The EU cannot be flexible on its principles with Brexit

How can the UK's position offer viable solutions for a future relationship?

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Introduction

It was only this July that for the first time, more than two years after the Brexit-referendum, British Prime Minister Theresa May presented a more detailed vision on the future relationship between the UK and the EU-27 after Brexit and the end of the already agreed transition period on 31 December 2020. Negotiations could thus move on from "divorce questions" about payments and citizens' rights to the more complicated question of forging out a durable economic (and security) partnership for the benefit of both partners, which is also a pre-condition for solving the Irish border question.

Briefly, the UK government's white paper envisions an association agreement with the EU, which includes a free trade area limited to goods, a dispute resolution mechanism and a continuous dialogue between the two partners. The question is, if this plan is a basis on which an agreement can be found within a framework that allows trade to flow as smoothly and frictionless as possible. In order to avoid a no-deal-scenario and a cliff-edge, many commentators, especially in the UK, demand a more 'flexible approach' from Brussels. There should be no doubt that the EU would like to see the UK staying as close as possible to the Union it is still part of and indeed, the EU has a variety of different arrangements with third countries, with different degrees of trade liberalisation and different institutional frameworks. However, the EU's margin for manoeuvre and thus any potential flexibility are limited by its own principles, its economic interest, and its raison d'être.

Autonomy of EU decision-making

In the foreword of the white paper, the Prime Minister claims: "The proposal…finds a way through, which respects both our principles and the EU's". Indeed, progress can be seen when it comes to the autonomy of EU decision. As the Irish Prime Minister stated, the document marks an 'evolution of the UK's position'. The UK accepts that in case of a free trade area limited to goods, it would have to follow the rules and standards set by the EU, and incorporate them into its legal order, albeit through a sovereign decision of the UK parliament in Westminster. De facto, the status quo would not change substantially. Even now, most EU laws must be implemented through the national legislator of the Member States. For EU-Member States, failures to do so result in infringement procedures at the Court of Justice of the European Union (CJEU). For the UK as a third country, failure to do so would put the whole partnership between the UK and the EU at risk. The UK government acknowledges furthermore that "the UK would not have a vote on relevant rule changes", proposing a consultation procedure. That a third country which has to apply EU rules is consulted before decisions are taken seems sensible, but there can be no right for the UK to vote in or even veto the decisions taken by the EU.

Jurisdiction of the Court of Justice of the European Union

More complicated is the situation with regards to the uniform interpretation of EU law under a future agreement and the role of the CJEU. On the one hand, the British government accepts the role of the CJEU as the sole interpreter of EU rules; on the other hand, it wants to hold its promise to Brexiteers to end the CJEU's jurisdiction in the UK. The July white paper foresees to end preliminary references to the CJEU by UK-courts. UK courts shall merely "take due regard to CJEU's case law", when making their decisions. This proposal is neither logical nor acceptable. Firstly, if UK courts are supposed to take the CJEU's case law into account, but can decide differently, the CJEU would *de facto* not be the sole interpreter of EU rules. Secondly, if a new legal question related to EU law concepts arises in a court proceeding in the UK, and the court has no possibility to refer the matter to the CJEU, the UK court would have no other choice than interpreting EU-rules itself.

Single market participation and indivisibility of four freedoms

The UK government proposes to establish a free trade area for goods only, which would constitute a selective participation in the single market. Since day one of the negotiations, the EU has been communicating that participation in the single market goes hand in hand with the acceptance of the four freedoms of movement for goods, services, capital, and people. This approach could at first glance be considered dogmatic, and it has been criticised for not being flexible enough. Yet, what is at stake for the EU is not less than the integrity of the single market and thus the core of European integration. The EU cannot allow any fragmentation of its single market. Politically, to not endanger unity among its members, and economically because no trade-deal with a third country provides benefits even close to the ones of a functioning single economic area made up of 27 countries. In addition, references to the arrangements with Canada and Ukraine are only partially relevant. The association agreement with Ukraine is primarily a political instrument to bring the country closer to the EU and is marking the first step on the (long) road to EU accession. Canada is separated from the EU through the Atlantic and cannot be an EU Member State. The UK, on the other hand, has been a member of the EU for more than 40 years. The preconditions are thus fundamentally different, as granting partial access for a European country to the single market could potentially put the benefits of full EU-membership into question.

Furthermore, a free trade area that is limited to goods and excludes the other three freedoms would give UK-based companies a competitive advantage over its competitors on the continent. For example, in the key automotive sector, a large share of production costs do not occur through the production itself, but through supporting services like financing, distribution, research and development. Since regulatory alignment on services would be excluded from the envisioned agreement, the UK could (and under the Tory-government probably would) deregulate its service industries, inter alia by lowering social standards, and thus generate a cost reduction giving UK-based companies a competitive edge. The EU Commission estimates that the potential damage for the EU's company could be as high as the damage for the UK's economy under a no-deal-scenario. A "goods only"-approach thus seems to be a dead-end, and that is not because the EU is religious about the single market's four freedoms, but because of hard economic interests.

Unresolved: Customs arrangement and the Irish boarder question

A non-starter is the proposed "new Facilitated Customs Arrangement" that, according to the white paper "would remove the need for customs checks and controls between the UK and the EU as if they were a combined customs territory, which would enable the UK to control its own tariffs for trade with the rest of the world and ensure businesses paid the correct tariff or no tariff". In theory, border customs checks would then not only be unnecessary between Northern Ireland and the Republic of Ireland, but also between the UK and the EU as a whole. It seems bold, if not even naïve, to demand that for the UK being able to "take back control" and negotiate its own trade deals the EU shall give up control over its own custom checks and outsource it to a third country. For the time being, the so-called backstop agreed in December 2017 remains the only viable option: Northern Ireland stays in the EU customs union, which would most likely result in regulatory divergence between Northern Ireland and the rest of the UK.

No-equal partners

The main hurdle for a solution is that large parts of the political establishment and the public in the UK seem to think that the EU-27 and the UK are equal in the negotiations, while in fact they are not. Firstly, the UK *has* a unique and special status within the EU. It is not part of Schengen, it stayed out of the common security and defence policy, opted out of the common migration policy, does not have to join the Euro, and can even decide to participate in justice and home affairs measures on a case-by-case basis. The rebate on British payments to the EU budget, which saved the country almost 130 billion Euros, is just the tip of the iceberg. It was the UK, which decided to give up this position, something neither the EU nor its 27 Member States ever wanted. In fact, Brexit could still be called off in a heartbeat, if the British citizens decided to do so.

Secondly, in the negotiations, the EU-Commission represents 27 countries with 440 Million citizens (and consumers), while the UK will be a country slightly over 60 million. In international negotiations, size matters. This is why the European countries face their negotiation counterparts united. To stay united, however, there must be no doubt that any country outside of the EU cannot have the same advantages as an EU Member State or even a special status mirroring the one the UK enjoys at the moment. In his quest for a "better deal" in the run-up to the referendum, David Cameron had to learn the hard way that - while the EU had every reason to keep the UK in the Union - **the EU's flexibility has natural limits where the integrity of the single market or its political unity and thus its own future are at stake.** There is no reason to believe Theresa May could broker a better deal for a third country than Cameron was able to secure for an EU Member State. It is high time this basic asymmetry of the negotiations is accepted in the UK. Otherwise, it will be virtually impossible to reach a basic agreement on the future relationship in time for the October summit in Brussels.