



INSIGHT

BREXIT: THERESA MAY'S RED LINES GET TANGLED UP IN HER RED TAPE. A COMMENTARY ON THE WHITE PAPER

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ABSTRACT: The 29 March 2017 is now set to become the historical day Art. 50 TEU was triggered for the first time ever. Equally, unprecedented negotiations, in which the United Kingdom and the European Union will settle their divorce, will follow. With the aim of proving that the UK Government has the necessary negotiating strategy, it recently published a White Paper on its exit from and new partnership with the EU. Despite the promises, this Paper is far from providing certainty and clarity. However, it is also a step away from a previous superficial and simplistic approach to Brexit. In this Insight, I explain why the White Paper is riddled with contradictions and why, nonetheless, this confusing and vague exposition of what the UK will be seeking to achieve from its withdrawal is a welcome though disguised acknowledgment of the complexities that Brexit will entail.

KEYWORDS: Brexit – White Paper – hard and soft – Art. 50 TEU – Theresa May – negotiations.

I. INTRODUCTION

After the notification of the intention of the UK to exit the EU, it would surely be interesting to know what the United Kingdom's Brexit negotiating strategy is, as well as the expected outcome. Particularly as, so far, the lack of acknowledging the consequences surrounding the whole ordeal or "political chutzpah" has been painfully obvious.¹ An immensely complex and uncharted procedure, Brexit has been oversimplified since the very beginning. Clear examples are the simplicity of the ballot question summarized in an "in or out" vote² or the internal constitutional battle for British sovereignty formulated in terms of "Parliament v Government".³

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¹ A. LAZOWSKI, *Procedural Steps towards Brexit*, in *CEPS Commentary*, 13 July 2016, www.ceps.eu.

² Bewildered anthropologist M. Reeves writes: "The question, when it came, was striking in its simplicity: 'should the United Kingdom remain a member of the European Union or leave the European Un-

The biggest simplification, in my opinion, has been the “hard or soft” debate. For some, the oversimplification of the withdrawal from the EU after more than 40 years of membership is such that it is impossible to find agreement on the definitions of the terms “hard” and “soft”.⁴ Maybe there is no agreement, but I think we can easily make a “simple” black and white distinction between the two. A “hard” Brexit should be understood, on the equivalent end of the colour spectrum, as an immediate withdrawal from the EU⁵ without any Art. 50 agreement and future trade between the divorcees relying simply on WTO rules.⁶ A “soft” Brexit, on the opposite side, resembles a “Norwegian” model, as it is the most similar relationship between a third country and the EU to that of membership.⁷

When the Government’s White Paper on the United Kingdom’s exit from and new partnership with the EU was published on the 2 February 2017,⁸ it set out as its first guiding principle “Providing certainty and clarity”. It is also defined as “a clear vision of what we are seeking to achieve in negotiating our exit from, and new partnership with, the European Union”.⁹ It was natural to expect, therefore, that it would finally tell us which Brexit, hard or soft, the UK would be seeking. After six months of speculation and uncertainty, this clarity was eagerly awaited, as much as the disappointment was going to be inevitable.¹⁰ If we are to take the concise and simple concepts of “hard” and “soft” as laid out above, and ask the question “so where does our White Paper fit in?” the answer is far from clear and certain. However, I believe the confused and at times self-contradicting approach of the Paper does actually benefit such a complex ordeal more than the previous superficial black and white one. Alas, maybe Brexit is not so simple after all.

ion?”. Cf. M. REEVES, *Democracy on speed*, in *Brexit Referendum: first reactions from anthropology*, in *Social Anthropology*, 2016, p. 479, bruunjensen.net.

³ UK Supreme Court, judgment of 24 January 2017, *R (Miller) v. The Secretary of State for Exiting the European Union*, [2017] UKSC 5, www.supremecourt.uk.

⁴ R. RUPAREL, *What does a hard Brexit or a soft Brexit actually mean? Comments for Open Europe*, 26 September 2016, openeurope.org.uk.

⁵ F. ZULEEG, *What Kind of Brexit?*, in *European Policy Centre*, 4 November 2016, www.epc.eu.

⁶ C. GRANT, *May is Weak in Europe but Strong at Home*, Bulletin article for Centre for European Reform, 26 January 2017, www.cer.org.uk.

⁷ Committee on Constitutional Affairs of the European Parliament, *Brexit and the European Union: General Institutional and Legal Considerations, Study for the AFCE Committee* PE 571.404, 25 January 2017, www.europarl.europa.eu.

⁸ Cf. UK Government, “The United Kingdom’s exit from, and new partnership with, the European Union”, February 2017, (hereinafter, “White Paper”), www.gov.uk.

⁹ See UK Government, Policy paper “The United Kingdom’s exit from and new partnership with the European Union White Paper”, www.gov.uk.

¹⁰ A.S. GRAELLS, *A Disappointing Brexit White Paper Makes for Disappointing Comments*, in *How to Crack a Nut – A blog on EU economic law*, 2 February 2017, www.howtocrackanut.com.

II. THE WHITE PAPER

A hard Brexit (meaning as stated above, no deal at all) has been considered unavoidable,¹¹ due to the EU's stance,¹² if Theresa May's red lines are to be met: no freedom of movement, no jurisdiction of the Court of Justice (recovery of British sovereignty), no Common Commercial Policy (new customs agreement), and no contributions to the EU budget.¹³ Accordingly, all these elements are present in the White Paper, mostly mimicking May's previous rhetoric.¹⁴ But surely it can't take 77 pages to give a simple no "hard" feelings farewell? As we will see, there are many elements in those pages that could lead us to think that such "hard" feelings are just a cover up for underlying "softer" emotions.¹⁵ Unfortunately, this does not necessarily mean the Conservative Government is turning away from a hard Brexit. It is much more realistic to find that they are quite confused about how to accomplish a successful one while at the same time conserving their red lines.¹⁶

As already pointed out by some, May's red lines are clearly incompatible with her negotiating partner's need to set an example to other potential withdrawers,¹⁷ and also with her own aims of making Britain stronger, fairer, more united and more outward-looking (in as much as her red lines, if they are to be left duly uncrossed, could lead to a hard Brexit which could include a weaker British economy, a lower tax revenue, an internal sovereignty crisis and a merely trade oriented foreign policy).¹⁸ I would like to explain how these red lines are also alarmingly incompatible with the rest of the White Paper's strategy (which as a whole does not seem to be seeking a hard Brexit). Firstly,

¹¹ S. MICOSSI, *Soft Brexit is not an option*, Commentary for CEPS, 25 November 2016, www.ceps.eu.

¹² Cf. the famous "hard Brexit or no Brexit, Donald Tusk warns UK", Article for the Financial Times, 13 October 2016, www.ft.com, or the more recent Statement after the Informal meeting of the Heads of State or Government of 27 EU Member States, that states: "access to the Single Market requires acceptance of all four freedoms", www.consilium.europa.eu.

¹³ M. GASIOREK, P. HOLMES, J. ROLLO, *UK-EU Trade Relations After Brexit: Too Many Red Lines? Overview of Chatham House Event*, November 2016, www.chathamhouse.org.

¹⁴ The Guardian calls it a souped up version of Theresa May's speech last month: see *Editorial*, in *The Guardian*, 2 February 2017, www.theguardian.com, and R. WHITMAN, K. ZIEGLER, P. SYRPIS, M. GARCIA, *Experts read the Brexit White Paper: so you don't have to*, in *The Conversation*, 3 February 2017, www.theconversation.com.

¹⁵ It is quite plausible, too, as stated by Michael Emerson, that this hard but soft approach is a desperate solution to the difficult task of having a double (and double again) audience to satisfy: remainers and leavers; home and abroad. M. EMERSON, *Theresa May's Brexit speech of 17 January 2017 – Decoding its clarity and ambiguity*, Policy Insight for CEPS, 25 January 2017, www.ceps.eu.

¹⁶ S. USHERWOOD, *A bridge to nowhere?*, in *UK in a Changing Europe*, 6 February 2017, politics.surrey.ac.uk.

¹⁷ P. CLEPPE, *The view from Brussels: If Britain gets a Bad Deal, the EU also loses*, in *Open Europe*, 3 February 2017, openeurope.org.uk.

¹⁸ M. LEONARD, *May's Vision for Brexit Fails to see the Big Picture*, Commentary for European Council on Foreign Relations, 18 January 2017, www.ecfr.eu.

because replacing membership with a Free Trade Agreement (FTA) will not allow for the recovery of British sovereignty. Secondly, because a new customs agreement will not enable “the freest and most frictionless trade possible in goods and services between the UK and the EU”.

III. THE FREE TRADE AGREEMENT

Through the FTA (Principle 8 of the White Paper, “P. 8”), the intention (it seems) is to keep zero tariffs on goods (P. 8.2), the freest possible trade in services (P. 8.2.1) and the common regulatory framework with the EU Single Market (P. 8.2). This is coherent with the view of the UK as champions of free trade (P. 9) and the famous Great Repeal Bill that intends to convert the *acquis communautaire* into British law (P. 1). This is not coherent, however, with the UK Parliament’s proclaimed capacity to later decide which elements of that law to keep, amend or repeal (P. 1.3) or with ending the jurisdiction of the Court of Justice (P. 2). It is no wonder May does not seek to adopt a model already enjoyed by other countries (P. 8.2) as these contradictions render her ‘model’ completely without precedent.

The main economic purpose of the Union between EU member states is turning 28 small European countries into the biggest trading block in the world.¹⁹ This secures it a privileged place in the global economic order. This means, ultimately, that a third party that wishes to be tightly integrated with the European internal market will be hard-pressed to do so without ceding any legislative and judicial sovereignty.²⁰ Access to the single market can only be granted when the other party complies with EU adopted legislation to avoid regulatory divergences that can impede trade. Such is the case for all deals negotiated so far between the EU and third countries, exemplified by Norway,²¹ Switzerland,²² Canada,²³ and Ukraine.²⁴ These countries must comply with the internal market’s set of common rules while having, of course, limited or no participation in the adoption of that law. So far, the UK has helped create the EU law that it now intends to convert into national law, but what happens next?²⁵ The dynamic character of the EU’s *acquis* means that all of these models must count with

¹⁹ Latest monthly trade figures for EU28 and Euro area with Extra-EU from 16 January 2017, www.trade.ec.europa.eu.

²⁰ H.P. GRAVER, *Possibilities and Challenges of the EEA as an Option for the UK after Brexit*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 803 *et seq.*

²¹ Committee on Constitutional Affairs of the European Parliament, *Brexit and the European Union*, cit., p. 29: Norway needs to follow EU regulations while having only limited impact on their development.

²² *Ibid.*, p. 31: Bilateral agreements make large portions of EU law applicable in Switzerland.

²³ *Ibid.*, p. 33: CETA provides for strict regulatory compliance with EU law as well as rules of origin.

²⁴ *Ibid.*, p. 35: Deep and Comprehensive Trade Agreement include a vast amount of EU provisions.

²⁵ S. PEERS, *As Bad as it Gets: the White Paper on Brexit*, in *EU Law Analysis*, 2 February 2017, eulawanalysis.blogspot.it.

incorporation mechanisms to keep up with future amendments of EU law. Just how a common market is to function if there are two legislative powers, Council and Parliament of the EU on the one hand, British Parliament on the other, that can both independently modify and adopt new rules concerning the goods and services circulating within that market has been left unanswered.²⁶ There is no escaping, however, the White Paper's first major contradiction: the UK will now be incorporating EU law with the aim of participating in the Single Market, without participating any longer in the future development of that law. Can it, at the same time, really fulfil its aim of "taking back control of our laws" (P. 2)?²⁷

The CJEU, of course, plays a central role in all of this. The EU changes not only through legislative action but also through the dynamic interpretation of its judicial power.²⁸ The White Paper includes an Annex with examples of dispute resolution mechanisms (these serve only as examples, mind)²⁹ that could be incorporated into the future trade deal between the EU and the UK. Indeed, a comparative analysis will lead us to realize that both deal and resolution mechanism will most probably be submitted to the CJEU for an Opinion on its compatibility with the Treaties.³⁰ So it happened, for example, with the Agreement on the European Economic Area (EEA Treaty) and its proposed system of judicial supervision,³¹ which the Court deemed incompatible with the Treaty establishing the European Economic Community because it would not be able to achieve legal homogeneity. It was not until renegotiation empowered the Joint Committee to keep under constant review the development of the case law of the Court of Justice and to act so as to preserve the homogeneous interpretation of the agreement, that the Court judged the EEA Treaty compatible with EU law.³² So much for "ending the jurisdiction of the Court of Justice of the European Union" (P. 2). Not only will it have its say about the powers conferred on it in the Treaties and the subsequent validity of the EU-UK trade deal negotiated in the light of them;³³ but its case law is

²⁶ S. MICOSSI, *Soft Brexit is not an option*, cit.

²⁷ As stated in A. DUFF, *How Europe sees Brexit*, in *European Policy Centre*, 24 January 2017, www.epc.eu, "because the EU is a much larger and well-established market, these rules (a new regulatory system replacing that which Brexit destroys), and any more besides, will be EU rules first and British rules second".

²⁸ H.P. GRAVER, *Possibilities and Challenges of the EEA as an Option for the UK after Brexit*, cit.

²⁹ See P. 2.10.

³⁰ S. PEERS, *Brexit: can the ECJ get involved?*, in *EU Law Analysis*, 3 November 2016, eulawanalysis.blogspot.it.

³¹ Court of Justice, Opinion 1/91 of 14 December 1991.

³² Court of Justice, Opinion 1/92 of 10 April 1992.

³³ As the Court of Justice more recently did in its Opinion 1/09 of 8 March 2011, when it declared that the European and Community Patents Court was not compatible with the provisions of the TEU and the TFEU; or in its landmark Opinion 2/13 of 18 December 2014, in which it jealously sentenced that accession of the European Union to the European Charter of Human Rights in the terms of the draft agreement submitted to it was incompatible with the autonomy of EU law.

actually an inescapable part of the EU *acquis* that the UK will be obliged to follow if it is to maintain access to the Single Market.

As we can see, equally superfluous to the idea of Westminster creating all the regulatory divergence it sees fit is that those laws be interpreted by British judges as they see fit. For the pure sake of legal certainty (which the White Paper inexplicably plans to maximise, P. 2.10), different courts applying the same legal framework will always tend to do so in a unified manner³⁴ (and it is not likely, building on experience, that the CJEU will be following the British court's lead instead of the other way around!). The contradictive nature of the White Paper is blatant. It is just not possible to take the EU legal and regulatory framework, set it in the UK by democratically elected representatives (P. 3.4) and then completely ignore its creators (Council of EU and Parliament), guardian (Commission) judiciary (CJEU) and the other 27 States and numerous third countries that all comply with this autonomous legal order.

IV. THE CUSTOMS AGREEMENT

As regards the second pillar of this somewhat dilapidated plan, the customs agreement, the White Paper offers a quaint exposition of the concept on p. 47: "a customs union is an arrangement designed to allow goods to circulate freely by the introduction of a common external tariff and the removal of tariffs between the participating States". By its nature, the Paper continues stating, it restricts member's ability to enter into separate free trade agreements with third countries by preventing them from applying a different tariff to the common external tariff. The logic follows through: the UK wants to have its own independent trade policy. Therefore, the UK can no longer be part of the Common Commercial Policy or the Common External Tariff. These are the elements, said Theresa May in her speech on 17 January,³⁵ that prevent her from striking her own trade agreements with other countries. This does not, however, preclude the UK from having a customs agreement with the EU, she added. Maybe not. It is true that some countries, namely the European Free Trade Association States, have trade sovereignty while maintaining a close relationship with the EU. This, however, enters into direct conflict with the White Paper's refusal to making "vast contributions to the EU budget" (P. 8.51) as the EU's current partners are not going to stand for a worse deal than the UK's. A similarly close relationship is going to cost a similarly high price.³⁶ The other evident contradiction is the

³⁴ Be it Member State National Courts, the Court of Justice of the European Free Trade Association or the EU-Turkey Association Council.

³⁵ See Theresa May, *Theresa May's Brexit Speech in Full*, in *The Telegraph*, 17 January 2017, www.telegraph.co.uk.

³⁶ As J.-C. PIRIS claims that countries with access to the Single Market in such favourable terms as Norway or Switzerland are expected to make a significant financial contribution, as would Britain; cf. J.-C. PIRIS, *If the UK votes to leave: the seven alternatives to EU Membership*, Commentary for *CER*, January 2016, www.cer.org.uk, p. 7.

need for strict EU rules of origin and customs procedures that leaving the Customs Union will entail.³⁷ Not only will there be higher trading costs for the UK, but it seems to be slipping far away from the much repeated “frictionless” trade envisaged post- Brexit (P. 8). This is where May's red lines clearly get tangled up in her red tape.

V. CONCLUSION

In conclusion, the White Paper seeks an impossible FTA and an impracticable customs agreement. May's red lines are not only incompatible, therefore, with the EU's interests, but actually contradict the rest of the UK's own negotiating strategy. Even more so when we find that the Paper includes other proposals with a clearly ‘softer’ edge. In effect, it provides for the maintenance of acquired rights of EU citizens in the UK if the same is offered vice versa (P. 6).³⁸ It also vouches for, and presumably intends the UK to partake in, the completion of the Single Market for services (in line with the importance of this sector for the UK economy)³⁹ stating categorically that “the Single Market for services is not complete” (P. 8.18) and that ‘we will be aiming for the freest possible trade in services between the UK and the EU Member States’ (P. 8.21). It admits financial services passports are beneficial for the UK (and how so!)⁴⁰ (P. 8.23) as well as other highly integrated services: transport, energy and communication (P. 8.27). It also expresses an interest in EU crosscutting regulations (P. 8.36) and EU agencies (P. 8.42), as well as close collaboration in science and innovation (P. 10) and fight against crime and terrorism (P. 11).

Painfully torn between two concepts that are too simple to contain the complexities of Brexit, the UK's White Paper appears to turn to the EU for an answer. Indeed, the EU could react to such illogical and unflattering demands⁴¹ by letting May convince the public back home that ‘no deal was better than a bad deal’ (P. 12.3). However, a more likely option is that the European leaders will ignore these impossible and contradictory

³⁷ S. ÜLGEN, *The UK Should Stay in the Customs Union After Brexit*, in *Politico Europe*, 17 January 2017, carnegieeurope.eu.

³⁸ Though it is clear she will not commit to such protection without a reciprocal pledge from the EU, J. ELGOT, *Brexit bill: MPs reject amendment to protect EU citizens in UK*, in *The Guardian*, 9 February 2017, www.theguardian.com.

³⁹ Latest UK National Statistics, November 2016, www.ons.gov.uk: the services industries overall account for around 79% of UK gross domestic product (GDP).

⁴⁰ W. RINGE, *The irrelevance of Brexit for the European Financial Market*, Research Paper for the University of Oxford, January 2017, papers.ssrn.com.

⁴¹ It is quite uncomfortable how the White Paper keeps reiterating how much the EU needs the UK, an unseemly “amicable threat” about tax havens included (P. 12.3). The data is expressed as such: 2.8 million EU nationals are resident in the UK, whereas only 1 million UK nationals are long-term resident of other EU countries (P. 6) or, while the UK exported £230 billion worth of goods and services to the EU, the UK imported 291 billion worth from the EU (P. 8.4) or, there are over 5000 UK firms that utilise passports to provide services across the rest of the EU, but around 8000 European firms that use passports to provide services into the UK (P. 8.23).

pleas and take up on the more Norwegian aspects of the discourse, as it is in everybody's interest to avoid a "hard" or "cliff-edge" Brexit (P. 12).⁴² Admittedly, the "soft" edges to an otherwise "hard" stance are, in line with the general design of the Paper, as vague as the inviolability of its red lines. However, since a hard Brexit would not actually take much negotiating, everything the White Paper deems "subject to negotiation" is an initial rejection to what many have deemed the "worst-case scenario".

The White Paper does very little, in the end, to provide a clear vision of what the UK will be seeking to achieve in negotiating their exit from, and new partnership with, the European Union. It does, however, say something equally important: we are open to negotiation and we are finally becoming aware of the enormous complexities Brexit will entail.

⁴² The President of the Confederation of British Industry, Paul Drechsler, said up to 90% of UK exports to EU would be hit by export tariffs or non-tariff barriers if no deal was agreed and that the consequences for some companies would be so dire it was impossible for them to prepare for this "worst-case scenario": H. STEWART, *Brexit without trade deal would open Pandora's box, says CBI chief*, in *The Guardian*, 2 March 2017, www.theguardian.com.