

UK/CH : im gleichen europäischen Boot ?

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No Negotiation Prior to Notification: Challenging the Approach of the EU to the UK Exit Negotiations

Since the news broke that the United Kingdom had voted to leave the European Union a united chorus has emanated from Brussels and the various European capitals maintaining that (i) the four freedoms are indivisible (ii) and that there is to be no negotiation prior to Article 50 of the Lisbon Treaty being invoked. While the former position is well known and any attempt to curtail freedom of movement will be met with short shrift by the EU, as the Swiss have experienced, the latter position requires some more careful consideration despite its matter-of-fact appearance.

In part the EU may be sticking to this position because in the aftermath of the vote the UK government desperately sought pre-negotiations. The shock at the result of the referendum across Europe should not be underestimated with abortive attempts and the desire for the British to get on with it even led the EU to see whether they could invoke Article 50 themselves. The EU must gain some satisfaction in being able to politely smile and repeat its mantra of no pre-negotiations when confronted with the victorious Leavers Johnson, Davis and Fox. But what effect does this position have and could it in fact be detrimental to the EU?

We must take as genuine the dejection with which EU diplomats and politicians reacted to the result but why then were they in such haste for the UK to begin a negotiation process that sets a two year time bomb ticking to hasten the country's departure. In many ways they had no other option to be seen to try and undermine the vote would be seized upon not only in the UK but across the continent and getting things sorted quickly must be seen as the least painful course of action. If there is a genuine wish that the UK remains in the EU then there has to be a realisation that delaying the triggering of article 50 is the only way to achieve this. Although the architect of Article 50 Lord Kerr stated

that it could be retracted once invoked the political cost of doing so makes such a retraction look extremely unlikely. In this respect the EU has to understand the political situation in the UK and recognise how pre-negotiations could enable pro-EU forces to respond and overturn the referendum result.

Understanding the political situation in the UK however is not easy. Confusion reigns in Westminster with both the government and opposition deeply divided on what form leaving the EU should take with voters for Leave even more so. A necessity to be seen to honour the result of the referendum makes it unlikely that parliament will block the triggering of Article 50 even if as expected the Supreme Court rules that it is parliament that has that right and not the government. Once negotiations get underway the government will have to be in full control and Parliament's plea for a role will likely be ignored.

The democratic control of proceedings begins to look incredibly suspect. Parliament should have a say on the final deal not merely on a mandate to negotiate where even if they attempt to put stringent restraints on the Government these could be rejected by the EU. The situation serves to reconfirm the ridiculousness of the question posed in the referendum where the electorate were asked to choose between the status quo and a series of contradictory promises many of which were immediately walked back from. For any political support for the UK to remain in the EU to gain traction they must be able to argue against what the reality of leaving looks like. In this vain the leaders of the Leave campaign who now occupy senior government positions must have a free hand in negotiating with the EU the best possible package it can without interference from Members of Parliament. Only once this deal is complete should Parliament be asked to invoke Article 50 knowing full well what such a vote entails. In order for this to happen the EU would have to drop its 'no negotiations before notification principle.'

That the EU may agree to negotiate prior to Article 50 is invoked is not as farfetched as it may appear. The EU unlike the UK has a very clear negotiating position that the four freedoms are indivisible. If as expected the UK will not be receiving a better deal than it has from membership the EU can simply repeat this point and delight in the efforts of UK negotiators to coax them into agreeing something else.

What would the EU lose by violating this principle? There is the hope in some quarters that triggering Article 50 would cause a wave of economic problems for the UK exasperating the drop in sterling that has occurred since the vote in June. Poor economic performance could push public opinion against leaving the EU but could also be interpreted as necessary pains until the deal is finalised. Either way it is a dangerous strategy to hope that economic punishment will push voters in the UK back into the arms of the single market. Also any negative downturns would be just as likely to occur once the shape of a deal was known before Article 50 was triggered and could help to fuel arguments to reject it by politicians within the UK.

The EU cannot prevent the UK from leaving alone. Those who believe that the UK should remain a member have to seize the void left by an unclear government position and start make the fight that any deal should be subject to either parliamentary approval or better still another referendum. This will require bold political leadership and should be accompanied by proposals for democratic reform to rid the country of the first past the post system as well as constitutional change to increase devolution. These conversations are taking place but their relevance to one another has to be made clear. The vote to leave the EU was partly a frustration at a political system that saw the Conservative party take control of the whole legislature and executive with just 36.1% at the 2015 general election. The vote on the 23rd June was as much about the democratic institutions within the UK as the failures of the EU.

Perhaps it is inevitable that the script that seems to have been set in motion will play out as anticipated. The UK parliament will invoke Article 50 with some meagre promises from the government and then negotiations will proceed until a deal is cut that is ultimately unsatisfactory for both sides. Voices decrying the outcome will be little entertained and the reality of the new situation will settle in. Maybe another twist is yet be written and maybe there is chance to upset the perceived narrative that the UK is soon to withdraw from the EU.