The Red Cell

Mission Unaccomplished:

Reviewing the EU Council's Negotiating Mandate

October 2020

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Introduction

On 1 October 2020, Commission President Von der Leyen announced, in a pitstop press conference, that she was initiating legal proceedings against the UK. its crime was daring to include a Parliamentary emergency break clause in its Brexit domestic legislation. To be precise, and the wording was notable, she referred to the legislation "as is", allowing a measure of latitude you might need hiking boots to explore.

No breath was expended, however, on exploring the rationale behind why the UK Government might genuinely feel unsafe in the arrangements as they stood. So, as we approach an eschatological moment in the Brexit talks, now seems an appropriate moment to consider the declared objectives of the EU negotiators that might generate legitimate concerns.

Of course, there is the backdrop – the dire track record of the EU itself, from stitching up John Major over his Social Chapter opt out and then David Cameron over his Eurozone bail out opt out. Then there is the methodology itself, from Barnier demanding the Backstop be locked in first before discussing anything else (the Sequencing blackmail scandal – a stance which risked an instant 'hard border'), to the first draft text listing transition ending at some point before the end of the year "20XX".

But let's instead simply focus in on the cornerstone of the EU's negotiating mandate, specifically what Team Barnier were instructed to get out of the negotiations and how they set about the mission. What can they tell us about the EU's objectives out of Brexit, and how much the UK should trust the EU institutions? The answer is disconcerting, and moreover reveal that Brexit-scuppering British MPs in persistently undermining their own Government have been hacking the keel from under their own boat.

The mandate

Council Decision 2020/266 of 25 February 2020 authorised the opening of negotiations for a new partnership agreement. This was the most comprehensive document generated so far, a far cry from the original June 2017 Terms of Reference that came in at under 400 words, and the meagre official script nudges of similar length that would infrequently emerge from updates to the Council.

The negotiating instructions are set out in a lengthy Addendum, which makes the original 'mission statement' appear casual and ad hoc. But they are in parts incoherent, even contradictory – entirely thus in keeping with a set of instructions delivered by committee.

The full story behind the EU side of the negotiations will likely never be told. The texts that end up in the EU's Florence archives are likely to be as sanitised as the office hand gel, and it will take years for various key political figures to spill occasional beans in their memoires – and even then well short of Yanis Varoufakis levels of Open Sauce Heinzery. Nevertheless, from what is in the public domain we can sketch an initial picture.

The problem that clearly arises from the Mandate is that it has generated gaps the negotiator is able to interpret, as well as conflictions that he has been able to deploy as an anchor against pursuing Free Trade options. For context, take the primary text. The Council notes (my emphasis) that,

> "Article 184 of the Withdrawal Agreement provides that the Union and the United Kingdom are to use their best endeavours, in good faith and **in full respect of their respective legal orders**, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period."

Two important instructions here emerge from almost the same breath. The first implicitly recognises that the UK has a different legal tradition and democratic framework. This is an acknowledgement that has been signally forgotten over UK seeking domestic safeguards from the Commission seeking to force EU rules on the internal UK market. The second is a clear instruction to get the deal done within the set timeframe. Yet two explicit deadlines, over Fisheries and the Services Deal, have signally not been pursued by the Barnier Team with the called-for level of energy.

But let's reflect on the key document, the mandate annex, and its instructions.

Cultural objects

If you are looking for a hint of the lack of good will contained within the negotiation mandate, look no further than Paragraph 33. This states that,

> "The Parties should, consistently with Union rules, address issues relating to the return or restitution of unlawfully removed cultural objects to their countries of origin."

It transpired that when the negotiating objectives were being discussed, Greece, reportedly with Italy's backing, inserted a clause demanding the Elgin Marbles back.

While clearly negotiating mandates are set to protect national interests, the inclusion of this into an FTA when not even covered in the existing EU treaties is absurd, particularly for a country that is particularly engaged in protecting global heritage at risk (this author successfully proposed the policy behind establishing a Cultural Protection Fund in 2016; and the British Museum which houses the Marbles itself is heavily engaged in outreach with counterparts in for example Iraq). The objective does perhaps serve some other Member States' interests in seeking to undermine not simply UK museum holdings (by peculiarly setting precedent over their own), but also the auction market. In the context of the shenanigans that underlay the EU's droit de suite (Artists' Resale Rights) legislation, as a serious contribution to generating a lasting agreement based on mutual trust, it falls dramatically short.

State aid rules

The mandate also rather presumptuously demands in paragraph 96 that,

> "The envisaged partnership should ensure the application of Union State aid rules to and in the United Kingdom."

Note that this expressly demands EU rules be transposed inside the UK's own internal market, and not even just inside Northern Ireland. The EU-Canada system by contrast allows for notification and then challenge through the panel system. The UK-Japan system does include a preventative element, but only to stop a future "British Leyland" scenario developing of authorising unending payments. For context, the author remembers a conversation with the late Lord Marsh, who jocularly noted his achievement as head of British Rail was to cut its annual losses down to a mere one billion. So some framing of policy here in an FTA can be beneficial, particularly when at the last election there was a potential Marxist Prime Minister, and the Conservative Party has itself still not determined if it is going to run a subsidy policy to support 'Red Wall' seats. But exporting rules and controlling their oversight is a different matter.

We might here rather usefully move to the other side of the windowpane. In August, the EU signed off on a €5 billion special instrument, the "Brexit Adjustment Reserve", to counter unforeseen and adverse consequences in Member States in sectors that are worst affected by Brexit. This is but the latest example in a series of the EU using its core budget to generate subsidy for industry. When the Eurozone Crisis hit, while considerable focus was placed on the extra money being raised for special support funds, the EU also quietly adjusted its existing Regional and Social aid budgets to provide faster direct subsidy support to East Germany and Southern Europe, shunting funds from one existing budget to another as 'shock relief'. The UK might correspondingly as legitimately demand an equivalent veto right on the internal policy of the EU as far as its own, inherent, subsidy structures operate. For the EU operates a Cohesion Fund, a European Agricultural Fund for Rural Development (EAFRD), a European Maritime and Fisheries Fund (EMFF), a European Regional Development Fund (ERDF), and a European Social Fund (ESF), with a budget of €454 Billion covering the period 2014-2020. More than that; it extols them.

The EU's transitional bail-outs budget line has been a case of longstanding notoriety. The UK, tellingly, very rarely applied, even while the money kept on flowing into German energy coffers. Germany, and to a lesser extent Spain and Poland, have been late in weening themselves off subsidising coal. Indeed, the EU has been very slow in encouraging this, since the core treaties have allowed for protectionism in sectors considered of national interest. Even the moves to transition industry under the 'green agenda' see new forms of subsidy being drawn in on a massive scale. Germany is throwing €40 billion in structural aid at its coal-producing regions over the next 18 years, while being in receipt of major grants from the EU's Research Fund for Coal and Steel to help plan this. It is also set to receive perhaps a quarter of the EU's own €40 billion Just Transition Fund matched decarbonisation grants. Yes, Barnier has the cheek to directly accuse the UK of potentially wanting to subsidise energy production.

The scale is massive but what should also be of concern is the scope. The range of issues that has come up before a Commission veto, looking just at what has been on the agenda in the last few weeks, covers everything from managing beaver damage through to policy on youth hostels – via Cardiff's clean bus technology project and the UK's new Trade Credit Reinsurance Scheme.

However, the EU attitude is perhaps most clearly demonstrated from how it has considered UK assets as its own. That's not just in terms of appropriating the UK share of EU property (variously assessed at anywhere between €4bn and €15bn), but in its approach over unambiguous investments compared with liabilities. The UK will get its EIB money bank on its own timeframe, shorn of any profit, and exposed to fresh liabilities. WA150.4 meanwhile states that existing EIB liabilities will remain. The text suggests that, under WA150.5, this is supposed to be limited to current capital and would stand as a medium term liability, which may imply it would be in the order of about €3bn, but frankly the limiting definition is less elastic than blue tack. Indeed, under WA140.5, the UK taxpayer

will not know until 2029 what the end bill will be. Under WA150.8 the actual UK liability remains classified. In this wider financial context, UK concerns about letting the self-serving and legally inventive European Commission anywhere near direct oversight of the UK's spending plans are entirely justified.

Labour and social protection

The Mandate seeks to keep EU Social Chapter costs weighed down on UK industry even after leaving the EU, hindering prospects for Britain gaining competitive advantage in any market, since these are not simply intended (nor could they practicably be designed to cover) just work done on exports into the EU market.

Paragraph 101 declares that the impact of the laws, regulations and practices should be no less than that applied at the end of 2020, which at least does not make this a demand for dynamic alignment – but it does preclude any changes that businesses might want to see happen in short order from happening, ever. The areas covered are "at least the following areas: fundamental rights at work; occupational health and safety, including the precautionary principle; fair working conditions and employment standards."

This is already an encompassing list. However, para 109 then goes on to say that it should include "provisions on adherence to and effective implementation of relevant internationally agreed principles and rules. This should include conventions of the International Labour Organisation (ILO) and the Council of Europe European Social Charter." This does now imply a dynamic interpretation, because the EU's Social Chapter objectives are a subjective and developing interpretation of the Social Charter set into a legal framework, meaning that the Commission could conceivably demand as it introduces new legislation that the UK ought to follow suit. Para 110 continues, inserting a ratchet effect: "where the Parties increase their level of environmental, social and labour and climate protection beyond the commitments in [listed articles], the envisaged partnership should prevent them from lowering those additional levels in order to encourage trade and investment."

Given the track history of the EU not just overriding John Major's opt out in Social Chapter matters, but applying supremely spurious Health and Safety references to make it a QMV issue, this is an area where the UK has clear sight of a track history of bad faith by the EU even where there has been a solid and supposedly unambiguous treaty defence mechanism. Moreover, the CJEU has specifically played along with the deceit.

Taxation harmonisation

Competitive advantage relates also to the prospect of the UK 'undercutting' high tax EU counterparts. The latter-day defence used in EU circles is to point to evil multinationals and tax-dodging (despite this being a mechanism the EU has itself signed off on in the past in order to support regional and 'Poor Four' development).

Paragraph 100 states that the envisaged partnership "should also ensure that the United Kingdom reaffirms its commitment to the Code of Conduct for Business Taxation." This is a suspicious demand. The Code is not even a legally binding instrument for EU states themselves, so other than generating an aspirational and unenforceable vaguery of the kind the EU has been declaring of late it does not do, it is unclear what the force of such a statement would carry. This is all the more striking

as the concept was introduced in the first place to facilitate rolling economic alignment by the future Eurozone countries – ie not the UK.

Environmental protectionism

If it's not 'unfair' tax competition or 'unfair' business competitiveness, the default EU excuse to hamper your competition is by trying to export your own environmental costs. Unsurprisingly, this is a trick included in the text too.

Paragraph 103 demands that the same cut off baseline happens for environmental legislation as for Social Chapter legislation, with a 2020 lock in a big list of fields including Climate Change. Into this is inserted the demand that the UK still applies the controversial precautionary principle (i.e. risk management is skewed towards acting based on possibility rather than balance of evidence). Para 106 adds that the UK ought to maintain a system of carbon pricing, notwithstanding how vastly discredited EU carbon policy has become, of "at least the same effectiveness and scope".

We'll review Michel Barnier's handling on his mandate shortly, but it's worth here contextualising the strategy with some comments he made in his Dublin speech on 2 September. The EU's head negotiator said,

> "I noted with interest a recent speech by the Chief Executive of the Environment Agency for England, Sir James Bevan. He suggested that, after Brexit, water quality standards for English rivers, lakes and beaches should be less rigorous than under the EU's Water Framework Directive. Of course this raises major environmental and health concerns."

There is no "of course" about it. Barnier's off-hand, decontextualised and flippant comment is intellectually dishonest, and telling for it. What Sir James Bevan in fact said was that the directive was "a candidate for thoughtful reform". Regulators may need to focus time and resources on indicators that might not make much difference to actual water quality, Bevan said, and some rivers in urban settings would never achieve all criteria because they could not be restored to their natural state.

His actual speech, rather than the one Barnier sought to redraft, was in favour of regulation but against excessive regulation. This perhaps hit a nerve with a member of the Commission to blame for such bad law in the first place. Sir James' sin was to note that, "Good regulation protects people and the environment from harm."

> "What does good regulation look like? It regulates the right things in the right way to produce the right outcomes."

He continued,

> "As they teach you at Harvard Business School, the main thing is to make sure that the main thing really is the main thing."

He went on to cite a specific example of the UK regulator not following the letter of the EU regulation and building a new waste plant but supporting farmers not to pollute in the first place. And critically, not that you can tell this from Barnier, Sir James went on to say, "the WFD is not in my view a candidate for repeal – because it has driven a lot of improvement in our waters – but it is a candidate for thoughtful reform to deliver even better outcomes."

> "I am all for doing that innovative thinking, including about which bits of inherited EU law we should keep and which we should change. If changing the law will allow us to regulate better and achieve higher environmental standards, we should always be open to that. Sometimes it will and sometimes it won't."

The speech is something you have rarely heard until Brexit from civil servants and quangonauts. There is a simple reason for that. Unilaterally fixing bad gaffes that sit within EU legislation has long been what Whitehall calls "out of scope"; a candidate for reform that once spotted you have to bin straight away because the fact of EU membership alone prevents any change. Brexit of course alters that, but only if the European Commission's meddling fingers are kept out.

Sir James' speech is extraordinarily informative for two reasons. It shows that even among the familiar community of red tape champions and gold plating polishers, some people at senior levels at Whitehall and the Quangocracy do see the value in and the opportunity for considered reform, and are up for constructive meaningful change. Secondly, it demonstrates that the EU negotiators see it as a real threat, perhaps even as a personal indictment on the failings of their own system and are prepared to do anything to stop it including lying.

Fisheries

Apparently, everyone except continental professors of EU Law admits that the CFP was a stitch up, misapplying treaty clauses on fish catch so as to create access into the rich territorial waters of accession states for the EEC's Founding Six. That politically fuelled ambition remains in the negotiating mandate, which sees access to stocks as an acquired right to be protected rather than reconsidered in the context of the default in international law.

Under paragraph 86, a mechanism for the "management of shared fish stocks" should be considered as part of the economic agreement. Para 88 states that "the objective of the provisions on fisheries should be to uphold Union fishing activities. In particular, it should aim to avoid economic dislocation for Union fishermen that have been engaged in fishing activities in the United Kingdom waters." This at least has the merit about being blunt. Para 89 declares the target should be to "uphold existing reciprocal access conditions, quota shares and the traditional activity of the Union fleet", which then "can only be adjusted with the consent of both Parties". Para 90 then directly links quota to other areas of the trade agreement, though notably does not interdict an FTA being reached if the UK refuses to budge a nautical mile, though the terms would be less developed. This will be an important provision in the weeks ahead.

Contrast that with Barnier's comments in Dublin on 2 September:

> "We fully understand and respect that the UK will become an independent coastal state, outside the Common Fisheries Policy. But we will not accept that the work and the livelihoods of these men and women be used as a bargaining chip in these negotiations."

This is precisely what he is asking for in the talks on fisheries and is precisely what he is prepared to do with respect to every other aspect of the talks, relating to jobs in every other trade and transport sector.

Barnier might here have picked more an audience more judiciously than the Irish, who have been just as long-suffering under the CFP as UK fishermen have. Moreover, past British Governments have even historically underused their allocations in the Irish Box in order to help Dublin out.

In his speech to the EESC on 10 June, Barnier though had this to say;

> "Fishing, for which we want a fair solution, linking access to water, and access to markets. And I repeat, there will be no trade and economic agreement without agreement on fisheries or on the level playing field"

This exceeds the mandate we saw set above in Paragraph 90, which talks of fisheries terms merely "guiding the conditions" of wider trade terms. Similarly, in his speech of 23 July where he declares "any agreement cannot lead to the partial destruction of the EU fishing industry" allows for zero scope for negotiating merely reduced access. We might recuse Barnier as being subject to different pulls from member states on this issue; what we can't excuse is the EU collectively blaming the UK for trying to fix the CFP, as is completely its right under the defaults of international law, and Barnier threatening to withhold any agreement on trade, and then blaming member states themselves for his own mishandling of the Mandate.

Incidentally, the EU became a party to the International Convention on the Law of the Sea (UNCLOS) which sets out the international default over territorial waters on 1 April 1998, and of its Straddling Stocks agreement on 19 December 2003. This latter was preceded by a letter (A/CONF.164/L.50) apparently challenging the legality of the international law in question and suggesting it would refuse to go along with it; the implications given that member states were signing up to it are, in retrospect, both topical and extraordinary.

Human Rights

Paragraph 118 states that the JHA elements would be automatically suspended if the UK either denounced the ECHR, or simply amended the Human Rights Act 1998 "to abrogate domestic law giving effect to the ECHR, thus making it impossible for individuals to invoke the rights under the ECHR before the United Kingdom's courts." The text here is muddled but serves to deter any UK Government from seeking to fix the failures of Human Rights law by repatriating it and placing it within a UK Bill of Rights and Obligations, as has been Conservative Party policy in the past.

As a point of reference, MEPs pushed on putting a human rights clause into CETA (despite Canada being a massively liberal country). Canada is merely an observer at the Council of Europe and its courts note, but do not adhere to, ECHR case precedent. By contrast, the EU did not push the human rights topic with the EU-Singapore deal, and has simply called for 'progress' when signing other trade treaties with countries of some human rights concern. One is left with the impression that this is an EU area of political freeloading and grandstanding, in this instance involving a profound ignorance of, or disinterest in, genuine problems that require fixing.

Equivalence

Mutual recognition of standards – quality controls, professional qualifications, or trade group certification – would address many of the major obstacles arising from Brexit. It looks like a particularly obvious way to handle transition, by setting up a process to manage divergence over time. But it also removes powerful bureaucratic levers and hinders protectionism; and from that observation, it's quite easy to work out who its supporters and opponents are.

The Mandate itself is permissive but underdeveloped, and therefore leaves the door open for Barnier to swerve it. Paragraph 2 says that the partnership should cover trade and economic cooperation. Para 44 allows for either side to introduce safeguards "for preserving financial stability, market integrity, investor and consumer protection and fair competition," adding that any agreement should respect the Parties' regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest, plus a further "prudential" safeguards get out. This ought to rule out the UK having to follow any acquis, incidentally.

Then comes the important declaration on Financial Services: "The key instrument the Parties will use to regulate interactions between their financial systems will be their respective unilateral equivalence frameworks." We have still to see that even being mooted from the Barnier side, however.

In para 46, the EU side are instructed to unilaterally generate equivalence measures, presumably on the basis of whatever the Commission feels is of sufficient interest to put on the table. This is a peculiar mandate for a team sent to arrange an FTA with a country currently aligned to EU rules.

What might we make of this instruction from the Council? It is unambitious. It reflects the longstanding lack of will (and indeed bad faith by some parties) who have been happy to develop the Single Market agenda in Goods while never chasing it in Services, although it too is one of the Four Freedoms. A BIS White Paper from just before the referendum noted, "Where the single market is most obviously failing to fulfil its purpose is in services. Services make up 70% of Europe's economies and generate over 90% of new jobs, but account for only 20% of intra-EU trade. Uncompetitive services markets are the most significant driver of the EU's productivity gap with the US." Or we might consider the ECIPE paper What is wrong with Europe's single market? from 2016, which suggested, "Europe's Single Market is in many ways an illusion – it exists only nominally. There are substantial barriers to cross-border exchange and the Single Market is riddled with uncertainty", going on to explain, "The obvious example of the incompleteness or the "un-singleness" of the Single Market is the services sector."

The unhappy lesson from this is that if the EU side has never stuck up to its side of the bargain over the Single Market in Services, we shouldn't do the EU any special favours now in the goods sector in which it enjoys so substantial a trade surplus.

The Barnier interpretation

Paragraph 13 of the mandate separately says that "The adoption by the Union of adequacy decisions, if the applicable conditions are met, should be a factor for fostering cooperation and exchange of information." At least on some levels, such as data protection, there is an allowance that UK management and rules could be trusted. So how did Michel Barnier address this issue; as a opportunity, or as a barrier?

Well, it turns out that Barnier has consistently complained about the threat of the UK undercutting standards, predicated on unevidenced premise and general assumption – even as he began openly predicting the UK would never become a "Singapore on Thames". One specific complaint was over unspecified failures by UK negotiators to provide safeguards for policing data, by which he presumably meant simply not allowing the CJEU unilateral oversight.

Particularly telling, he has a track record of criticising the prospect of even of the mutual recognition of qualifications, which he expresses as a benefit of the Social Market that should come at an unspecified accompanying cost. This is an extraordinarily protectionist stance given that, as he himself admits, the principle is recognised through the Council of Europe, and is being pursued across several initiatives in that forum involving EU member states.

In his Vienna Speech of 19 June 2018, at the EU Agency for Fundamental Rights and aligned with his audience's priorities, he stated,

> "our future relationship with the UK will need to be based on strong safeguards on fundamental rights, data protection and dispute settlement."

He continued to insist that,

> "the UK's data protection standards will therefore have to remain in line with ours and confirmed by an adequacy decision from the EU."

At a speech in Lisbon in front of the International Federation of European Law (FIDE), on 26 May 2018, he again played to his audience;

> "You are EU law experts, and you can see how the UK's ideas pose real problems: Who would launch an infringement against the United Kingdom in the case of misapplication of GDPR? Who would ensure that the United Kingdom would update its data legislation every time the EU updates GDPR? How can we ensure the uniform interpretation of the rules on data protection on both sides of the Channel? The United Kingdom needs to face up to the reality of the European Union. It also needs to face up to the reality of Brexit. […] And, as indicated in the European Council guidelines, the UK must understand that the only possibility for the EU to protect personal data is through an adequacy decision."

The tenor shifts even within his own speech, from hardline to permissive. Does Barnier himself have an idea what he is aiming for? After all, the Commission has signed off on adequacy arrangements for Uruguay and Japan, and yet he is sounding as if it is an impossible hurdle intended with universal application.

It is perhaps not so surprising then that if Council seems to have had to subsequently grip him in 2020. Para 20 of the Mandate clarified,

> "The envisaged partnership should include appropriate rules of origin based on the standard preferential rules of origin of the Union and taking into account the Union's interest"

Yet in his speech to the EESC of 10 June, Barnier still focuses on the more philosophical second part of that instruction and drops the first. Here he is talking rather of Brexit providing an opportunity not of securing trade but to damage a competitor;

> "As it prepares to leave the Single Market and the Customs Union, we must ask ourselves whether it is really in the EU interest for the UK to retain such a prominent position. Do we really want to consolidate the UK's position as a certification hub for the EU, knowing that it already controls some 15%-20% of the EU certification market? Do we really want to take a risk with rules of origin that would allow the UK to become a manufacturing hub for the EU, by allowing it to assemble materials and goods sourced all over the world, and export them to the Single Market as British goods: tariff- and quota-free? Do we really want the UK to remain a centre for commercial litigation for the EU, when we could attract these services here?"

He continues, asserting bluntly as a seeming nod to Para 20, “this is simply not in the overall long-term political and economic interest of the European Union.”

Barnier has dropped the mandate of mere negotiator and is asserting himself as the guru of EU trade theory. If there is a tipping point issue where the Council is pushed into demanding Von der Leyen take personal charge to get a pragmatic deal done, this might be it. But there are other candidate areas.

Transport

The negotiating mandate is quite clear on the deal it wants to reach in this area. Paragraph 71 sets out that, “The envisaged partnership should establish open market access for bilateral road freight transport, including unladen journeys.” The UK would not benefit from cabotage (moving goods within a Member State) or grand cabotage (between Member States), but point-to-points drop off and transporting goods bilaterally would be signed off on.

Yet for Barnier, speaking on 21 August, there needed to be extra burdens placed on any UK transporters;

> “British negotiators do not want certain standards to apply to British road hauliers when travelling in the European Union. And that was repeated again this week. Especially on working time or installing modern tachographs in trucks to control driving and rest times. […] And of course, in any case, why should we give access to our roads to road hauliers who refuse to apply rules that are essential to the good working conditions and safety of all?”

The example is absurd from its base presumptions, given the mixture of distinct national constraints (on top of EU rules within the EU27) but also for example how the UN’s AETR terms (covering wider geographical Europe) include tachygraph requirements, and how the AETR rules are the same as the EU’s over driver hours. It’s not entirely clear that Barnier knows the UN has been working in this field for the past few decades; he is at the least being disingenuous.

In the same speech, his unwarranted obstructionism extends into aviation;

> “Why should we also allow British airlines to operate the same routes as European operators if they are not bound by comparable standards for environmental protection or passengers?”

That is arguably a fair enough contention – if applied purely within the EU27. Except that it fails to distinguish between direct flights (which the Mandate is happy with) and cabotage; and it singularly ignores both the fact of common manufacturer standards, but also the impact of the very international agreements the EU team is elsewhere expecting the UK stays signed up to.

Chunnel

Brussels meanwhile has been expeditiously sapping paragraph 77 of the Mandate. The clause simply says that, “The envisaged partnership should address, if necessary, the specific situation of the Channel Tunnel.”

It turns out, however, that EU ministers – almost certainly on a Commission draft – have been producing paperwork to try to quietly shunt management of the Channel Tunnel away from the

format of an intergovernmental agreement into some form of new Euroquango. Had this agreement been left to limbo into post-Brexit structures unobserved, it would amongst other things have given a foothold for EIU institutional interference, starting with the European Union Agency for Railways (ERA) on standardisation issues and safety procedures, and quickly extending into security provisions.

Attempting to Trojan Horse material to subsume an existing and entirely separate bilateral agreement is a particularly noxious display of bad faith on the part of Brussels, and raises obvious questions as to what else might have been missed.

Security

Several paragraphs instruct the EU negotiators to develop a practical, functioning bilateral arrangement that avoids 'cliff edge' issues. Para 115 says that "the Parties should establish a broad, comprehensive and balanced security partnership. This partnership will take into account geographic proximity and evolving threats, including serious international crime, organised crime, terrorism, cyber-attacks, disinformation campaigns, hybrid-threats, the erosion of the rules-based international order and the resurgence of state-based threats." Para 116 states that, "The security partnership should comprise law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, as well as thematic cooperation in areas of common interest." Para 120 adds that this should include "reciprocal access to data available at the national level on DNA and fingerprints of suspected and convicted individuals as well as vehicle registration data (Prüm)", and with sharing information on wanted and missing persons and objects later named.

While not exactly mimicking the previous arrangements, the intent is that in their effect they should come pretty close. Para 121 allows for exchanges via Interpol, Europol, bilateral and international agreements, so that the envisaged partnership enables "simplified, efficient and effective exchanges of existing information and intelligence", adding perfectly reasonable caveats both sides would deploy. Para 123 states that arrangements for this "partnership" would be effective, streamlined, subject to judicial control and time limits, "enabling the United Kingdom and Union Member States to surrender suspected and convicted persons efficiently and expeditiously." This sounds like exactly what the UK negotiators want to deliver.

Where was Barnier coming from in all this? If we again travel back to beyond the Mandate, we get some inkling as to why talks have gone astray. Again, the context of the audience is relevant and on 19 June 2018 he was speaking at Vienna to the EU Agency for Fundamental Rights. Here he is building obstacles to any UK deal demanding CJEU involvement, because of the way the EU legal system needed to be isolated. The EU system meant it was,

> "an 'ecosystem' based on common rules and safeguards, shared decisions, joint supervision and implementation and a common Court of Justice. If you leave this "ecosystem", you lose the benefits of this cooperation."

But there is an odd schizophrenia in play, because it is accepted that the effects can be largely replicated;

> "But let's be clear: based on the UK's positions, our cooperation will need to be organised differently. It will rely on effective and reciprocal exchanges, but not on access to EU-only or Schengen-only databases."

The speech included an otherwise underplayed dismissal of the Project Fear material that was otherwise coming out of Brussels briefings as negotiation leverage;

> "This does not mean that we cannot work together on extradition. We are ready to build on the existing Council of Europe convention, to which all Member States have signed up. For instance we could envisage streamlining the procedure, facilitating processes, introducing time-limits. This is very much needed."

Meanwhile, Barnier has been pushing for the UK to be locked into a semi-collapsed Third Pillar, while simultaneously emphasising and dismissing the risks that might befall if the UK side proved recalcitrant. The inherent and impossible ambiguity within Barnier's negotiating strategy has been behind the failure to deliver what would otherwise be low hanging fruit.

CFSP

The Second Pillar is another area where the UK has been far less willing than the EU side to establish institutional buy in, though it took Boris Johnson's election for Team Barnier to finally accept this reality. The subsequent 2020 Mandate recognised the requirement was for generating docking ports for the UK to engage, on occasion, and on an ad hoc basis.

Paragraph 129 noted (my emphasis), "When and where the United Kingdom has shared interests with the Union, the envisaged partnership should enable the United Kingdom as a third country to cooperate with the Union." Paragraph 136c added, "The participation of the United Kingdom on an exceptional basis in projects in the framework of the Permanent Structured Cooperation (PESCO), where invited to participate in an individual project by the Union."

You can see why this might need to be stated in black and white when you consider that Barnier has been pushing for far more, damaging talks in the process. In 14 May 2018, he was saying,

> "The level of ambition of our future partnership will very much depend on the UK's readiness to commit. The more the UK converges with EU foreign policy and substantially engages alongside the EU, the closer the cooperation is likely to be. Of course, some defence and intelligence actions take place outside the framework of the EU, such as in NATO. Bilateral relationships will also continue to develop. And the UK will continue to operate with partners in ad hoc groupings, such as recently in Syria. Yet, the EU is more than a coalition of the willing. It is a Union. […] It seems natural, therefore, that we should build our cooperation together, rather than build it piecemeal. This cooperation should be based on an alignment of foreign policy objectives, rather than short term and ad hoc interests."

He continued,

> "President Juncker has called for a European Defence Union. President Macron for European sovereignty. Chancellor Merkel for a Union that shapes its own destiny. […] There is no ideology on the EU's side. No emotion. No willingness to punish. Never. But ambition and respect for our rules."

In fact, this sounds very much indeed like an ideology: the ideology of a Defence Union, into which he wanted to link the UK as a key European Defence power. While for practical and self-interested reasons he might aspire to that, it was politically made clear to him from the outset that this goal was not shared, or at least had its boundaries. Yet even as recently as his EESC speech in June 2020, he proclaimed (without notably having the nerve to do so in English),

> "Nous avons aussi été déçu par le manque d'ambition et d'engagement du Royaume-Uni dans d'autres domaines: Je pense notamment à la politique étrangère ou à la défense"

Perhaps his annoyance is genuine and directed at the failure of Whitehall's PESCO sympathisers to fully win their political masters round under May, and to lose them entirely under Boris. If so, it is a peculiar feature of the EU's negotiation strategy, to attempt to subvert the staff of their counterparts.

Satellites

Paragraph 140 of the Mandate allows for the "possibility" for the United Kingdom to "have access to" the Galileo Service, and in accordance with Union law.

This declaration is extremely limited. The reality is however that the prospects of UK access were stitched up long before the 2020 Mandate. Barnier for example back in 14 May 2018 asserted that,

> "The EU's rules on Galileo have been in place for a long time and are well known to the UK. In particular, third countries (and their companies) cannot participate in the development of security sensitive matters, such as the manufacturing of PRS-security modules. Those rules were adopted together by unanimity with the UK as a member, and they have not changed."

Those rules were put in place to accommodate a policy (subsequently retreated from) of allowing China to become a major project partner, before someone in Brussels realised (too late) what a tremendously bad idea this was on strategic as well as Intellectual Property Rights grounds. In effect, Barnier has been treating the UK like China, scripting the policy before EU ministers came to a decision over it. Coincidentally, the French Space industry meanwhile wins out.

Democracy and accountability

The EU is keen to provide a veneer of democratic accountability to its operations. This explains the costly nonsenses of the European Economic and Social Committee and the Committee of the Regions, for example. The problem has been that the systems don't work. MPs have never had early sight of drafts, let alone hear of concept proposals early on, thanks to the comitology process handing the critical role to the Commission and the Commission not wanting to give it up. Even the Orange Card and Yellow Card systems for supposedly providing teeth to Subsidiarity have been a total flop.

Nevertheless, the Mandate specifically recognises that the FTA generates a "partnership" that is not simply one-sided. Paragraph 149 states the "commitment to engage in regular dialogue and to establish robust, efficient and effective arrangements for its management, supervision, implementation, review and development over time". The resolution of disputes and enforcement are to be "in full respect of the autonomy of their respective legal orders."

Paragraph 165 states that there might be the "possibility for a Party to activate temporary safeguard measures with respect to the other Party, that would otherwise be in breach of its commitments in case of circumstances of significant economic, societal or environmental difficulties of a sectorial or regional nature liable to persist. This should be subject to strict conditions and include the right for the other Party to rebalancing measures. The measures taken should be subject to independent arbitration."

These processes are already contained within the arbitration panel system under the Withdrawal Agreement, and thus constitute a mechanism to be carried across into the FTA itself to supersede the WA text. But what is striking from revisiting this wording is the implicit recognition that the Parliamentary Bill, to generate a domestic safeguard mechanism, is in keeping with the spirit of democratic accountability expressed in this text – subject to the proviso that the EU be allowed (as per normal WTO rules) to take countervailing measures of like impact and value. The safeguards legislation should be entirely accommodatable by the Commission in the context of an FTA.

Meanwhile however, Michel Barnier has signally failed to acknowledge that the stated UK Government strategy is to diverge gradually and in a managed way. At Dublin, he complained, "How can we make progress on sanitary and phyto-sanitary issues when we have no idea how the UK's system will evolve?" The answer is 'Quite easily', if you follow the principles of managed divergence, as has been explained to him repeatedly over the past three years. Or we can reflect on his contradictory complaint of 23 July where he said, "The UK tells us it needs certainty for its businesses. But that cannot be at the price of long-term uncertainty and disadvantage for our businesses in the EU." The Barnier office is the home of contemporary cakeism.

Conclusion

It is a question that occasionally gets asked: if Margaret Thatcher was such a Eurosceptic, why did she sign the Single European Act? A 1992 study identified as one of three critical reasons – internal Party pressure (the other two being the risk of France and Germany building their own mini-deal and then inventing lots of Technical Barriers to Trade). UK negotiators were very concerned at Qualified Majority Voting which surpassed their own red lines, particularly given the Core Six weighting as it then stood. However, internal Conservative Party pressures from pro-Europeans was significantly disrupting the Thatcher Government – and this was known by Mitterand and Kohl's negotiators who exploited it to the utmost.

The subsequent track record of the EU in twisting the text of signed treaties to get its own way at UK expense is justification enough for the UK to include a safety valve in future UK-EU relations. The attempt by Greece to shovel in the issue of the Elgin Marbles should naturally encourage negotiators to review the small print, but it has always been the approach of Michel Barnier that should encourage us be alert as to pitfall clauses in the end text – ever since he was caught on camera (in the Verhoftstadt Brexit documentary) stating that he intended to tell UK negotiators "brutally, but calmly" that continued UK payments into the EU were non-negotiable, but that this should not be admitted publicly.

It is clear from his speeches that the EU's negotiator has been seeing the talks not so much as an opportunity for safeguarding trade on the EU side, but as a mechanism to manage a threat. Perhaps he would have been in more engaging had he not been thwarted in his bid to become Commission President.

This is what Barnier said to the EESC on 10 June;

> "Wanting this partnership does not prevent us from being lucid: the United Kingdom, in addition to being a close political partner, is positioning itself as a direct economic competitor, on our doorstep. Of course, this competition is welcome – provided it is built on a fair and equitable basis. Finding this balance between ambition and realism with our

> closest partner and competitor is the whole point of this negotiation that has been our business for four and a half months now."

And again, in his speech in Lisbon in front of the International Federation of European Law (FIDE) on 26 May 18;

> "Brexit is not, and never will be, in the interest of EU businesses."

To which the riposte is: not if you don't make it so; and perhaps in the interests of EU businessmen someone better should have been given the job and certainly someone who can carry a better level of trust on the UK side. When he remarked to the EESC, "the British must accept that the Political Declaration is a precise text, which must now be translated legally", it was uttered without a hint of irony over both the failure of his own team to adhere to the strictures in the Agreement over deadlines on fish and Services. Similarly, there was what was being said behind the scenes, when briefing journalists in November/December 2018 and emphasising that the Political Declaration was not politically binding but only aspirational.

On 26 February 2020, literally the day after the Council issued its negotiating mandate, Barnier spoke to the ESCP Business School, of which he is an alumnus.

> "Ladies and gentlemen, we are no longer in the 1970s, when the main purpose of trade agreements was to take down tariff walls. A modern trade agenda is about more than boosting economic exchanges and commercial opportunities. Modern trade is sustainable trade. It is about ensuring high standards, from social or environmental to health and safety. This is even more true with a very close partner like the UK, with whom we should develop a common ambition."

Those of course bring costs, regulatory burdens, and political ambitions for ever-closer union – precisely what Brexit was meant to escape from. But then, the UK to Barnier is, post-Brexit, "a direct competitor that is right on our doorstep". If so, we should take him at his word – and only accept a suitably flexible and light-touch FTA in response.

About the Author

Dr Lee Rotherham has been an adviser to John Major's whipless rebels, Eurosceptic MEPs, three Shadow Foreign Secretaries, the Conservative delegate to the Convention on the Future of Europe, a delegate to the Council of Europe, and government ministers. He was Head of Opposition Research for the No Campaign in the AV Referendum, and Director of Special Projects at Vote Leave, the designated pro-withdrawal campaign during the 2016 referendum.

He has twice been a Conservative candidate in General Elections, in 2001 in St Helens South (the "butler campaign"), and in 2005 in Rotherham standing against the then-Europe Minister. Outside of Westminster he has worked in publishing, teaching, heritage, and in Defence.

He has been very extensively published in academia and especially across think tanks, and with a large number of books on both historical and political issues to his name.

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