

What May Not Happen in UKexit

“You can’t always get what you want” is not wisdom confined to the Rolling Stones. But what the UK’s new Prime Minister, Theresa May, may want, aside from remaining Prime Minister until 2020, is not clear. Her dictum that “Brexit means Brexit” is of no help, because “Britain” is not a state, let alone a member state of the European Union. UKexit is the correct abbreviation for what may unfold. Brexit, by contrast, does verbal violence to the UK, which is a double union, neither a British nation-state, nor a Greater England. One union is that of Great Britain, which joins Scotland to England and Wales; the other, more historically troubled, is that of Great Britain and Northern Ireland. One of May’s problems is that she cannot exit one union, the European, without damaging the two other unions that make up the UK.

The secession of the entire United Kingdom of Great Britain and Northern Ireland from the EU is possible. Article 50 of the Treaty on European Union expressly enables a member state to negotiate its secession with its soon-to-be ex-partners. But before, and until, that article is engaged, a constitutional pause is occurring. The new Prime Minister and her new cabinet, as well as their opponents, are reviewing their options. In doing so, they are fully conscious of the results of the advisory referendum of 23 June 2016. Of particular concern is the fact that Scotland and Northern Ireland are manifestly more enthusiastic about remaining in the EU than England and Wales are in wanting to leave. That presents May’s government with a major challenge. May might also be vaguely aware of one abiding law of the EU: every referendum result that has been adverse to European integration has either been reversed through a subsequent referendum – or ignored.¹ A 52-48 outcome is eminently reversible, if not by May then by her successor (possibly from another party). The messier and costlier the withdrawal process, the more likely its reversal becomes.

Tellingly, among May’s first meetings in her new role have been those with the First Minister of Scotland, Nicola Sturgeon, and with Arlene Foster and Martin McGuinness, respectively the First Minister and Deputy First Minister of Northern Ireland (who are equal in power and status, despite the difference in their titles). And at the time of writing, May is meeting Enda Kenny, the Prime Minister of the Republic of Ireland, co-guarantor of the institutions of the Good Friday Agreement of 1998, embedded in an international treaty, and a key stakeholder in the event of UKexit.

May has been emollient and reserved, but she has made commitments that may have far-reaching consequences. Her actions suggest tacit acknowledgment of the profound crisis of legitimacy that may follow if Article 50 is invoked without the consent of Scotland and Northern Ireland.

Northern Ireland’s union with Great Britain is qualified by a political settlement, in which an EU-embedded Republic of Ireland is an institutional partner. UKexit would breach this 1998 agreement, which was ratified by the peoples of both entities on the island in separate referendums. That settlement made Northern Ireland a federacy: a legal arrangement in which neither Northern Ireland nor Great Britain may unilaterally alter its constitutional relationship with the other (though provision is made for Irish reunification).² But exactly such a step is now under contemplation: UKexit would be executed against the will of a local majority in Northern Ireland and against the will of the majority in the Northern Ireland Assembly. May’s cabinet must explain why a referendum held in 2016 within the UK and Gibraltar should supersede or abrogate key features of the agreement ratified by referendum in both parts of Ireland in 1998 (and ratified in a treaty registered at the United Nations, which affects not one but two member states of the EU.

- 1 See M. Qvortrup: Referendums on Membership and European Integration 1972-2015, in: *Political Quarterly*, Vol. 87, No. 1, pp. 61-68. The author correctly predicted the outcome in the UK: “Based solely on this statistical analysis, we would expect the current government to lose the referendum by 4 per cent.”
- 2 B. O’Leary: The Belfast Agreement and the British-Irish Agreement: Consociation, Confederal Institutions, a Federacy, and a Peace Process, in: A. Reynolds (ed.): *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford 2002, Oxford University Press, pp. 293-356.

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May's cabinet also has to reflect on the possible damage to recent arrangements agreed with Scotland that would flow from UKexit. It would reverse express commitments given when Scotland voted in a referendum in 2014 to remain within the UK. The referendum result represents a material change in Scotland's status, within both its unions. The prospect now exists that Scotland could be taken out of the EU against the will of its people. May's early moves suggest she will consult with Scotland and Northern Ireland over UKexit, but one might interpret them as suggesting that she is deliberately granting both countries a tacit veto over any exit strategy from the EU.

The organization of exiting from the EU has been assigned by May to prominent Conservatives who sought to leave the EU (David Davis, Liam Fox and Boris Johnson). Folly or cunning? No one knows whether these Leavers can reach an agreement with their cabinet colleagues on the best way to leave the EU, or on the UK's best future relationship with the EU (if any). If these "Brexiters" persuade the cabinet to pursue a definite plan – advised by a civil service that was unprepared for a Leave result – they then have to ensure that their agreed exit strategy can survive the House of Commons and Lords (in which "Remain" majorities still exist). And all of this has to occur before the Brexiters know whether their plan (and accompanying contingency plans) can survive at the negotiating tables with the massed ranks of the EU member states.

May's assignment to her Brexiteer colleagues is therefore exceptionally difficult. Her assurances to Scotland, Northern Ireland, and Ireland have compounded their problems. Since May appears to be prepared to concede to Sturgeon full consultation on unfolding proposals to exit – to head off a possible referendum in Scotland to leave the UK – any strategy for leaving the EU will have to result in a relationship that is as close as possible to the existing EU membership in order to persuade Sturgeon and her colleagues to co-operate. However, such a "soft exit" might not satisfy Conservative or UKIP voters.

May has also sought to assure both Irelands that there will not be a hard (customs or immigration) border between them. Unless she is prepared to create a border in the Irish Sea within the UK (which would offend Ulster Unionists), that too seems to mean that any exit from the EU would keep the UK within the single market, with its full four freedoms, including freedom of movement. These Scottish and Northern Irish constraints point to the so-called Norwegian option, in which the UK would pay all the costs of membership and obey all relevant EU law to keep access to the single market, but without being a member state. This option would scarcely appease those who voted to leave in the conviction that they would thereby constrain immigration. It would also increase the so-called democratic deficit by depriving UK citizens of any say over EU lawmaking.

There are therefore at least two possible readings of May's early moves. She may simply be pursuing incoherent objectives, appeasing all she meets, adrift as an unexpected Prime Minister. Alternatively, she may be planning a protracted quasi-secession from the EU, one which may never be completed, in which she may be prepared to play the Scottish and Northern Irish cards to constrain the hardline Brexiteers in the cabinet, who have yet to articulate their plans.

But if May wants a democratic resolution to her difficulties, there is nothing in UK or EU law to prevent her from considering a creative compromise – one in which England and Wales leave the EU, while Scotland and Northern Ireland remain within both the EU and the UK.³ One major advantage of this proposal is that if England and Wales discover that they do not like life outside the EU, their return to membership would be within the control of the UK government. Thus, this compromise provides a moment to calm the UK's territorial politics. It would also give the EU a continuing stake in some of the UK, while enabling Northern Ireland and Scotland to remain within the EU, as their citizens clearly desire. The English and Welsh, by contrast, would get a chance to learn if they really want what a majority of their citizens voted for.

³ See B. O'Leary: *The Dalriada Document: Towards A Multi-National Compromise That Respects Diversity in the United Kingdom*, 13 July 2016.