at Bertelsmann Stiftung) underlined how, from an EU perspective, countries outside the Union cannot possibly enjoy treatment as favourable as that for member states.

The thing to watch: The future of European integration

As many speakers emphasized, while Brexit has short-term implications for the UK and the EU, it will also influence Europe in the long-term, and a thing to watch is whether and how integration moves forward once the UK leaves. According to Michele Chang (Professor of Political Economy at the College of Europe in Bruges) Brexit will affect the Economic and Monetary Union (EMU), shifting political alliances and altering economic incentives. She explained that the UK was the biggest member state outside the Eurozone: without the UK, therefore, greater pressures may emerge for the “Euro-Outs” to adopt the single currency, and for the Euro Area to integrate further, for example in banking, budgetary and fiscal policy. Similarly, Deirdre Curtin (Professor of EU Law at the European University Institute) noted how, in the Area of Freedom, Security and Justice, the UK’s withdrawal will change current dynamics: while the UK enjoyed several opt-outs, it was a leader in the area of intelligence-sharing and police cooperation. In this context, it will be interesting to see how the EU develops its security strategy – and if and how the UK may remain linked to it after Brexit.

At an institutional level UK withdrawal also opens a window of opportunity for constitutional changes in the EU. Federico Fabbrini (Professor of European Law at Dublin City University) suggested that, post-Brexit, several EU treaty provisions and a number of quasi-constitutional EU norms – including the European Council decision on the European Parliament’s composition and the rules on financing the EU – will have to be amended to adapt the EU to the reality of a Union of 27. Revising these laws should be seized as an opportunity for more far-reaching constitutional changes, dealing with the structural problems dramatically exposed by the multiple crises affecting the EU, including the euro-crisis, the migration crisis and the rule of law crisis. As Danuta Hübner (Chairwoman of the Constitutional Affairs Committee of the European Parliament) said in closing the conference, treaty change is inevitable if Europe is to move forward. The over-riding question now is whether deeper integration will proceed at the same pace for all 27, or rather in a multi-speed

fashion, with the 19-strong Eurozone the constituent framework creating a political union.

About the author

Federico Fabbrini is Professor of European Law at the School of Law & Government of Dublin City University. He is the author of “Economic Governance in Europe” (Oxford University Press, 2016) and he will be the editor of the forthcoming book “The Law & Politics of Brexit” (Oxford University Press 2017) collecting the papers presented during this Conference at Dublin City University (Oxford University Press, 2016).

About the conference

The Conference “The Law & Politics of Brexit” took place on 20 and 21 April 2021 was at the School of Law & Government of Dublin City University. It was convened by Federico Fabbrini and sponsored by the Bertelsmann Stiftung, together with the Centro Studi sul Federalismo (Turin), the Reinholdt W. Jorck og Hustrus Fond (Copenhagen), and Matheson Law Firm (Dublin). Further details available [here](#).

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