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The Brexit Revolution

New Political Conditions Change the Dynamics of the Next Phase of EU-UK Negotiations

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Following the United Kingdom's withdrawal from the European Union (EU), the Brexit negotiations are entering the decisive next phase: In a transition period of now only 10 months, the future relationship between the EU and the United Kingdom with regard to economic, internal security, and foreign policy as well as an overall institutional framework must be negotiated. But the signs point to confrontation. The main aim of the domestically strengthened British government is absolute dissociation from the EU; the list with potential points of conflict with the Union's negotiation objectives is long. Together, the negotiators must find a new model of cooperation between partnership and competition.

It took the United Kingdom three and a half years after the referendum to leave the EU on 31 January 2020. In tough negotiations with many threats, political chaos, and confusion, especially in London, political decision-makers and negotiators succeeded in bringing about an orderly Brexit.

However, the withdrawal agreement that has now entered into force "only" clarifies the issues of divorce: These include 1) all the transition issues that need to be dealt with in such a complex unbundling process, such as the handling of ongoing court cases, 2) the protection of the rights of EU citizens in the United Kingdom and vice versa, 3) the United Kingdom's obligations to the EU budget, and 4) special geographical arrangements for Gibraltar, UK bases in Cyprus, and, in particular, Northern Ireland. Finally, the withdrawal agreement creates common institutions and sets the transition phase until the end of 2020. During this transition period, EU law will continue to be applied in the United Kingdom (including full access to the Internal Market and Customs Union), and the United Kingdom will continue to pay into the EU budget as before, but it has now left all EU institutions.

The Clock Is Ticking Even Faster

Now the core questions of Brexit must be answered: the future relationship of the United Kingdom with the EU in trade, economic cooperation, internal security, foreign and security policy, and many other areas. The time frame for these negotiations is extremely tight. According to the with-

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drawal agreement, the transition period ends on 31 December 2020, within which period a new trade agreement between the EU and the United Kingdom is to be concluded, at the very least. Otherwise, the United Kingdom will leave the EU's single market and customs union without a follow-up agreement.

This is reminiscent of previous Brexit negotiations, which also had to take place within a certain period of time; otherwise, a no-deal Brexit would have been imminent. However, the current situation is different. For one, time is pressing, even more than before. Article 50 of the Treaty on European Union (TEU) sets a deadline of two years to negotiate a withdrawal agreement. Even these two years were not enough for the EU-27 and the United Kingdom to agree on the four "aspects of divorce", partly because of the political infighting in London. The deadline therefore had to be extended a total of three times in order to avoid a no-deal Brexit. The transition period of 11 months is considerably shorter. Moreover, negotiations on the future relationship touch upon many more policy areas. Just looking at trade, the average duration of recent negotiations for large EU trade agreements, such as those with Canada or Japan, has been just over five years.

The political dynamic of the negotiations are also different because, although the impact of a "no trade deal Brexit" is still regarded as significant, it is expected to be less impactful than a "no deal Brexit" would have been. After all, the United Kingdom has left the EU in an orderly fashion, and key issues of the transition have been resolved. Now, in the event of a failure to reach an agreement, "only" a reversion to the rules of the World Trade Organisation would remain, leading to the reintroduction of customs duties, border controls, and all the economic consequences associated with them. Since the EU as a whole is much more important for the United Kingdom (about 49 per cent of British trade in goods) than vice versa (about 15 per cent of EU-27 trade in goods), the pressure on London to reach an agreement is, rationally speaking, much greater. However, the political inhibitions in London about the risk of failure of negotiations are perceptibly lower than before the no-deal Brexit, which was feared to lead to more serious chaos. For parts of the British government, a no-trade-deal Brexit, now referred to by UK Prime Minister Boris Johnson as the "Australia" model, is at least an acceptable, if not preferred, outcome of the negotiations.

In addition, the conditions for extending the transition period are much more difficult. The negotiations under Article 50 TEU could be extended several times by unanimous vote, and such a decision could have literally been taken up to the very last minute before the deadline. The transition period, on the other hand, can only be extended once, at most until the end of 2022. More importantly, a decision on an extension under Article 132 of the withdrawal agreement must be taken by 30 June 2020. If it becomes apparent in autumn 2020 that no agreement on a trade agreement can be reached for the time being or that ratification is faltering, it will no longer be legally possible to extend the deadline. Finally, Johnson has categorically ruled out a request for an extension of the transition phase by the United Kingdom and has had this enshrined in UK law. Although Johnson could reverse course and call upon Parliament to change the law, the political costs would be high for Johnson, despite his now comfortable majority. At present, there is no indication that the Johnson government is willing to change course on its main aim to fully leave all EU rules behind on January 2021, although opposition politicians are starting to call for an extension of transition due to the coronavirus crisis.

The Domestic Victory of the Brexiteers

The biggest change compared to the previous Brexit negotiations is the almost complete domestic political triumph of the Brexiteers under Prime Minister Johnson. After losing the general elections of 2017,

following which Theresa May could only govern with the help of the Northern Ireland Democratic Unionist Party (DUP), the British government was without a majority of its own during one of its most complex foreign policy negotiations. The consequences are well-known: Theresa May lost more votes in the House of Commons than her five predecessors combined; Johnson, too, was only able to win a few procedural votes until the new elections in December 2019. Before that, there was only a majority in the House of Commons against a no deal Brexit, but not one in favour of any of the Brexit options or a second referendum.

Since the election victory of Johnson and his Conservative Party, however, the political conditions have been reversed. With his promise to "Get Brexit Done" and by uniting pro-Brexit voters behind his party, Johnson has achieved a triple success. Firstly, the Tories have now regained an absolute majority with 365 of 650 Members of Parliament (MPs). Johnson is no longer dependent on the DUP as a majority provider, while individual groups within the Tory parliamentary party can no longer cost him the majority. In addition, when the withdrawal agreement was ratified, he succeeded in ensuring that Parliament had less say in the agreement(s) on the future relationship than it has had on the withdrawal agreement.

Secondly, with his election victory, Johnson has ended the "civil war" in the Conservative Party over European politics that has lasted for more than 30 years. Prior to the 2016 referendum, the majority of conservative MPs were in favour of staying in the EU. This has now completely changed. By the end of 2019, there were only 22 Tory MPs who were prepared to vote in favour of the anti-no-deal legislation, against the instruction of party leadership. Johnson's decision to expel them from the parliamentary party cost him his majority in the autumn of 2019. However, none of these MPs made it back into the House of Commons in the new elections, whether they ran as independent candidates or for the Liberal Democrats. The signal to the party is unmistakable — there will be no more rebellion against Brexit policy from within the Tory party.

Thirdly, Johnson has a free hand in domestic politics, at least temporarily. The British political system gives a prime minister with an absolute majority a high degree of power, in particular when compared to federal systems, such as in Germany. In addition, both the Labour Party (reduced to 202 MPs) and the Liberal Democrats (11 MPs) have lost their party leaders. The internal processes to determine the succession will run until April (Labour) or even July (Liberal Democrats). Shaken to their core by their respective electoral defeats, neither party is in a position to present an effective opposition. In addition, the civil society "Remain" movement had, until January 2020, concentrated solely on a second referendum, mobilising large crowds for impressive demonstrations across the country. However, now that the United Kingdom has left the EU, the previous "people's vote" campaign lacks a political strategy, partly because the demand for a return to the EU can be regarded as unrealistic for years to come. This means that the British government can now pursue its own Brexit policy without almost any domestic political barriers.

Setting Itself Up for Confrontation

With this new power, the British government is gearing up for a confrontation with the EU. To this end, Johnson, unlike Theresa May, has from the beginning relied on declared Brexit supporters in his cabinet. All the members of the government are now proven Brexiteers, many of whom campaigned for withdrawal from the EU even before the 2016 referendum. In particular, the UK Treasury, which traditionally tends to be pro-single market, is being geared to support a hard Brexit. In contrast to his predecessors, the new Chancellor of the Exchequer, Rishi Sunak, emphasises the advantages of a clear break from the EU. Instead of resistance from the cabinet, the central ministerial posts are now occupied

by politicians who reject any deeper institutionalised cooperation with the EU. The Brexit revolutionaries of the "Vote Leave" campaign have thus taken control of the Conservative Party, the government, and Parliament.

Under these conditions, a strategy for post-Brexit relations is already emerging, which is primarily based on confrontation and complete separation from the EU. The prevailing narrative among Brexit supporters is that, in the first phase of Brexit negotiations, the United Kingdom was, in their view, humiliated because the British government did not want to, or could not, credibly threaten to break off the negotiations. In line with this basic understanding, the British government has already threatened to break off the negotiations if no progress in their favour is apparent by June 2020.

Following the Brexit vote, a wide range of potential models of cooperation were discussed: from the Norway/European Economic Area (EEA) model with extensive access to the internal market, to a customs union, all the way to a traditional free trade agreement. Theresa May wanted to negotiate an interim solution and at least maintain the frictionless movement of goods — and was prepared to accept EU standards for this. Among others, the then UK Foreign Minister Boris Johnson resigned in protest because, in his view, a Brexit without regulatory freedom and a trade policy of its own was not a proper Brexit.

In this sense, his government has abandoned the goal of maintaining frictionless trade in goods and emphasises the need for regulatory freedom. It wants a standard trade agreement and rejects any obligation to maintain or align with EU standards. British companies are already being prepared for the reintroduction of border controls with the EU from 2021 onwards, even if a trade agreement is concluded.

Regional Tensions

Aside from economic constraints, there is one potentially limiting factor on the British government's hard Brexit policy: Brexit fuelled regional tensions within the United Kingdom. In January 2020, the regional parliaments of three of the four nations of the United Kingdom — Wales, Scotland, Northern Ireland, the latter even unanimously — voted against the withdrawal agreement. The British government, however, was legally able — and politically willing — to override them. The regional governments and parliaments also have no veto position in the negotiations on the future relationship.

Nevertheless, the British government will have to weigh up a political trade-off. Northern Ireland deserves special attention: After three years of deadlock, power-sharing has been restored, and a new Northern Ireland Executive was able to be formed in early 2020. However, the peace process remains fragile, and the surprise election success of Sinn Féin in the Republic of Ireland has put the issue of Irish reunification on the agenda once again. Crucially, due to the Northern Ireland Protocol in the Withdrawal Agreement, Northern Ireland will continue to apply EU rules on goods, VAT, and state aid, for example. These measures were agreed to keep the border between Northern Ireland and the Republic of Ireland open. In consequence, however, the more that the United Kingdom withdraws from the single market of the EU, the more border controls will become necessary between Northern Ireland and the rest of the United Kingdom. In the case of a very hard Brexit, the British government would have to accept that this will boost demands for a "border poll" in Northern Ireland.

At the same time, the conflict between the Scottish Executive and the Johnson administration is one of the UK's central political battles of 2020. Moving towards a hard Brexit, contrary to the 62 per cent of Scots who voted "Remain", has significantly strengthened the independence movement. Brexit has now become a key argument for the proponents of Scottish independence. In several polls at the beginning of 2020, a (slim) majority of Scots were in favour of independence. In January 2020, the Scottish Parliament launched legislation for a second

independence referendum. Legally, Scotland can only organise a binding referendum with the consent of the British Parliament — something that the Conservatives have already rejected. However, this blockade attitude will be politically difficult to sustain if the Scottish National Party wins the Scottish elections in 2021. In order to keep the United Kingdom together, the British government should actually take Northern Ireland and Scotland into consideration — but so far it has tended to be confrontational, especially with regard to Scotland.

Main Areas of Conflict

At every stage of the Brexit negotiations to date, the EU and the British government have emphasised their common desire to negotiate an "ambitious, broad and deep partnership". But now at the beginning of the transition period, the signs are pointing to confrontation. Both sides had previously agreed on the outlines of future relations in the (non-binding) Political Declaration, which was adopted in parallel with the withdrawal agreement. The original Political Declaration was agreed in 2018, but Johnson also renegotiated parts of it with the EU-27 and explicitly consented to its content. Since then, however, both sides have set their respective negotiation aims, revealing many areas of conflict.

Difficult Trade Negotiations

The first area is economic partnership. At its core, the EU remains an economic community, and 47 years of economic integration have contributed to close economic ties with the United Kingdom. The basic aim is to regulate market access in all sectors that have been covered by EU membership so far — goods, capital, financial and other services, data, public procurement rules, mobility of persons, transport, aviation, energy, fisheries, and more.

In principle, both sides are interested in a standard trade agreement to preserve their respective autonomy. However, they have fundamentally different ideas about this: The EU is striving to include provisions on fair competition (level playing field) in a standard free trade agreement. Not only are existing EU standards to be protected, but a procedure for aligning to new EU standards is also to be created in particularly critical areas. This goes beyond the provisions of previous EU trade agreements. The EU-27 justify this with the depth of market access (zero tariffs, zero quotas), the economic weight of the United Kingdom, and its geographical proximity.

The British government, on the other hand, wants a free trade agreement based on the model of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada; it also rejects any obligation to maintain, or even dynamically align to, EU standards. Nevertheless, it wants (unlike Canada) zero tariffs without exceptions and, with cooperation from regulatory authorities, to keep non-tariff barriers to trade as low as possible.

Other lines of economic conflict lie in fisheries policy and financial services. For the former, the EU mandate aims to maintain access to British territorial waters and retain fishing quotas. In contrast, Brexit supporters are keen to regain control of their own fisheries policy. The Johnson government therefore wants to negotiate a separate bilateral agreement on fisheries with the EU, allowing for annual flexibility as an "independent coastal state", similar to Norway, and to determine better conditions for its own fishermen. According to the Political Declaration, which provides for an agreement on fisheries by June 2020, the EU wants to make this a litmus test of Britain's willingness to compromise.

The situation is to some extent reversed with regard to access to financial market services. The British government has dropped the goal of maintaining full access to the EU single market for financial service providers from London. Nevertheless, it wants the EU to create a permanent equivalence for financial services in order to secure long-term access to the EU market for

the City of London. The EU-27, however, insist that equivalence decisions are unilateral, and that it must be able to reverse them at any time in order to protect the EU financial market in case of doubt. In the Political Declaration, the Union committed itself with "best endeavour" to complete the equivalence assessment by June 2020.

Internal Security

The second area is cooperation on justice, home affairs, and migration policy. The critical issues here are to develop (more limited) instruments for data exchange, operational cooperation between law enforcement authorities, judicial cooperation in criminal matters, and cooperation in the fight against organised crime and terrorism. As an EU member, the United Kingdom has occupied a paradoxical position in this policy area. On the one hand, in developing EU justice and home affairs policy, it has negotiated for itself extensive opt-out rights and was not a member of the Schengen Area; on the other hand, it has participated in a large part of the measures of justice and home affairs policy by way of opt-in. In practice, the United Kingdom therefore has often been a driving force when it comes to closer justice and home affairs cooperation within the EU.

According to the Political Declaration, both sides want "close, mutual and reciprocal" cooperation in this field. The potential for conflict concerns the balance between access to EU databases and the binding effect of standards under European law, for example in data protection. London also wants "pragmatic" cooperation, but only as long as it is ensured that the United Kingdom is not bound by EU law and is not subject to the jurisdiction of the European Court of Justice (ECJ). In contrast, the EU-27 want to make the exchange of data dependent on the extent to which the United Kingdom undertakes efforts to comply with European data protection standards. The EU also makes cooperation on internal security conditional on the United Kingdom remaining a member of the European Convention on Human Rights (ECHR), which the British government, like all legal obligations, rejects, although the United Kingdom itself is a founding member of the ECHR.

Foreign and Security Policy

A third important area of negotiation is cooperation on foreign policy, security, and defence. Here the need to find a new way of working together is even more pressing: The greatest value of EU foreign and security policy is in the permanent coordination of EU member states. Although EU law continues to apply in the United Kingdom during the transition, the United Kingdom has already left the EU institutions. It no longer participates in EU coordination, neither in Brussels nor in international organisations such as the United Nations or in third countries. The United Kingdom is therefore no longer sitting at the table — to the detriment of both sides — when coordinating in the EU format on how to deal with Russia, Syria, Turkey, China, Libya, Iran, and the Western Balkans.

According to the Political Declaration, Brussels and London aim for "ambitious, close and lasting cooperation", which includes the establishment of structured consultation formats, consultations on sanctions, the possibility of British participation in EU operations, the development of defence capabilities, and the exchange of intelligence information. However, London has already scaled back its ambitions in this regard and wants to do without institutionalised foreign and security policy cooperation with the EU altogether. Accordingly, the British government will try to switch to bilateral and multilateral cooperation, in particular with Paris, Berlin, and Warsaw, as well as with NATO. This is also a challenge for Germany, which will have to weigh its interest in keeping the United Kingdom aligned with European foreign and security policy, for example on Iran, with its interest in strengthening the EU as a foreign policy actor.

Essential Governance Issues

Fourthly, the EU and the United Kingdom will need to negotiate new governance structures, that is, an institutional framework that brings together the various areas of cooperation. The EU is therefore aiming for an Association Agreement that covers as much of the EU-UK cooperation as possible. According to the Political Declaration, this institutional framework should include a standard dialogue format at all levels, a parliamentary exchange format, and a dispute settlement procedure. The latter is particularly important in order to enforce possible agreements on a level playing field. In its own mandate, however, the United Kingdom aims for a series of agreements that are not directly connected by a joint governance framework.

The withdrawal agreement already provides for a dispute settlement procedure. If one of the parties fails to comply with its obligations, an arbitration panel may be convened. In case of disputes relating to EU law, the ECJ must be consulted and its rulings are then binding for the arbitration panel. In the event of continued breaches of obligations under the withdrawal agreement, the EU — or the United Kingdom, for that matter — may, after no solution is reached over a six-month period, suspend all rights under the withdrawal agreement, or even any other agreement between the two partners. The EU wants to anchor a comparable "guillotine clause" for all areas of the future agreement, including the competence of the ECJ in matters relating to Union law. In addition, the EU mandate provides that the parties to the contract may impose sanctions immediately after a violation and not at the end of a lengthy arbitration procedure. This would enable the EU to sanction British violations of EU standards or agreements on fisheries policy directly, or at least to signal the use of sanctions.

Due to their cross-cutting nature, institutional issues are likely to be the most difficult part of the negotiations. London strictly rejects any jurisdiction of the ECJ over British law; rather, it wants to orientate itself on the dispute settlement provisions of CETA. The ECJ has no role to play in this, and the possibilities for sanctions are much more limited. In addition, instead of an overarching association agreement, the British government wants a series of individual contracts that are not linked by a common institutional framework. But only the binding nature of the dispute settlement measures will decide how robust the agreements on regulatory standards or data protection are.

The fifth and final aspect that will weigh on the negotiations is the implementation of the protocol on Northern Ireland. As a reminder, the biggest political conflict in the final phase of the Brexit negotiations concerned how to deal with Northern Ireland. Unlike Theresa May, Boris Johnson has accepted a solution whereby Northern Ireland will continue to be bound by EU single market rules on goods after the transition period, whereas any customs duties will be due on the importation of goods from Great Britain into Northern Ireland if the goods are "at risk" of being traded in the EU. This compromise, worked out under high political and time pressures, must now be implemented by 31 December 2020. However, both sides interpret the obligations very differently: Whereas the EU assumes the necessity of border controls in the Irish Sea, Johnson and his government publicly deny this. Whether the EU and the United Kingdom find a common interpretation — and how well implementation then works — will affect mutual trust in the negotiations on future relations.

Between Competition and Partnership

The analysis shows that the next phase of Brexit negotiations are taking place under completely different political conditions. In the first phase of the negotiations, the EU-27 appeared united and were able to largely dictate their exit conditions to a divided Britain. In the second phase of the negotia-

tions, the major conflicts will no longer be carried out in the British Parliament, but between Brussels and London. The Brexit revolution is nearing completion — in the British government, the Brexiteers alone now set the tone; strengthened at home, Johnson will pursue a confrontational strategy from the outset. There is no evidence of restraint due to economic considerations or out of regard for Northern Ireland and Scotland, each of which prefers a soft Brexit.

The EU must also critically reflect on its political negotiation strategy. Although it seems to be again very well prepared for the many technical details under the leadership of Michel Barnier. Beyond that, however, the EU-27 must prepare itself for a phase of negotiations that is politically more conflict-ridden. When setting priorities and balancing interests, it becomes more difficult to preserve the unity of the 27. Germany, which is set to take over the Presidency of the Council during the most sensitive phase of the Brexit negotiations in the second half of 2020, must also contribute to this. There will be accusations from London, threats to break off talks, and attempts to sow divisions between the EU-27.

A compromise zone is not apparent at the beginning of the negotiations. British demands for maximum sovereignty are being put up against the EU's claim to set regulatory standards in its neighbourhood: Even with a clear reduction in the level of market access compared to the single market, the EU will only allow a far-reaching trade agreement with zero tariffs and zero quotas for a large economy in its neighbourhood if it includes robust procedures for enforcing a level playing field. Added to this is the great time pressure of now only 10 months. It leaves no scope for negotiating product category by product category, as in a traditional trade agreement. This insistence on strict red lines on both sides, coupled with the confrontational approach of the British government, increases the chances of a no-trade-deal Brexit. Despite the wear and tear effect, the EU must prepare itself again for a failure of the negotiations.

One way out of this stalemate would be to think about the problem of achieving a level playing field in reverse. Instead of legally obliging the United Kingdom to adopt EU standards, contrary to its self-image as a sovereign state, procedures should be developed for dealing with British divergence when it actually happens. The starting point would be the common goal of a zero tariffs free trade agreement, because on day 1 after the transition phase, the United Kingdom will still be applying the EU standard in its entirety. Instead of requiring the United Kingdom to be legally bound to EU standards, however, the EU could develop a procedure whereby, in the event of real British divergence, the Union could robustly and proportionately rebuild trade barriers to enforce fair competition rules. The EU should also prepare such trade defence instruments for the event of a no-trade-deal Brexit. London would thus have the fundamental freedom to deviate from EU standards, while the EU would have the means to protect the European economy in case of doubt. Moreover, the difference would be clear between the EU/internal market membership and this "UK" model with free trade agreements and reinsurance against divergence. On this basis, negotiators could, even with the high time pressure, develop a model that reflects the special position of the EU and United Kingdom between partnership and competition.

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