

## THE EUROPEAN UNION AND THE BREXIT PARADOX

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### Abstract

The article analyses the consequences of the withdrawal of the United Kingdom from the European Union, particularly the political effects of its decision. In the first place, it addresses the holding of the referendum, and the decision to withdraw, as a paradigmatic example of the so-called "new politics" that has given special prominence to the so-called populist forces in Western societies. Then, the peculiar negotiation between the UK and the EU to establish a withdrawal agreement is examined. Next, the different forms of commercial ties that the EU currently maintains with third States are identified as a reference to the agreement that may be established with the United Kingdom. Finally, the viability of the Global Britain project as a future strategy to regain a position of international influence is evaluated. The conclusion reached is the paradox that Brexit represents, as the United Kingdom has launched a traumatic, uncertain and divisive process to achieve an international, political and commercial position, which in objective terms will be indisputably worse than the one it left.

### Keywords

Brexit, European Union, United Kingdom, Referendum, Trade Agreement.

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## THE EUROPEAN UNION AND THE BREXIT PARADOX<sup>1</sup>

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### 1. The Brexit paradox: a “democratic” decision against Britain's own interests<sup>2</sup>

A paradox is a “fact or expression apparently contrary to logic” (DRAE)<sup>3</sup>. It is an apparently true manifestation that, however, contains a logical contradiction. Brexit constitutes a paradox in the sense that British voters chose in the June 2016 referendum an option that is contrary to their own material and political interests.

Undoubtedly, the departure of the United Kingdom from the European Union weakens the European project, but so far less than expected. Instead, the break will really hurt the country that is leaving. The economic, commercial and business costs will add up to a bill yet to be determined, very high in any case, depending on whether the United Kingdom and the EU finally manage to agree on a mutually beneficial form of economic and commercial coexistence (Dhingra et al, 2016). In any case, the magnitude of the material damages that Brexit entails is outweighed by the loss of the positive and stereotyped image of the country, its political system, the leadership and international influence that it has wielded through the exercise of its extraordinary soft power. It will mean a break of its political system that directly affects its party system and threatens the very constitutional structure of the United Kingdom. Territorial cohesion between the four nations that comprise it (England, Wales, Scotland and Northern Ireland) is in danger by giving up European integration. We have seen it in Northern Ireland, where the possibility of re-establishing an international border places the 1998 Good Friday peace accords at risk and fuels sentiments in favour of the island's unification. One of the keys to peace and coexistence in this territory lies precisely in the existence of a porous intra-community border that is a consequence of the unity of the EU market. A similar concern is also seen in Scotland, where the Scottish National Party, currently in power, threatens to hold a new referendum on its relationship with the United Kingdom, encouraged to retain membership of the EU through future accession once independence is achieved.

<sup>1</sup> Article translated by Carolina Peralta.

<sup>2</sup> A first version of this paper was presented and discussed at the seminar organized by the Centro de Investigação em Ciência Política - CICP at Minho University (Braga), in December 2019, with the title: “A União Europeia perante o paradoxo do Brexit”.

<sup>3</sup> All cited online references were last accessed on 30/09/2020.



If the motto during the Brexit campaign was to vote out to "take back control", what one sees is precisely the opposite. A new paradox.

Why does this situation occur? Is it perhaps a problem of the decision-making mechanism adopted in consultation with the electorate? Are democratic systems unreliable and should a momentous decision be voted on? Obviously, the problem is not democracy as a political system, but rather the evils that afflict Western societies that present a series of common features shared by many countries (Portugal is an exception), the most obvious manifestation of which is the rise of the so-called populist forces from one side of the Atlantic to the other.

Brexit is a paradigmatic example of this process of political change in Western societies that perhaps symbolizes a change of era. Brexit is analysed here as a representative category of this process of change in a double dimension: the responsibility of political leaders who embrace these populist policies for their own advantage and to avoid their own responsibilities; and the motivation that drives citizens to support such options.

Regarding the first question, Brexit is a clear example of political mismanagement within the Conservative Party. Threatened by a split as a consequence of the bitter confrontations that date back decades, and the pressure exerted by the electoral advance of the demagogic Independence Party (UKIP), Prime Minister David Cameron avoided holding a congress that would resolve the internal division by convening instead, a referendum, encouraged by the success achieved in the consultation on the independence of Scotland (Castellà, 2016). This way, he managed to transfer an internal problem of the party to the whole country and, by extension, to the whole of the Union. In order not to face a domestic problem, it generated a constitutional and international crisis.

Political mismanagement does not concern only the decision to consult the population, but also the chosen procedure. All major political decisions (such as, for example, a constitutional reform) are framed in a procedure regulated by the countries' constitutional systems. Despite their differences, they all share common features: an extended legislative procedure that allows detailed analysis of the rules to be adopted and a reinforced voting procedure that requires qualified majorities in the Chamber and, in some cases, calls for elections for the new parliament to ratify the decision. And also the holding of a referendum, at the end of the process, to corroborate the decision made, but never as a consequence of a popular initiative, except in the few constitutional systems in which it is contemplated, such as the cases of Switzerland or the State of California (Butler and Ranney, 1978). Faced with this traditional use of the referendum, the British government used it as a formula for direct democracy, in contradiction to its political system, which is the archetypal example of parliamentary democracy. In addition to the known weaknesses of this form of direct democratic exercise (the possibility of manipulating deliberative assemblies, the opportunity offered to demagogic arguments or their interested celebration based on the priorities of the rulers' agenda), political theory had repeatedly warned of the danger that the decisions adopted this way may be the result of the passions of the moment, without any procedure that imposes limits on the power of the majority: "Referendum democracy is objectionable mainly because it



establishes (...) a system majority government that excludes minority rights" (Sartori, 1988: 156).

The procedure followed in the United Kingdom has incurred in all the dangers political theory warned about: the referendum was held at the beginning of the procedure, the result of which, to be applied, does not require any reinforced majority and lacks any other counterweight or filter that conditions its execution. Only once leaving the EU was approved was the design of the rule that made it possible to apply such a resolution began. Resorting to a referendum as the supposedly more democratic decision procedure eliminates the procedural guarantees and the parliamentary debate typical of indirect democratic systems. It reduces decision time to an instant by simplifying complex problems to the extreme of reducing them to yes or no. An electoral campaign is not a parliamentary debate. There is no reply or dialogue, and the opportunity to launch demagogic arguments, if not simple lies, multiplies, creating a very intense emotional climate that is increasingly decisive in electoral processes.

A referendum, the exercise of the so-called direct democracy, is not the most appropriate procedure to make important political decisions. Those who chose to use it do so for political advantage, to take advantage of the emotional state of an electorate that can be excited by multiple means and thus avoid a debate that highlights the negative consequences of the decision, if not its infeasibility.

A referendum is not invalidated as a decision-making mechanism in democratic processes, but it cannot be a single act, nor should it be placed at the beginning of the decision-making process. It should be part of a longer and more rigorous process that allows analysing the consequences of the decision and evaluating the way it will be carried out. In democratic systems, all these guarantees are given through parliamentary procedure. Brexit runs aground when it comes to applying the result of the referendum in Parliament and the consequences derived from the decision are verified, preventing the majority that would allow its execution.

The referendum, as used in the terms of David Cameron's government, was self-advantageous and demagogic. And, of course, its celebration did not bring any democratic bonus.

Let us now examine the second question posed: the motivation that drives voters to choose a certain option.

There is a huge amount of academic literature published in recent years that convincingly explains the process that has allowed the electoral boom of the so-called populisms (Goodwin and Eatwell, 2019). Although each society has its own domestic ghosts, social scientists have identified some aspects that are common in all cases where there has been an electoral victory of these political forces or their postulates, as has undoubtedly been the case of Brexit.

The first common factor lies in the existence of a fragile society as a consequence of the growing duality driven by globalization and reinforced by the impact of the 2008 crisis on Western societies (Rueda, 2014).



Social dualization is a phenomenon of increasing division that occurs within national societies between a minority, urban and enlightened group, linked to transnational production and information chains, and a majority group that is "left behind", which sees their material and working conditions deteriorate as wage earners (the end of the middle classes: Guilluy, 2019). The main consequence of this dualization phenomenon is that it is increasingly difficult to move from the *territorialized* to the *globalized* group, although not the other way around.

This dynamic generates an extraordinary frustration regarding social promotion expectations in broad social layers. The social lifting that the welfare state entailed has ceased to function and its loss fuels growing resentment, which can occasionally manifest itself in the form of a social explosion, a process identified as the *tunnel effect* by Albert O. Hirschman (Costas, 2015). Accordingly, the *globalized* are "denationalized", while the *territorialized* are "renationalized".

They feel unjustly harmed and degraded by their condition as losers in front of the educated, urban and cosmopolitan groups that stigmatize them. Self-perception as victims of globalization leads them to reaffirm themselves in everything they reject: the longing for protectionism (King, 2017) and a kind of national withdrawal from the global, in the confidence that the nation-state can protect them more effectively than international or multinational institutions such as the EU (Grygiel, 2016).

The second aspect is how identity, the feeling of belonging to a community, has become the backbone of mass political action through what Francis Fukuyama has called the *politics of resentment* (Fukuyama, 2019: 23), used in different ways.

The identification of groups that are assembled around identity feelings that can be the most varied is becoming more and more frequent. In addition to the nation, religion or ethnic group, which traditionally have been the most common, now there are also issues such as gender or sexual orientation. These groups share the perception that their identity does not receive the recognition it deserves from others. An allegedly humiliated group that demands to restore its lost dignity constitutes a more effective mobilizing element in political processes than rationality based on a cost/benefit calculation. The emotional appeal to the vote invoking identity feelings is the key that the so-called populist forces use to win electoral majority by offering fanciful solutions, if not lying and brazenly manipulating the electorate. The feeling of identity has replaced the materialistic logic of belonging to a specific social class. The parameters that traditionally defined the ideological spectrum of Western societies in terms of right and left have been irreversibly altered (Bobbio, 1995). The definition of political options that were previously made under material criteria (based on the position occupied in the production system as an employee or owner) has come to depend on other postmaterialist criteria which, increasingly, are linked to the feeling of belonging to a certain identity and a system of values. The globalized are not necessarily "right-wing", on the contrary (the *gauche brahamane* identified by Piketty, 2019). Nor the territorialized are necessarily "left-wing": in the US, they constitute Trump's electoral base. The anti-globalization, anti-cosmopolitan and renationalizing reaction can manifest itself both on the left and the right, but they find a shared channel of expression through populist platforms.



The third element that allows explaining this dynamic is the cause whereby emotion prevails in front of reality when voters decide their political option. How do we get to lose the sense of reality and, even, the very notion of true? Hans Rosling conducted decades of research to show that humans have a tremendously distorted view of how we perceive what is happening in the world (Rosling, 2018). Using surveys directed at groups of all walks of life and nationality on global parameters related to the economy, development, demography and the environment, he concluded that our perception was always inclined towards pessimism. The problem is not ignorance, and even less ignorance due to lack of information, which for decades has been more abundant than ever, although not more accessible. The problem is our individual perception of the world and reality, deeply pessimistic and fearful of changes. These negative feelings tend to be stimulated by the media and certain political groups through discriminatory criteria that tend to disseminate biased information with a high dramatic impact. They try to capture the attention of the audience, effectively contributing to establish in the collective conscience the idea that everything is going wrong, that the future is going to be worse, that they are the harmed ones and need restitution. The feeling of threatened identity stimulated by a distorted perception of reality leads to a simplified political choice, to the extreme that reduces the solution of all problems to a single cause that can be neutralized only with a vote: the problems are caused by Mexican immigrants, or Jews, or Spain, or the European Union.

The British vote in the referendum constitutes a paradox only if we use a rational choice analysis typical of other times. It is the paradigmatic example of the new stage where national and international politics are in, where traditional references to the left or right do not explain political alignments, where reality is not the basis of the logic of political action. On the contrary, in many cases reality is an accessory discomfort that can be easily dispensed with.

## **2. The European Union and Brexit**

The UK's decision to withdraw from the EU Treaty placed the EU in a state of alarm. A new and very serious problem was added to those already present (design of the euro, migration crisis,...) pointing to a scenario of "existential crisis" as defined by the president of the Commission Jean-Claude Juncker (Juncker, 2016). This was due to the relevance and international weight of the United Kingdom, for setting a precedent that could influence other Member States, for denying the self-legitimizing and complacent discourse of inclusive Europeanism. With Brexit, the EU faced a situation that challenged its own survival: being or not being part of the Union.

More than four years after the referendum, it can be said that the Union has survived, although all the threats are still present and the problems, rather than resolved, seem postponed. Neither the euro nor the migratory crisis, nor Brexit, are past, they continue to be problems of the present with which we will have to live in the future.

Regarding Brexit, the extraordinary political, legal and diplomatic capacity of the EU to face a challenge that only had a generic treatment through Article 50 of the Treaty of the Union (TEU) is striking. Throughout the negotiating process, the Union has shown what possibly are its greatest institutional virtues: an extraordinary regulatory framework



adapted to specific needs defined through permanent negotiation: the law through consensus.

Let us recall how the negotiation process started. It was not from the presentation of two negotiating proposals, one from the United Kingdom and the other from the Union. These were not two positions that tried to reach a shared synthesis (Patel, 2018). It has never been an international negotiation. It was something quite different, and it should be remembered.

In January 2017, Prime Minister Theresa May presented her exit plans and the new framework of relations that she intended to agree with the Union (May, 2017a). She also expressed her intention to negotiate a transition period to smooth the process. The significant delay with which the British Government established its negotiating position and the fact that it did not formally notify its withdrawal to the Union until 29 March of that same year should be noted. The intention of trying to gain time was evident but, in the end, it did not bring her any advantage in the negotiation.

In this document, the British Government established the so-called "red lines" that defined the objectives it wanted to achieve:

- Establishment of controls to regulate immigration from EU countries.
- Independence of the British justice, which would cease to be under the jurisdiction of the Court of Justice of the EU.
- Renouncing the single market (which implied giving up participating in the so-called "four freedoms": free movement of people, capital, services and goods).
- And instead, negotiate a free trade agreement with the EU.

For its part, the EU responded through the President of the Council, Donald Tusk (European Council, 2017), establishing the times and the material scope of the negotiation:

- It was necessary to negotiate, in the first place, the way the British withdrawal would take place and only when a "substantial progress" had been achieved would a second negotiating phase take place, with the United Kingdom already a third country, to agree on a new association agreement.
- The possibility of "à la carte" participation in the Single Market based on sector approaches was excluded.
- And, finally, it was proposed to solve the most urgent problems derived from the British withdrawal
  - To ensure legal security to resident citizens and companies, avoiding a legal vacuum that would allow the enforcement of new regulatory measures that violate acquired rights.
  - Demand that the United Kingdom comply with its financial commitments, which were finally estimated at around € 40,000 million.



- Study “flexible and creative solutions” to avoid a rigid land border in Northern Ireland.

With this decision, the European Council managed to thwart one of the few negotiating tricks that the British Government had: negotiating at the same time the exit and the future relationship with the EU. By being able to negotiate on those terms, the United Kingdom would have had the opportunity to conduct the negotiation according to its interests, which basically consisted of achieving a sort of selective membership in the Union by fragmenting the single market. Having to accept a negotiation in successive phases, the British only had to try to break the community bloc by offering bilateral agreements to the Member States separately (Rogers, 2019)<sup>4</sup>, or threaten a hard break in the relationship by taking the resident population hostage (RTVE, 2018) or weaken the future relationship on security issues (May, 2017b).

The EU has managed to maintain negotiating unity and has faced British threats by limiting its negotiating capacity in the face of evidence that it could offer nothing in exchange for its claims. The loss of options led the British Government to use a last resort: successively threaten the Union with causing total chaos (May, 2018), and to its Parliament by not leaving the Union if the agreement offered by Brussels was not approved. Brussels finally accepted the May cabinet after having previously rejected it (*El País*, 2019a).

With the British negotiating strategy neutralized, the question was posed in essentially technical terms: how to shape the exit demands freely and unilaterally expressed by the British Government? It should be remembered that the “red lines” defined a very narrow area with little room for manoeuvre.

The work of the Commission and the European negotiating delegation was to give legal form to these British proposals, protecting the integrity of the *acquis communautaire*. A British proposal that was never presented was not discussed, rejected or accepted. On the part of London, only wishes were expressed and when those wishes were transferred to the text of a treaty, the result frustrated the emotional illusion generated by Brexit in such a way that Parliament rejected it up to three times, and by a large majority, the proposal accepted by its Government. This led to a situation of institutional blockade that ended up forcing the resignation of Theresa May and the constitution of a new conservative cabinet led by Boris Johnson as of 24 July 2019.

Johnson, a fierce opponent of the agreement reached by the May government, presented to the British Parliament a new agreement with the EU negotiated in record time at the end of October 2019. In reality, it cannot be properly said that it was a new agreement but rather a modification of the document closed with Theresa May in 2018 that fundamentally affected the situation regarding the border between Ireland and Northern Ireland.

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<sup>4</sup> “Theresa May did not know how the EU worked when she activated Article 50 and thought she could reach a Brexit deal by negotiating directly with European leaders. It didn't work during [David] Cameron's negotiation before the referendum and it hasn't worked now either”. Statements by the former permanent representative of the United Kingdom to the European Union, Ivan Rogers.





In the 2018 agreement, the so-called “Irish backstop” was intended to prevent the reinstatement of a physical border between Ireland and Northern Ireland. This provision sought to preserve the 1998 *Good Friday peace accords*, which ended three decades of violence in Ulster, while protecting the integrity of the European single market. It was a last resort solution that would only come into force if, after the transition period foreseen in the agreement, London and Brussels did not find a better solution.

In the agreement signed by the Johnson government with the EU on 17 October 2019 (BBC, 2019), the so-called “Irish protocol” ceased to be a safeguard clause to become a permanent situation as long as the Northern Irish parliament so decided. This agreement provides that this region is part of the British customs territory, although it is subject to the Community customs regime and under the jurisdiction of the Court of Justice of the European Union. This means that border controls will be carried out at the ports of entry into Northern Ireland and not at the border with the Republic of Ireland, to control goods declared as destined for Ireland, even if they come from other parts of the UK. Consequently, the new customs border is moved to the Irish Sea.

To reach this agreement, both the United Kingdom and the EU made important concessions, which was quite a surprise given the sovereign intransigence that Johnson had championed until then and the solemn statements made by the European authorities affirming that the 2018 agreement was closed and could not be renegotiated again (*El País*, 2019b).

The determining factor that made it possible to reach the agreement was the change in the position of the Dublin government, which accepted this compromise solution. This allowed the alignment of the rest of the Community partners with the Commission, which from the beginning of the negotiation had given Ireland the last word on this specific issue of the British withdrawal agreement. The only non-negotiable limit was, and still is, to preserve the integrity of the European single market, and the agreement guarantees this.

With his bombastic style, Boris Johnson presented the signing of the agreement with the EU as a “great victory” (Day, 2019). His best argument was to ensure that the previous Irish backstop was gone. The survival of this special customs situation was left exclusively to the Irish Parliament. Every four years, the Assembly of Northern Ireland may vote to abandon this special regime, which would mean its disconnection from the European Union and the establishment of the border with Ireland as the external border of the EU. If the Assembly approves by a simple majority to maintain the special regime, it will be extended for another four years. In the event that a favourable vote is obtained with a reinforced majority (which would imply counting on the votes of the Catholic and Protestant parties), the renewal would be for eight years. In the event that it was not approved, a two-year period would be established to negotiate the new formula that would replace it (*El Confidencial*, 2019).

The Northern Irish unionists of the DUP (Democratic Unionist Party) expressed their opposition to the provisions in the new agreement, but their influence as a supporter of the minority Conservative government disappeared when Johnson achieved a comfortable absolute majority of the chamber on 12 December 2019. The agreement



was finally approved and the United Kingdom officially withdrew from the EU on 31 January 2020.

Since then, and until the expiration of the transition period on 31 December 2020, the bilateral relationship has been maintained, in its practical effects, in terms similar to those that prevailed until then: the United Kingdom remains within the single market and the customs union during the transition period, without being a member state, and therefore lacks voice and vote in the community institutions. Although the possibility of extending the transition period was offered to give more time to the negotiating committees of the treaty that would regulate the future relationship, the British Government rejected this possibility. This decision put strong pressure on the negotiating commissions in charge of agreeing on the treaty that governs future bilateral relations, as the time available to close a negotiation is limited, which, as has been shown, is proving extremely difficult.

When it seemed that this chapter had been successfully closed, with the entry into force of the Withdrawal Agreement (Agreement, 2020) that has allowed the United Kingdom to formally exit the Union, the British Government presented to Parliament, at the beginning of September 2020, an Internal Market Bill designed to allow goods and services to flow freely through England, Scotland, Wales and Northern Ireland when the transitional period ends on 1 January 2021. Surprisingly, its articles include the possibility of unilaterally modifying the terms agreed upon in the aforementioned Agreement.

By invoking the right "to act in the best interests of Northern Ireland and the UK internal market" (UK Government, 2020), the law would allow eliminating the UK's obligation to control goods destined for North Ireland from the rest of Great Britain. That is, to eliminate the "border" in the Irish canal, to which it had committed itself in the Agreement, without re-establishing the territorial border between Ireland and Northern Ireland. This is precisely the key point on which the Withdrawal Agreement was built, which ensures both the validity of the *Good Friday agreements* and the integrity of the European internal market.

The legislative initiative represents a violation of the terms agreed with the European Union, of which the British Government is fully aware. The Minister for Northern Ireland, Brandon Lewis, has publicly stated that: "it will break international law" (*The Guardian*, 2020a). The head of the British Government's legal department, Jonathan Jones, resigned as a result.

According to Lewis, it would be a "very specific and limited" violation of international law, based on the need for the Government to reconsider its international obligations to the extent that "circumstances" have changed.

Implicitly, the British Government is appealing to Article 62 of the Vienna Convention on the Law of Treaties, which establishes the *rebus sic stantibus* principle. The problem is that the circumstances have not changed, quite the opposite. Even the Agreement itself provided for the application of this commitment even when a commercial treaty was not agreed within the foreseen time period.



Unilateral action by the British Government, should the Internal Market Bill come into force, violates the UK's international commitments and, as Theresa May has stated before Parliament (BBC, 2020a), permanently compromises its international reputation<sup>5</sup>.

The excess of the British legislative initiative is of such scope that the European authorities have initiated a disciplinary proceedings after its approval in the Westminster Parliament by a large majority (340 favourable votes compared to 256 against), even pending its passage through the House of Lords for final approval. Pressured by the intransigent wing of the Conservative Party, Johnson had to include an additional safeguard in the text of the bill according to which the Government will not be able to modify the commitments reached in the Withdrawal Agreement without the express authorization of Parliament.

Specifically, the President of the Commission, Ursula von der Leyen, announced the sending of a "formal notification letter" to open an infringement procedure that will take the case before the Court of Justice of the EU, under whose jurisdiction the United Kingdom remains during the current transitional period (*The Guardian*, 2020b). The infringement file is not initiated due to possible violations of the Agreement to which the Internal Market Law may give rise, but due to violation of article 5 of the Withdrawal Agreement, which includes the need to negotiate in good faith between both parties.

The legal process of the sanctioning file would not be paralyzed with the end of the transitional period. Article 87 of the Withdrawal Agreement establishes that the European Commission has a period of up to four years, once the transitional period is concluded, to initiate a procedure against the United Kingdom, if it considers that it has breached any of its obligations under the Agreement. The text of the Agreement also provides that if one of the parties considers that there has been a violation of the agreement, it may request the creation of an arbitration panel before the Joint Committee, which would be constituted within three months of the request. If the issue that is the subject of the complaint is related to Union law, the panel would not pronounce itself and would direct the matter to the Court of Justice of the European Union as the ultimate interpreter of Community law.

Although the legal effectiveness of the procedure is limited and, above all, slow, it represents a gesture of firmness on the part of the Commission in the bilateral trade negotiation that remains open. Given the antecedents of Boris Johnson's political behaviour throughout this prolonged negotiation plagued by stunts, Brussels has not ruled out that it may be a new theatrical wink directed at the most intransigent sector of the Conservative Party before reaching a final commitment on the trade agreement under negotiation, which, to be concluded in the coming weeks, will require some renunciations with respect to its initial postulates (*El Confidencial*, 2020a).

Whether or not it is a stratagem in the final stretch of the negotiation, the reality is that the protocol on Ireland is a highly complex legal instrument that will require, for its

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<sup>5</sup> "This can only weaken the UK in the eyes of the world (...) our reputation as a country that sticks by its word will have been tarnished". John Major, Tony Blair, Gordon Brown and David Cameron have also spoken out against the bill.



correct application, not only the goodwill of both parties but also an exhaustive and rigorous application of the controls envisaged to avoid creating a black hole in the internal market of the Union. It is an ugly cloud on the horizon that threatens the future relationship that is finally agreed between the UK and the EU.

### 3. The trade agreement that would govern future relations between the UK and the EU

Although future relations between the two partners cannot be exclusively circumscribed to the commercial sphere, the future trade agreement will be the key to underpin the bilateral relationship that is established.

The EU does not have a single model for association with its trading partners. In fact, it is extremely flexible in the type of commercial relationship it establishes with third states. At present, up to five different forms of connection can be identified (Table 1): through membership of the European Economic Area, where Iceland, Norway and Liechtenstein participate; the European Free Trade Association, where Switzerland is located; the Customs Union Agreements, such as the one with Turkey; a Free Trade Agreement like the one in force with Canada; and the general framework established by the World Trade Organization.

Table 1.- Types of commercial relationship between the European Union and third States

Type of agreement	Countries	Characteristics
European Economic Area (EEA)	Iceland Norway Liechtenstein	<ul style="list-style-type: none"> <li>- Membership of the EEA implies access to the common internal market with free movement of people, goods, services and capital.</li> <li>- Despite not being member states, their participation is necessary to adopt around 20% of EU legal acts.</li> <li>- The Common Agricultural Policy and fisheries policies, the Customs Union, the Common Trade Policy, the Economic and Monetary Union, the Common Foreign and Security Policy, and justice and home affairs are outside the agreement, although these countries are part of the Schengen Area.</li> </ul>
European Free Trade Association (EFTA)	Switzerland	<ul style="list-style-type: none"> <li>- It participates in the European Economic Area through EFTA. This implies accepting European legislation, contributing to the Community budget and the jurisdiction of the Court of Justice of the EU.</li> <li>- Outside the Customs Union.</li> <li>- It is part of the Schengen Area</li> </ul>



		- No right to establish banks.
Customs Union with the EU	Turkey	<ul style="list-style-type: none"> <li>- Practical freedom of movement of GATS<sup>6</sup> goods on services</li> <li>- No rules of origin and reduced customs costs for most products.</li> <li>- EU regulations and standards checked at the border. Adoption of EU tariffs for non-EU trade. No influence on regulations or trade agreements signed by the EU with third States.</li> <li>- Trade in financial services as a third country.</li> <li>- Restricted movement of workers.</li> </ul>
Free trade agreement	Canada	<ul style="list-style-type: none"> <li>- Access to the single European market with very low tariffs. In general, goods are the least affected, but services have limited access.</li> <li>- Rules of origin and customs costs, with border controls to verify conformity with community regulations.</li> <li>- Trade in financial services: prudentially, under a third country regime. No automatic establishment of banks.</li> <li>- Possible movement of workers, not completely restricted.</li> </ul>
World Trade Organization (WTO)		<ul style="list-style-type: none"> <li>- Most Favoured Nation tariffs and GATS fees for services.</li> <li>- Rules of origin and customs costs.</li> <li>- Enforcement of the set of EU regulations and standards verified at the border.</li> <li>- Trade in financial services under third country regime.</li> <li>- No provisions for the movement of workers.</li> </ul>

Source: Vega, 2019:12 y 17; author's own list.

With such an example of flexibility, it is hoped that the UK can find a tailor-made fit in its future relationship with the EU, but this is not being easy or fast. Of course, the future agreement governing trade relations between the EU and the United Kingdom does not necessarily have to conform to one of the formulas described above and it is likely that, as was the case with Switzerland at the time, a custom fit is defined for this specific case.

<sup>6</sup> GATS: General Agreement on Trade in Services (1995).



Switzerland's situation (European Commission, 2019) is truly special, insofar as after rejecting its accession to the EU in 1992 in a referendum, the Swiss government tried to seek the closest possible link with the European Economic Area (EEA), except in those aspects that had provoked the rejection by the electorate. Consequently, the result of this negotiation, conducted in two phases, was the signing of ten bilateral treaties that regulate areas such as the free movement of people (Switzerland participates in the Schengen Agreement), air and road traffic, agriculture, public procurement and science. Switzerland contributes to the Community budget and is outside the Customs Union. It has a cooperation agreement in the repression of fraudulent financial activities but its banks do not have the right to establish themselves in the territory of the Union.

Undoubtedly, the touchstone of the future relationship lies in the UK's non-membership of the Single European Market. After leaving the Union, it left the EEA at the same time, which led to its withdrawal from the single market. Of course, it can join the EFTA and participate in the EEA through it. But in such a case, it would have to adopt European law, contribute to the Community budget and accept the jurisdiction of the Court of Justice of the European Union. All of which would imply returning to square one, but in worse conditions.

In any case, in view of the available options, the United Kingdom could achieve a status similar to that countries such as Norway, Switzerland, Turkey or Canada now have: outside the institutions and with a very limited capacity to influence the policy of Brussels. It will be a third country in the face of a commercial bloc that, until now, has managed to preserve its unity and its negotiating strength.

The British Government's aspiration is to reach a free trade agreement with the EU, similar to the one established between the EU and Canada. This was stated at first by the Government of Theresa May and has been confirmed by the Johnson Government, a proposal that has not been rejected by the Union. Trade negotiations began in March 2020, after the withdrawal was complete, and have been particularly difficult. It is a conventional international negotiation whereby each party tries to pursue interests that, in principle, are not convergent. The EU has managed to overcome, to date, the inherent difficulty of establishing a common negotiating position involving 27 states. These circumstances, present in all trade agreements signed by the EU, are responsible for the fact that the negotiating periods that have traditionally required this type of agreement before reaching its conclusion were particularly long. In the case of the Global Economic and Trade Agreement between the European Union and Canada, known as CETA (Comprehensive Economic Trade Agreement), it lasted seven years, and did not enter into force, provisionally, before 21 September 2017 (European Commission, 2017). It would be a truly unusual fact if the agreement with the United Kingdom could be concluded in just seven months, before the end of the transitional period.

The time pressure introduced in the negotiating process was a deliberate action by the Johnson Government, by not requesting an extension of the transitional period. If the objective pursued was to make Brussels' negotiating position more flexible in the face of the threat of a "hard Brexit", this negotiating strategy has not obtained the desired results. The negotiation remains stalled at a number of critical points on which no



agreement has been reached when there are barely a few weeks before the time limit available to close an agreement runs out.

The points where the greatest divergences are concentrated are the content of the future agreement on fisheries (the EU wants to maintain a situation as close to the current one while the United Kingdom aspires to impose an annual negotiation on licenses and volume of catches), regulatory harmonization (a common alignment of the respective regulations that would make it possible to reduce border controls) and what is possibly the central issue: the so-called level-playing field.

This expression refers to the preservation of fair competition under market conditions by preventing the United Kingdom from carrying out a kind of dumping that harms the single market. Brussels' fear lies in the possibility that the British economy could transform itself into a model based on low taxes and low regulation, lowering its environmental, social or labour standards and authorizing public aid to companies, in order to make unfair competition regarding European competitors.

Within the EU, companies cannot receive State aid so as not to distort competition, and they have to comply with demanding social, labour and environmental standards and maintain taxation in line with the rest of the European partners. Thus, the creation of an enclave across the English Channel, like a new Hong Kong with access to the European market, would break the domestic market.

The fear of this possibility was expressed by the EU in the Political Declaration on future relations with the United Kingdom (Declaration, 2019), a non-legally binding political document. It established the bases on which the future trade agreement would be negotiated, committing to establish "an ambitious, broad and balanced economic association" (point 17). This commitment is terribly difficult to materialize because it affects the very foundation on which the Brexit legitimizing discourse has been built: the recovery of lost sovereignty through full normative and regulatory capacity (O'Toole, 2020).

The conclusion of the trade negotiations has proven enormously difficult. It is not a dispute raised in diplomatic terms that allows the best possible agreement to be reached, satisfying both parties. Apart from its extraordinary technical complexity, the negotiation faces two strategies that are non-negotiable for the parties: the preservation of the internal market for the Union and the satisfaction of the expectations aroused during the Brexit campaign among the British population. The promises made by the Brexiteers, mostly false or impossible to fulfil, compromise not only the stability of the current government but the future strategy that the United Kingdom intended to follow after its withdrawal from the EU.

#### **4. The uncertainty of Global Britain as a future strategy for the United Kingdom**

Although the hopes of reaching an agreement at the last moment have not been extinguished, the feeling of disbelief in the political circles of Brussels and also among senior British officials with respect to the negotiating position of the Johnson Government



is perceptible (*El Confidencial*, 2020a). One last pirouette is expected, as happened in September 2019, that will allow the commercial negotiation to be closed in extremis. And for the same reasons, it is also feared that the British Government will subsequently fail to comply with the agreed commitments.

The United Kingdom sometimes looks like a prisoner running away from the prison that was holding him. The wish to achieve the desired freedom prevails over any other consideration, although in the attempt, the reputation and good name of the country that had been one of the most compliant European partners of EU law is tarnished (Mangas, 2020)<sup>7</sup>. Forty seven years locked up in the community “jail” may have made them overestimate their own capacities and also idealize the outside world where they intend to return to and which bears so little resemblance to that of half a century ago. In the midst of the geopolitical struggle between the Chinese and the United States, along with other lower-ranking powers, the possibilities of becoming an autonomous relevant actor are certainly limited.

However, Boris Johnson is not daunted by the challenge. In his first speech as head of government, he presented the idea of recovering the “natural and historical role” of the United Kingdom as “an entrepreneur, who looks outwards and is truly global, generous and committed to the world” (Johnson, 2019). This idea was invoked again by the Secretary for Foreign Relations, Dominic Raab, before Parliament at the time the withdrawal materialized (Raab, 2020). Thus, the narrative of a Global Britain that aspires to pass on the image of the country as a world leader was retaken. This idea was originally created as a slogan to counter fears that Brexit could lead the country to international marginalization. Enunciated as a great political project by Theresa May, it constitutes a kind of strategy to guide the British international image in the new stage that is beginning (Glencross and McCourt, 2018). Still, its conception and enforcement raise serious doubts.

One of the illusions that fuelled Brexit consisted of being able to free itself from the restrictions that the EU imposed on the United Kingdom in its relations with third States, which made it lose economic opportunities. Once the withdrawal is complete, the country will regain the freedom to negotiate trade agreements with the entire world.

Indeed, since 1 February 2020, the United Kingdom has been able to negotiate and conclude trade agreements with full autonomy, but the results achieved by its diplomatic efforts have been limited. The structure of British foreign trade, as is common to all Member States, is highly conditioned by its membership of the EU. 60% of its exchanges were carried out through community channels (11% directly with the Union and 49% through EU trade agreements). Due to its membership of the Union, the United Kingdom was part of around 40 trade agreements signed by the EU with more than 70 countries. Until the end of August 2020, British trade diplomacy had managed to transfer 19 of these agreements, so that they could be used from 1 January 2021 (Table 2). Together they represent 8% of the total volume of its exchanges (BBC, 2020b).

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<sup>7</sup> In 43 years (1973-2015), the UK was sued for breach of EU law before the Court of Justice 139 times. In 30 years (1986-2015) Spain was sued 244 times.





Table 2.- United Kingdom trade agreements that will enter into force on January 1, 2021 (August 2020)

Country or territory	Value of trade with the UK in 2018	Country or territory	Value of trade with the UK in 2018
Andean countries	£3.4bn	Liechtenstein	£146m
Caribbean countries	£3.7bn	Morocco	£2.5bn
Central America	£1.1bn	Pacific Islands	£163m
Chile	£2bn	Palestinian Authority	£41m
Eastern and Southern Africa	£2bn	South Korea	£14.8bn
Georgia	£123m	Southern Africa nations	£10.2bn
Israel	£4.2bn	Switzerland	£32.4bn
Jordan	£448m	The Faroe Islands	£252m
Kosovo	£8m	Tunisia	£542m
Lebanon	£762m		

Source: BBCb, 2020.

There are still pending negotiating agreements with countries that currently do not have trade agreements with the EU: the United States, Australia and New Zealand, among others. London's diplomatic efforts with such close political and cultural partners have so far not borne fruit. The expectations aroused in the United Kingdom by belonging to a shared past do not compare with the reality of a world market in fierce competition. As New Zealand's Deputy Prime Minister Winston Peters has stated, "the United Kingdom seems to be a bit rusty" and has forgotten to negotiate (*El Confidencial*, 2020b)<sup>8</sup>, which does not necessarily imply that agreements cannot be reached in the next few months.

The greatest achievement attained by British diplomacy to date has been the signing of a free trade agreement with Japan in September 2020 (*El Confidencial*, 2020c). The agreement, which is basically a transposition of the existing one with the EU, although London has insisted on highlighting that it goes further, represents 2% of British foreign trade and is expected to have a positive impact on British GDP of 0.07%, in the long run.

As it could not be otherwise, trade alternatives to the EU, although feasible, are not proving quick or easy to achieve for a diplomacy that has not faced negotiations of these characteristics for decades. Due to proximity, market structure and integration between

<sup>8</sup> "They have never had a test, so to speak. It's like entering Ashes [famous cricket competition between England and Australia] when you haven't played for 30 years; It is the same thing that is happening now to the United Kingdom".



the respective economies, the European internal market will continue to be, at least for the next decade, an essential factor for British prosperity. The paradoxical consequence of this reality is that only the signing of a trade agreement with the EU will be able to offset the trade damages for the United Kingdom arising from Brexit (Brakman et al, 2018).

In the event that this agreement with the EU cannot finally be concluded within the limited timeframe available, once the transitional period has expired, bilateral exchanges will take place, as of 1 January 2021, in accordance with the basic rules established by the World Trade Organization (WTO). This will imply applying tariffs to most of the British exports to the continent (obviously, the United Kingdom could do the same for Community products). It will also mean restoring merchandise controls at the border, which will imply customs saturation and, predictably, an increase in the delay in supplies. And the British service industry will also lose guaranteed access to the European market. All this in a context of economic recession aggravated by the COVID-19 pandemic, which has led to a historical drop in GDP of 20.4% in the second half of the year (*The Guardian*, 2020c).

The Government of Boris Johnson is trying to outline some guidelines to re-establish the position of the United Kingdom on the board of global power, but the Global Britain project will hardly be able to be the adequate strategy. In the first place, because it is contradictory to the very social bases that supported Brexit. A project that aspires to full integration in the globalization process collides head-on with the perception of threat that many British citizens feel when facing this opening to the outside (Gaston, 2020). Secondly, due to the lack of connection that underlies its conception with respect to the current international context, the UK will hardly be able to regain the predominant position occupied during its imperial past as a medium-sized economy in a world dominated by great powers and trading blocs. The UK cannot hope to become a commercial superpower on optimism alone (Saunders, 2019).

The material limits to aspirations embodied in the Global Britain project are easily evidenced in practice. Faced with the pressure exerted by the Trump Administration, the British government has not hesitated to join the US policy against China, limiting its access to the domestic market by prohibiting investments in strategic sectors such as the nuclear one or excluding Huawei from launching 5G in British territory (Sendagorta, 2020). While the fundamental British interest would lie in reaching a broad trade agreement with China, its strategic autonomy is conditioned by the geopolitical influence of the United States. In any case, the negotiating capacity of British diplomacy to conclude a trade agreement favourable to its interests with a power like China remains to be seen.

## **5. Provisional conclusions**

Although the process is still ongoing and the level of uncertainty about its outcome is considerable, some conclusions can be drawn on a provisional basis.



The first one has to do with the integrity and survival of the European Union. The confusion bordering on the chaos in which the UK has plunged will surely discourage any further attempt to activate Article 50 of the Treaty on European Union by another Member State. Still, while the British withdrawal does not trigger the dismantling of the Union, this should not hide the evidence that the EU needs to rethink its integration model in the face of the avalanche of challenges it faces. The *functionalist path* followed in the European integration process since its inception has yielded all possible results. The problems that we face exceed the partial technical decisions that can be made. The future of the Union only seems assured by initiating a new *federalizing path*.

To the long list of difficulties that afflict us, the threats to security at our external borders, geopolitical competition or the growing social and territorial dualization of the Union, it cannot be ruled out that a new and unforeseen problem is added: the future relationship with the UK. If the British withdrawal fails to satisfy the political and economic aspirations of British society, it will be thrown into a crisis whose effects will undoubtedly affect the Union. If, on the contrary, the Global Britain strategy succeeds in becoming a commercial and financial node in the global economy, the EU will have to be extremely vigilant to preserve the integrity of its internal market. It cannot be ruled out that the future relationship with the United Kingdom may evolve through conflicting channels that will make us direct competitors, if not rivals.

And finally, regardless of the commercial relationship that may be established between British and European Community, the last great paradox of Brexit will occur, in any case: to have started this traumatic, uncertain and divisive process to achieve an international, political, and commercial position, which, in objective terms, will be indisputably worse than at the starting point. It is ironic that the great hope that Brexiteers seem to embrace is to turn the United Kingdom into an enclave in the style of what Hong Kong was during its colonial era: an economy parasitic of a large market.

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