Lord David Owen: Here's how to stop the EU yelling "heel" and prosper after Brexit

This piece first appeared in the Sunday Times and was also posted on Lord Owen's personal website. It is used with full permission of the author.

A vital Brexit issue will have to be resolved in the next six to eight weeks. Are we to be thrust into political limbo after leaving the European Union next year or will we assert democratic control through parliament, a core reason for many voting to leave the EU?

The guidelines from the other 27 EU heads of government, published last month, called for any transitional arrangement between the UK leaving the EU on March 29, 2019 and the end of December 2020 to be "clearly defined and precisely limited in time". It went on to say any EU legislation would have to apply to the UK under the competence of the European Court of Justice (ECJ), and that the UK would participate in the customs union and the single market.

We have already seen the peremptory way the EU-UK agreement document published in phase one of the negotiations was brushed aside a fortnight ago, when a Brussels source spoke bluntly: "The deal in December did specify March 2019 for [ending] free movement rights. That was then." Now free movement extends throughout the transition. The European parliament's Brexit co-ordinator says "it will be whole *acquis* [the term for the EU's body of laws] and nothing else". He says MEPs would accept a longer transition from 21 months up to 36 months.

What all this demonstrates is that, under article 50, the EU

negotiators see themselves as prisoners to agreement from any of the 27 member states. Donald Tusk, president of the European Council, made this crystal clear over Ireland. Now objections from former east European countries have moved the goalposts to the UK's detriment. We are on notice that the next problem will be Gibraltar. This pattern will continue in other areas until we have more leverage in negotiations. The UK has already shaken hands on shelling out billions of pounds during the transition and we talk in parliament of no taxation without representation. Yet that is exactly what we are going to see more of during our period in limbo with no vote.

The think tank *Open Europe*, an objective commentator, puts the figure at approaching €60bn. As a Brexiteer, I fully accept that the UK would make payments to the EU budget during our transition, as all non-EU members of the European Economic Area (EEA) already do. However, like Norway, we would make extra payments if there were a successful free trade agreement. Lord Kerr, who as a diplomat designed article 50, told the House of Lords: "We will come to heel in the end, probably quite quickly, because it is very important to avoid the cliff edge next year. We will not avoid it, but we will postpone it." That sums it all up. This government is coming to heel and we had better realise it now.

We could effectively avoid both these cliff edges – an agreement on leaving the EU and on free trade – if the European Council's guidelines for the "political limbo" period allowed for the UK to participate inside the single market as a non-EU member of the EEA. For the past 18 months, I have quietly tried to
convince the prime minister that this is the best existing democratic framework for us to be within for the transition period. It does not mean exercising the same powers as are open to the other three members – Norway, Iceland and Liechtenstein – and we would be accepting the European Council's demand for an absolutist status quo standstill, but

we would not be in limbo.

We would have automatic EEA consultation rights on EU legislation and would not be under the ECJ, but the EEA-Efta (European Free Trade Association) court and the EEA governance pillar. Professor Carl Baudenbacher, a judge of the Efta court, giving evidence in the Lords, indicated that the EEA/Efta option for the UK's transition period is feasible, even given the short timescale.

I have no doubt whatever that a transition predominantly via the EEA would, quite manifestly, be better for all concerned. A domestic advantage is it would curb any legal action over the EEA agreement that might be in prospect. A court case in November 2016 claimed that the UK had a legal right to remain in the EEA, despite ceasing to be a member of the EU, until parliament voted otherwise. This was not accepted by the High Court, which ruled that the case was being brought too early for it to adjudicate. If the UK government does not give the year's statutory notice of leaving the EEA in March, and relies on automatic exit in March 2019, we could see the lawfulness of the government's conduct being challenged in UK courts.

Despite constant warnings, the government has hidden behind a longstanding diverence of interpretation on whether, on leaving the EU, a country ceases to be a contracting party to the EEA agreement. The fact is the UK government– not the EU – signed the relevant documents to enter the agreement. A government that was serious about negotiations and acquiring more leverage would have no hesitation at all in testing this case as a matter of international law by the Vienna convention and where the ECJ is not the final authority. Nevertheless, that is history. Now if the EU-UK withdrawal agreement contained a few technical amendments, the UK could set aside all legal arguments by staying in the EEA during the transition period.

The details will soon emerge where it will be clear that the EU accepts the EEA agreement continues to apply during the limbo period but the UK is not allowed to participate. The EEA option I am arguing for – for the duration of the transition only – is a mixture of bespoke and off-the-shelf. It cannot become a
permanent mechanism for leaving the EU, as many Brexiteers feared might happen. It is being advocated as a good-faith response to the European Council's guidelines. It would help fill in the detail of how the UK government will approach the transition to achieve its aim of a bold and ambitious free trade agreement. Having the greatest possible tarie and barrier-free trade with our neighbours is an achievable ambition, as well as negotiating our own trade agreements around the world on leaving the EEA.

Few want a hard Brexit, but to avoid it the UK needs to put forward a reasoned democratic arrangement for handling the transition. Any proposed limbo status is unacceptable. The UK should insist on full participation and full rights under this agreement, including, subject to the consent of its non-EU parties, the ability to participate in its EEA-Efta governance pillar, free of direct ECJ and European Commission supervision. For EU members, an EEA transition follows precedent in using existing democratic machinery and treaties. It could hopefully unite all shades of "leave" opinion, and attract some former remainers who are vocal over continuing in the single market outside the EU for the transition. It is high time we came closer together in parliament as we embark on this national endeavour.

Lord Owen was the Labour foreign secretary from 1977 to 1979 and later led the Social Democratic Party