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THE ELEMENTS OF A POST-BREXIT SETTLEMENT[1]

By Professor Sir Alan Dashwood QC

It is time to start thinking about the possible elements of a post-withdrawal settlement calculated to ensure a continuing close relationship between the UK and the EU. A solution that caters for the UK's economic needs ought to be attainable, if it is also designed to play to the country's particular strengths, which make it a more important partner for the EU than any other European State.

A maximalist proposal ("soft Brexit")

Continuing membership of the internal market for goods and services must be the primary goal. A "hard Brexit", which entailed coming out of the internal market and trading with the EU on the basis of WTO rules, or negotiating a free trade agreement (FTA) with the Union, might perhaps be an acceptable solution for most goods (not for agricultural products), though it would probably discourage inward investment in manufacturing; it would, however, almost certainly damage the UK's services industries, especially financial services, since these are vulnerable to protectionist measures masquerading as prudential regulation. Witness the abortive attempt by the European

[1] This paper develops ideas that were initially set out in a short article published in the August issue of European Law Review under the title "After the Deluge", and were subsequently aired in a talk given to the Competition Law Association (CLA) on 26 July 2016. It has benefited from the discussion that took place on that occasion.

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Central Bank in 2011 to restrict the handling of trades denominated in euros to clearing houses situated within the Eurozone; any future arrangement between the UK and the EU will need to include safeguards against discriminatory action of that kind.

Even a far-reaching FTA like the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada would not provide a level of access for services, especially financial services, and a level of legal protection against discrimination, comparable to that enjoyed by the UK as an EU member. Nor, it should be noted, would UK businesses qualify for "passporting" (enabling them to operate without undergoing fresh certification) under such arrangements.

In broad terms, it is suggested, the solution should consist of full participation in the internal market, subject to some curbs on freedom of movement, and with "add-ons" in the form of a degree of continuing participation by the UK in certain other EU policy areas. A substantial contribution to the EU Budget would be unavoidable. The UK would, however, be outside the Common Agricultural Policy and the Common Fisheries Policy, as well as the Common Commercial policy with third countries (hence the need to negotiate new trade agreements with international partners); and it would not be part of the EU's customs union and would, therefore, have to re-establish its own external tariff (while being required, like the EEA countries, to apply the rules of the EU for determining the origin of goods, in order to maintain the integrity of the internal market).

Freedom of movement

The starting point in devising the internal market package that the UK needs will have to be the acceptance, *in principle,* of the four freedoms, including the free movement of persons. Regarding the latter, a successful outcome to the negotiations will require a softening of positions on both sides.

Continuing rights of entry, residence and equal treatment

It is proposed that the following categories of persons should continue to enjoy unrestricted rights of free movement and of equal treatment, under conditions equivalent to those laid down by the currently applicable EU legislation (provided, of course, that equivalent rights are guaranteed by the 27 Member States):

(i) *Persons who have already exercised rights of free movement under the Treaties before a specified date (the date on which the Article 50 notice is given, for instance)*

The principle should be that all acquired rights be respected. Thus, for instance, any individual that had acquired a right of permanent residence pursuant to Article 20 of Directive 2004/38 would be entitled to remain indefinitely in the Member State concerned. Those resident for between three months and five years would enjoy the lesser rights they had acquired pursuant to the Directive before the relevant date.

Businesses that had secured "passports" prior to the specified date should enjoy similar protection.

(ii) *Workers accepting "offers of employment actually made"*

This is the category of workers specifically identified by Article 45 (3) (a) TFEU as the recipients of the rights that are there defined. Preserving their free movement rights would help to protect the interests of UK employers in

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sectors that are especially dependent on EU migrant workers, such as the NHS, social care, the hospitality industry and some farming sectors. It would also enable universities and other research institutes to go on recruiting able graduates from all over the EU.

(iii) *Persons exercising the right of establishment or freedom to provide services*

The genuineness of persons proposing to become established could perhaps be tested by requiring them to provide a viable business plan

(iv) *The self-sufficient*

A more stringent test than the present one of not becoming a burden on the host country's social assistance services might be contemplated. This right would be of particular importance to UK nationals hoping to retire to Member States with a more congenial climate.

(v) *Students*

Maintaining, between the UK and the other Member States, the right of non-discriminatory access to higher education institutions would preserve one of the great cultural and intellectual gains of EU membership, to the benefit of institutions and students not only in the UK but in all of the Member States.

(vi) *Visitors*

There should be visa-free travel, in both directions, for all UK and EU citizens for up to three months, under conditions similar to those laid down by Article 6 of Directive 2004/38.

Controls on new job seekers

Effectively, the new controls would be limited to persons coming to the UK after the prescribed date in order to look for work ("new job seekers").

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Controls on new job seekers might consist of a combination of practical measures to ensure that those claiming the status are genuinely looking for a job and have a reasonable prospect of finding one, and that they can easily be removed if they are unsuccessful, together with some kind of emergency brake mechanism that would be triggered when the volume of those arriving is perceived to be creating serious socio-economic problems.

Measures of the former kind might entail an obligation for a person seeking work to register this intention upon arrival in the UK, and to be liable to deportation after six months if they have failed to find employment, during which period they must be self-supporting.

A precedent for an emergency brake mechanism can be found in Article 112 of the EEA Agreement, which provides:

> "*1. If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.*
>
> *2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as shall least disturb the functioning of this Agreement.*
>
> *3. The safeguard measures shall apply with regard to all Contracting Parties*".

The procedure laid down by Article 113, which is referred to in Article112 (1), requires notification to be given to the EEA Joint Committee and a month's delay before the safeguard measures are implemented (other than in exceptional circumstances requiring immediate action), in order to provide an opportunity for consultations within the Committee.

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In his evidence to the Treasury Select Committee on 5 July 2016 Professor Michael Dougan expressed scepticism as to whether, given its exceptional character, the Article 112 mechanism, or something like it, could figure usefully among the arrangements for the UK's future relationship with the EU. This is a rare occasion on which I find myself in disagreement with Professor Dougan. On the one hand, the exceptionality of the Article 112 mechanism and the requirement that its operation be time-limited show that it is fully compatible with the principles of the internal market. On the other hand (and this ought to provide comfort for those in the UK wishing to re-assert control over immigration from the EU), the mechanism can be triggered unilaterally by the host State. It is true that the procedure of Article113 EEA calls for prior consultation within the EEA Joint Committee, except in cases of urgency, but the Committee has no power to override the host State's sovereign judgment as to the necessity of applying the emergency brake. Presumably, the nuclear sanction, were a State found to be abusing the Article 112 mechanism, would be expulsion from the EEA; but there would be no risk of this, where a genuine case of "economic, societal or environmental difficulties of a sectorial or regional nature" could be made out. It would probably be necessary to secure, as part of the withdrawal settlement, an acknowledgement that conditions presently exist for recourse to the mechanism, for a period of (say) 7 years.

"Add-ons" to the internal market

The four areas of EU activity outside the internal market, identified below, are ones to which the UK has contributed substantially, and whose prospects of future success are liable to be damaged by its departure from the EU. The UK's willingness to continue participating in these areas would not only serve its own interests and those of the 27 Member States by helping to ensure the effective

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attainment of common policy objectives but may also furnish a quid pro quo for the acceptance by the remaining Member States of a brake on migration.

The areas in question are the following:

(i) Research

UK institutions have been in the forefront of cross-border collaboration in scientific research within the EU, while winning a significant proportion of EU funding. There is anecdotal evidence that the planning of some projects has been halted since the vote on 23 June, owing to uncertainty as to the basis on which such collaboration can be organised in the future. Preserving the present level of UK participation in the Union's research effort would benefit the whole European scientific community.

(ii) The Erasmus exchange scheme for students

Over the years, thousands of UK students have had their intellectual horizons broadened by this scheme, while young people from other Member States value the opportunities it offers to enjoy the advantages of the UK's system of undergraduate education.

(iii) The area of freedom, security and justice (FSJ)

The UK presently participates in FSJ, as provided for by Title V of Part Three of the TFEU, under special legal arrangements contained in Protocol 21 to the EU Treaties. It is proposed that the effect of these arrangements should be preserved post-Brexit, including the possibility for the UK to opt into future FSJ measures. The UK will still face the same threats from terrorism, international crime and uncontrolled migration as its neighbours in the EU – threats that will still call for a collective European response. It would clearly be in everyone's best interest that the UK should continue to play its full part in

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the operation of the European Arrest Warrant, Europol and the Schengen Information System, as well as in strengthening the protection of the Union's Mediterranean frontier.

(iv) The common foreign and security policy (CFSP)

The loss of the UK as a member, given the scope of its international connections, based on a long history of active diplomacy and on cultural and historical ties, as well as the size and quality of its armed forces, would seriously diminish the credibility of the CFSP. For the UK, too, as a single actor on the international stage, it would become harder to secure a leading role in initiatives such as the negotiations on the Iranian nuclear weapons programme. There are good reasons, therefore, for the UK to seek some degree of continuing participation in the CFSP, and for the 27 Member States to welcome this, especially those in eastern Europe that are most at risk from Russian adventurism. Indeed, the continuation of direct participation by the UK in decision-making on CFSP matters would not pose insuperable constitutional problems, owing to the unique institutional and procedural arrangements that apply in this area.

The legal framework of a post-Brexit settlement

There are two questions to be considered: whether the UK should seek to join the EEA or should rather attempt to negotiate a bespoke post-Brexit settlement with the EU; and, whichever of those approaches is adopted, what the relationship should be between that negotiation, and the negotiation and conclusion of the withdrawal agreement provided for by Article 50 TEU.

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The choice between joining the EEA and a bespoke settlement

The EEA Agreement is the existing model for participation in the internal market by non-members of the EU. However, joining the EEA would not necessarily constitute a straightforward solution for the UK post-Brexit.

In the first place, the EEA consists of two blocks, the EU and its Member States, on the one hand, and three EFTA countries (Norway, Iceland and Liechtenstein), on the other. To become a party to the EEA, after ceasing to be a Member State of the EU, the UK would have to move to the EFTA block, which would require the unanimous agreement of its present members. This cannot be taken for granted. The UK's much greater size than any of the existing EFTA members might be thought liable to upset the balance of the group, while the history of its troubled relationship with the EU might make it appear a potentially disruptive partner.

Secondly, the free movement of persons is an integral element of the EEA system. Here, a remedy might be found in Article 112, provided that it was considered acceptable for the mechanism to be activated by the UK immediately upon its becoming an EEA member.

Thirdly, the EEA has its own institutional structure comprising the EEA Council, the EEA Joint Committee, the EFTA Surveillance Authority and the EFTA Court. Participating in the EEA Council and the EEA Joint Committee as part of the EFTA block ought not to prove problematic for the UK, since these are bodies that operate by consensus. However, the more uncompromising supporters of Brexit may have reservations about the UK's submitting to the jurisdiction of the EFTA Surveillance Authority and the EFTA Court, which have powers approximating in some respects to those of, respectively, the European Commission and the Court of Justice of the EU; a counter-argument would be

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that the EFTA bodies are less driven by integrationist ideology than their EU counterparts, and that the EU's Charter of Fundamental Rights does not extend to the EEA.

Fourthly, the EFTA countries in the EEA are required to contribute to the EU budget; however, the same would undoubtedly apply under any bespoke agreement enabling the UK to remain within the internal market.

Fifth and finally, the EEA Agreement is thought by some commentators to need updating, since it reflects the situation that applied in the early 1990s, when the internal market, and particularly the market for services, was less highly developed; there have, for instance, been difficulties in adapting the mechanisms of the Agreement to the EU's financial supervisory framework, established in 2010 in the wake of the financial crisis, though these now appear to have been resolved.[2] While that consideration might be thought to render the EEA option less eligible, it could be contended that accession by the UK would provide an opportunity for the revision of the EEA system, which would benefit all its members; though such revision would evidently represent a long-term project.

A bespoke agreement broadly replicating the EEA would have the advantage of being designed to accommodate the specific situation of the UK and to reflect the internal market at the present stage in its evolution. Negotiating such an agreement would, of course, take a considerable time. Moreover, it seems doubtful whether the UK would be permitted to enjoy continuing participation in the internal market, in the absence of institutions charged with the task of ensuring its compliance with internal market rules; while the establishment of

[2] This point was made by Professor Piet Eeckhout in the course of the discussion at the meeting of the CLA on 27 July 2016.

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a new pair of institutions, corresponding to the EFTA Surveillance Authority and the EFTA Court, but with their jurisdiction limited to a single country, might not be acceptable to the EU. A possible solution would be to bring UK members into the EFTA bodies, and to extend their jurisdiction to cover the new agreement. Such an arrangement would make good legal sense, since the "internal market" of which the UK would be seeking to retain membership would include the three EFTA States belonging to the EEA.

In the result, it is suggested that, in spite of some difficult issues that would have to be addressed, either of these options would be capable of providing the legal framework for the kind of post-Brexit settlement that the UK needs.

In contrast, the "Swiss model", consisting of a bundle of bespoke agreements, has been found unsatisfactory in practice, which makes it unlikely to appeal to the EU as a solution in the case of the UK. Nor would it achieve the UK's principal objective, since it does not provide the requisite level of access to the financial services market.

The relationship between the withdrawal agreement and the framework for future relations between the UK and the EU

Article 50 (2) TEU refers to the negotiation of an agreement with the departing Member State "*setting out the arrangements for its withdrawal,* ***taking account of the framework for its future relationship with the Union***".[3]

From that wording, it appears legally possible that the withdrawal arrangements and the framework for future relations between the EU and the UK could be wrapped up together in a single agreement, based on Article 50 TEU and

[3] Emphasis added.

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concluded, on the Union side, by qualified majority vote of the Council after obtaining the consent of the European Parliament. However, that is likely to prove practically possible only if the UK were willing to settle for a "hard Brexit", based on a simple FTA. If the UK were negotiating for a far-reaching relationship of the kind recommended here, the EU side would probably insist upon giving this the form of an association agreement concluded on the basis of Article 217 TFEU, which requires the Council to act by unanimity, again with the Parliament's consent; and probably also on its being a "mixed" agreement, with the Member States as parties alongside the Union, as in the case of the EEA Agreement. In terms of hard political realty, therefore, the kind of post-withdrawal settlement that the UK should be seeking is likely to have to be negotiated separately.

However, there is no legal requirement that the withdrawal agreement be negotiated and concluded pursuant to Article 50 before work can begin on the agreement incorporating the post-withdrawal settlement – quite the contrary, in fact. For the former to fulfil the express requirement of "taking account of the framework for [the UK's] future relationship with the Union", negotiations regarding the latter must have reached the point at which such a framework is discernible, if only in outline. The requirement is a balancing factor in the procedure of Article 50, enabling the withdrawing State to insist that some guarantees, if only as to the general shape and character of its future relationship with the EU, be included in the Article 50 agreement negotiated under the constraint of the two-year time limit.

No clue is given as to the content of "the arrangements for [a State's] withdrawal" that the Article 50 agreement must cover. As a minimum, such arrangements would, presumably, have to determine the status of individuals and companies enjoying established free movement rights, and also, as Charles

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Grant has put it, "divide up the properties, institutions and pension rights, and deal with budget payments".[4] In addition, besides providing the guarantees as to the framework for future relations referred to in the previous paragraph, the agreement could, and it is suggested should, lay down transitional arrangements, to apply during the period, which may extend over a number of years, in which a fully articulated settlement is being worked out. Other commentators have proposed that the transitional arrangements be contained in a separate international agreement (though the legal basis for this in EU law is unclear).[5] However, it would be more advantageous for the UK, and fully justifiable legally, for these to be contained in the Article 50 agreement.

Conclusion

The UK should approach the forthcoming negotiations with the EU with confidence and in a positive spirit. Our declared aim should be to preserve the closest possible relationship that is compatible with the decision, reached by a relatively narrow majority in the Referendum, that the UK should cease to be an EU Member State. That relationship must include continuing membership of the internal market, since nothing else will guarantee the unimpeded market access necessary to safeguard our financial services industry; but it should also cover other matters in which the UK has shown that it has a great deal to offer the 27 Member States, more particularly crucial aspects of internal and external security. Some form of reasonable curb on the free movement of job seekers ought to be attainable as one element of a "maximalist proposal" of this kind. Soundings taken in advance of the formal commencement of negotiations, including from the EFTA block of EEA members, should help determine whether the settlement should entail accession to a perhaps reformed EEA

[4] In a CER paper of 28 July 2016 entitled "Theresa May and her six-pack of difficult deals".
[5] Charles Grant, *ibid.* See also the briefing paper for Open Europe by Damian Chalmers and Anand Menon, "Getting Out Quick and Playing the Long Game".

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(with additional Protocols to cover the proposed "add-ons") or should be incorporated in a bespoke agreement (perhaps with an arrangement for "borrowing" EFTA institutions). In either case, the withdrawal agreement and the agreement on the post-Brexit settlement will probably have to be negotiated separately, though this does not mean successively – the former must contain at least the outline of the "framework" to be articulated by the latter; and transitional arrangements are likely to be needed. The technical issues involved may be challenging, but they are not so hard as to defeat the ingenuity of lawyers, so long as there is a political will to compromise, in the light of perceived mutual interests, on both sides of the negotiation.

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