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WHY A "SOFT" BREXIT IS NOT FEASIBLE

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IN DISCUSSIONS ABOUT BREXIT, analysts and political pundits tend to presume that negotiations on a new framework for the relationship between the European Union (EU) and the United Kingdom (UK) will revolve around a compromise that would allow the UK to limit the free circulation of EU workers, while maintaining access to the Single European Market (SEM), especially for services, more or less under the current rules. A group of highly reputed European personalities — Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff[1] — have gone as far as to propose a Continental Partnership (CP), in which the UK would not only be able to limit the free movement of persons, but it would also have a seat in a "Council" in charge of legislative coordination between the UK and the EU with the power to propose amendments to draft European legislation (although the European Parliament would not be obliged to accept them: thank you!). The more time goes and issues are dissected, the more I grow convinced that an agreement on those terms, and indeed any general agreement granting the UK access to the SEM will prove impossible.

Indeed, the SEM holds a unique place in the panorama of global regulatory models in that it ensures the free circulation of goods, services, capital, and persons based on the fundamental principles of *mutual recognition* of national rules and *equivalent protection* by the national legislation of member states. When national rules are found not to meet the requirement of equivalent protection[2] — for example, in the protection provided on the safety of a specific product or the qualifications of a professional seeking to operate in a EU country different from its country of origin — a member state is entitled to restrict free circulation. In this event, the

[1] Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram Wolff, "Europe after Brexit: A proposal for a continental partnership", Bruegel, September 2016.

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

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European Commission would propose legislation to raise the minimum mandatory protections so as to reestablish the conditions for free circulation. In order to function, this system relies on elements of a true constitutional order. These are, firstly, the supremacy over national legislation of EU rules in areas of Union competence and their direct effect within national legal orders, so that those rules become immediately applicable in the relations between private agents within the SEM, including in domestic court proceedings; and, secondly, the existence of a supranational system to ensure the correct application of the Treaties and Union law, grounded on the European Commission's role as the guardian of the Treaties and the final say of the European Court of Justice (ECJ).

This is the context in which the question has been raised as to whether it would be possible for an international treaty with a third country (i.e., the UK after exit) to grant individual agents from that country free circulation within the SEM based on EU rules of mutual recognition and equivalent protection, while limiting the free circulation of EU citizens towards that country. For the EU, this would be equivalent to introducing a limitation on the rights conferred to its own citizens by the Treaties, in order to grant (equally partial) free circulation to nationals of a third country that is unwilling to recognize those rights. There is little doubt, in my view, that free circulation rights represent an inseparable and unitary set of rights that can't be traded within an international agreement with third countries. Under Article 3 of the Treaty on the European Union (TEU), the common area of freedom, security and justice is a central aspect of EU citizenry and forms an inseparable set of political rights.

Therefore, I find especially misleading, in this context, the argument whereby demands to limit the free circulation of workers are also arising within many a member state of the Union, and therefore Brexit would offer the occasion to revise those rules for the Union as a whole. As I have argued elsewhere, the pitfall in this argument lies in confusing the Schengen Area and the free circulation of EU citizens.

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

Many ongoing discussions, and tensions, between the member states in the European Council are centered on the issue of the effective control of the common external border against migrants from third countries, terrorists, drug traffickers, and so on. The condition for saving Schengen from oblivion is re-establishing effective border controls vis-à-vis third countries. This was successfully carried out on the eastern border by closing the Balkan route to migrants, but it has yet to be achieved on the southern border. France and Austria are threatening to reintroduce border controls because they do not want to take migrants who land in Italy and whom Italy would like to see move north. In this respect, it can be said that while Schengen also has an economic dimension, it is a 'political' project, of which the UK has never been part.

The principle of the free movement of people, on the other hand, is an integral part of the Single Market and applies to all EU countries, irrespective of whether they are part of Schengen. By and large this right is not called into question in the EU. Moreover, leaving aside for a moment my previous argument on the impossibility to separate the fundamental freedoms granted by the TEU, it must also be recognized that without the free movement of people, even the freedom of establishment and the freedom to provide services across borders would be

nullified. The City is well aware of this – and for this reason has advocated maintaining free circulation for qualified people after Brexit, without which their ability to operate on the continent would be crippled.

However, free circulation of workers is not the only obstacle to granting the UK access to the SEM, and not even the most intractable. Indeed, the important question is another one: once the UK leaves the Union becomes a third country, based on what principles would its products and operators circulate within the SEM and, obviously assuming full reciprocity, would EU products and services circulate within the UK market? Certainly, application of the principle of equivalent protection would not be possible without the surveillance and adjudication powers of the European Commission and the ECJ. And the UK would claim similar powers of surveillance over products and services coming from EU countries. We are all well aware that a main motivation behind the Brexit vote was precisely to reestablish the full sovereignty to the Parliament in Westminster and national courts, over EU legislation and the ECJ. But if the UK cannot accept the jurisdiction of the ECJ, and EU operators were unwilling to accept the jurisdiction of UK courts, then free circulation based on mutual recognition of rules could not function.

What would happen, moreover, once the European Council and Parliament, on this side of the Channel, and the UK Parliament on the other side of the Channel, started to modify their rules for market access independently, and the rules started to diverge? Would it remain mutually acceptable to grant market access on the basis of increasingly divergent rules? Is it conceivable that an international agreement could limit the ability of domestic legislative institutions to change domestic rules, in response to fresh and diverging demands for public protection in the two jurisdictions?

The answer quite obviously is NO, as is confirmed by the fact that no international agreement of this sort have ever been signed anywhere in the world. International treaties granting market access to a foreign market based on the home country's rules simply do not exist. In order to enter a country's market, it is necessary to respect that market's access rules.

This is indeed a constant feature of all treaties granting access (generally or selectively) to the SEM in place between the EU and the European Economic Area, Switzerland, or even Ukraine (if it is ever ratified). All these treaties are substantially based on the acceptance of European regulations and the final jurisdiction of the ECJ. It is not by coincidence that the Swiss government is bending over backwards to not execute the referendum results on limiting the immigration of EU workers to Switzerland — for fear that this would cancel by a stroke of a pen more than 120 sectorial agreements concluded between the EU and Switzerland over the past 40 years.

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

In conclusion, the notion of a "soft" Brexit, characterized by the maintenance of current regimes governing the free circulation in areas handpicked by the UK, while removing the Commission's and ECJ's control over the respect of the Internal Market rules, is completely baseless. The UK will simply "drop out" of the SEM, and then will have to seek agreements on selective and reciprocal access to certain SEM market segments – say financial services – certainly without "passporting" privileges, since these are predicated on full acceptance of EU fundamental freedoms under the ultimate control of the ECJ.