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The legal catch-22 of a CETA-Brexit: either too little or too much to avoid a pretty hard Brexit

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The European Commission's chief *Brexit* negotiator Barnier recently stated that the 'Comprehensive Economic and Trade Agreement' (CETA) between the EU and Canada is the only feasible model left for Brexit. If this is so, it is bad news. Inevitably, a CETA-Brexit will be much closer to a hard Brexit than to the glorious bespoke deal promised by May.

This contribution first sets out the problems a CETA-Brexit is supposed to fix, and then outlines several legal reasons why CETA cannot do so.

First, the problems. The UK is leaving the EU. The big question is how. To ensure an orderly exit, three agreements seem necessary. First, an agreement on the withdrawal itself. The *outlines* of this agreement, including the Brexit payment, have just been agreed. Second, a separate agreement is needed to determine the future EU-UK relationship after exit. Under what conditions, for example, will UK factories, farmers and financial institutions have access to the EU? Third, because the agreement on the future relation will never be ready on time, we need a transitional agreement to cover the period between exit and the start of the new relationship.

One of the key problems in concluding these agreements is time. Save for an extremely unlikely extension or a delayed withdrawal, both the withdrawal agreement and the transitional agreement must be in place before 29 March 2019 to prevent a hard Brexit whereby the UK unilaterally leaves the EU without any agreement.

So how to conclude two extremely complex and contested agreements in effectively less than a year? May and leading Brexiteers have always promised a 'bespoke' deal, tailor made to fit UK interests. Yet a bespoke deal seems impossible in terms of time and EU political will. 291 days after notification we finally have sufficient progress to *start* trade talks, though several tough issues, including how to avoid a hard border in Northern-Ireland, have effectively been kicked down the road. So why assume a much

more complex transitional deal trade deal can be negotiated roughly the same time, allowing time for ratification?

Logically, if tailor-made is too costly, one looks at of-the-peg solutions: are there any ready-to-wear legal regimes that the UK can wear during transition? One such model would be the European Economic Area (EEA). This model provides the UK with sufficient market access, but also crosses almost all red lines set by the UK, including continued free movement of persons, financial contributions to the EU, *de facto* jurisdiction of the European Court of Justice (CJEU), and continued 'subjugation' to EU legislation.

So could CETA provide a better of-the-peg solution? Unfortunately not. Two factors already limit CETA's usefulness: CETA does not provide nearly enough market access to prevent a pretty hard Brexit, whereas sufficiently upgrading CETA will be almost impossible.

As to market access, the main problem is services. CETA simply does not provide effective market access for services, including financial services. Even for goods, however, CETA offers nowhere near the same access.

Why is this so? To begin with, CETA was designed for EU-Canada trade, which is very different from EU-UK trade. In 2016, for example, EU-Canada trade in goods was €64.3 billion, whereas in 2015, trade in services amounted to €30.1 billion. In contrast, UK exports in goods and services to the EU amounted to £240 billion in 2016, being 43% of the UK's total exports. Services, moreover, make up over 80% of the UK's economy. CETA, therefore, is to EU-UK trade what a fork is to soup.

In addition, CETA does not deal with the real obstacle to trade for an integrated economy as the UK: so-called Non-Tariff Barriers (NTB's). For example, imagine a manufacturer of medical equipment that has to meet 28 different sets of product requirements, or a bank that must comply with 28 regulatory regimes. Even if they have to pay no tariffs, the regulatory burden of meeting all these different rules will prevent these companies from effectively entering national markets. Removing such NTB's, however, requires deep integration, including harmonization of national regulations and a central court. Guess what: there is a reason why Member States ceded authority to the EU in return for an internal market.

CETA, therefore, provides nowhere near the market access required to prevent a major economic hit for the UK and the EU. A fact recognized by May in her Florence speech:

'But compared with what exists between Britain and the EU today, [a Canadian style free trade agreement] would nevertheless represent such a restriction on our mutual market access that it would benefit neither of our economies.'

Yet if CETA will not work as it is, can we not 'pimp' it to make it fit for service? Unfortunately, this brings us to the second problem: sufficiently upgrading CETA is near impossible for reasons of time, politics and law.

For starters, the 1598 pages of CETA took almost 10 years, and CETA is still

only partially and provisionally in force. The EU and UK do not have ten years.

In addition, upgrading CETA would lead us into the exact political deadlocks concerning sovereignty, harmonization and CJEU jurisdiction that are blocking a 'bespoke deal'. More access will still come with higher sovereignty costs the UK seems unwilling to pay.

Last but not least, there is a nasty legal catch-22 that hinders any attempt to seriously upgrade CETA for Brexit purposes: the Most Favoured Nation (MFN) clause concerning services. This clause, subject to minor limits, would obligate the EU to grant the same rights to Canadian companies as it offers to UK companies. Briefly put, giving real access concerning services to the UK would automatically obligate the EU to give the same rights to Canada, as well as other countries with a similar MFN clause in their FTA, including Korea and Singapore. Why would the EU do so?

To make matters worse, the CETA MFN obligation only does not apply if the EU-UK agreement would create an internal market, grant the right of establishment, or include the approximation of legislation. If the stakes were not so high, one could almost appreciate the irony: to escape the CETA MFN clause, the UK would have to accept precisely that which it has so vehemently decried: an internal market, free movement or EU control over UK laws.

CETA, therefore, is not a very suitable model for Brexit. So if CETA is indeed the best option left, and not just a bogeyman to make the UK more pliable, a Christmas miracle would be rather welcome right about now...

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