

David Davis Sketches Desired EU–UK Relationship

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21st February 2018

David Davis's recent speech^[1] outlined several facets of the UK Government's Brexit agenda that had not previously been clearly elucidated. As such, it demonstrated a clear vision of the direction of travel, which appeared notably closer to that espoused by so-called "Remainers" such as Philip Hammond than "Brexiters", most notably Jacob Rees-Mogg and Boris Johnson. This is of particular interest given the most recent letter sent to the Prime Minister from the Eurosceptic "European Research Group" signed by 62 Conservative MPs.

In particular, Davis began to outline a coherent intended "end position" with respect to Britain's future relationship with the European Union. Davis reiterated the UK Government's longstanding position that as the UK was moving from a position of complete alignment with the EU, it should be feasible to negotiate a closer and more comprehensive agreement than any heretofore. The novelty of Davis's latest speech lies in an effective enunciation of what the UK views such a "comprehensive" trade deal ought to look like.

Davis suggests that, "The agreement we strike will not be about how to build convergence, but what we do when one of us chooses to make changes to our rules." The implication of this statement is clear: a future comprehensive economic agreement should look a lot like European Union membership. In essence, it appears that this most ardent of proponents for leaving the EU is now in favour of an arrangement that continues the *status quo ante* but with the ability to derogate from certain rules (including those not yet passed).

There are two outstanding challenges for Davis in this approach. The first challenge is both conceptual and procedural: the UK Government must explain, in detail, how such derogations might be managed and enforced. Inside the EU, conformity with trade standards is enforced and the ultimate legal arbitrator is the Court of Justice. If Britain wishes to avoid being under the jurisdiction of said court, it needs to specify and explain precisely which authority is to oversee and adjudicate in the event of a dispute.

In addition, there needs to be a robust framework explaining how and in what circumstances each partner (both UK and EU) would be able to derogate from or change existing standards. Within the EU, there is an extensive legislative process and legal framework that exists precisely to maintain uniform standards. It is this that prevents France from unilaterally changing regulations so that British made vacuum cleaners are suddenly no longer permitted. This framework has been built over many years and will be extremely challenging to replace. Indeed, even with the current oversight there are still examples of violations (one story from the CBS roadshow about a failure to accept an E111 form, the predecessor of today's European Health Insurance Card, stands out). How much more difficult, then, will implementing a new framework with a new supra-national authority be.

For example if, as has been mooted, the UK wishes to move away from certain European financial regulations, what safeguards need to be put in place and to whom can either party go should there be a dispute? It is not possible to run such an arrangement on trust alone: what happens if a future government (on either side) wishes to abolish or change regulations that the other party feels are needed for public wellbeing or safety? Where is the line between acceptable differences in regulations (e.g. driving on different sides of the road) and differences so severe as to render regulations “non-equivalent”?

The second challenge is political. Davis’s vision of close cooperation appears to contradict the desires of many other proponents of Brexit within his party. The letter of the European Research Group[2] suggests that for a significant minority within the governing Conservative Party, complete “regulatory autonomy” is a minimum requirement. Such autonomy would, inevitably, preclude external oversight of the sort necessary for regulatory alignment. This is a clear corollary of the desire to “take back control” of all regulation. If the UK wishes for the ability to change regulations on a whim then, by definition, it forgoes the benefits of regulatory convergence. The logic is clear: the latter follows inexorably from the former.

It is further unclear how Davis’s position fits with that espoused by his cabinet colleagues. It certainly appears to contradict the position of the Foreign Secretary who expressly wishes to “take back control of our laws”, including “our regulatory framework” in order to be able to do trade deals with non-EU members. Davis is certainly correct that “the future of standards and regulations [...] is increasingly global”. Nevertheless, we remain a long way from this brave new world of global regulations and standards and there will remain substantial regulatory divergence between economies for many years to come. In the interim, the UK must make a decision as to where it stands – with Davis in his desire to maintain a substantial degree of regulatory alignment or with Johnson who wishes for a “retreat to the high seas” and wholesale shift in regulation.

It is also unclear to what extent the UK would be able to reap the benefits of maintaining a substantial degree of regulatory alignment with the rest of the EU. The Prime Minister has ruled out membership of both the EU Customs Union and European Economic Area. This will necessarily and inevitably entail additional friction (including customs checks) for that portion of trade conducted with the EEA. Indeed, it is likely that a degree of regulatory divergence from the EU may be necessary if the UK is to have the trade deals with third parties that Liam Fox and Boris Johnson envisage. Only the UK can decide if this is a price worth paying.

1. David Davis, *Foundations of the Future Economic Partnership* 2018, Department for Exiting the European Union.
2. European Research Group, *Letter to the Prime Minister*, in *Spectator*. 2018.