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May 2017

## About the author

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On 19 April, the Prime Minister, Theresa May, safely won the necessary level of support in a House of Commons vote for the holding of an early General Election. It will take place on 8 June, nearly three years ahead of the regular date as scheduled under the Fixed-term Parliaments Act 2011. The holding of this poll amounts to a tacit concession that the European Union (EU) referendum of June 2016 has failed satisfactorily to resolve the issues it was intended to address. Indeed, rather than settling difficulties, it has created a political conundrum that only further extraordinary action can resolve. This paper sets out the various shortcomings with the referendum that have become apparent. It discusses the significance of the triggering of the General Election; and the possible consequences that will follow. Finally it considers the prospects for the UK approach to the EU in the environment that forms after the poll. It asks, if the election fails to provide May with the resolution she seeks, what might follow.

## The problem of the referendum

The first difficulty with the EU referendum involves the idea, promoted by many of its advocates on both sides of the substantive question, that it would end the longstanding dispute over the issue of European Union (EU) membership. It has had precisely the opposite

impact. Following the referendum, divisions over EU membership became more bitter than ever before. These underlying divisions remain, nearly a year later. With a margin of only 51.9 to 48.1 per cent, it would be hard to apply a term such as emphatic to the scale of the 'leave' victory. In this sense, the referendum simply served to reveal a pronounced lack of agreement, rather than help establish it.

The Prime Minister, Theresa May, has suggested that those on the losing side (of whom she was – nominally – one) have now accepted the matter as settled. They are, in her account, now enthusiastically supporting her government in its moves to depart from the EU. May has undergone a public conversion from a lukewarm 'remain' to an enthusiastic 'leave' stance (as have many other politicians in both the main parties). But it is not clear that members of the public who voted 'remain', who do not stand to benefit personally in the same way as May and some of her colleagues from such a reversal, have followed a similar path in large numbers. Indeed, there is firm evidence to the contrary, including the mass petition for a further referendum that immediately followed the vote, the Richmond Park by-election result, and opinion research findings.

Admittedly, some 'remain' voters seem to have come, probably reluctantly, to the conclusion that UK departure

is now inevitable. This viewpoint is understandable, especially given the failure of MPs – the majority of whom were also supporters of continued membership – properly to represent the ‘remain’ position after the vote. Those of a ‘resigned leave’ outlook may even take the view that, given this unavoidability, the task of exiting should be embarked upon swiftly and effectively (though a definition of effectiveness in this context is problematic). But such outlooks, where they exist, should not be automatically equated with contentment or optimism. Moreover, those of this disposition presented with the prospect of a government seeking to reverse the current policy towards the EU, would be unlikely to object and might indeed be highly receptive.

Far from being a conciliatory device, then, the referendum has created tensions. It has opened up unprecedented divisions that extend beyond the immediate issue of the EU itself. While the overall result was evenly balanced, it contained within it sharp discrepancies; between younger and older people, between the more and less educated, and between different territories within the UK. The prospect of Brexit has exacerbated problems including those involving disputes about the future of Scotland and Northern Ireland within the UK, both of which produced ‘remain’ results (as did Greater London). They are discussed in an earlier Federal Trust pamphlet, ‘The EU Referendum, Devolution and the Union’. Further evidence of the inadequacy of the referendum as a means of resolving rather than creating discord is the extent to which it has become a subject of controversy in its own right, with fundamental disagreements about its constitutional status.

The referendum has proved deficient in a second sense, connected to the first. A further basis on which it was advocated was that it was democratic. It would, some exponents held, enable members of the public to make an important decision on behalf of the UK. Yet the nature of the choice it supposedly offered was flawed. The ballot paper presented voters with a superficially simple decision: to ‘remain’ or to ‘leave’. The former option entailed to a significant extent retaining existing arrangements. In this sense – though exactly how the EU might develop in future was of course unpredictable – it

was a knowable path. Brexit, however, was not. As is now plainly apparent, it could come in different varieties. The mildest forms of withdrawal might more closely resemble continued membership than would the most extreme types of departure. No clear, single account of what ‘leave’ meant – or at least, how the UK would approach Brexit negotiations – was on offer to the public in advance of the referendum, either from the government, which supported ‘remain’, or from ‘leave’ campaigners. The possibilities following from a ‘leave’ vote, then, were diverse. But the binary nature of the referendum question meant that those supporting ‘leave’ were unable to indicate the form of departure they favoured. Therefore claims that the referendum could create a powerful mandate or obligation for any definite course of action were always dubious.

Moreover, the referendum and its aftermath served to highlight high levels of ignorance over the meaning of EU membership, and the implications of departure, among public and politicians alike. Within such an environment, the idea that the referendum could produce a powerful democratic authorisation or imperative for change is further compromised. Finally, while some might see them as admirable exercises in popular engagement, referendums can expose some of the more problematic features of democracy when it takes on a direct and majoritarian character. To seek to isolate a single decision from the purview of institutions such as Parliament and the executive creates problems for the representative system of governance. Moreover, to create circumstances in which one group is able – even by the smallest of margins – crudely to impose a particular change on the whole is to court instability. Finally, it is arguable that the referendum has served to vest authority in the institution claiming to be the custodian of the Brexit vote – namely the UK government – more than the public. The UK executive is claiming for itself considerable latitude in the precise interpretation it applies to the result, placing it at an advantage both over the public and other democratic institutions such as Parliament and the devolved authorities. The viability in practice of the conclusions the government feels able to draw, however, remains to be seen.

Many of those who espoused an EU referendum on avowedly principled grounds – that it would settle

the matter or allow the people to make a decision – did so because they hoped for a particular outcome in one direction or the other. Some anticipated that a referendum would be a means of securing UK membership of the EU. That they made a grotesque miscalculation is manifest. But what of those who saw the referendum as a means of achieving UK departure from the EU? They might feel that their judgement has been vindicated. Achieving their goal through the more regular mechanisms of representative democracy would have been an altogether more challenging proposition. In both Houses of Parliament, and even among Conservative MPs, a majority seemingly supported ‘remain’. The only time a party contested a General Election on a clear programme of withdrawal – Labour in 1983 – it suffered a crushing defeat, to which this policy was perceived as being a significant contributory factor. The referendum appeared to offer a means of bypassing Westminster and Whitehall and – if a ‘leave’ vote could be won – achieving exit from the EU.

The referendum and its outcome have certainly created a powerful political impetus for departure that might not otherwise have been possible to generate. However, the result is not self-enacting. Interpreting and authorising a response to the vote of June 2016 inevitably fell to the institutions of representative democracy that some hoped the referendum would circumvent, including the Cabinet, the Civil Service, Parliament and the courts. Supporters of Brexit have depicted the behaviour of some of these bodies as amounting to resistance to the decision made on 23 June 2016. In fact, they were simply performing their constitutional functions. The judiciary, for instance, made a decision on a point of law regarding the legal authority required to trigger Article 50 of the Treaty on European Union (TEU), thereby instigating the exit process; while the House of Lords made (non-fatal) amendments to a bill presented to it by the Commons, and subsequently gave way. In behaving in this entirely reasonable fashion, these institutions served to remind electors and commentators of the impossibility of governing purely through a popular vote.

While the referendum offered a means of minimising

certain institutional blockages, it could not circumvent the inescapable and enormous difficulties that the attempt to leave the EU entails. It was an awareness of these likely problems that made so many at elite level in the UK reluctant to countenance departure from the UK. In the wake of the ‘leave’ result, though the government has formally committed to Brexit, far from disappearing, the complexities that are involved, and the flaws in some of the prospectuses that were offered for a post-EU UK, have become more widely and increasingly apparent. Crucially, it now seems settled that the EU will not tolerate ‘cherry-picking’ from the UK in its approach to post-EU arrangements; and that it will not begin negotiating a Free Trade Agreement (FTA) with the UK until satisfactory progress has been made regarding the terms of exit. The confirmation of this position – which should surely have been anticipated by the UK from the outset – seems to have provided a crucial motivation for the calling of a General Election. Yet it is not clear why a poll – whatever the precise result – would make any significance difference to the stance of the EU. Those involved in Brexit negotiations for the EU side have many considerations, among which the exact size of the Commons majority of the UK government, and how recently it has obtained it, are clearly not foremost.

A final area of evident shortcoming for the referendum involves its function as a party political management tool for the Conservative government that held it. David Cameron, the Prime Minister who instigated the vote, surely perceived it in this sense. Early in 2013 he committed, should he win an outright majority in the next General Election, to a vaguely defined renegotiation with the EU, the terms of which he would put to the public. In doing so he sought to appease increasingly assertive and radical Eurosceptics within his party, preserve unity between those who favoured exit and those – probably a majority of his MPs – who did not, and minimise the electoral threat posed by the UK Independence Party (UKIP). At the time Cameron made this commitment, he did not necessarily expect that he would be in a position to form a single-party government after the coming election. He might not, therefore, be able or need to deliver on his pledge. Winning a Commons majority in May 2015,

therefore, was retrospectively – and perversely – a disaster for his political career, since it made an EU referendum inescapable. The ‘leave’ result forced him immediately to announce his impending resignation. It had, from the point of view of Cameron, failed. Moreover, far from proving to be a means of containing Eurosceptics and perhaps reconciling them to EU membership, the referendum has enabled them to secure – for the time being – dominance within the Conservative Party. The decision by May to adopt a policy of abrupt Brexit seems to be founded in a view on her part that the same forces that brought about the vote are no more amenable to conciliation than they were before it. A referendum in this sense has not managed tensions within the Conservative Party. It has ceded dominance to one particular faction within it, and committed it to a course of action that many within the party surely regard with unease.

Since May became Prime Minister, she has witnessed these various deficiencies in the referendum become manifest. It has failed to settle the issue in the wider country. It has proved defective as a means of meaningful democratic decision-taking. The referendum clearly did not secure continued EU membership; yet neither has it in itself attained Brexit. As a party political management device it has not worked. A parliamentary party the majority of which (including May) did not support ‘leave’ is now subordinate to a minority of the opposite view. The decision to trigger an early General Election was motivated partly by the opportunity created by the political problems of the Labour Party. Yet it can only be understood by reference to the EU referendum. Clearly, May no longer believes, if she ever did, the extravagant claims she made about the authority that the vote vested in her and her government as the custodian of a decision to leave.

When we consider the motives for May in calling the General Election, what was surely not the decisive consideration, despite claims to the contrary, is the idea that the winning of it might substantially enhance the bargaining position of the UK in negotiations with the remaining EU. As has often been the case in UK history, it is domestic political considerations, and in particular the internal affairs of the Conservative Party, that create

the prism through which European policy is viewed. Yet while decisions have often been made on a basis of short-term, local concerns, they have failed to deliver even on these terms, while at the same time precluding the formation of a coherent or effective approach to the EU. The remainder of this paper considers whether a General Election can resolve the problems that the referendum failed to dispel, and the added difficulties it created. It also discusses, to the extent that satisfactory answers are not found, what will follow.

## **A mandate for Brexit?**

When the forthcoming General Election was called, it was generally assumed that the Conservative Party would increase the size of its Commons majority at the General Election. In doing so, May presumably hoped to achieve a number of outcomes with respect to the domestic politics of the UK. She aimed to insulate her government against possible rebellions on her own backbenches. Furthermore, were there a downturn in the popularity of her government, a larger Conservative contingent in the Commons would be less vulnerable to whittling away in by-elections. May also hoped to win a personal leadership mandate, rather than continuing to rely on a position inherited from her Conservative predecessor at No.10, David Cameron. This objective helps explain the repeated use of phrases such as ‘Theresa May’s Conservatives’, ‘Theresa May and her team’ and ‘Theresa May’s strong and stable leadership’ in the party election manifesto. It seeks to instil the idea that a vote for the Conservative candidate in a given parliamentary constituency is an endorsement of the leadership of May. Alongside this personal authorisation, she hopes to legitimise the policy programme that she has formulated since taking over from Cameron, described in the same document.

The EU referendum result, and May’s response to it, is a prominent aspect in all of these concerns. The timing of the early election means that the poll can take place before any possible difficulties with negotiations and the consequent deal with the EU – or lack thereof – become concrete, potentially eroding her personal popularity

and the standing of her government. The rebellions a larger majority might be able to dilute could be over the European issue, as various Conservative backbench MPs find features of the process to which to object. A personal mandate might help May to enforce discipline on her own party in this area, thereby affording her a degree of discretion in how she manages the post-referendum process. Finally, she can assert that the General Election has imbued her European policy with a democratic force to which political opponents, in the House of Lords, the devolved territories and elsewhere, should defer.

It is entirely understandable that May might deduce that the possible political benefits justify for her the calling of the General Election. However, such calculations necessarily lack precision. First, they assume a significantly enlarged Conservative majority. A loss of seats – though it does not seem a plausible outcome – could lead to the fall of the Conservative government, and would certainly call into question May's leadership. A roughly static outcome or only a marginal increase would not only fail to deliver the possible advantages discussed above, but also undermine the credibility of the Prime Minister, including among her own party. In advance of the May 2015 General Election, any result that enabled Cameron to form a relatively secure single-party government was regarded as a substantial political success if it could be achieved. This time around, something more is required. If it is not, May's judgement in calling an early vote, and her conduct of the campaign, will come under scrutiny. Criticism from within her own party would occur, possibly in public. The General Election will have yielded negative political returns for her, even if the balance of seats won represents a net gain.

But how large a majority is enough retrospectively to justify her decision? A further complication is that it is difficult to produce a precise figure. There is no magic number. Much will depend on context. Opinions will vary at the time of the result, and possibly change in the light of subsequent events. Below the headline figure, other factors will intrude. They might involve territorial divergences either of seats won or of voting. For instance, there will be close interest in the performance of the Conservative Party in Scotland, and its implications for

the interconnected issues of the future of the Union and the EU referendum. Elsewhere in the UK, observers might seek to identify any replications of the phenomenon associated with the Richmond Park by-election of 2016, with differential voting patterns that are attributable to dislike of the particular approach May is taking to the EU. Outcomes that suggest strong resistance in parts of the country, notwithstanding a victory for May that might on the surface appear resounding, could serve to detract from the impression she will seek to create that the UK is united behind her, Brexit, and her implementation of it.

There is a further potential limitation on any mandate May could seek to claim. It relates in particular to the specific approach she has formulated in response to the referendum result. As discussed above, that May sought this General Election was in part a tacit admission that the referendum had not satisfactorily settled the issue of UK membership of the EU. The Conservative manifesto seeks to present this issue as closed, stating that: '[f]ollowing the historic referendum on 23rd June 2016, the United Kingdom is leaving the European Union.' No allowance is made for the legal position that the UK can change its policy at any time without being bound by the vote of 2016; and that the great majority of experts believe that it is possible to revoke the activation of Article 50 TEU.

Yet even if one shares the view that leaving is now a democratic requirement or political or legal inevitability, a problem arises: namely that the question asked of voters on 23 June 2016 did not allow them to support any given form of departure. It is certainly the case that leaving the EU while seeking to preserve as many of the features of membership as possible lacks the logic that is contained in the alternative proposition that exit, if it is to be carried out, should involve substantial change. However, we cannot know what were the precise views – if they held them – of participants in the referendum on this matter. It is entirely reasonable to conclude that among the 51.9 per cent of those voting who backed 'leave', at least 1.9 per cent would not have supported the particular approach being embarked upon by May, if able to express a view. May has not expressly conceded this point. But through calling the election on a manifesto referring to policies including

departure from the European Single Market and Customs Union she seems to have exhibited a sense that she needs firmer democratic authorisation than she currently possesses. To re-iterate, the variation between different kinds of possible exit from the EU is immense – greater, indeed, than the difference between remaining and some variants of leaving. Yet the UK government decided initially not only that departure was required, but also that it was responsible for determining on its own account the approach to be taken by the UK. In doing so it extended beyond the proper limits of executive discretion within the context of our democratic constitution. The Supreme Court confirmed in January this year that some features of this mode of operation violated the law. Now, May appears to have recognised that there are political limitations also and seeks confirmation from the electorate. But can she obtain it in the way she hopes?

Despite recent movements in opinion polls, it is entirely possible that May will win a majority in the House of Commons. On this basis she will inevitably assert that she now has a democratic mandate for her EU policy. She or her allies are also likely to hold that this result has now combined with the referendum verdict, producing an even more powerful imperative to comply with the course of action favoured by the UK government in this area. Though it should not be dismissed entirely, there are many well-rehearsed problems with the electoral mandate concept. At a General Election, the immediate task of voters is to take part in deciding the member that their constituency will send to the House of Commons. The idea that they are engaged in settling particular policy issues is a theoretical construction layered on top of this fundamental function. There are problems inherent in arguing that a vote cast for the Conservative Party in the 2017 General Election should be taken as an endorsement of every element in its 84-page manifesto. Nobody – even its authors – could be fully aware of its entire contents. Moreover, its meaning can be open to interpretation. May herself has during the course of the present campaign created doubts by qualifying aspects of the manifesto programme that suffered from a poor public reception.

It is, however, fair to note that the EU-related aspects of

the text are likely to be better known to the electorate, and their importance more widely understood, than is generally the case with such documents. From this point of view, the ability of the election to create a mandate over the EU might be seen as enhanced. Yet this claim should not be overstated. Polling conducted by YouGov on 22-23 May asked voters to name, without prompting, what they thought were the central proposals contained in the Conservative manifesto. The second most frequent response was 'Going ahead with Brexit'. Yet though it was highly ranked, only 12 per cent mentioned it – meaning that 88 per cent did not. Furthermore, knowing that the Conservatives have included plans for 'Going ahead with Brexit' in their manifesto is not the same as being aware of the account they have offered (such as it is) of how they will go about doing so.

Moreover, awareness of a policy in a manifesto does not necessarily equate with support for it – indeed the opposite is possible. Controversy seems to be an easier route to public attention than universal acclaim. The most frequently named item in the poll cited above, by a long distance, was 'Care reforms or dementia tax', with 36 per cent – a proposal that has achieved exposure because it has been a subject of pronounced hostility. A significant portion of Conservative voters in 2015 opted for 'remain' in 2016; and we can assume that in 2017 many of them will continue both to support the Conservative Party and to oppose – or at least regret the prospect of – leaving the EU. Some in Scotland who wish to maintain membership of the EU will back the Conservatives in the General Election because they also support continued Scottish participation in the UK. In some instances then, voters will be supporting the Conservative Party despite, not because of, its EU policy.

When considering public awareness and its connection to mandates, it could be pointed out that it is, in theory, easier than ever – for anyone who wishes to – to consult party manifestos, which are available online in seconds. Voters might be advised to check the small-print before making their decision. It could be held that even if they do not then they have nonetheless consented – tacitly – to the propositions contained within the manifesto. However, aside from difficulties with the plausibility of a scenario in

which millions of people might make the effort to read and comprehend in full a detailed party political document, in this instance, there is a problem with the coherence of the small-print, undermining its potential to bind even those who have read it, let alone those who have not. The exact approach to exit expressed in the manifesto contains within it certain ambiguities and unknowns (see appendix a) for relevant excerpts from the manifesto). Some seem to be deliberately created by the drafters in an effort to reserve freedom of action. Others arise because the process of leaving involves another party – the EU and 27 member states – that is broadly in a stronger bargaining position than the UK, the compliance of which is required for some of the objectives the Conservative manifesto sets out. We cannot know for certain what can or will be obtained; but it is reasonable to assume – as May herself seems to have done – that it will not live up to some expectations that have been generated by ‘leave’ enthusiasts within the UK.

One example of nebulosity in the manifesto comes where it notes a desire to obtain a ‘deep and special partnership with the European Union’. The words ‘deep and special’ lack precision. Perhaps more significantly, the text then states that: ‘[t]he negotiations will undoubtedly be tough, and there will be give and take on both sides’. This phrasing clearly suggests that the UK government might need to compromise on its intentions as set out in this same document; yet there is no guidance offered as to what the UK might ‘give’. The text then immediately goes on to state that ‘we continue to believe that no deal is better than a bad deal for the UK.’ We are not told what would constitute an agreement so ‘bad’ that ‘no deal’ was preferable. Further definitional vagueness can be found in the pledge that ‘We will control immigration’ – what precisely does ‘control’ mean? A conscious attempt to allow for flexibility can be found in the passage stating the intention to ‘maintain as frictionless a border as possible for people goods and services between Northern Ireland and the Republic of Ireland.’ The UK will indeed be constrained by the bounds of possibility in this endeavour, as with all others connected to exit from the EU.

A further statement in the manifesto engages matters beyond the immediate control of the UK government. It

reads: ‘[w]e believe it is necessary to agree the terms of our future partnership alongside our withdrawal, reaching agreement on both within the two years allowed by Article 50 of the Treaty on European Union.’ As discussed above, the EU has already ruled out an immediate parallel process; and even if it wanted to cooperate, the practicality of accomplishing the dual task within the allotted time period is questionable.

A pledge that is both precise and engages issues within the power of the UK comes with the statement that the UK will ‘no longer be members of the single market or customs union’. A May government could, if it wished, insist on this outcome. But it is the very determination in this area that could render unattainable other aspirations associated with the project of departure from the EU. It is worth noting, however, that this dual pledge is followed by other – more vague – objectives. The text immediately refers to seeking a ‘deep and special partnership including a comprehensive free trade and customs agreement.’ The problems involved in discerning the meaning of the phrase ‘deep and special’ have already been noted; a similar difficulty arises with the word ‘comprehensive’. Seemingly seeking once more to reserve some discretion for itself, the text then states that the UK may want to participate in ‘specific European programmes’, to which a contribution, moreover, will be entailed. Continuing on the sensitive subject of money, the manifesto states that ‘We will determine a fair settlement of the UK’s rights and obligations as a departing member state, in accordance with the law and in the spirit of the UK’s continuing partnership with the EU.’ This passage is the product of an awareness that failure to agree an exit package that satisfies the EU will preclude an FTA. It does not make clear, however, who the ‘[w]e’ who will be arriving at the arrangement are. Certainly it will not be the UK alone. Nor does the document give an idea as to what ‘fair’ – one of the most contestable words in the English language – might mean. The passage then concludes: ‘The principle, however, is clear: the days of Britain making vast annual contributions to the European Union will end’. While the ‘principle’ may seem ‘clear’, the precise application of the phrase ‘vast’ is not; and the words ‘annual contributions’ could allow for some other form of outlay made on a different timeframe.

In considering those aspects of the manifesto that are – perhaps by design – characterised by vagueness, one might defend this approach on a basis that it would be unreasonable to expect to give away negotiating positions in advance. There is some substance to this claim, though it is vulnerable to abuse. Furthermore, the UK government has been exceptionally clear over its intentions regarding what might otherwise have been an important focus for negotiations: membership of the Single Market and Customs Union. Yet, whether or not this degree of indeterminacy is justified, its presence in the manifesto will make it harder for a future May government to claim that it had prior democratic endorsement from a General Election for whatever the ultimate outcome of exit is. Furthermore, where the manifesto seeks authorisation for outcomes that are beyond the direct control of the UK, or are perhaps unattainable, it arguably dilutes further its credibility as a source for a definitive mandate of some kind; as well as potentially inviting political difficulties through the creation of expectations that go unmet.

Beyond the specific difficulties with the Conservative manifesto text, it is difficult to perceive the General Election as setting out to the electorate as a whole a clearly defined range of choices. According to where they live in the UK, voters will be exposed to different campaigns, with a varied range of parties seeking their votes. In Northern Ireland, for instance – in which there was a ‘remain’ majority in 2016 – the slate will be unlike that of any other part of the UK. In most seats in this territory, the Conservative Party will not appear on the ballot paper, meaning that voters will have the opportunity neither to endorse nor reject it. Yet Northern Ireland receives special attention in the Conservative manifesto, and is arguably the part of the UK for which the stakes are highest regarding whether and how the UK exits the EU. Wales, Scotland and England likewise have their own distinct party systems. Common to all of these territories is that they will not be presented with a carefully defined choice between two – or a range of – options specifically on the EU issue.

Yet even if a vote for the Conservative Party were interpreted as reasoned and express endorsement of May’s approach to and leadership of EU policy, and even if the Conservatives ‘win’ the election, securing

a substantial Commons majority, the complications continue. As is well known, under the single member plurality system employed for UK parliamentary elections, a party can win a majority in the Commons while falling well short of receiving half of the votes cast at the General Election. The Conservative Party, however well it performs, will surely not reach over 50 per cent. No party has done so since 1955, when the Conservatives attained 50.2 per cent. May, therefore, is unlikely to obtain a majority of votes cast, let alone of the whole electorate. If a decision to leave the EU was held to require specific approval from a majority of those voting in a referendum answering this express question, it might be held that the same standard should be applied to the matter – at least equal in importance – of how, precisely, the expression of a desire to depart from the EU should be implemented. For the reasons discussed above, a General Election cannot provide this kind of authorisation. Instead, then, it seems poised to compound rather than resolve the mandate problem created by the 2016 EU referendum. (Moreover, if sheer weight of support has significance, it is also difficult to conceive that the total number of votes cast for the Conservatives will reach the level of those cast for ‘leave’ – or indeed those cast for ‘remain’ – in the 2016 referendum.)

## **After the election**

Taking into account the issues discussed in the section above, and assuming a probable increase in the Conservative majority of some kind, what possible political scenarios will May face, and what difference will the election have made to them? To answer this question, it is worth considering the different types of political opposition she might meet with. Some resistance might come from specific territories of the UK where a majority of those participating in the referendum voted ‘remain’. They might not be convinced by the claim that, between them, the referendum of 2016 and the General Election of 2017 have resolved on behalf of the whole UK the fact and manner of exit from the EU. Potentially, political pressure could become greater, depending on how negotiations and their consequences play out. Moreover, while May could argue that the electorate have



provided her with a mandate, the population cannot be bound by itself. If hostility to departure or the form it is taking becomes more intense or widespread among the public, this phenomenon will create problems for the government, with or without an election taking place.

The main institution through which pressure can be applied to the UK executive is Parliament. The Conservative Party has committed, as it states in its manifesto, that '[t]he final agreement will be subject to a vote in both houses of parliament.' This nod in the direction of representative democracy and parliamentary control over the executive (which does not make clear what would happen if the two Houses disagreed) would in practice amount to little in the way of empowerment of the legislature. It does not allow Parliament to set the parameters for the approach that the UK government would take to negotiations in advance or as they unfold. Assuming any agreement is reached with the EU – not a guaranteed outcome – Parliament would in the expectation of the Conservative government have the choice between accepting it, or opting for exit without a deal: a *fait accompli*. The UK government does not plan to ask Parliament whether, in the light of the outcome of negotiations, it would like the UK to seek to revoke Article 50 and remain within the EU. The vote as envisaged, then, would only serve to confirm the extent to which the UK Parliament has become downgraded in the wake of the EU referendum. Parliamentarians have to a large extent been complicit in or even promoted this diminution. Nonetheless they still possess the capacity to assert themselves, should they wish to use it.

Before the election, the main source of resistance to the government response to the referendum within Westminster came from the House of Lords. While the Conservative Party may increase its strength in the Commons on 8 June 2017, it will remain in a minority in the Lords, where, moreover, a majority – including a significant number of Conservative Peers – were supporters of 'remain' in 2016. Claims will be made that a Conservative victory will provide the Commons with a new enhanced right to trump the Lords over EU matters. In fact, regardless of any election, the Commons is already in a position of parliamentary 'primacy',

underpinned by the Parliament Acts 1911/1949, and various non-statutory arrangements, as well as a general understanding that, as an elected chamber, the Commons has a democratic legitimacy that the Lords lacks. But, putting aside the difficulties involved in construing a mandate (as discussed above) what actual constraints might the Lords become subject to directly as a consequence of the General Election? The main consideration here involves the so-called 'Salisbury-Addison convention' (see appendix b). Traditional interpretations of this rule suggest that the Lords should not block a bill that implements commitments made in the manifesto of the governing party. Yet it does not preclude amendments to bills (except perhaps those of a 'destructive' variety). Furthermore, it applies only to bills and not, presumably, votes on resolutions. Moreover, Salisbury-Addison is only a convention, the precise application and very existence of which has been a subject of dispute. It does not necessarily bind the Lords to any course of compliance.

While the Lords could if it chose create difficulties for a May government over the EU, the Commons has far greater latent potential. It has powers that the Lords lacks, for instance: to vote on the budget; to authorise early general elections; and to create and destroy governments through providing or withdrawing confidence. None of these powers need to be actually used against a government for the Commons to impose itself. Their mere existence means that currents of opinion among MPs need to be taken seriously. Therefore, despite discussion of the idea of a referendum result as supreme, what takes place (or does not occur) in the Commons over coming years will be crucial to the UK approach to the EU.

One possible difficulty for May in the Commons would be a cross-party grouping, including some of her own MPs, coalescing against leaving, or at least the more abrupt version of it to which May is committed. The General Election could produce a Commons with a smaller number of MPs who were so-inclined. It should also be noted that, though a majority of MPs were seemingly 'remain' supporters, few in the two largest parliamentary parties asserted themselves in this

regard. However, during the new Parliament, the material consequences of May's policy will become increasingly tangible. A particular problem, or combination of difficulties, could lead to pronounced unease in Westminster. In such circumstances it is possible that some Conservative MPs will act in concert with those of other parties to challenge the path that the May government is following. Even if the General Election of 2017 has reduced the chances of a numerical defeat in the Commons, rebellions – especially on such a core issue – are, if they occur, a problem. They do not have to lead to the government losing for it to be concerned. Party leaders take them seriously and generally try to stop them before they take place.

If a rebellion within her own ranks becomes a realistic proposition, May has already ruled out the likely ameliorative options, such as membership of the EEA/EFTA or a revisiting of the idea that the referendum result is somehow binding. She has done so because – like successive Conservative leaders from John Major onwards – she regards pacification of a different group within her party, once known as Eurosceptics, as a far greater priority. In some ways, she is sound in her judgement. Within the Conservative Party, those hostile to the EU (or UK participation in it) have been consistently more concerted and assertive in promoting their cause. Their firm persistence has led to significant achievements. Combined with other factors such as the influence of UKIP, it brought about the referendum in the wake of which their agenda has captured not only the Conservative Party but the UK government. May is therefore correct to regard the Eurosceptics as a formidable force. Her response to this assessment has been to present herself as having become one of their number, or at least as an ally who will deliver their objectives. The difference between May and previous Conservative leaders, brought about by the 2016 referendum, is that rather than seeking to secure obedience from Eurosceptics through limited proposals that seek to take into account their concerns but do not meet their objectives, May now is more fully attempting to secure their goals (and has co-opted some of them into important roles in her Cabinet). But future problems could lie in the very nature of those objectives. In as far as they are coherently formulated, key aspects of them could well prove to be individually undeliverable or

mutually incompatible. The obstacles – both practical, and engaging the politics of the UK and the EU – to the attainment of an outcome satisfactory to many of the leave supporters are discussed in more detail in a previous Federal Trust paper, *Deal Or No Deal? The Article 50 process in context*. These difficulties will remain, irrespective of the outcome of the 2017 General Election.

Eurosceptics have never been a wholly homogenous bloc, especially with regards to their vision of the alternative to EU membership. The idea of a post-exit FTA between the EU and the UK has figured in some of their projections. However, many experts have raised doubts about the idea that such an FTA could be completed within the initial 2-year time frame provided by Article 50 TEU. Furthermore, if the UK does wish swiftly to commence negotiation of an FTA, it might need to agree a financial settlement for departure on a scale that many firm supporters of leaving find unpalatable. The Conservative manifesto, discussed above, is exceptionally optimistic on these counts. Moreover, if arrived at, any such FTA may in practice require from the UK adherence to significant portions of European law – a prospect that is surely anathema to Eurosceptics. It could also involve the continuation of aspects of EU membership for transitional – or perhaps indefinite – periods. May appears to accept that the UK will continue to participate in some aspects of the EU and in return make regular payments over and above any severance settlement. To 'leave' enthusiasts – including those who are in theory committed to an FTA – such outcomes are likely to represent a failure to provide the desired clean break from the EU; and amount to an unacceptable financial cost.

Firm advocates of leaving, however, are also likely to argue that if an FTA-exit of a type they deem desirable is not obtained, then the UK can manage well without one. This outlook is reflected in the rhetoric of May about no deal being better than a bad deal. One problem with this stance is that it does not sit comfortably with the idea that a hugely beneficial FTA with the EU can be obtained. Surely, one might ask, the loss of such a prize might be the occasion of a clear

assessment of the different options, in particular weighing the benefits of leaving without a deal against seeking to revoke Article 50 and remain within the EU? However, the logic of the 'leave' position, particularly in its more radical form, is to drive the UK towards departure without an FTA, possibly following a breakdown in exit negotiations. Such a circumstance is likely to be disruptive and damaging in political and economic terms, to the EU, the European region, and the world – but most of all the UK.

Of the two scenarios for exit suggested above – that might be termed 'messy' and 'clean' – the first seems certain to provoke objections from Eurosceptics. May could regard herself as having obtained some kind of mandate for personal discretion from a General Election victory in 2017, or argue that the wording of the manifesto issued at the time of this contest contained sufficient hints at such a course of action as to justify its pursuance. Whether those committed to a more abrupt departure than the 'messy' option offers will regard such assertions as valid is doubtful. But would the 'clean' option succeed in finally satiating Euroscepticism? The economic discomfort that could accompany this variety of exit would be unlikely to persuade many advocates of leaving that their programme was the source of the difficulties. It is far more likely that other culprits would be sought abroad and at home. They might include the EU and its remaining member states, multinational corporations and members of the UK elite such as civil servants, media figures, parliamentarians, ministers – and the Prime Minister herself.

In the changed post-referendum environment, then, May is pursuing a more proactive approach to the appeasement of Euroscepticism than earlier Conservative leaders. However, she is perhaps committing the same fundamental error as her predecessors, in calculating that the allegiance of Eurosceptics can be bought, that they are willing to compromise, that they see the EU as one of a number of issues to be balanced against each other in a process of rational negotiation, and that they will be impressed by calls for loyalty to the party or to its leader to take precedence over their particular agenda. It is not clear that the General Election of 2017 will have altered this underlying pattern of behaviour. If in the estimation of the Eurosceptics May is seeking to use the mandate obtained in June 2017 in

some way to circumvent that produced in June 2016, they will adhere to the latter over the former. In such circumstances, the major Conservative split over the EU that successive party leaders have sought to avoid through increasingly significant concessions to the Eurosceptics will have occurred – and because of those very efforts at amelioration. The General Election, like the referendum before it, will have failed to deliver the hoped for resolution; and will have created pronounced uncertainty about the future of the UK. A major realignment of the political landscape might at this point be both necessary and unavoidable.

In 1979 J.A.G Griffith famously wrote that '[t]he constitution of the United Kingdom...is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.' Yet while the UK system may appear to be malleable, those pursuing their favoured outcomes within it nonetheless tend to display a need to assert the existence of norms that justify their actions, as though there were an existing set of standards by which to abide. We can observe this phenomenon in relation to the EU, where first a referendum and presumably next an election will be held to have produced a mandate that overrides all possible restraints in its path. Those who seek to challenge the charge towards an EU exit led by May need to question not only the merits of the substantive policy, but also its claims to constitutional legitimacy. Democratic mandates have meaning and are not a pure fabrication. But they must be qualified, nuanced and placed within a wider context of interlocking forces, some old, others more recent. They include the rule of law, the unfolding multinational, territorially diverse quality of the UK state – and the authority of Parliament, within which the Commons is the senior partner, upon which the executive itself rests.

## Appendices

Appendix a: Excerpt from *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future*, The Conservative and Unionist Party Manifesto 2017, pp.35-6.

### 'LEAVING THE EUROPEAN UNION

Following the historic referendum on 23rd June 2016, the United Kingdom is leaving the European Union. Only the Conservative Party, under Theresa May's strong and stable leadership, can negotiate the best possible deal for our country...We want to agree a deep and special partnership with the European Union...The negotiations will undoubtedly be tough, and there will be give and take on both sides, but we continue to believe that no deal is better than a bad deal for the UK. But we will enter the negotiations in a spirit of sincere cooperation and committed to getting the best deal for Britain. We will make sure we have certainty and clarity over our future, control of our own laws, and a more unified, strengthened United Kingdom. We will control immigration and secure the entitlements of EU nationals in Britain and British nationals in the EU. We will maintain the Common Travel Area and maintain as frictionless a border as possible for people, goods and services between Northern Ireland and the Republic of Ireland...we will protect the democratic freedom of the people of Gibraltar and our overseas territories to remain British, for as long as that is their wish. The final agreement will be subject to a vote in both houses of parliament. As we leave the European Union, we will no longer be members of the single market or customs union but we will seek a deep and special partnership including a comprehensive free trade and customs agreement. There may be specific European programmes in which we might want to participate and if so, it will be reasonable that we make a contribution. We will determine a fair settlement of the UK's rights and obligations as a departing member state,

in accordance with the law and in the spirit of the UK's continuing partnership with the EU. The principle, however, is clear: the days of Britain making vast annual contributions to the European Union will end...We believe it is necessary to agree the terms of our future partnership alongside our withdrawal, reaching agreement on both within the two years allowed by Article 50 of the Treaty on European Union.

### Appendix b: The 'Salisbury-Addison convention'

Excerpt from House of Lords/House of Commons Joint Committee on Conventions, *Conventions of the UK Parliament*, First Report of Session 2005-06, Volume I, HL 265-I; HC 1212-I, 3 November 2006; paras 99-100.

'99. The Convention which has evolved is that:

In the House of Lords:

A manifesto Bill is accorded a Second Reading;

A manifesto Bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the Bill; and

A manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose

100. In addition the evidence points to the emergence in recent years of a practice that the House of Lords will usually give a Second Reading to any government Bill, whether based on the manifesto or not. We offer no definition of situations in which an attempt to reject a Bill at Second Reading might be appropriate, save that they would include free votes. But to reject Bills at Second Reading on a regular basis would be inconsistent with the Lords' role as the revising chamber. In practice the Lords have the means to express their views on the principles of a Bill without rejecting it at Second Reading, by tabling a non-fatal motion or amendment at Second Reading.'