

# Britain and the EU: Difficult Questions after the Referendum

## Conference Report

December 2016

### Conference Report of the event held on 27<sup>th</sup> October 2016

#### Introduction

As part of its ongoing commitment to analysing and discussing key European issues, the Federal Trust in conjunction with the Global Policy Institute and Industry Forum held an afternoon discussion on the issues arising from the June 23<sup>rd</sup> referendum vote to leave the European Union. Two panels of informed speakers from widely different backgrounds, political, journalistic and legal, sought to bring some clarity to the uncertain choices facing the British government and people in the aftermath of the vote. In particular the panel attempted to answer two questions uppermost in many minds: namely "Where does the Referendum leave us?" and "What does Brexit mean?"

Unsurprisingly, in the course of ventilating possible answers to these questions, a number of relevant issues were highlighted which pointed to the process of Brexit being a highly complex interplay of constitutional, political and legal mechanisms. Irrespective of what any administration might desire, the timetable and any eventual implementation of Brexit would only be possible once certain constitutional requirements were fulfilled. If it was difficult to map the way forward, it was absolutely clear that Brexit could not be "a quick fix". However rapid and final those who supported "Leave" wished the process to be, there were built in checks on the road ahead. In the absence of a written constitution such requirements were perhaps best described by Professor Sionaidh Douglas-Scott, Anniversary Chair in Law at Queen Mary University London, as "constitutional expectations". Such expectations could not be ignored by any Prime Minister and would need time to be complied with.

The issues around triggering Article 50 were "murky and unprecedented" in Professor Douglas-Scott's view but if Brexit was about "taking back control" and investing the British Parliament with authority it had "lost" to European institutions than it was illogical and misguided to suggest Article 50 could be suddenly triggered without authorisation from both houses of Parliament. The use of the Royal Prerogative in such circumstances after a highly controversial referendum campaign marked by spectacular half-truths and in some cases outright mendacity was a risky undertaking for any administration.

In addition to the political and constitutional imperative, there was the (relatively) straightforward legal question of whether the government possessed the power to deprive UK citizens of their rights accumulated over years of EU membership and accruing to them under the European Communities Act of 1972. This point of view, Professor Douglas-Scott noted, was the subject of a legal challenge in both Northern Ireland and the High Court. It was also especially keenly felt in Scotland where a majority of voters had supported "Remain" and where the First Minister had opened the possibility of calling a second referendum on Scottish independence.

These rights also touched other areas which lay outside the political and legal spheres. Stephen Wall, a former adviser on Europe to former British premier Tony Blair noted that many of these rights enshrined values which were at the heart of the EU's "socially liberal consensus". These values had evolved over many years and were above all "worth fighting for" and were as important as any economic or political questions. "What sort of country are we?" he asked, noting that many sentiments expressed during the campaign by the "Leave" camp had appeared to fly directly in the face of these values.

The younger politicians on the panel were guarded in their criticism of the result and focussed more on general financial issues. Fear of offending "the will of the people" appeared

an unspoken undercurrent among MPs. The shadow Foreign Minister, Catherine West (MP for Hornsey and Wood Green) stressed that her constituents were keen that Brexit should not negatively impact economic growth and prosperity and that this prosperity should be shared by all regions of the UK. Government policy was chaotic and confused but she seemed wary of calling for Brexit to be reversed.

Finally Baroness Smith of Newnham noted that confusion appeared to be the order of the day not just among the government but among all those who had advocated Brexit. There were many differing opinions as to how Brexit should be implemented and what indeed it should mean. Brexiteers might have thought they were achieving finality and clarity on the 23<sup>rd</sup> of June but in fact they had simply initiated a dynamic process with many checks and milestones along the route.

## Panel 1: Where does the referendum leave us?

The Panel seemed to agree with Lord Armstrong of Ilminster's assertion in the House of Lords during the debate on the Referendum result (July 5<sup>th</sup>) that Brexit had created "the most ungodly mess I have ever witnessed in more than 65 years of public service". It was not just a political crisis but an existential one for the UK.

Sir Stephen Wall noted that in his conversations with the EU President, Donald Tusk, he had become convinced that there was no such thing as a "soft Brexit". The EU President had reiterated his view that the UK faced a choice between membership of the EU and "hard Brexit". There could be no via media and those who sincerely believed that access to the single market was compatible with immigration controls were in danger of being misled by a wholly unrealistic assessment of the situation. The founding principles of the EU were unlikely to be up for negotiation. The 27 nations of the EU were not minded to give any favours to a country which seemed blindly indifferent to demonstrating the remotest solidarity with its nearest and most important neighbours.

For the UK, the key questions were: can the referendum vote be reversed? And can those who are committed to remaining in the EU play a role in that reversal given the political disarray currently enveloping the Parliamentary parties? "The politicians do not seem at the moment to be able to take the lead on this", insisted Stephen Wall.

Stephen Wall's views were echoed by Jackie Minor, Head of Representation, European Commission Representation who

stressed that in her view there "can be no better relationship with the European Union than fully-fledged membership of the European Union". The idea of a "better" relationship with Europe from outside the EU was wishful thinking "which none of the 27 nations of the European Union would be prepared to indulge". This view would become widely apparent as the prospect of negotiations became more concrete. So far the 27 nations had showed remarkable discipline and solidarity and had not broken ranks and offered the UK any morsels of comfort or indeed any details of what the negotiating position of the EU might be.

Lord Dykes emphasised the sovereignty of Parliament which the Prime Minister appeared determined to dilute by triggering Article 50 without authorisation from both houses. This was an abuse of executive power which was unlikely to succeed. As a former colleague of Edward Heath and one who had worked hard to "secure our entry" into Europe in the 1970s, the referendum result had been a "shocking" event. But it was vital that Parliament was involved in the next stage. The role of Parliament in overseeing the negotiations was "a constitutional priority". The House of Lords fully expected to play a significant role in scrutinising the government's position ahead of any triggering of Article 50.

Professor Douglas-Scott supported this constitutional imperative, noting that the future of this country's relationship with the European Union was not the only issue at stake. Given the significant majority for "Remain" in Northern Ireland and Scotland, there was a very real risk that the United Kingdom might face an internal constitutional crisis to match its external one with the EU. The legal requirements arising from devolution meant that there were strict conventions governing the relationship between Westminster and the Scottish Parliament. The "Sewel" convention (named after Lord Justice Sewel, a prominent lawyer involved in the Scottish and Northern Irish Devolution negotiations), which formed an important part of the Memorandum of Understanding between the UK and Scottish governments, requires the devolved legislatures to give consent if Westminster legislates on matters which "fall within the devolved legislatures' competence". The First Minister of Scotland had already indicated that such consent would not be forthcoming because she would not "permit Scotland to be dragged out of the EU against her will". A legal challenge to the government's position would attempt to clarify these issues over the coming weeks along with the question of whether the rights of British citizens under EU law could be removed without Parliamentary authorisation as the Prime Minister intends.

Among the many questions put to the panel was to what extent might the curious limbo that the UK found itself in after the vote lead to an eventual shift in public opinion and a possible reversal of the decision. The panel appeared confident that such possibilities were not remote but that considerable time might have to pass to secure such a development. In the meantime the

ebb and flow of a dynamic process was likely to continue for many months if not years to come. The panel agreed that the negotiating position of the government was weak, incoherent and lacking in any credibility. It was unlikely to develop any plausibility for several months and even then internal feuding, confusion among the higher ranks of the civil service and the absence of any support from the EU to help flesh out a negotiating position of compromise ahead of Article 50 being triggered would hinder the articulation of a meaningful strategy. Although the EU had appointed a negotiating team under Michel Barnier, it was not going to disclose its negotiating stance until Article 50 had been triggered.

As Ms Minor insisted: "The position of the EU is very clear. There will be no negotiations until Article 50 is triggered and so far all 27 nations have, perhaps to London's surprise and disappointment, stuck to this line". In this sense the asymmetry of the negotiations and indeed the equation of power appeared to suggest in Ms Minor's view that the referendum might have left the UK dazed and confused but the EU functioning coherently and intelligently in the face of its latest challenge. The British media had failed in the run-up to the referendum to present realistically the fundamentals of the relationship. The UK would discover that the EU was not a "pushover" when it came to negotiations and would guard tenaciously the principles and values on which it was founded and the "Four Freedoms" which were not negotiable. To imagine, as the "Leave" camp frequently said, that "it was only a question of time" before the entire EU edifice "collapsed, following the UK's exit" was wishful thinking remote from any reality.

## Panel 2: What does Brexit mean?

The panel was changed for this discussion. Former civil servants and journalists were included and the lawyers withdrew. The term Brexit of course, even without lawyers present, continued to offer only an array of awkward ambiguities. No member of the panel could agree on what Brexit actually mean but with the exception of the one MP on the panel, there was a consensus that the "will of the people" so often invoked by the Brexiteers did not exclude a dramatic shift in public opinion. The referendum had not sealed the UK's departure from the EU.

Lord Inglewood, a former conservative MEP, gave an eloquent presentation in which he argued that he was in favour of Europe not just because of the economic and political arguments advanced during the day's discussions but on account of the fact that the EU meant that unlike his father and grandfather he had not had at a young age to go off to France to fight the Germans. He added that he also strongly believed that "one should be

able to go to Victoria station and get a ticket to anywhere one likes in Europe." These arguments, in particular the ability of the EU to preserve the peace of Europe, were the key to the success of the European project and the UK turned its back on this at its peril. Two world wars and a cold war were proof enough in the twentieth century of the need for a structure to defend the progress Europe had made.

All the panel agreed that the government's position was one of thinly disguised chaos. "There is a lot of volatility in the economy", Catherine West noted adding that "we should really be sending a strong signal of friendship towards Europe" given the uncertainty of the times. The Prime Minister's thin mantra of "Brexit means Brexit" was uninformative if factually correct but as an expression of policy left much to be desired.

Baroness Smith highlighted the internal contradictions of the Brexit camp during the campaign. How could people who believe in free trade be prepared to tolerate leaving the customs union with the EU? How could people who wanted to retain access to the single market believe that they could jettison the jurisdiction of the European Court of Justice? "We are no clearer at the end of October than we were at the end of June", she added noting that the Brexiteers are peddling a "circle that can never be squared".

The contradictions of the Brexit position were the topic of several questions. Many agreed that the government was unlikely to offer much clarity on this in the short term. Some questioned whether they would be even able to deliver clarity in the long term. The internal contradictions of the "Leave" camp are so great that they are unlikely to survive any encounter with reality.

Finally Graham Avery, a senior member of St Anthony's College, and a former civil servant who had been involved in the UK accession negotiations to the European Community noted that the UK was a small country but pace Paul Spaak there were some European countries which still did not realise how small they were. As a Welshman, with British citizenship, he was also a proud European, married to an Italian, "the best kind of European union", and he saw nothing incompatible with being both a good European and a loyal British subject.

Mr Avery was scathing above all about the British media including the BBC which consistently failed to understand the European point of view and systematically misrepresented everything that came out of Europe. Far from this policy of the British media adapting itself to Brexit by raising its game, the BBC and the other British media had continued to pursue a disinformation strategy utterly at odds with the interests of the British people. "People do not realise that when Mrs May uses the language of UKIP in her speeches and says things like "To be a citizen of the world is to be a citizen of nowhere", she is saying things which

The reply of Nicola Sturgeon to the "hard" was also briefly touched upon by Mr Avery who noted that Mrs May's policy appeared to be one of polite non-commitment towards Scotland which would be informed but not really consulted. The "Leave" camp's insistence that Scotland was in no position to call a second referendum on account of the weak economic situation in Scotland, partly caused by low oil prices, was not necessarily correct, although Scottish First Minister, Nicola Sturgeon, was unlikely to rush precipitately into a second vote and would most likely wait for the internal contradictions of the Prime Minister's position to become more widely obvious to her supporters north of the border.

On the subject of Northern Ireland, Mr Avery foresaw great practical difficulties. The hard frontier between Northern Ireland and the Irish Republic could remain "soft for people" but would have to become "hard for goods". The UK would almost certainly leave the CAP and that would immediately raise the question of the freedom of movement of agricultural goods. Modern technology tags on lorries, as suggested by some Brexiteers might work but it was hard to see them being applied to cows or sheep.

It was far too early to appreciate what Brexit really meant but if implemented it was likely to represent more than just a superficial alteration of trading arrangements between the UK and her biggest partner. This would open up the possibility of democratic adjustment. John Palmer, a former Guardian correspondent, insisted that Article 50 would lead to a second popular mandate being necessary on the terms of Britain's exit from the EU and indeed her ongoing relationship with the EU. Asked if he believed Tony Blair was right to call for a second referendum, Mr Palmer believed that it seemed unrealistic for Theresa May to imagine she could organise such a radical change to the country without a parliamentary and popular vote.

## Conclusion

To sum up the two panels' conclusions a number of agreed points emerged. First there was a strong consensus that the government's attempts to push for a swift Brexit were unrealistic. The time required would be increased by legal and constitutional factors. Whether such a delay might allow a shift in public opinion was more questionable but for several members of the panel and the audience this was an attractive scenario. It was agreed that for such a scenario to enjoy any measure of success, the negative economic effects of exiting the EU would have to be demonstrated along with the sharp and unrealistic contradictions in government strategy. The uncertainty over the future of Scotland and even Northern Ireland would also play a role.

However, to counter this eventuality, it was speculated that the government's tactics would be to draw a smokescreen over these factors, focussing on short-term "positives", many of which would have to be artificially constructed. Ironically both sides in the debate have a vested interest in playing for time. The government needs time to await developments in the EU political landscape following elections and votes which may deliver new negotiating partners. Time will also allow it to draw up a comprehensive negotiating strategy based on the new political realities following the US elections. But for those who seek to reverse the result of the referendum, only time will permit that shift of public opinion which could deliver such a development ahead of a general election in 2020 and which would possibly supply the popular mandate capable in theory of reversing it.

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