

The Elements of a New EU-UK Relationship

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Elements of a new EU-UK relationship

The purpose of this paper is to discuss some of the elements of a new EU-UK relationship that would reconcile, to the extent to which they can be reconciled, the interests of Ireland, the EU and the UK. This is done on the basis of features of the situation that seem probable. However, the paper is limited by the fact that the Leave campaign in the UK has never had a clear picture of what new arrangements they would try to make with the EU. Even more serious, some of the objectives of the Leave campaign are mutually incompatible. It will become clear, as it became clear when the European Economic Area Agreement was negotiated in the 1990s, that no completely satisfactory solution is possible.

The European Economic Area

It is convenient to begin this paper by discussing the European Economic Area (EEA) as a possible basis for a new arrangement, for several reasons. It is the arrangement that is closest to the present position of the UK, and therefore would minimise the changes involved. The terms of the EEA Agreement are clear in most respects, and can be discussed and analysed. The changes and additions that would be needed to adapt the agreement arrangements to the situation of the UK can be identified and considered. The EEA has now been in operation for twenty-two years and the experience can be looked at. Analysis of the changes and additions that might be needed to adapt the EEA arrangements to the situation of the UK is also useful because similar provisions might be needed if some other alternative were thought better.

The essential elements of the EEA are that the non-EU EEA States (Norway, Iceland and Liechtenstein) are in the EU Single Market, and that they are obliged to copy all the EU Single Market measures. The overriding aim of the EEA is to ensure homogeneity, that is, to ensure similar or identical laws in the EU and the EEA states. The Agreement is applied by the EFTA Surveillance Authority (ESA) and the EFTA Court, whose functions, although on a small scale, are essentially the same as those of the European Commission and the European Court of Justice of the EU.

The EEA is a free trade area, not a customs union, and the States negotiate their own external trade agreements. Norway makes a substantial contribution to the EU budget. The UK would be expected to pay more.

The EEA – unavoidable features

There are several features of any new arrangement based or modelled on the EEA that are unavoidable. First, the UK would have no vote or influence over any new measures that would be adopted by the EU. This arrangement is regarded by Norway as unsatisfactory, although Norway has a right to be informed and consulted.

The above is of course true of every alternative to full EU membership. However, it is important in the EEA because the non-EU states are obliged to copy and apply all EU Single Market legislation.

The second unavoidable feature is that the Agreement is applied, and when necessary enforced, by the ESA and the EFTA Court. It can be taken for granted that the EU will not agree to any new arrangement with the UK that gives the UK access to the Single Market without judicial enforcement. The EU has told Switzerland formally that judicial enforcement is a necessary element in the new arrangement between the EU and Switzerland, and it is impossible to imagine that the EU would not insist in this in its relationship with the UK. If the UK were to become a party of the EEA Agreement, the UK would nominate a member of the EFTA Surveillance Authority and a judge of the EFTA Court.

The UK has had sufficient confidence in the EFTA Court to submit the ‘Icesave’ case to the Court. However, submitting one specific matter to the Court is very different from agreeing to submit an unlimited number of cases to it in the future. The immoderate and unjustified abuse of the European Court of Justice during the Leave campaign does not suggest that the UK, will be inclined to accept the jurisdiction of any international court.

Even if these two features of the EEA were acceptable to the UK, new arrangements based on the EEA Arrangement would not be easily accepted by the EU. The UK would be far larger than the next largest EEA State, Norway. It is clear that the ESA is reluctant to enforce the EEA Agreement strictly against Norway. The EU will not easily be convinced that the ESA would enforce the new arrangement thoroughly against the UK.

The EEA Model – free movement of persons

The EEA Agreement guarantees free movement of persons, as well as the other elements of the Single Market – freedom of establishment and services, and free movement of capital. However, one of the principal reasons for the Leave decision was to enable the UK to restrict movement of individuals into the UK from the EU. At first sight, therefore, this seems to make any arrangements based on the EEA unacceptable to the UK, and that may indeed prove to be so.

There cannot be access to the Single Market without free movement of persons, which is one of the four pillars of the Single Market. The ‘four freedoms’ are inextricably linked. It is not merely that the EU would not allow the UK to obtain access to the Single Market without reciprocity on free movement of persons; if an effort were made to give the UK access to the EU

single market without freedom of individuals to go to the UK, the UK would be free to interfere with or frustrate freedom of establishment, services and capital simply by preventing the companies involved from bringing in the individuals that they wanted to employ. In addition, having the other freedoms without free movement of persons would be rightly regarded as giving rights to employers without giving corresponding rights to employees.

Broadly, immigration can be discouraged or controlled in three ways. Firstly, individuals considered undesirable can be indentified and deported. Secondly, social welfare benefits can be refused to immigrants. Thirdly, only immigrants with experience, skills, health insurance, qualifications or resources considered useful would be allowed in. The third approach, whatever the details, would involve a huge bureaucracy to screen all potential immigrants, and to distinguish between temporary visitors and potential immigrants. In any case, it would be necessary to identify refugees and asylum seekers. Under any version of this third approach, there would need to be some kinds of screening at an external frontier. In other words, any general restriction on free movement of individuals would necessitate border controls of some kind.

Two qualifications that might help resolve the impasse can be indentified. First, the UK might be allowed to adopt (and the EU might itself adopt) rules and procedures allowing individuals with known records as criminals or agitators to be kept out. This would be permissible under EU law, even if the rules were made stricter than they are at present. Secondly, the UK could restrict or refuse non-contributory social welfare benefits to individuals who had never sought jobs and were not seeking jobs. Provided that this was done on a non-discriminatory basis, this would also be permitted under EU law.

The Ireland-UK Common Travel Area

Whether or not the UK-EU arrangements are ultimately based on the EEA Agreement, free movement of individuals between Ireland and UK is crucially important to both parts of Ireland. If the UK is allowed to regulate the movement of individuals from the EU into the UK, the arrangements, whatever they are, will have to be applied on the land frontier of Northern Ireland, and on all sea and air routes between Ireland and the UK. It would be out of the question to allow free movement of EU citizens into the UK provided that they came through the back door via Ireland and Northern Ireland. Statements by Northern Ireland politicians that the Common Travel Area would be unaffected are plainly and obviously incorrect. In theory, immigration controls could be imposed on movements of individuals from the island of Ireland into the UK, but that would still involve inconvenience for all travellers by sea and air, as well as being unacceptable to residents of Northern Ireland who would be treated, in effect, as if they were not UK citizens.

Free Movement of Agricultural Products

When the UK is no longer in the EU, the EU Common Agricultural Policy (CAP) will no longer apply in the UK. The Leave campaign does not appear to have any plans for an agricultural policy that might go some way towards compensation for British farmers for the loss of the CAP. As a result, all that can be said at present is that Irish policy should be designed to ensure that EU agricultural products can be sold freely in the UK. However, it is at least possible that the UK will ultimately adopt a cheap food policy and import, for example, large quantities of beef from Brazil and Argentina. As the UK will not be in the EU Customs Union, and since the UK will presumably want to keep its hands free to negotiate trade agreements with, among others, Brazil, Australia, New Zealand and Argentina, it will be extremely difficult to obtain any agreement that would protect Irish exports of agricultural products to the UK from being undercut by cheap imports.

It might therefore be necessary for Ireland to try to ensure that, if agricultural exports to the UK were not protected from low cost competition by the new EU-UK agreements, and if the UK adopted a cheap food policy, the EU would take steps to compensate Ireland in some way, since Ireland would be much more seriously affected than any other EU Member State.

Fisheries

When the UK leaves the EU, UK fishermen will no longer have any automatic rights to fish in EU waters, or in any seas in which the EU has negotiated fishing rights for EU fishing vessels. In return, UK fishermen will have exclusive rights to fish in UK waters, which would be the Scottish sector, the Northern Ireland sector, the Western North Sea and the Channel, and part of the Celtic Sea. The UK will therefore need urgently to negotiate new fishing agreements with the EU, and Ireland's interests should be taken care of by the EU negotiators. It may be that Ireland will be able to claim rights to increased catches in the Irish part of the Atlantic, in view of the size of the Irish sector.

This will be complicated by the possibility that Scotland may become separate from the rest of the UK and that the Scottish sector of the Atlantic will remain in the EU. UK waters would then be limited to the North Sea, part of the Celtic Sea, and a small Northern Ireland sector between the Scottish and Irish sectors. This would make it even more urgent for the UK to negotiate fishing rights in the EU and elsewhere, but the UK would be doing this in a weak bargaining position.

Financial Services

When the UK has left the EU, the financial services industry in the UK will no longer be subject to EU rules, and the EU rules will need to be replaced by UK measures. The Leave campaign has suggested that this would allow the UK financial services industry to be free from constraining EU requirements, and it will therefore be able to become more competitive. However, it is certain that many of the existing EU rules will have to be replaced by UK measures with broadly similar aims and effects.

Even more importantly, the UK will be forced to choose between seeking to maintain mutual recognition of UK and EU requirements ("passporting") by imposing requirements similar or identical to EU requirements, on the one hand, and giving the UK financial services industry a competitive advantage by imposing less strict requirements, on the other. The two objectives are not compatible.

The Swiss Model

It has been suggested that the UK might negotiate arrangements similar to those of Switzerland. These are, in brief, a series of more than one hundred and twenty specific agreements. However, this seems to be ruled out, for several reasons.

First, the EU has told Switzerland formally that the EU is not prepared to allow the existing agreements to continue. The overall situation is complicated, inefficient, untidy and ineffective. The EU will insist that they are replaced by a single comprehensive agreement, which must include judicial enforcement. The EU has suggested that Switzerland should join the EEA.

Second, the Swiss agreements do not deal with financial services, which are extremely important for the UK. Neither do they deal with agricultural products.

Third, the Swiss-EU agreements provide for free movements of persons. If the UK sought to copy the Swiss agreements, the UK's wish to regulate immigration would make it impossible to copy the Swiss agreements without fundamental modifications.

In short, the 'Swiss model' is not really a viable alternative to the EEA or "Norwegian" model for the UK.

A Free Trade Area

The Leave campaign suggested that the only thing needed would be a free trade area. For goods, that would mean no tariffs or quantitative restrictions. However, for free trade in services, some harmonisation of legislation is needed, to make mutual recognition possible. There would have to be similar rules about public contracts, and controls on State subsidies. It is not possible in a modern economy only to have rules on tariffs and quotas. Special rules would be required for agricultural products. Even for trade in goods, border controls of some kind would be needed to apply rules of origin.

It can therefore be assumed that if the UK wished to negotiate some kind of free trade arrangement, the result would be very similar to the EEA Agreement. It can also be assumed that, in view of the size and importance of the UK and the comprehensiveness and complexity of the arrangements, the EU would insist that a judicial tribunal would be needed to interpret and apply the rules. In short, it would be much simpler for the UK to join the EEA.

Police and Judicial Cooperation

Agreements between the EU and the UK would be needed to replace the EU police and judicial cooperation measures that now apply in the UK - that is, those measures from which the UK has not opted out.

There are no obvious reasons why these arrangements would cause difficulties. They might need to be supplemented, as at present, by bilateral Ireland-UK agreements.

General Comments

It is essential to remember that Ireland should not suggest arrangements that are unlikely to be acceptable to the other EU Member States. Ireland will no doubt do everything possible to find a reasonable solution for the UK in the situation that the UK has created for itself, but Ireland should not alienate itself from the EU States for the sake of the UK. In this context, the report that Ireland has already said that it will oppose further economic integration is unfortunate.

Whatever the position of the UK may be, UK companies will have some rights to establish themselves in the EU and, having done so, to get all the benefits of EU law. The EU negotiators will be aware that EU companies will not necessarily have corresponding rights in the UK, and will try to insist on arrangements providing substantial reciprocity.



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