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Revolution without end? A politician's view of Brexit

The Rt Hon Dominic Grieve QC MP
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Introduction

I am most grateful for the kind invitation that has been extended to me tonight to give this talk. The last few weeks have not been a quiet time when it comes to the Brexit process, so it is rather pleasant to get away from the environment at Westminster for a moment of reflection on what is taking place, even if in doing so I know I can't escape the labels placed on me of "mutineer, traitor, rebel commander, bespectacled Che Guevara, and most recently, grand old Duke of York".

The origins of my presence here lies, I think, in your organisers noticing that, in the last few years, I have taken to giving talks on politico-legal topics, mostly around Human Rights (the subject which led to my leaving government) and then on legal aspects of Brexit (the subject which seems to have taken us over). I have certainly found these useful for clarifying my own thoughts, particularly in the conversations afterwards with audiences often expert in their area of law.

I am conscious this evening of being with a group whose area of practice is both important to our financial and commercial sectors and entirely bound up with our EU membership. Brexit affects you directly as the EU legal framework has had a significant impact on the evolution of UK competition law: merger control for those mergers meeting EU filing thresholds, the rules preventing state aid and the power to carry out on site investigations for breaches of competition rules; all with the ECJ as the ultimate arbiter on matters of law. The Government itself has recognised that Brexit will lead to a significant growth in the work of the Competition and Markets Authority in relation to both mergers and anti-trust cases, and has allocated an extra £23.6m to its £66m budget for 2018/19 as a consequence.

But beyond those key facts all remains opaque. As with much else with Brexit, we have no idea as to how existing structures will evolve once we have left. We don't know if the Commission will remain competent to investigate matters arising before March 2019 or if the ECJ will still have jurisdiction. We don't know how two parallel jurisdictions will work, as EU competition rules under Articles 101 and 102 TFEU will continue to apply to agreements for the conduct of UK businesses that have an effect within the EU, including the possibility of investigations and fines by the EU Commission. We have no idea of what final form any permanent Brexit treaty will take or even if we will get an Article 50 agreement to leave by March 29, 2019. The exact terms of Transition, if it takes place, and its effects on

competition law are unclear. The House of Lords Select Committee Report [1] of last December highlighted an increased burden on business from all this uncertainty. Doubtless there will be work for competition lawyers in all this as well. But, as with almost everything which Brexit throws up, all I can really say about this at present is that it is the very opposite to the principles of "quiet" government that I am enjoined to pray for on a Sunday when I go to church. It seems to me, therefore, that the better contribution I can make to discussion this evening is not to give you more analysis of the possible legal and constitutional consequences of Brexit but to try to go to the heart of the politics, as I see it. Because how the politics plays out in the next few months is going to determine the future economic wellbeing and the security of our country for some time to come.

It is a truly revolutionary moment in our affairs. For two years now we have seen the development of an unparalleled political and constitutional crisis for our country. It has precipitated the fall of one Government and contributed last year to the failure of another to get any sort of coherent mandate for carrying out Brexit. It divides friends, families, generations and political parties and has ended twenty-five years of broad political consensus as to how our economy and international relationships should be managed. I keep on noticing at Westminster that the size of the challenge it poses has induced a mixture of paralysis, hysteria and avoidance from politicians of all hues. There is a marked reluctance to engage honestly with the issues or to express openly opinions as to the best way forward. And, as I have to admit of myself, what constitutes the best choice for our country in the circumstances in which we find ourselves is very difficult to discern with certainty. It is possible for entirely reasonable people to disagree. So tonight provides me at the least with an opportunity to unburden myself of my own thoughts on where we are and what we should do in going forward. We might then have a discussion which may be helpful in shaping what ought to come next.

The Causes of Brexit

I don't want to get too bogged down in the causes of the referendum result of June 2016, but some analysis of them is necessary if we are to see our present challenges clearly.

The result was undoubtedly the product of the coming together of multiple grievances amongst sections of the public. In voting to leave, the majority, repeating the mantra of "taking back control", was making some form of demand of the Government and Parliament for a change in direction for the United Kingdom, particularly in respect of our participation in building supra-national legal frameworks. It was also a demand concerning what is expected of our unwritten constitution which has become heavily entwined with those supra-national frameworks the UK has helped to build.

Doubtless immigration played the key role, in that EU membership has, through the existence of freedom of movement, acted as a driver to population growth and a consequent pace of demographic change that left many feeling uncomfortable, as I can see from my constituency correspondence.

But, just as importantly, the EU's reputation as an economically successful entity, able to secure its external borders and deliver on its own slogan of being an area of "area of freedom, security and justice" (see the Lisbon Treaty preamble) has been called into question. The problems resulting from the creation of the Euro and its impact on the weaker economies that were admitted to it, the financial crisis of 2008 and its economic consequences, the disorderly nature of the influx from outside its borders of desperate millions of refugees and economic migrants prompted by war and poverty and environmental

[1] European Union Committee, 'Brexit: Deal or No Deal', 7th Report, Session 2017–19, HL Paper 46

crises in the Middle East and sub Saharan Africa have seriously undermined its reputation as an agent of stability. It has also made attractive the idea that trade agreements outside of the EU might be more desirable than within it, seeing that between 2009 and 2014 the average annual growth in the Eurozone was -0.2% compared to +5.2% in emerging markets as a whole. As we can see from the rise in populist governments in countries such as Hungary, Austria and Italy and the political dynamics now at play in many others, this malaise is not confined to our country.

But to all this we have to add domestically a very British, or at least English, view of the nature of the nation state and with it of our national identity. During the Referendum how very often I heard on the doorstep that people were fed up with being told what to do by unaccountable foreigners. My Conservative Brexiteer colleagues in Parliament have in varying degrees signed up to the view that EU membership undermines the sovereignty of Parliament in a manner which is damaging to our independence and our parliamentary democracy and system of law. In a form that exists in almost no other country in Europe there is an intense pride in a continuous historical narrative that in constitutional terms goes back to Magna Carta, then the emergence of the Commons as a distinct body by the 14th century, Habeas Corpus and the Bill of Rights of 1689. Above all, this view makes Parliament the central bastion of our liberties and resists any constraint upon it.

Now I should emphasise that I have no difficulty sharing in that pride. It would be hard, for example, as a 21st century lawyer not to experience patriotic sentiments in knowing that, as early as the 15th century, Chief Justice Fortescue in his de Laudibus legum Angliae, deprecated the use of torture and praised due process and trial by jury and their uniqueness to England. There is even an excellent section in that work which the Government might have profitably read in relation to whether or not the power to trigger Article 50 and leave the EU lay with them using the Royal prerogative . “The King of England” he said “cannot alter nor change the laws of the realm at his pleasure”. Even then it had to be done by statute.

But this pride can easily power the creation of myth. Principles were often not observed. And the doctrine of parliamentary sovereignty was created as an assertion of the supremacy of the legislature over the executive, yet at times it is now invoked as some kind of prohibition on national participation in any form of international engagement requiring the pooling of sovereignty.

Yet that is precisely what the institutions of this country have been doing successfully for centuries. We have embarked on policies that have developed and changed our laws, not just through domestic legislative mechanisms but through international engagement and the creation of treaties designed to make the world a better, safer and more predictable place. We are signed up to over 13,500 of them which are still applicable and range in importance from the UN Charter to local treaties over fishing rights. Over 700 contain references to binding dispute settlement in the event of disagreements over interpretation. And with the passing years these treaties, be they the UN Convention on the Prohibition of Torture or the creation of the ICC, have dealt not just with interstate relations but state conduct toward those subject to its power. So important has been this treaty making power that the Ministerial Code, until 2015, referred specifically to the duty of civil servants and ministers to respect our international legal obligations. This was then deleted by the then Prime Minister, David Cameron, in a fit of pique after having been reminded of this too often. But the Cabinet Office had to admit the omission made no difference to the obligation which is Lord Bingham’s eighth principle of the Rule of Law. Without it there would be no rules based international system at all. And, despite some lapses, we have been very good at observing the Rule of Law. We are probably the greatest treaty making power in world history and still talk up the benefits. It was striking to note the understandable concern we have just

registered when President Trump indicated a lack of support for the international rules based order at the recent G7 summit. We were right to do so.

However, the fact that this irritation existed and is still frequently expressed by politicians in respect of the ECHR and decisions of the Strasbourg Court let alone the EU and the ECJ is revealing of an important political facet of Brexit. For years running up to the Referendum the default position in British politics has been a willingness by politicians to promote international engagement, coupled with frequent unwillingness to debate or justify its implications for national sovereignty openly, a pattern of behaviour bound to build up hidden tension. EU membership was of course a step change because the nature of the project and its complexity, required there to be primacy of EU law and direct effect over the national law of member states in the event of an incompatibility in areas of EU competence.

And this behaviour has suffused our political culture. Seeing that the image David Cameron chose to project as leader of the Opposition and, subsequently, as Prime Minster was of a high level of euro scepticism, it is not surprising that, when he had finished his negotiations in the spring of 2016 with our EU partners, he found himself in a poor position to explain and promote the benefits of continuing membership of the EU. He did not have political credibility. As I came to realise during the Referendum campaign, hostility and irritation with the EU, often for imprecise reasons, is a widespread cultural phenomenon and not, as I have often heard argued, confined to poorer voters in areas of economic decline. The most striking feature for me was the number who had plainly benefitted from EU membership in their own lives yet were happy to see those benefits set aside for the future, as an assertion of identity. Many of us in politics were quite content for years to adhere to the promulgation of a message that the EU was at best an irritating necessity. However, although our criticisms of it were often justified we failed to acknowledge or highlight its positive aspects. The Referendum campaign was a very poor forum for detailed debate. The outcome was, in these circumstances, not at all surprising, at least to me.

I apologise for taking a bit of time over these points, but they are important as they explain so much of the politics surrounding the issue of sovereignty that are now being played out, particularly within my own party.

Consequences

Leavers celebrated the Referendum result as the necessary step to restoring Parliamentary sovereignty and nationhood; “Independence Day” as Boris Johnson continues to declare. But they then argued that Parliament’s new found sovereignty should not extend to legislating for, or even just approving, the triggering of the Article 50 process, as the people had spoken and nothing more was needed. It was argued that the Government had been turned into the agent of the people and was required to trigger Article 50 irrespective of how this might conflict with previous statute law or the consequences it might have for the acquired rights of the Queen’s subjects. This argument is entirely contrary to principles of constitutional law that in the words of Professor Dicey, and as cited in the “Miller” case, “the judges know nothing about any will of the people except in so far as it is expressed by an act of Parliament and would never suffer the validity of any statute to be questioned on the ground of its having been passed or kept alive in opposition to the wishes of the electors”.

In fairness to the Government, it did not seek to argue that the holding of the EU referendum of itself gave it authority to trigger Article 50. It sought instead to contend that it was entitled to do this under the Royal Prerogative, because its action was confined to international relations and that the domestic changes that might follow for UK laws enjoyed under UK statutes were an incidental consequence of it that Parliament had not expressly or impliedly

restricted. This argument was as we know rejected by both the High Court and Supreme Court.

But although the judgements were a landmark for confirming the principles of parliamentary sovereignty that should be beloved of Brexiteers, they showed no appreciation of that result whatsoever. Both judgements were accompanied by vitriolic abuse and vilification of the judiciary of a kind one might more readily expect from a country sliding into fascism, rather than one bent on recovering sovereign freedom under law. The irony is that, far from the judgement inhibiting the Brexit process, it has given it a structure where previously there had been every appearance of procedural chaos. Not surprisingly, Parliament voted to give the Government the authority to trigger Article 50. Strongly as I and many other MPs may believe Brexit to be a mistake, it has always been clear to me that, Parliament having granted an advisory referendum, denying the result could fatally undermine Parliament's democratic legitimacy.

The consequences of Article 50 being triggered, are however, now with us and, as some of us predicted at the time, those consequences are proving very complicated in ways which make the original Government notion that withdrawal could be done by principally using prerogative powers look utterly extraordinary.

Firstly, the negotiations themselves are not going smoothly. In her Lancaster House, Florence and Mansion House speeches the Prime Minister set out a vision for the future of our country. She sought to reconcile a pragmatic desire to maintain access to our European markets for goods and services and a deep and special relationship with the EU, with the political requirement that, in order to enable us to exercise immigration controls and secure the right to negotiate third country trade agreements, we should be free of the constraints of the EU treaties and above all of the jurisdiction of the ECJ. She also wishes us to continue participating in a series of EU regulated activities in the fields of science, medicine, security, data sharing and justice but again wants a special status for us that leaves us as an active participant and not just as a third country observer. Again, there is insistence that a different arbitral mechanism from the ECJ must be found for those activities that need regulation.

These aims are in themselves, reasonable ideas and if she were to achieve them it would be a successful outcome. But the problem is that we are not negotiating with a sovereign entity, as some of my colleagues seem to believe. The EU is an international treaty organisation underpinned by a complex rule book. Those rules exist because the 28 member states cannot trust each other spontaneously; they trust each other because they work on the basis of agreed common rules with common enforcement, common supervision and under a court that makes sure they apply those rules in the same manner. While it has historically shown considerable flexibility in accommodating divergence amongst its member states when collective agreement to do so exists, it has much less flexibility to do this in its dealings with third countries, which is what we are about to become and how we are viewed in the context of negotiating a continuing relationship.

To this we have the added problem of our relations with Ireland, a country of so much importance to us bilaterally that we still, by statute, do not treat it as a "foreign country"[2]. The Belfast/Good Friday Agreement with Ireland is an international treaty of prime importance to us for helping secure peace and de-toxify the issue of Northern Ireland's status in the UK.

The Agreement does not require both countries to be in the EU but it certainly presupposes it. It has become a major issue, as Ireland is the state most vulnerable to economic damage from the creation of a hard border between ourselves and the EU and the maintenance of a

[2] s. 2(1), Ireland Act 1949.

peaceful civil society in Northern Ireland is fragile and of the greatest importance. It should hardly come as a surprise therefore, that in view of the interest of the EU in supporting the Good Friday Agreement and mitigating the vulnerable position of Ireland, the EU should have made the avoidance of a hard border a precondition to any withdrawal agreement.

When the Prime Minister, who is without doubt a committed Unionist, acknowledged its consequences by agreeing the Joint Declaration in Brussels last December, to maintain an open border without controls between Northern Ireland and Ireland, she accepted a fetter on our future status outside the EU that is in direct contradiction with some of her other political aims. It is impossible to see how the open border can be maintained without our being in some form of Customs Union so that there are no tariffs and no need for border inspections. It would also be necessary to maintain a high level of regulatory alignment in many areas so that free cross border activity is not jeopardised. Those outcomes are ultimately enforced at present by the ECJ.

The two suggested methods put forward by the UK to deal with these issues do not look viable. The first, Maximum Facilitation, a virtual border without infrastructure, does not as yet have the technology to underpin it and could not be in place by the expected end of Transition in January 2021. The second, a customs partnership, would have to be an extraordinarily complex legal and fiscal system by which the UK mirrored the EU's requirements for imports from the rest of the world, applied the same tariffs and rules of origin but then managed its own tariffs and trade policy for goods intended for the UK market only by a system of reimbursement of the tariffs on such goods.

Further, the EU has to date dismissed both options as unworkable and there is, in any event, a difference of view between the Commission and the UK Government as to whether or not the December agreement to maintain an open border extends to Northern Ireland only or to the whole of the UK. The Commission has emphasised that the concession of maintaining an open border after Brexit and Transition are completed is limited to Northern Ireland only, but it is clear that the Government would require it to extend to the whole of the United Kingdom and has been aiming to make the same rules apply as part of a future trading agreement that would affect Dover as much as Newry. Without it Northern Ireland would be carved out economically from the United Kingdom and there would have to be a customs border running down the Irish Sea. If this is the Commission's position then its proposal is, in any event, entirely unacceptable to the Government as incompatible with the Union and, therefore, national sovereignty. It is right in this. I have not come across a single MP at Westminster who would accept such as proposal. But that then makes any prospect of making progress in the negotiations unlikely and a No Deal Brexit a real possibility. The only answer to this from hard Brexiteers has been to suggest we should just threaten to leave with No Deal and then keep an open border. This misses the point that if we are returning to the WTO and its rules, such an open border would breach them.

The EU Withdrawal Bill

It is not surprising therefore that, with this increasing uncertainty as to outcome, the passage of the EU Withdrawal Bill through Parliament should have become the parliamentary focus for all these political contradictions.

The Bill itself was supposed to be a process bill and to have little to do with the form Brexit should take either as to the terms of withdrawal or the future relationship with the EU. It was introduced to convert and entrench EU law into domestic law to ensure legal continuity, save in those areas, such as Agriculture, Immigration and Trade, where primary legislation would be brought in before Exit Day to replace EU law. No one could reasonably suggest that in

the circumstances of our leaving the EU it was not essential to get something of this sort onto the statute book.

But the Bill as drafted and published was rather different in intent and effect. It served only to emphasise the profound changes to our legal order that Brexit will bring and the risks attendant to it.

Thus, EU law was to be retained and to keep supremacy after Exit Day for those laws enacted prior to Exit Day or modified after it. But the general principles of EU Law and the Charter of Fundamental Rights have been reduced to no more than interpretative aids to "retained" EU law on the grounds that to retain any free standing effect would offend parliamentary sovereignty even if our own Supreme Court interpreted it rather than the ECJ. The Bill as now enacted has the effect of leaving large areas of rights law in areas such as equality and privacy with no protection from diminution, even if the Government has insisted it has no such intention.

The Bill also contained (and the Act contains) Henry VIII powers to change primary legislation by statutory instrument. In fairness to the Government this was inevitable in order to bring Brexit about within the time constraints it has set itself. But their draconian nature was bound to emphasise the incongruity between the claimed recovery by Brexit of parliamentary sovereignty and the reality of a massive accrual of Executive discretion, the usual consequence of political crisis, as history so often shows.

Another issue was the impact of Brexit on the competences of the devolved administrations and the extent to which the Government was taking powers back to Whitehall which were nominally devolved but in practice run by the EU. This highlights another disruptive impact of Brexit on the Union of the UK and a ready source of grievance for the SNP in particular, as they continue to argue for breaking up our country.

During the passage of the Bill through both Commons and Lords the legislation has undoubtedly been improved. A compromise was put forward on Devolution sufficient to satisfy the Welsh if not the Scottish Government. The Henry VIII powers were in some instances restricted and better scrutiny mechanisms for them introduced. The power, for example, to amend UK law by secondary legislation claimed to be needed so that we might continue to comply with our international obligations has been removed, as was the power to amend the Bill itself. The Government has conceded that, for a period of three years after Exit Day, a right to challenge for failure to comply with general principles of EU Law should be retained. The Government has accepted the need to negotiate an arrangement for the post Brexit reunification of an unaccompanied child refugee in the EU with a relative in the UK. It is now agreed that the EU's environmental principles will be preserved in a new Environment Bill to be brought before Parliament.

And perhaps, most significantly in the light of the controversy over the treatment of the Irish border in the Withdrawal Agreement, but not enough noticed, the Government has felt obliged to accept the bulk of a Lords amendment that enshrines in statute the need to preserve the Good Friday Agreement treaty requirement for North-South cooperation in Ireland and prevents the establishment of new border arrangements that include any physical infrastructure.

But the Bill's passage, as often happens in Parliament, has brought to the surface other divisions on how the process of Brexit should be controlled and with it how its impact might be moderated or even reversed.

Last December, the Government suffered its only defeat in the Commons on the then Clause 9 of the Bill that gave sweeping powers to start implementing the terms of withdrawal from the EU, even before Parliament had approved those terms by resolution (in accordance with the ordinary constitutional process for ratification of international treaties) or enacted them for domestic effect by primary legislation. Those untrammelled executive powers were modified to require primary legislation to have been passed first. At the time this was proclaimed as giving a "Meaningful Vote" to Parliament on any deal, but it did so only indirectly and it did not deal with the role of Parliament in the event of there being no deal on withdrawal at all. No Deal on anything would be a catastrophic state of affairs as our country would effectively grind to a halt. It is also, one would hope, rather unlikely, as the consequences for the EU would also be extremely disruptive. It is difficult therefore to see that, even if there is no deal on transition or future trade, something would not be put together at the last minute to maintain the essential exchanges, such as air flights, now subject to EU law and regulation. But the serious risk exists and, astonishingly, it seems to be one in relation to which some of my Conservative colleagues who support Brexit express complacency, if not pleasure. Their underlying claim is that only if the UK is prepared to walk away from negotiations will we get a deal. And most strikingly some have developed an argument that the Referendum result is an instruction from the electorate that, in the event of No Deal, or any deal being rejected by the Commons, Government and Parliament should respond to by doing nothing but passively let the Article 50 clock run down so as to terminate finally and entirely the UK's participation in the EU regardless of the consequences.

As has been made clear in a recent paper by the Institute for Government[3] this suggestion of a binary outcome bears no relation to constitutional reality. If there were No Deal, or the Commons were to reject whatever deal has been reached, Parliament including, in particular, the Commons has a variety of constitutional tools at its disposal to influence the outcome. Of course it cannot micro manage negotiations which are, in any event, the prerogative of the Executive. But it can certainly express a clear view by giving advice or making recommendations to try to influence the Government and, as a last resort, express no confidence in its approach. It was the marked unwillingness of the Government to admit this which led Lord Hailsham in the Lords to bring forward and get passed an amendment that provided for a statutory power requiring the government to consult Parliament in such events and for the Commons to have the power to mandate the Government to take action. This might, for example, include asking the EU for Article 50 to be extended to allow more time for talks and/or legislating to hold another referendum. It became apparent when this amendment came back to the Commons that it had enough support on the Conservative benches to endanger the Government's majority.

It was this that led to the Prime Minister offering personally to try to address MPs' concerns. In doing so she made clear that she considered a mandatory power by the Commons over the Government to be unacceptable and unprecedented. I have no difficulty agreeing with that. Nothing similar has been done since the English Civil War of the 17th century and that curious experiment ended in a military coup. Rather, the political and constitutional requirement in my view was to find a structured way in which the current powers of the Commons might be given expression in the event of such a national crisis. This is what led to the new amendment passed by the Lords and the debate in the Commons last week on it.

It remains my view that the amendment would have provided a useful structure for such a crisis. But the Government having expressed initial approval of it then made a volte face and, in the event, offered only the guarantee of a ministerial statement and an unamendable parliamentary motion in government time to note it. When pressured further there was then

[3] 'Trade after Brexit: Options for the UK's relationship with the EU', Institute for Government, 18 December 2017

the further concession of an immediate written ministerial statement to finally and expressly acknowledge the constitutional reality that the Commons could not be prevented from utilising any one of a variety of mechanisms under the Standing Orders (or even from suspending those Orders) so as to enable a debate on No Deal (however arising) and/or the passage of resolutions approving actions that might differ from the Government's then stated position and policy.

What was most noteworthy to me in the course of the Withdrawal Bill was the extent to which this particular issue exposed the deep fear - I have to describe it as paranoia - of some of my Parliamentary colleagues who have supported Brexit. Faced with the possibility of anything which, however remotely, might prevent an inevitable departure on 29 March 2019, they were not amenable to reason. They could not accept that this had constitutionally to be a possibility.

Some who voted Remain and share my view that Brexit remains a major error, have expressed to me more or less severe disappointment that I chose to accept the Government amendment when linked to the Written Ministerial Statement. Many, as I know from my correspondence, or from the numbers that attended the large demonstration last Saturday, are frightened about the future and desperate for anything that suggests that Brexit itself might be checked. But the recent vote was not about stopping Brexit. It was about a significant point of detail on constitutional process. Brexit is inevitable since the triggering of Article 50, unless the Government chooses to ask for and obtains the agreement of the EU to stop or delay it (or Parliament intervenes to request it and takes steps to persuade the present Government to accept that position or gets rid of the Government). The risk that I see from the current political situation is that we are approaching a moment when the paralysis that Brexit has inflicted on our political system reaches a point where coherent governance of any kind becomes impossible. Neither of the two main political parties has any internal unity on the best way to proceed in the current situation. Neither has a policy that looks likely to lead to a successful deal with the EU in respect of the key issues on which we ought to be focussed, namely maintaining the frictionless trade in goods and services which even a person who had many criticisms of the EU, such as Margaret Thatcher, saw as key to our short and long term national prosperity. This is, after all, why she laboured so hard to create the Single Market. It has never been my personal objective to just create more political instability. As a traditional Conservative, I shall leave "creative destruction" to ideologues unless it is really unavoidable to make progress towards a better outcome in any, let alone this, political crisis. We have had too much "creative destruction" already.

The Way Forward

The coming months will, in any event, see many more occasions for debate on key outcomes from the negotiations. Quite apart from the June EU Council, of which there are now very limited expectations of progress, the Government has promised a return of the Trade Bill for its Report Stage before the summer recess at the end of July and this will offer an opportunity to debate and vote substantively on whether or not the UK should seek to stay in a customs union or arrangement. The advantages for frictionless trade are clear, but it also means the likely abandonment of carrying out most, if not all, third country trade deals which have been trumpeted as essential to our country's bright future. It is hard to see that they are if the price is the loss of access to existing European and other markets. But a customs union on its own does not solve the problem of frictionless trade. That depends on the maintenance of the high level of regulatory alignment that the Government seems disposed to accept in any event and which parts of the EU Withdrawal Act are designed to facilitate. The question of continuing participation in the European Economic Area cannot then be avoided because that would guarantee frictionless trade in goods and services in its

totality. But, unless we can graft ourselves onto an existing entity such as EFTA, the validity and acceptability of the current Governmental “red lines” that require us to leave the Single Market and the jurisdiction of the ECJ and the Government’s current attitude to the principle of freedom of movement underpinning the Single Market equally cannot be avoided. Even within EFTA the flexibility available on the principle of freedom of movement might be very slight and no EFTA country is currently in a customs union with the EU. There is no doubt, however, in my mind that there are Conservative colleagues in Parliament, as well as many members on the opposition benches, who want to see these issues seriously debated and their consequences taken into account by the Government in the negotiations.

It is impossible not to conclude that the Government has made its life much more difficult by its so called “red lines”. No reading of the Referendum question required the red lines at all. The Prime Minister’s decision to follow the advice of Mr Nick Timothy and limit her freedom to negotiate in this way and then to seek to enshrine them in a flawed general election manifesto has left her little room for manoeuvre if she cannot achieve her ideal of the EU simply conceding them. It is entirely unacceptable that the country should be given the impression that if a deal within the “red lines” can’t be achieved the only option is a No Deal Brexit. I have to say bluntly to my colleagues who believe this is the case, that I think it most unlikely they will carry a majority of the House of Commons with them on such a proposal. As companies such as Airbus and BMW, and I suspect others, start stating in public what they have been saying privately for months about the risks of a “hard Brexit,” MPs are hardly likely to entirely abdicate their own responsibility for the economic wellbeing of our country by ignoring them. Only this week a UBS survey of 600 companies has shown that 35% plan to reduce UK investment post Brexit, 41% plan to move a large amount of capacity out of the UK, mostly to elsewhere in the EU. If nothing else the loss of revenue should give pause for thought.

It does indeed seem to me to be one of the worst aspects of our current debate, that there is a marked unwillingness to engage with wholly legitimate questions on Brexit. No one has a monopoly of wisdom and it may be, for example, that anxieties over the economic consequences of an unsatisfactory deal may be excessive and that the opportunities are better than I believe them to be. But a Government which seeks to close down a parliamentary discussion on the consequences of losing frictionless trade when the Government’s own internal economic reviews have all shown serious negative affects is irrational. The same applies to attempts at suppressing debate on the basis that any dissent must undermine our negotiating position. At what point do such dissenting views then become acceptable to utter? One is left with the deeply worrying feeling that the Government is so frightened at the weakness of its position that it avoids engagement on it as much as is possible

Conclusion

And this brings me finally to the question of the views of the electorate in this matter.

It is now two years since the Referendum took place. We have little idea what the view of voters’ are now following what has happened since. The evidence of my own mail bag suggests a sense of growing anxiety over the course of the negotiations and a desire to have a say over their outcome. Those who bother to communicate with their MPs are a tiny minority, but the consistency of this message is noteworthy and has been reflected in a recent YouGov poll which showed that 53% now wanted this. Then there were over 100,000 people who turned out last Saturday to demonstrate for it. But any such suggestion is entirely ruled out by the Government. Surely common sense suggests that, however inconvenient, this idea should be kept in mind, and indeed prepared for, as at least a possibility. If there is a serious impasse at Westminster over the terms or absence of any

deal, it might be the one democratically and constitutionally acceptable way of resolving the matter whatever the outcome might be. In a democracy the ultimate wish of the electorate on a matter of importance cannot be denied them. But it strikes me as odd that we should insist on carrying out the mandate of the 2016 Referendum without further consultation if evidence grows that either public opinion is changing significantly or the originally predicted outcome has changed. Once out the ability to reverse this decision of fundamental importance to our country's future is likely to be very difficult if not impossible. As politicians we are in danger of getting the thanks of no one for carrying on with a revolution the ideas and goal of which were not, and are not, thought through.

Dominic Grieve QC MP