CEPS COMMENTARY

Thinking ahead for Europe

'Soft Brexit' is not an option

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24 November 2016

In the discussions on Brexit, analysts and political observers tend to presume that negotiations on a new framework for the relationship between the European Union and the United Kingdom will revolve around a compromise that would allow the UK to limit the free circulation of EU workers, while maintaining access to the EU single market, especially for services, more or less under the current rules.[1] Pisani-Ferry et al. (2016) have gone so far as to propose a Continental Partnership (CP), in which the UK would not only be able to limit the free movement of persons, but would also have a seat in a 'Council' in charge of legislative coordination between the UK and the EU with the power to propose amendments to draft European legislation (although the European Parliament would not be obliged to accept them).[2] These ideas in reality mimic arrangements already in existence within the European Economic Area (EEA). However, the more time passes and issues are dissected, the more I grow convinced that an agreement on those terms with the UK will prove impossible.

Key ingredients in the EU single market

The single market holds a unique place in the panorama of global regulatory models in that it ensures the free movement of goods, services, capital and persons based on the principles of *mutual recognition* of member states' rules for the protection of safety, health, consumers, the environment and the working environment – based on the assumption that those national rules provide *equivalent protection.* When national rules are found not to meet the requirements of equivalent protection[3] – for example, in the health and safety standards of a specific product or the qualifications of a professional seeking to operate in an EU country different from his/her country of origin – a member state is entitled to restrict free

[1] For a thorough discussion of existing agreements between the EU, the EEA and various other partners, see M. Emerson (ed.), *Britain's Future in Europe: The known plan A to remain or the unknown plan B to leave*, Brussels and London: CEPS and RLI, March 2016.

[2] See J. Pisani-Ferry, E. Röttgen, A. Sapir, P. Tucker and G. Wolff, "Europe after Brexit: A proposal for a continental partnership", Bruegel, Brussels, September 2016.

[3] Under the legal procedures and the safeguards provided for by the Treaties and the 'rules of reason' established by the Court of Justice.

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movement. In this event, the European Commission would propose legislation to raise the minimum level of mandatory protection so as to re-establish the conditions for free movement.

In order to function, this system relies on elements of a true constitutional order. These are, firstly, the supremacy over national legislation of EU rules in areas of Union competence, and their direct effect within national jurisdictions, so that those rules become immediately applicable in the relations between private agents within the single market, including in domestic court proceedings; and, secondly, the existence of supranational institutions ensuring the correct application of the Treaties and Union law, i.e. the European Commission in its role as the guardian of the Treaties and the Court of Justice of the European Union (CJEU).

Free movement of persons

This is the context in which the question arises as to whether it would be possible for an international treaty with a third country – which is what the UK would become after exiting – to grant individual agents or companies from that country free circulation within the single market based on EU rules of mutual recognition and equivalent protection, while limiting the free circulation of EU citizens towards that country (presumably with symmetrical limitations of free circulation of UK nationals within the single market).

In my view, free circulation rights – as provided for by Article 3 of the Treaty on the European Union (TEU) – represent an inseparable and unitary set of rights that stand at the very centre of EU citizenry and which therefore cannot be traded within an international agreement with third countries.

This thesis is not contradicted by the safeguard clauses included in the EEA Treaty and the bilateral agreements with Switzerland, which only allow for *temporary* restrictions on free movement *under special circumstances* and by no means can be seen as a general suspension of free movement. It is also not contradicted by the Association Agreement concluded with Ukraine, which includes a Deep and Comprehensive Free Trade Area or DCFTA (nor by the similar agreements concluded with Moldova and Georgia), which contains limitations of access of Ukrainian workers to EU labour markets, as steps in the gradual (and inevitably long) process of integration within the EU single market. An exception from free movement has been granted – clearly in view of the tiny dimension of the country – to Liechtenstein, which may limit the *annual increase* in the number of residence permits, but a lack of residence may not impede access by EU citizens to the local labour market.

I also find especially misleading, in this context, the logic behind the demands to limit the free circulation of workers that are being voiced in many member states of the Union, and therefore by extension the implication that Brexit offers the occasion to revise those rules for the Union as a whole. As I have already argued elsewhere,[4] the fallacy in this argument lies in its confusion of the Schengen Area with the free movement of EU citizens.

The Schengen agreement – an intergovernmental agreement originally signed by five EC members in 1985 which was incorporated into EU law by the Amsterdam Treaty in 1997 – abolished internal border controls between member states (with opt-outs by the UK and Ireland, but participation by Iceland, Norway and Switzerland) and established a common external border of the EU, supplemented by common visa controls and police cooperation. The Council now wants to strengthen this construction with a common border and coast

[4] S. Micossi and R. Perissich, "The Brexit Negotiations: An Italian Perspective", CEPS Commentary, 25 October 2016.

guard. Many ongoing discussions, and tensions, between the member states in the European Council are centred on the issue of the effective control of the common external border against migrants from third countries, terrorists, drug traffickers and so on. In this respect, it can be said that while Schengen also has an economic dimension, it is a 'political' project, of which the UK has never been a participant.

The principle of the free movement of people, on the other hand, is an integral part of the Single Market and applies to all EU countries, irrespective of whether they are part of Schengen. By and large, this right is not called into question in the EU. Moreover, even leaving aside for a moment my previous argument on the impossibility to separate the freedoms of movement granted by the TEU, it must be recognised that, without the free movement of people, even the freedom of establishment and the freedom to provide services across borders would be nullified. The City is well aware of this reality – and for this reason has advocated maintaining free circulation for qualified people after Brexit, without which their ability to operate on the continent would be crippled.

Free movement cannot stand without the Commission and the CJEU

Free circulation of workers is not the only obstacle to granting the UK access to the EU single market, and not even the most intractable. Indeed, there is another important question: once the UK leaves the Union and becomes a third country, on what principles would its products and operators circulate within the single market and, obviously assuming full reciprocity, would EU products and services circulate within the UK market? Certainly, the application of the principle of equivalent protection would not be possible without the surveillance of the European Commission and the ultimate adjudication powers of the CJEU; and in all likelihood the UK would claim similar powers of surveillance over products and services coming from EU countries.

Indeed, a main motivation behind the Brexit vote seems to have been precisely to re-establish the full sovereignty of the Parliament in Westminster and national courts over EU legislation and the CJEU. But if the UK cannot accept the jurisdiction of the CJEU, and EU operators were unwilling to accept the jurisdiction of UK courts, then free circulation based on mutual recognition of rules would not function. And indeed, the room for any agreement based on single market principles would vanish.

What would happen, moreover, once the European Council and Parliament, on this side of the Channel, and the UK Parliament, on the other side, started to modify their rules for market access independently, and the rules began to diverge? Would it remain mutually acceptable to grant market access on the basis of increasingly divergent rules? Is it conceivable that an international agreement could limit the ability of domestic legislative institutions to change domestic rules, in response to fresh and diverging demands for public protection in the two jurisdictions? The answer quite obviously is NO, as is confirmed by the fact that no international agreement of this sort has ever been signed anywhere in the world. International treaties granting market access to a foreign market based on the home country's rules simply do not exist. In order to enter a country's market, it is necessary to respect that market's access rules.

This is indeed a constant feature of all treaties granting access (generally or selectively) to the EU single market, as mentioned above. All these treaties are based in substance on full acceptance of European regulations, the surveillance powers of the Commission and the jurisdiction of the CJEU. It is not by coincidence that the Swiss government is bending over backwards to avoid implementing the results of its 2014 referendum limiting the immigration of EU workers to Switzerland – for it is absolutely clear that this would cancel

by a stroke of a pen more than 120 sectoral agreements concluded between the EU and Switzerland over the past 40 years.

What happened with the new Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is also revealing. The EU has been able to give provisional application to the treaty only by excluding the provisions establishing a supranational tribunal for the resolution of investment disputes – an institution that had met widespread resistance in the public opinion in many member states. Moreover, a 12-page explanatory document has been attached to the treaty to further clarify that it would not entail any new limitations on the rights of the EU and its member states to regulate security, health, the environment or employment, and that regulatory cooperation would be of a purely voluntary nature. Similar reasons explain why the TTIP negotiations have not progressed very far, confronted as they were by mounting popular opposition.

'Soft Brexit' not an option in practice

In conclusion, the notion of a 'soft Brexit', characterised by the maintenance of current regimes governing the free circulation in areas handpicked by the UK, while removing the Commission's and CJEU's control over the respect of the internal market rules, seems groundless. Once it will have sent the Article 50 notification of its intention to exit the EU, the UK will simply 'drop out' of the single market, because a general agreement on the continuation of existing arrangements without the supremacy of EU law and the attendant role of the Commission and the Court is not possible. Therefore, they will have to seek agreements on selective and reciprocal access to certain segments of the single market – say financial services – and certainly without 'passporting' privileges, since these are predicated on full acceptance of EU fundamental freedoms under the ultimate control of the CJEU.

Moreover, in all likelihood any such set of agreements would take longer to negotiate and ratify than allowed by the strict timetable set by Article 50 (two years from notification). The only 'softening' mechanism that would be available in this regard would be to agree on transitional arrangements lasting as long as required to define the new framework of relations between the EU and the UK. These arrangements, however, will only be feasible if the UK is willing to accept a continuation of the current legal and institutional set-up of the EU single market as long as needed until a final settlement is agreed upon.