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EUROPE AFTER BREXIT

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EUROPE AFTER BREXIT

Andrew Duff¹

No country was ever meant to leave the European Union. In that sense, the EU was an experiment condemned to succeed. And in that same sense, Brexit is a massive failure of the European project. The departure of the UK will leave the EU smaller and poorer, with its reputation on the world stage undeniably diminished.

The extent to which Brexit poses a fundamental risk to the Union is badly underestimated in London. In other capitals, the fear persists that another EU leader may one day follow the British example and demand a renegotiation of terms of membership for futile or spurious reasons.

It is not too early, therefore, to try to draw some lessons from Britain's costly, long drawn-out and painful process of leaving in order that the same mistakes are not repeated. We may not yet know quite *how* or *when* the UK will finally depart. But we certainly know *why* it wants to leave. So we may learn from Brexit something more about what kind of a polity is the EU, and about how the EU should treat its close neighbours in the years to come.

ARTICLE 50

Article 50 of the Treaty on European Union (TEU), which governs how a state should leave the Union, was inserted into the Constitutional Treaty of 2004 with the support of both federalists (wanting renegade states to leave the federal union) and nationalists (wanting liberation from federal union). Whether or not the clause was ever intended to be used is academic: opinions in the Convention on the Future of Europe differed, and both Greece and Britain were floated as potential candidates for secession. It was agreed to have a provision which provided for a voluntary democratic exit - with the implied but nonetheless clear understanding that no state could or should ever be expelled from membership against its will. The Convention's president, Valéry Giscard d'Estaing, proposed the two-year time limit in order to minimise collateral damage to those states remaining.

From the outset it was clear that Article 50 was more about defending the interests of the EU than aiding and abetting the departing member state. It is wrong to draw too strict an analogy between Article 50 and Article 49 TEU, which regulates the accession of a new member state. The EU is committed in spirit and in law to widen its membership. In the past, it has proselytised in the hope of recruiting more members. Article 49 establishes elaborate but systematic processes by which a candidate state is pulled towards and across the threshold of membership.

¹ This paper is an extended version of a lecture delivered at the Dimitris-Tsatsos-Institute for European Constitutional Sciences, FernUniversität in Hagen, on 12 November 2019.

Not so Article 50, whereby the errant state is enjoined before leaving to agree to the terms of its withdrawal: if no agreement is reached, the EU treaties simply cease to apply to that state two years after it triggered the formal process. The main purpose of Article 50, then, is to allow the EU to cut its legal and political links, leaving the erstwhile partner to its own devices. Pointedly, Article 50(4) recalls that if a state which has withdrawn asks to rejoin, it must use the route provided by Article 49.²

Implicit in the European Union's Article 50 process is the assumption that the departing state knows why it is leaving and where it intends to end up having left. That is why Article 50(2) speaks of the need to settle the state's withdrawal arrangements "taking account of the framework for its future relationship with the Union". It is not the fault of the EU, still less of the drafters of Article 50, that the UK transpired not to have the faintest idea what it wanted to do post-Brexit. But nor was it the job of the EU to rescue the UK from its own folly.

The EU did its best to accommodate the UK's confusing and contradictory red lines without compromising its own core principles. The Commission, especially, has retained studious neutrality over Brexit. Its Task Force 50, led by Michel Barnier, focussed on accomplishing its mandate to reach a withdrawal agreement with the UK. It did not draft texts on behalf of the UK government even when it could easily – and helpfully – have done so.

CAMERON'S LEGACY 2016

The EU's officially cool position was much influenced by its recent bad experience of coping with the British. Lessons were drawn from David Cameron's damaging renegotiation of the UK's terms of membership in the course of which the European Council made too many concessions. Britain's 'New Settlement' of its relations with the EU was concluded in February 2016 after laborious and fractious negotiations. The EU made a well-meaning but vain attempt to rescue the prime minister from the plight of his own making.³ Had the new arrangements ever entered into force, it is likely that the UK, as a disaffected and insincere member state, would have been a continuing source of discord for many years to come. In his memoirs, Cameron confesses:

"At heart, the ambition of my plan was simple: to shift the EU from its long-held view that all its members were travelling towards the same destination, but at different speeds, and that Britain, the reluctant European, would get there in the end. I wanted to get it across, once and for all, that the UK was not only travelling at a different speed, but that we had a different destination in mind altogether. 'Yes' to trade and cooperation, but 'no' — indeed never — to political union, currency union, military union or immigration union."⁴

² A diverting historical analogy is 410 AD when the Roman legions simply packed up and left England and Wales: holding the far-reaches of the empire had become too costly (and maybe just too cold and wet). Nobody knew whether the Roman government would be back. It would not. Roman norms seem to have survived in Britain for a while before they eventually dwindled away, overtaken by history.

³ <https://www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf>.

⁴ David Cameron, *For the Record*, 2019, p. 628.

In particular, granting Cameron his most cherished prize of a British opt-out from the historic mission of “ever closer union” was a gross error with potentially devastating consequences for the Union’s future cohesion and solidarity. Thanks to Charles Michel, the Belgian prime minister, a late clause was added to the New Settlement that made the whole package deal null and void should the British people, in their wisdom, reject it. As they did. The constitutional integrity of the Union was at least preserved, and the prospect of rows with the European Parliament and litigation at the European Court of Justice over the implementation of the New Settlement was avoided.

THE REFERENDUM

Cameron’s botched renegotiation had at least served to ready Brussels for a Leave vote. The referendum took place on 23 June 2016. Presidents Tusk and Juncker issued a press communiqué the following day:

“We regret this decision but respect it ... We now expect the United Kingdom government to give effect to this decision of the British people as soon as possible, however painful that process may be. Any delay would unnecessarily prolong uncertainty. We have rules to deal with this in an orderly way.”

On 29 June, the European Council minus Mr Cameron agreed on a statement drafted largely by Jeppe Tranholm-Mikkelsen, Secretary General of the Council. It established the ground rules for the deployment of Article 50:

“There is a need to organise the withdrawal of the UK from the EU in an orderly fashion. Article 50 TEU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK’s intention to withdraw from the Union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place.”

Note the introduction of the concept of orderliness, not found in Article 50 itself.

“In the future, we hope to have the UK as a close partner of the EU and we look forward to the UK stating its intentions in this respect. Any agreement, which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations. Access to the Single Market requires acceptance of all four freedoms.”

The explicit insistence on balancing rights and obligations was novel, indicating to all concerned that the UK as a third country could not expect more rights than it had when a member state. Access to the internal market would depend on Britain’s ability to respect, and to be seen to respect, the level playing field.⁵ The assertion of the indivisibility of the four

⁵ For a good analysis, see Fabian Zuleeg and Larissa Brunner et al in *Ensuring a post-Brexit level playing field*, European Policy Centre, 2019.

principles of freedom of movement was an elaboration of existing treaty provisions made in the knowledge that the UK wanted to restrict immigration from the EU.⁶

GUIDELINES AND CORE PRINCIPLES 2017

Backed by her Parliament, Theresa May wrote to President Tusk on 29 March 2017 instigating the formal process of Article 50.⁷ Again the EU moved quickly to instil discipline and direction into the Brexit business. The European Council published seminal guidelines on 24 April:

“[T]he Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States ... With this in mind, we must proceed according to a phased approach giving priority to an orderly withdrawal ... Throughout these negotiations the Union will maintain its unity and act as one with the aim of reaching a result that is fair and equitable for all Member States and in the interest of its citizens. It will be constructive and strive to find an agreement. This is in the best interest of both sides. The Union will work hard to achieve that outcome, but it will prepare itself to be able to handle the situation also if the negotiations were to fail.”⁸

Note the first explicit appearance of the concept of the EU's own interests – a term not found in the treaties. Returning to their main theme, the European Council fired another warning shot across the bows of the British:

“It further reiterates that any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field. Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union that does not live up to the same obligations as a member cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no “cherry-picking”. The Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union.”⁹

These core principles would apply not only to the negotiation of an orderly withdrawal but also “to any preliminary and preparatory discussions on the framework for a future relationship, and to any form of transitional arrangements.”

Alongside what came to be the very familiar bogey of cherry picking, came the idea of a time-limited transitional period. Again, transition periods are not to be found in Article 50 although

⁶ The free movement of goods, persons, services and capital is provided for under Article 26(2) TFEU.

⁷ On 1 February 2017 the House of Commons voted by 498 to 114 to trigger Article 50.

⁸ <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brex-it-guidelines/>.

⁹ Article 19 TEU, supplemented by relevant case law which advances the prerogatives of the Court, notably Opinion 2/13 on the EU's frustrated application to become a party in its own right to the European Convention on Human Rights.

they have proven useful in smoothing the accession to the EU of new member states under Article 49.¹⁰ Finally, the UK was enjoined not to forget that while it remained a member state it remained subject to the treaty principle of sincere cooperation.¹¹

The European Council decided to phase the talks with the British and to sequence their phasing when it was satisfied various conditions had been met: in other words, priority issues had to be resolved first before moving on to wider political discussions about the nature of the future relationship. Nothing would be agreed until everything was agreed in a single package deal. And the EU's immediate interests were to be seen to first, before turning to deal with Britain's bid for long-term partnership.

Although the Commission was mandated as chief negotiator, the heads of government did not let go of the reins. Here Article 50 does begin to resemble the intergovernmental diplomacy of Article 49 – but with the important caveat that “there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union”. The EU would speak and act with one voice. The UK was effectively prohibited from engaging in its historic diplomacy on mainland Europe of *divide et impera*.

The EU adopted a strongly centralised approach to Brexit. The hybrid nature of EU governance was established – Commission and Council working in tandem – but so also was the hierarchy between the EU institutions and national capitals. Brussels was in charge, and tightly organised. The Commission's Task Force 50 was backed up by the Council working group, chaired by Didier Seeuws, and supported by the European Parliament Brexit steering group under the leadership of Guy Verhofstadt. The rotating presidency of the Council of ministers played no role. Off-message remarks by ministers in national capitals were swiftly slapped down. The most revealing moments of EU insider politics were exquisite comments dropped to the press by Donald Tusk and Jean-Claude Juncker at the close of meetings of the European Council, often late at night.

TOUGHENING UP 2018

The European Council issued subsequent guidelines in December 2017 which consolidated its own position and clarified the rules under which the negotiations would be conducted. The line did not vary but the language got tougher, especially as attention turned to the nature of the future relationship and the May government became entangled in barbed wire around its own red lines. In March 2018 the European Council warned:

“[T]he European Council has to take into account the repeatedly stated positions of the UK, which limit the depth of such a future partnership ... In this context, the European Council reiterates in particular that any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field. A

¹⁰ The fact that the UK government tries to rename the ‘transition’ period as an ‘implementation’ period illustrates, albeit unwittingly, that it really has no idea where it is going.

¹¹ Article 4(3) TEU.

non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member.”¹²

The Article 50 negotiations culminated in the Withdrawal Agreement of 25 November 2018. The Preamble stresses that its objective “is to ensure an orderly withdrawal of the United Kingdom from the Union”. It claims “to provide reciprocal protection for Union citizens and for UK nationals”, to make a single financial settlement, and “to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the UK”. The Agreement “is founded on an overall balance of benefits, rights and obligations for the Union and the UK”.¹³

A CONSTITUTIONAL MOMENT

The Withdrawal Agreement could never have been concluded if the EU had been less than firm with the British who, for their part, showed themselves to be fickle and disorganised. The European Council always maintained that if the British adapted their red lines, the EU position would be adaptable accordingly. The EU made every effort, short of compromising its core principles, to ensure that Brexit took place within the constitutional ambit of the Union, maintaining the spirit of sincere cooperation. The EU deferred to Theresa May’s second version of the Irish backstop, keeping the whole UK territory in the customs union. When the new British government under Boris Johnson changed direction by ditching the backstop altogether, rejecting customs alignment and heading for a mere free trade agreement, the EU adapted its own position, as it always promised it would.¹⁴

The decisions of the European Council to thrice extend the deadline of the Article 50 process beyond 29 March 2019 may have been unwise – but the EU can hardly be faulted on the grounds of inflexibility or a lack of magnanimity.¹⁵

One recalls also that concurrent with Brexit, the EU has had to deal with other challenges to its constitutional order. For the first time the EU has had recourse to the use of Article 7 TEU which lays down procedures of discipline and penalty in the event that a member state breaches the rule of law.

The coincidental deployment of Articles 7 and 50 have created for the Union a certain constitutional moment of self-definition. The EU is propelled into a period of introspection from which it should emerge with a greater understanding of what it is to be a member state – even as the British discover more about what it is not to be a member state.

At the time of writing, we do not yet know whether Article 50 has worked to achieve an orderly Brexit, or how the rule of law issues in Poland and Hungary may eventually be resolved. But

¹² <https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>.

¹³ The Withdrawal Agreement and the Political Declaration, OJ C 0661, 19 February 2019.

¹⁴ https://ec.europa.eu/commission/publications/revised-protocol-ireland-and-northern-ireland-included-withdrawal-agreement_en.

¹⁵ Andrew Duff, *Brexit: Losing control*, European Policy Centre, 24 April 2019.

it is clear that the transparent and disciplined way in which the Commission has conducted these proceedings (under the watchful guidance of the European Council) has paid dividends in terms of the EU's internal unity and cohesion. It is not an exaggeration to say that, perversely despite the loss of a major member state, the EU is emerging somehow stronger out of the Brexit process.¹⁶

ARTICLE 8

How might that unity survive during the next phase of negotiations with Britain? The Lisbon treaty provides some useful pointers. Article 8 TEU binds the EU to “develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”. The EU may conclude specific agreements with such neighbours containing “reciprocal rights and obligations as well as the possibility of undertaking activities jointly”.

No matter what style of association is sought by a third country or offered by the EU, its negotiation will need to cover ground made very familiar by Brexit. The agenda will prioritise a financial settlement, citizens' rights and customs at the borders. Even a minimal free trade agreement will require a EU UK treaty that deals not only with tariffs and non-tariff barriers but also with the level playing field. Differing levels of regulatory alignment will open different degrees of British access to the EU market. Subjects to be covered in any trade agreement are bound to include technical regulations and standards, state aid, labour and social policy and environmental policy. Any more ambitious association agreement will require joint governance, surveillance, supervision, dispute resolution and enforcement mechanisms. The choice the UK has to make between different types of special relationship with the EU has great strategic importance.

Within the broad political context of Article 8, Theresa May aimed at concluding an ambitious association agreement with the EU under the legal base of Article 217 TFEU. The Ukraine association agreement of 2014 provided the British with a useful modern template. Ukraine's partnership involves a deep and comprehensive free trade agreement, political cooperation in the security field, and robust arrangements for joint governance. As the Ukrainians discovered to their cost, under the terms of Article 218 governing the EU's international negotiations, such an association agreement (later copied for Georgia and Moldova) required the unanimous approval of all member states plus the assent of the European Parliament.¹⁷

Boris Johnson aims at a looser relationship in which the UK will be less closely aligned with EU norms with consequently reduced access to the EU market and more independence in trade policy. The recent free trade agreement with Canada offers the obvious template.

¹⁶ Christophe Hillion goes further. See *Withdrawal under Article 50: an integration-friendly process* in *Common Market Law Review* 55, 2018.

¹⁷ The Dutch held (and lost) a referendum on the Ukraine association agreement in April 2016, delaying its entry into force.

Other options exist — though none are wholly satisfactory. There is the European Economic Area agreement of 1992 with three of the four remaining members of EFTA, allowing access to the single market but not the customs union. Switzerland, the fourth EFTA state, has a jumble of bilateral agreements with the EU, sector by sector, and has an unstable and litigious relationship with Brussels. Turkey has an asymmetric customs agreement for goods, dating back to 1996. This limits Turkey's autonomy in trade policy and withholds full access to the single market. The Central European Free Trade Area ties the Western Balkan states and Moldova to the EU. EFTA has its own multilateral trade agreement with all the EU's association states. For most of these European third countries, the prospect of EU membership is a real, if distant incentive. In the shorter term, the prize of visa liberalisation is more tantalising.

Further afield, Israel entered an association agreement with the EU in 1995, supplemented by an Agreement on Conformity Assessment and Acceptance (ACAA) for industrial goods in 2013. In North Africa, only Tunisia has emerged from the Arab Spring as a modernising democracy under the rule of law with commensurate prospects of an EU trade and development agreement.

FROM ASSOCIATION TO ASSOCIATE MEMBERSHIP?

Nobody now suggests that the EU's neighbourhood policy has worked according to plan. Its multifarious agreements lack ambition and coherence: many of them, including the EEA with Norway, are proving difficult to manage and problematic to reform.¹⁸ Stabilisation tactics in the Balkans have won few prizes, and Turkey's relationship with Europe has cooled sharply. While the EU dithers in its own backyard, China and Russia have emerged as predators.

Brexit presents an unsought-after opportunity to reappraise the EU's neighbourhood strategy. One hopes the issue will surface as part of the discussions in the upcoming Conference on the Future of Europe.

One could envisage, for example, a formalised three-tier structure in which a strong federal core of the Union led a process of differentiated integration for a second tier of member states which aspired to join the core (and were capable of doing so), as well as for a third tier of associated states who had no aspirations to join the core (or were incapable of doing so).¹⁹

The latter group, while choosing never to become full member states, could take advantage of opportunities to join in certain sectoral unions – such as customs union, banking union, energy union, climate change, cultural policies, digital market and security cooperation. New eligibility criteria could be established for these third tier states, including the obligation to cooperate with others in the same region.

¹⁸ John Erik Fossum, *What is the Norway Model? Mode of Affiliation or Political Compromise?*, Political Quarterly, vol. 90:2, 2019.

¹⁹ Michael Emerson, *Scenarios for a Wider Europe*, CEPS Policy Insights 2019/02, February 2019.

It is even possible that the next treaty revision installs a new class of associate membership expressly in order to accommodate privileged partners of the Union, committed to the first two Copenhagen criteria but not the third.²⁰ Such a formal new category of membership could become very attractive to those countries - including Britain, Norway and Turkey - which seek close cooperation in economic and security matters but draw the line at the political project of federation.

The Copenhagen criteria, adopted in 1993 and 1995, established three basic conditions for eligibility for membership. For accession negotiations to be launched a country must satisfy the first criterion; to be concluded, all three. The first criterion demands that the candidate state enjoys stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The second requirement is to possess a functioning market economy capable of withstanding the competitive pressure and market forces of the European Union.

The third criterion, however, insists on the incomer's ability to take on the obligations of membership, including the capacity to implement effectively the rules, standards and policies that make up the body of EU law (the *acquis*), and to adhere to the aims of political, economic and monetary union. Inability to meet these last demands is precisely why the UK is no longer a viable member state.

Drawing from the experience of Brexit, qualitative objectives could be built into the concept of becoming (and remaining) an associate member state — such as orderliness, no cherry picking and a balance of rights and obligations. Special attention would need to be paid to the notion of EU citizenship, the financial settlement, and the control of borders. Joint governance arrangements would need to be ambitious, encouraging political participation by associated states, ensuring their respect for EU law in matters germane to their particular association agreement, but evading their vetoes on EU legislation.

JOINT GOVERNANCE

Although all associated countries would have to conform to uniform guidelines, each individual association would have special governance arrangements made to measure.

The secession of the UK from the European Union, for example, and the consequent loss of the City of London from EU territory, makes it a priority to invent a bespoke EU association regime for the financial sector. This must involve the EU's continued effective surveillance of British-based financial institutions, clear supervision of the UK's regulatory equivalence, and the effective passporting within the EU for authorised third country funds. Similarly, it is very much in the EU interest that British science remains plugged into the European network of R&D, including membership of the European Research Council. Likewise, if the UK is willing to continue to pool its intelligence into the security nexus of the Union, combatting crime,

²⁰ That is, a new Article 49a TEU.

espionage and terrorism, it should be welcome as a privileged partner in the work of the Political and Security Committee.

The success of such a variegated Union structure will depend on the strength, validity and sophistication of its governance. Here, the joint committee structure created for the management of the Brexit Withdrawal Agreement may offer a useful precedent. Joint UK-EU ministerial councils and official committees are envisaged to govern the progress of the transition period until a final association treaty can be concluded. Especially innovative is Article 174(2) of the Withdrawal Agreement which confers on the joint arbitration panel the power to decide by itself whether an issue at dispute involves a need to interpret EU law.²¹ In effect, the European Court of Justice has relaxed its previously strict rule – asserted over the EEA treaty and the accession of the EU to the ECHR – that it and it alone is entitled to judge when EU law applies.²²

Another factor to consider is the extent to which association countries should be enabled to participate in the work of the EU agencies and supervisory authorities. An early determination in the Brexit process to expel the British from membership of the agencies had to be modified when it was realised that the agencies themselves would need a continuing oversight of the UK's own home-grown authorities whose duties involved the scrutiny of British alignment on EU norms. Active participation by association states in the work of such agencies broadens the capacity of those bodies, reinforces the uniform application of EU law (adding to legal certainty) and serves to expand the EU's normative power. Observer status for third tier countries in all relevant EU agencies should be the minimum level of engagement.

ARTICLE 49

Whatever type of association agreement is reached for the UK in the next few years, it may not prove to have a long life. The debate about whether Britain should eventually apply to re-join the EU as a full member state has already begun.

The test of eligibility to launch a successful candidacy for EU membership is much tougher than when the UK first joined the European Community in 1973. In those days, accession negotiations concentrated on reducing Britain's Commonwealth preference for agricultural goods. Once France's President Pompidou had heard from British Prime Minister Heath that the UK would respect the unwritten rule of unanimity in the Council (the Luxembourg compromise), the way ahead was cleared.

Nowadays, however, once a state is accepted as a candidate under the terms of the first Copenhagen criterion, the Commission presents 35 sectoral chapters, all of which have to be opened and closed. The only real 'negotiation' comes towards the end of the enlargement process and weighs on budgetary contributions and voting weights. As with Article 50, so with Article 49: the EU side is dominant. One significant difference to procedure is that while

²¹ Tobias Lock, *On Thin Ice: the Role of the Court of Justice under the Withdrawal Agreement*, Verfassungsblog, 15 November 2018.

²² CJEU, Opinion 1/91 and Opinion 2/13, respectively.

Article 50 is concluded by a QMV decision of the Council, Article 49 requires an inter-state treaty agreed by unanimity and requiring ratification in all member states.

In the wave of optimism that followed the collapse of Soviet Europe in the early 1990s, the EU conceived eligibility for membership as largely a functional matter. The Copenhagen criteria were invented and imposed more to test the administrative capacity of the candidate countries than to doubt their political will. The initial reservations of Margaret Thatcher and François Mitterrand about rapid EU enlargement to the East were set aside.

In practice, however, the EU has found it more difficult than expected to govern its much larger membership, expanded from 12 states in 1989 to 28 in 2013. The transition away from communism in Central Europe has proved to be more protracted than the overcoming of fascism in Greece, Spain and Portugal. The economic integration of the newer member states has not led, as the functionalists had hoped, to smooth political assimilation. Widening has not gone hand-in-hand with deepening. The secession of the UK mocks “ever closer union”.

So if the EU is now to re-evaluate its neighbourhood policy, it must also take another look at the enlargement process. At present, in order to dodge deep disagreement about enlargement, the EU agrees to the opening of accession talks without having any honest intention of concluding them. The European Council’s latest strategic agenda, adopted at Sibiu in May 2019, illustrated hypocritically (one presumes unintentionally) its dilemma with regard to enlargement:

“The EU will promote its own unique model of cooperation as inspiration for others. It will uphold the European perspective for European States able and willing to join. It will pursue an ambitious neighbourhood policy.”²³

Doling out false hope has become a deliberate instrument of EU statecraft. Candidate countries are misled. Fed financial blandishments by Brussels, Western Balkan states are being paid to pursue formal accession bids. Oligarchs and politicians may not be deceived by these cynical tactics, but citizens can be. Within candidate countries, levels of popular support for EU membership start out exaggeratedly high: but when the ruling parties, posturing as pro-EU, have their corruption fed by subsidies from Brussels, dismayed public opinion turns against the EU.

Furthermore, such fictive, pretend enlargement damages the EU at home. Levels of popular hostility to further enlargement continue to rise. As with the Brexit referendum, fear of new waves of mainly Muslim immigrants fuels the growth of populist nationalism. President Macron is much criticised for his supposed veto on the opening of accession negotiations with Albania and North Macedonia, but many other EU leaders hide behind him. At least Macron makes a cogent case that the EU should not expand unless it is ready to deepen its internal integration. It is instructive to recall that those most in favour of enlargement are men like Viktor Orban and Matteo Salvini who, copying earlier British prime ministers, see a continual

²³ <https://www.consilium.europa.eu/en/press/press-releases/2019/05/09/the-sibiu-declaration/>.

widening of EU membership as a good way to steadily weaken integration and to blunt the centripetal force of Brussels.

CONSTITUTIONAL REFORM

The Conference on the Future of Europe, which is scheduled to begin work in 2020, will have to square up to the question of whether to strengthen executive authority at the centre of Union governance, especially of the Commission. Its discussions on neighbourhood should encourage it in that direction. Those who govern the EU must also have a care for their responsibility to the wider Europe. Without a strong centre to the Union there will not be a stable periphery of the Union.

We have seen how Brexit has already served to strengthen the state-like qualities of the Union and to sharpen its self-identity. Despite the fact that Brexit has been a costly and lengthy distraction from its normal business, the EU has ensured that the British secession has not been used as an excuse for reversing the level of integration for the rest of the Union.

The Von der Leyen Commission should now use Brexit as the pretext to spur on the EU 27 to the cause of political and institutional reform. Functionalism needs finally to give way to constitutionalism. The ad hoc pursuit of ever expanding goals has stretched the democratic legitimacy of the Union to breaking point. It would be foolhardy for member states to continue to consign yet more tasks to the Union without conferring on its institutions commensurate resources and powers, entrenched in an amended treaty.

Governance should no longer be treated as a mere problem of management: the lack of strong legitimate government is the Union's main democratic problem. The central question for the Conference on the Future of Europe, indeed, is to know whether the EU can agree to install a tier of effective democratic government up above that of the member states. The position the Von der Leyen college takes is critical here, especially to illustrate how the emergence of more federal governance can protect the interests of smaller member states and respect the principles of subsidiarity and proportionality.

The Union must assert boldly its own economic, political and security interests. But the assumption by the EU of strategic autonomy requires a federal executive capable of managing tiers of differentiated integration across the wider Europe; of taking horizontal action to foster transnational cooperation among its member states; and of taking vertical action to ensure efficient coordination between all levels of government, from the European, national and regional to local. Only a stronger executive at the centre of the Union will be able to manage its duties towards the periphery with coherence.

The need for greater centralisation is hardly discussed by the EU institutions and seldom understood outside Brussels: national parliaments, especially, will tend to react against it. The EU must work hard therefore to persuade its citizens to approve a centralisation of executive authority. Fortunately, many voters already seem to know that the scale and complexity of current challenges transcend the capacity of the old nation states and national political parties.

National jealousies about transferring powers up to the EU level look archaic when the EU must deepen its integration across many fields. Only a Union which enjoys more competence, adequate resources and effective institutions will be able to deliver public goods convincingly.

The agenda of President-elect Von der Leyen suggests that further constitutional change is once again realisable. In this, Charles Michel, the new President of the European Council, will help her. If a more federal union beckons, the EU will have to be imaginative about developing a series of dynamic association agreements with its neighbours designed to foster cooperation, manage conflicts and encourage convergence.²⁴

At the same time, if differentiated integration is to work, the rights and duties of core member states also need to be raised to higher levels, especially with regard to Schengen and eurozone membership. Core states should not be permitted opt-outs from federal common policies. Treaty-based rules for participation in measures of enhanced cooperation must be strictly applied. For example, no state should be allowed into the PESCO military arrangements unless it can demonstrate both the will and the capacity to fight a war.

REDEMPTION!

Should the UK ever decide to rejoin, it will find the Union rather different from the one it leaves in 2020. If a reformed EU works well it will be a more attractive proposition for the UK: it will also be better equipped to deal with British exceptionalism. Britain returning would be a vote of confidence in the European project. But there should be no doubt that when faced with the British application, the future EU can be expected to be especially vigilant about its capacity to maintain the momentum of future integration with Britain back as a full member.

As and when these matters are negotiated, the manner of Britain's leaving the Union, which has still to be finally determined, will surely be remembered.

²⁴ Andrew Duff, *The political reform agenda of Ursula von der Leyen*, European Policy Centre, 30 August 2019.