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Trade, Labor and EU Law Perspectives

On the eve of Brexit phase 2: the cliff has been moved but still looms large ...

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On 15 December 2017, the European Council concluded that ‘sufficient progress’ had been reached in the negotiations on the UK withdrawal from the Union to start the second stage of the Brexit procedure. This second stage, scheduled to start this week, should establish a new relationship between the EU-27 and the UK as a third country. Here are four insights to keep in mind on the eve of these negotiations.

Firstly, the fact that phase two of the procedure is about to start does not mean that phase one, on withdrawal and transition, is fully finished. Indeed, the December decision on sufficient progress was taken in spite of the fact that several key challenges for the withdrawal agreement were still unresolved. Most importantly, a real solution for the border issue between Northern Ireland and Ireland is still not in sight. In the draft withdrawal agreement of 19 March, the European Commission proposes, as a binding back-stop solution, that Northern-Ireland remains part of the EU Customs Union during transition. This solution, which would create a hard border *within* the UK, has so far been termed unacceptable by both PM May and the Democratic Unionist Party, the Conservatives’ Northern-Irish coalition partner. But a viable UK alternative has not been put forward either.

From this week onwards, therefore, negotiations on the withdrawal, on the one hand, and on the future relationship, on the other hand, will run in parallel. The EU Council thereby subtly underlined that negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible. It also stressed that there is no definitive agreement about anything until there is an agreement about everything.

Secondly, on the points of discussion that seem more or less settled by now, the momentum seems to be with the EU: the UK has agreed to pay a Brexit bill of over £50 billion and has consented to the provisions of the draft withdrawal agreement of 19 March envisioning lifelong residence and equal treatment rights for EU citizens in the UK and for UK nationals in the Union. Barring a credible alternative, the UK may realistically have had little options but to agree with the Union’s proposals on this point. In terms of process, moreover, the EU has so far also had it its way. The UK has been pushing to discuss the future UK-EU relationship since day one of the withdrawal talks. Yet the EU refused, demanding sufficient progress on withdrawal first. If the whole idea behind the sequencing of the negotiations – first the divorce talks, then the future arrangement –

was to convey the message the EU was in the driver's seat of the negotiations, the point has been made, loud and clear. Both in terms of substance and process, the EU has so far been calling the shots.

Thirdly, the UK remains determined to officially leave the EU on 31 March 2019, when the two year period under Article 50 TEU ends. Yet it is now obviously impossible to finalize an agreement on the new relation by then. To tackle this eventuality, Article 50 TEU explicitly foresees in the possibility for the European Council to unanimously extend the two year period, but only in agreement with the departing Member State. During such an extension, the UK would remain a full EU member, with everything this entails. However, it seems prolonged EU Membership is politically unacceptable for PM May. That is why, instead of an extension, the UK has requested a *transitional period*, after its formal EU departure. This should buy Brexit negotiators some time to reach 'a deep and comprehensive trade agreement', for the UK wants to keep a 'special relationship' with the EU.

The EU has agreed to a transition but has made it point clear that such an interim period must be in the interest of the Union, clearly defined and precisely limited in time. With these concerns in mind, it has included a very straightforward transition arrangement in the draft withdrawal agreement: until 31 December 2020, and unless otherwise provided, the whole of the EU law *acquis* shall remain applicable to and in the UK. This means, in particular, continued jurisdiction for the Court of Justice of the EU, continued payments to the EU, and continued rights for EU citizens that settle in the UK during transition. By the same token, as a third country, the UK shall no longer be represented in the EU institutions, nor participate in the decision-making of Union bodies, offices and agencies.

Leaving aside for now whether such an interim agreement can legally be based on Article 50 TEU, this is a far cry from 'taking back control'. During this period of 21 months, the UK remains subject to EU law, without the possibility of exerting any influence on it and must accept the jurisdiction of 'Luxembourg'. These are tough nuts to crack for the Brexit hardliners. But again, what is the alternative?

Fourthly, concerning the future EU-UK relationship, Teresa May initially, and incessantly, repeated, perhaps primarily targeting domestic audiences, that no deal was to be preferred over a bad deal. In essence, no deal means falling back to the WTO option. In such a scenario, the UK will no longer have access to the EU internal market and will inevitably be confronted with significant fiscal and especially non-fiscal trade barriers. Since awareness has sunk in that this might not be such an attractive trade perspective after all, the new UK government mantra has become that of a bespoke deal, reflecting the UK's unique position, and taking the shape of a deep and comprehensive trade agreement. In this respect, and without providing further clarity on its position on the framework for the future relationship, the UK has also signaled its intention to no longer participate in the Customs Union and the single market after the end of the transition period. This essentially cherry picking approach – no customs union, no free movement of persons, but unrestricted access to the market for financial services – seems impossible to reconcile with the EU's own unambiguous stance on the indivisibility of the single market and its insistence on the fact that no trade agreement can yield the same benefits as EU Membership. It also raises the question of how to avoid a hard border in Ireland after transition. At the same time, the European Council repeatedly confirms its readiness to establish partnerships in areas unrelated to trade and economic cooperation, such as the fight against terrorism and international crime, as well as security, defense and foreign policy. If the preceding negotiations on the withdrawal and the

transition are anything to go by, this may very well mean that the UK will ultimately be faced with the dilemma of choosing between a rock and a hard place: preferential, albeit limited access to the single market, at the high expense of loss of control and influence, not to mention the price tag in terms of continued EU contributions; or no deal. All in all, with every day that goes by, the latter scenario, and thus a hard Brexit, seems to draw nearer.

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