

One against 27: the pitfalls of Brexit negotiations with the EU

blogs.lse.ac.uk/brexit/2016/06/17/one-against-27-the-pitfalls-of-brexit-negotiations-with-the-eu/

17/06/2016

*If Britain votes to Leave, how will the exit negotiations be conducted? **Adam Lazowski** warns that Donald Tusk's preferred option of a two-stage negotiation – withdrawal, then an agreement on future relations – would be the worst possible scenario for the UK, because we would be negotiating the latter from outside the EU. Nonetheless, the other two negotiating options have their own risks. Both sides have much to lose, he argues, but the UK will be one state against 27.*



In an [interview with Bild Zeitung](#), Donald Tusk, the President of the European Council, argued that in case of Brexit, the EU will first seek to negotiate a withdrawal agreement with the UK. Only when the divorce materialises would the negotiation of future relations commence. This message should trigger flashing lights at Whitehall, and this is why.



Photo: [European People's Party](#) via a [CC BY-2.0 licence](#)

Firstly, let's see what exactly [Article 50 TEU](#) provides. It makes it clear that a withdrawal agreement will cover the terms of exit, taking account of future relations between the divorcees. The question is what should be negotiated and how. The first option is to negotiate one agreement covering both, the terms of withdrawal and future relations. Such a solution would minimise the uncertainty about the future, which will be high.

First and foremost, it would provide a bridge between full membership in the European Union and the post-Brexit relations. Formally, there are no legal obstacles to have those two birds killed with one stone. The downside, however, would be the complexity of negotiations that would translate into years of painful talks with various political twists and legal challenges on the horizon. It does not require a vivid imagination to anticipate troubles with ratification in the Member States, or even referenda.

The second option is to separate the terms of withdrawal and future relations into two different treaties, but negotiated in parallel. This would satisfy legal purists as those two dossiers would find home in separate deals and different procedural rules would apply. Still, in order to avoid a legal vacuum post-Brexit, these agreements would have to be bound by a guillotine clause. For the sake of legal and economic certainty they would have to enter into

force together.

This option is appealing, but it has a number of drawbacks. The first is the same as with the first option: it would be a very tedious and time-consuming exercise. Anyone with a bit of experience in international trade negotiations knows how much pain and sweat complex deals require. Furthermore, negotiating two deals in one go would be a risky business. In a likely scenario at least one of these agreements would have to be concluded as a so-called mixed agreement, meaning it would require ratification not only by the UK, the EU but also by all 27 EU Member States.

Having two agreements carries the risk that a parliament of a single Member State may not be eager to ratify the second agreement governing future relations. What if a Member State held a referendum on such an agreement and it was rejected? What would happen then? This is not scaremongering, but a basic risk analysis. For instance, the most recent referendum in the Netherlands has – at least for now – successfully blocked the full entry into force of the EU-Ukraine Association Agreement.

The third option is the one alluded to by Donald Tusk: two agreements negotiated one after another. First we take withdrawal, then we take future relations. For the UK this would be the worst scenario, for the following reasons.

To begin with, it would create a gap between the membership and future relations. It is unclear if we are talking about a complete legal vacuum or a transitional arrangement of sorts. Some are inclined to see the European Economic Area as a transition antechamber but they fail to take into account that rejoining the EEA on the EFTA side would require additional negotiations and treaties with Norway, Iceland, Switzerland and Liechtenstein on board.

Furthermore, the step-by-step scenario would considerably weaken the UK's bargaining position, as it would be negotiating its future relations with the EU as a third country, not an exiting Member State. The UK would then join a list of non-European countries attempting to have a privileged relationship with the EU. If the terms of Brexit and future relations were negotiated in one go, that would give the UK government much stronger bargaining power. Although Article 50 TEU makes it clear that a departing country would not participate in meetings of the Council and the European Council in the negotiations, it would still be in a strong political position to push its case through the diplomatic channels. It would also still have its representatives in the European Parliament.

Donald Tusk has also made an interesting comment about the timeline of the entire endeavour. The withdrawal agreement should be negotiated quickly, but regulating future relations would take years to accomplish. This is very bad news for the UK, as in parallel to the quick Brexit fix it would have to enter into negotiations for free trade agreements with dozens of countries, with which it trades quite freely thanks to already existing EU agreements. The latter would cease to apply to the UK as of the date of exit, which may be only a few years from now. To renegotiate them in parallel to withdrawal negotiations (or even after leaving) would be a resource-thirsty exercise.

One thing is certain: if the UK votes to leave the EU, the government should have a clear idea what to present to its European partners and push for a strategic option that would be the most beneficial. There will be no time for romantic visions. The Leave camp would have to face reality rather quickly. The plans it presented earlier this week are very unlikely to be acceptable to other Member States of the European Union. This is not to say that an EU exit is not possible. It certainly is, but it will have to be smartly played. Although both sides have a lot to lose, it will be one against 27. It would not be the EU leaving the UK, but the other way round.

This post represents the views of the author and not those of the BrexitVote blog, nor the LSE.

Adam Lazowski is Professor of EU Law at the University of Westminster.

- Copyright © 2015 London School of Economics