

Brexit Arithmetics*

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Red lines, packages, positions, no deal, concessions, hard-line, bluff – the early stages of the Brexit negotiations between the UK government and its EU counterparts did not bode well for what is still to come. Clearly, neither side seemed to find the vocabulary, tactics and vision to engage in positive-sum or integrative bargaining, the art of creating value at the same time as you share it, the 101 of any good negotiator.¹ As this book goes to press in the summer of 2017, a year after the referendum, we know a bit more about the two sides' stated positions and purported "red lines" than the Prime Minister's infamous "Brexit means Brexit."² Yet the end-game is harder to predict than with any standard multi-party, multi-level, multi-issue negotiations, simply because the parties don't seem to agree on what kind of game they are playing in the first place, either between the two sides or internally. All that is clear is that the result will depend less on what the UK wants and more on what the rest of the other 27 EU members (EU27) will give.

Nevertheless, I try to demonstrate here that the fundamentals are simple enough to be described in three short equations, each of which gives us a clue about an eventual Deal UK (Duk). This simplifying gimmick can also be used to ask what an integrative approach to these history-making negotiations may entail.

Equation 1: $V_m > D_{uk} > V_{nfm}$

This equation states that the general value of Duk cannot be greater than the value of EU membership (V_m), but that it could be greater than existing deals with non-former members (V_{nfm}) such as Norway, Switzerland, Turkey or Canada.

On the first side of the equation - $V_m > D_{uk}$ – we find a statement of fact that is obvious on the EU side but not on the British side – in fact, isn't the Brexit bet the exact opposite proposition - that the Duk that will eventually be struck, with all of the margins of freedom for the UK that will thus open up, will be better than the value of membership? There lies the first fundamental paradox of these negotiations. Clearly, this divergence can only work because the

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two sides make different bets about the future. But then again, this is not a bet about the weather but about a state of affairs where all sides have agency.

To restate the root of mutual misperceptions. For the EU, this is a truism: it would be absurd for Brussels to offer a deal to a third-country-to-be that is more valuable than the value of membership itself. When this is uttered in a neutral legalistic fashion, “more valuable” refers to the package of rights and obligations associated with membership vs non membership. The membership ticket must be worth something! But message sent is not message received: the British side hears this EU statement as wanting to “punish” the UK. How can they if they understand the basic fact of membership just stated? Well, this UK perception is not totally absurd, if we consider a broader take on “Deal UK” that is not just the formal legal-political deal but the outcome of that deal, something rather more amorphous that aggregates the formal deal with its symbolic, economic and political consequences. EU negotiators would be hard-pressed to deny that the value of Duk is also about precedent and *pour decourager les autres* – “we cannot make Brexit a success” is at least for some an implicit mantra, which makes it hard to separate legal from material considerations.

And who could blame them: like any club managing “commons” the EU must protect itself against free-riding. For most clubs, benefits can spill over to outsiders, and it is unfair for these outsiders to benefit without contributing at all. The UK cannot, therefore, get a better deal now than David Cameron was granted in February 2016 as an enticement for the British public to want to stay in. Concessions on free movement will need to cost enough in other areas to highlight the value of membership. The problem with the Brits as seen from Paris is that they are, well, too French: *ils veulent le beurre, l'argent du beurre et baiser la fermiere* (loosely translatable as wanting to have their cake, eat it, and have the kisses of the baker’s wife too). The Brexiteers must hear this straightforward reasoning. But the EU27 also need to ask themselves whether such a mindset does not simply show the EU as insecure and petit. Should people want to stay in the EU for fear of bad consequences if they leave, or would the EU not simply be more attractive if it was seen as magnanimous and grand in its dealing with its first departing member?!

Which brings us to the other side of the equation - $V_{Duk} > V_{nfm}$ - which may be the key to positive-sum Brexit negotiations. By suggesting that Duk ought to be better than the deals granted to countries that have never been EU members, it encapsulate the assumption that we need to build a unique special partnership. Lets ponder this proposition for a moment: a new species of state is conjured up with Brexit, namely the “former EU member-state.” Would it not debase the status of such membership to treat the UK worse than those who have never been equals around the EU table, who do not know “our” grand strategies and all “our” dirty little secrets, whose diplomats and civil servants have not contributed sweat and tears to promoting the EU agenda in the rest of the world for the last four decades, and (some of) whose politicians across the political spectrum have not courageously tried promoted the EU case against a relentless tabloid press? Would it not debase the status of EU citizenship if it could be lost so easily, EU citizen one morning, non-EU citizen the next! The ECJ has already ruled that citizenship of an EU member-state ought not to be lost easily. Things are of course different for the future citizens of a “former member state” – but this no-man’s land with no precedent needs to be explored.³

Moreover, we all know that “Great” Britain is not any old state and must be allowed to save face. This last consideration is never made explicit on the continent but is nevertheless part of Europe’s historical memory.

Add to these substantive points the simple facts that the UK will be negotiating while still a member, and that the marginal cost for the EU of undoing complex internal and external bargains that have included the UK in the last 42 years may be higher than the marginal benefit of “demonstrating” that leaving is costly. This all increases the plausibility of models like European Economic Area plus, or something else, like a different kind of a membership in a club of clubs.⁴

In all this, atmospherics matter as much as pragmatics. A (British) divorce was always going to be less friendly than a (Swiss) flirt. So it is also conceivable that the UK’s demands might appear so outlandish, and its tone so arrogant, that no one will care anymore about recognising its special status as a former member state or European great power. Especially if it uses as a bargaining chip the threat of a race to the bottom on such policies as corporate taxation, the continent’s willingness to cut it slack will swiftly diminish. This would be freeriding in its purest form and represent an admission that the UK has jettisoned any respect for the basic premises of the EU. In this case, why should Duk be better than deals granted to, say, EEA partners who respect the EU’s rule of the game with very little input of their own? The equation could become: $V_m > V_{nfm} > Duk$.

Would Duk remain better than No deal, even under these circumstances? Arguably, yes, given the unattractiveness of the UK’s BATNA (best alternative to a negotiated agreement) – not only in a WTO world where global rules are a moving target, but in as the only EU neighbour with not privileged ties. This prospect would be bad for the EU too of course. Unfortunately, how the “no Deal” alternative plays out in these negotiations will depend on whether parties care about relative or absolute gains – if the UK hurts more, the EU might throw its hands up and decree, inshallah!

Equation 2: Duk = FI – CP

The second equation about the specifics of the deal is even more straightforward. Duk will likely allow the UK to opt-in to aspects of EU membership which are earmarked for “flexible integration” (FI), but the EU 27 will resist British attempts to cherry-pick (CP) its favourite aspects of membership without any wider rationale. For instance, it might be ok to selectively participate in EU research networks or defence procurement, but not OK to opt out from regional funds which help Europe’s poorest regions or from the bits of product standards linked to the single market that the UK does not like.

In the next few years, flexible integration or differentiation will be key for the EU, even more than it has been until now (EMU, Schengen). If the EU is to survive, its policy and institutions must reflect what it has become: a continent-wide ensemble of heterogeneous states and economies which show little sign of convergence. The rationale matters to the UK deal: if the same EU laws and institutions affect different states differently, we need flexible integration, opt-ins rather than opt-outs. As with affirmative action, which is meant to compensate a disproportionate disadvantage from undifferentiated laws for a minority in

society, the UK could claim that its special circumstances warrant an extensive exploration of the potential for differentiated integration and that it could be an icebreaker in this regard. Perhaps non-euro (still) member states might want to join in this new kind of quasi-membership.

But there is a fine line between such flexible integration and what the EU die-hards ominously refer to as cherry picking (choosing your favourite policy solely on grounds of what works for you). It is around defining this fine line that much of the negotiations will hinge – an art the British side has yet to master. You want EU partners on board with some sort of *a la carte* exit? Figure out when does (good) differentiation stop and (bad) exceptions start. Avoid idiosyncratic, ad-hoc demands and find arguments based on generalizable principles. Part of the problem with the early phase of negotiations controlled by the former Home office supremo is that Theresa May’s only experience of the EU pertained to a field, Justice and Home Affairs (JHA) that had been among the most flexible in the EU legal landscape, allowing the UK to carve micro-opt ins where it had previously claimed macro-optouts. No wonder that the Junkers of this world thought she was on a “different galaxy” – she was in the JHA universe! Maybe she saw the EU at its best – allowing for the utter diversity of its member states.

When does (good) differentiation stop and (bad) exceptions start will be answered differently across areas of negotiations. The answer depends in part on whether one believes, as I do, in a “democratic” EU which flexibly adapts to the complex realities of its member states.⁵ There will be a need to revisit what I call “the construction of indivisibility” between the four freedoms which for most of the EU’s history were connected substantively and even linked strategically, but do not by their economic nature need to come in an indivisible unbundle. There will be discussions about the difference between “equivalence” which can be granted to the UK and mutual recognition which is a more exclusive privilege – but what if the real difference is that the latter can be revoked unilaterally, why not stay with recognition if the mix of trust and monitoring which it requires can be obtained with a UK whose starting point is to have been recognized already?⁶ There will be discussion about the EU budget about the difference between solid commitments and contingent liabilities, but at the end of the day who can doubt that principles will be twisted to accommodate the need for side-payments. And there will be critical discussions about how sticky, in principle, should EU citizenship rights be – an area where principles matter when sixty per cent of British citizens would be willing to pay to retain their EU citizenship.⁷

Some will argue that differentiated integration is backdoor membership while others will ask: what is wrong with that! The real problem will be who decides where the frontier lies between FI and CP. As the French see it, the Brits continue to yearn for bits of menu gourmand and bits menu touristique. Afraid not! you can choose among menus, but we choose what the menus are. As the Germans see it, however, better to have the Brits stay and eat at our restaurant, even if we need to bend the offerings. How the rest of Europe will side on this one might be critical.

Equation 3: $Duk = \text{Min}(U+B) + \text{Max}(M)$

This equation turns to the institutional approach adopted in the negotiations and states that Duk must maximize multilateralism (M) and minimize unilateral (U), or bilateral (B) approaches. With an EU based on the rule of law, there is precious little room for either of the latter. And where there may be some room, it should be used judiciously.

The pro-Leave camp in the UK sees unilateralism as the first step to “independence”: the absorption of British law by India when becoming independence from its British masters provides the best model for the so called “great repeal act” which will integrate all EU laws with an option to revise; the Corn Laws which enforced the UK’s unilateral free trade stance between 1815 and 1846 demonstrate the wisdom of unilateral trade disarmament and show the way to a new UK, free to open its markets to imports from around the world unshackled from the EU’s common tariffs, etc.

But aside from the irony of the Indian story, UK politicians have had to learn, not least from their own negotiators who know better, that unilateral openness means little in a world where trade is not mainly about tariffs but is underpinned by the mutual recognition of standards which are constantly and collectively updated, interpreted and litigated. Even if EU laws were copied-and-pasted into British law via the ‘great repeal bill’ (or better, the great repeat act) that would mean little without the cooperation mechanisms which make them operative as access tickets to the EU’s single market. And as far as unilateral threats of competitive regulation and devaluation, they either lack credibility when they amount to self-harm (tax intake or regulatory protection) or lack in effectiveness when they would simply invite retaliation from a much more powerful EU.

In truth, unilateralism can only work when it serves as signalling, as a show of goodwill, as the UK could have done earlier with the status of EU citizens in Britain: in this case, simply extending their right to stay without asking for anything in exchange would have bought much more goodwill on the treatment of retired British citizens in the EU than using them as bargaining chips.

Similarly, bilateralism seems to have been an early cognitive frame, starting with a British foreign minister threatening the Italians with an import ban on Prosecco. That is to misunderstand the logic of trade negotiations in the EU, which have been structured to allow no less cherry-pick between countries than between issues. Sure, there is lobbying within and by each member state – but their individual stance eventually has to come together in a single position. Indeed, by delegating negotiation authority to Michel Barnier, the EU has sought to pre-empt what it sees as the “divide-and-rule” *modus operandi* of the UK. But too much unity on the part of the EU would be a mistake. There is nothing wrong with the fact that the UK does have variable geometry relationships with many of the member states, from Spain where it exports its sunshine-friendly oldies, to Poland from whom it imports those who cares for the oldies who stayed put. These ties cannot be leveraged against the EU but must be harnessed to build a better, kinder Brexit.

More generally, the EU’s commitment to regional multilateralism is of course what defines it as a community predicated on replacing specific reciprocity with diffuse reciprocity based on collective rules (say agreeing on EU competition policy where the EU regulates anti-competitive behaviour on everyone’s behalf instead of allowing everyone to apply to antidumping).⁸ At the end of the day, the EU’s economic constitution is about transforming defensive trade weapons into both common rules and compensations, including subsidies to poorer regions who might benefit less than others from the single market. The more Britain is perceived as adopting what Europeans see as a transactional approach and ignoring the EU’s rules of the game, the less goodwill will remain in European capitals when the time comes to strike Deal UK.

Multilateralism may be antithetic to the “currency of control” worshiped by Brexiters, but they have little choice. And if they have, four decades of membership in this Union has created a deep degree of co-ownership of the multilateral rules that the UK itself greatly contributed in shaping. This historical responsibility in turn ought to constrain its manner of leaving, to the extent that Brexit will affect the countries’ respective ability to manage collective action problems on both side.⁹ Why behave as if the country had already unlearned the lessons of four decades of membership? Conversely, should the EU insist however that the new structures that manage the relationship post-brexite be the same or clones as its own, asking for the Agreement to “respect the role of the Court of Justice of the European Union” as if somehow you cannot leave the ECJ, like Hotel California.

The Brexit deal needs to invent a new kind of multi-normative multilateralism befitting the new state of affairs. Whether the Brexit talks follow the logic of trade negotiations, with Barnier and the Commission, the logic of Council negotiations, with Merkel and Macron, or the logic of climate negotiations, with broader bottom-up consultations they will be multilateral and perhaps borrow from all these shared experiences.

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In the end, it may be that the specific modalities associated with membership for a future out-almost-in UK do not differ widely from the specific modalities associated with its prior status of being in-almost-out. Some argue that Brexit will not make a damn bit of difference.¹⁰ I have argued that the parameters of the negotiations are such that on the contrary, there is a plenty of margin for interpretation and empathy in this vastly consequential games, and that if the parties are to avoid leaving too much value on the table, they will need to compare and contrast more systematically their respective takes on the basics of Brexit arithmetics.

¹ As we have taught at Harvard for the last our decades. See *inter-alia*, Raiffa, Howard, *The art and science of negotiation*. Harvard University Press, 1982; Lax, David, *The Manager as negotiator*. Simon and Schuster, 1987; Nicolaidis, Kalypso. "Power and Negotiation: When should lambs negotiate with lions?." *In Negotiating Eclectics: Essays in Memory of Jeffrey Z. Rubin*, edited by Deborah Kolb (1999): 102-119.

² For a journey on what this may mean as Brexit Mythology, see “Exodus, Reckoning, Sacrifice: Three Meanings of Brexit,” *Unbound-Random House*, December 2017

³ Mindus, Patricia. "A Sudden Loss of Rights." *European Citizenship after Brexit*. Springer International Publishing, 2017. 29-43.

⁴ “Theresa May claimed her offer to EU citizens would be ‘generous.’ It isn’t” *The Guardian*, 27 June 2017.

⁴ Majone, Giandomenico. *Rethinking the union of Europe post-crisis: has integration gone too far?*. Cambridge University Press, 2014

⁵ Bellamy, Richard and Sandra Kröger, “A democratic justification of differentiated integration in a heterogeneous EU” *Journal of European Integration*, Vol 39, 2017

⁶ For a discussion see *inter alia*, Nicolaidis, Kalypso, “Mutual Recognition in the Shadow of Brexit,” *Current Legal Problems*, Vol 70, October 2017

⁷ LSE research initiative for the study of electoral psychology, ECREP, in conjunction with polling firm Opinium, 4 July 2017

⁸ Phelan, William. *In place of inter-state retaliation: The European Union's rejection of WTO-style trade sanctions and trade remedies*. Oxford University Press, USA, 2015.

⁹ Lord, Chris, “The Legitimacy of Exits in the European Union,” *Journal of European Integration*, Vol 39, 2017

¹⁰ Jenkins, Simon, Soft Brexit is the only sane option,” *The Gardian*, 30 June 2017; Andrew Moravcsik,