

History does not always move forward - Brexit and the possible future relationship between the European Union and the UK



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Brexit is an important event for countries like Belgium which are heavily exposed to the UK's economy.¹ As talks on a Withdrawal Agreement and a future relationship between the UK Government and the European Commission's Brexit Task Force are ongoing, this paper provides an assessment of 5 possible scenarios for Brexit: a no-deal leading to 'cliff-edge' chaos and a future relationship based on WTO commitments, an extension of the art.50 negotiation period, an extension of the transition period, a comprehensive EU-UK free trade agreement, and the UK's 'White Paper' proposal. We show that for an orderly divorce with continued intense economic relations, one or both parties must move away from their 'red lines'. The outcome of the negotiations is therefore impossible to predict at the moment, also because sound economic reasoning is falling victim to politics and these are most volatile in the UK. We conclude with an overview of the impact of the Brexit scenarios discussed on parties' principles.

¹ The scenarios presented and opinions expressed do not in any way reflect the views of the College of Europe, the KULeuven or the National Bank of Belgium. The authors write in their own name. The article was finished for publication in October 2018.



Introduction

The ensuing paper provides a discussion of 5 possible scenarios for Brexit: a 'no-deal' leading to a 'cliff-edge' and economic relations based on World Trade Organisation (WTO) commitments, an extension of the art.50 negotiation period, an extension of the transition period, an FTA and the UK's 'White Paper'. These were chosen based on the personal opinion of the authors, what they think are the most likely outcomes of the negotiations. We deliberately do not discuss the so-called 'Swiss model' of future EU-UK relations, as due to the complicated governance structure of this Agreement, the EU is very hesitating to repeat such model. Concerning an EEA or 'Norway-style' agreement, we think of this as being too hard to endure for the UK without risking a full-scale political crisis, and as such it is not discussed hereinafter either.

1. 'A cliff-edge' leading to economic relations based on WTO commitments

'Cliff-edge' is a metaphor often used to describe an event whereby the United Kingdom (UK) would crash out of the European Union (EU) with no agreement on a Withdrawal Agreement and political declaration, or a Future Relationship Agreement, whatsoever. The result would be that the UK falls back to third country, WTO member treatment, similar to e.g. the USA. Tariffs would be based on the principle of Most Favoured Nation (MFN), which are the highest possible tariffs the EU applies to third countries (for a customs union or single market is an exception to this rule, allowing trade without tariffs. Moreover, Least Developed Nations often benefit from the WTO's Generalised System of Preferences or the Everything But Arms Scheme).

Albeit both parties at the table (the UK and the EU) seem to realise that they only lose in such a scenario, both economic and reputational, it cannot be ruled out. For any kind of agreement to be concluded, several steps are necessary, which is set out clearly in a recent paper of the UK-based think tank Institute for Government². First of all, negotiators have to reach an agreement. Secondly, thanks to the 'Grieve compromise', the UK's House of Commons (Commons) then gets its 'meaningful vote' (which is not the same as the final 'yes or no' vote of approval as the Commons can still amend the bill in this case) and approves the proposed agreement, or, if the EU is open to it (highly unlikely) sends the Government back to the negotiating table.

² https://www.instituteforgovernment.org.uk/sites/default/files/publications/brexit-scenarios-final_0.pdf, accessed on 13/8/2018.



Thirdly, the final provisional Withdrawal Agreement needs the ultimate consent of both the European Parliament (EP) and the Commons. If anywhere along the road someone says ‘no’, a deal is scuppered, and a ‘cliff-edge’ occurs. This set procedure leaves us with a lot of roads leading to a ‘cliff-edge’, and only one to a deal.

The non-negligible chance of a ‘cliff-edge’, and the negative economic consequences this would have do not mean however that the EU and the UK are accommodating regarding the remaining issues of the first Phase of the Brexit negotiations (governance, the Irish border, the indivisibility of the ‘four freedoms’, Galileo, intellectual property rights, Gibraltar, Common Foreign and Defence Policy...). The recently (12 July 2018) published ‘White Paper³’ shed some light on most of them, but important questions remain open (more on these later). In the next paragraphs, we will assess why the risk on a no-deal is rather high.

UK Cabinet divisions on Brexit

The reason for the frequent delays in the presentation of the UK’s ‘White Paper’ (and former position papers) is mainly due to Prime Minister (PM) May’s Cabinet remaining utterly divided over Brexit. Although two senior hard Brexiteers (Boris Johnson, Secretary for Foreign and Commonwealth Affairs and David Davis, Secretary for Exiting the EU) recently resigned in light of the Chequers compromise and subsequent ‘White Paper’, up until now Conservative hard Brexiteers only worked in parallel with soft Brexiteers (including PM May) in the Cabinet to work out their own scenarios. Not that the prior proposals by any of the two sides (‘max-fac’ for example) looked very convincing to the EU, but the fact that there is such a clear and public division in the Cabinet greatly hampers the UK’s negotiators to come forward with any kind of detailed position paper, and leaves them little to no room for discussion with the EU.

Ms May proved herself very skilled in handling the Commons and choosing her words carefully to keep the whole cabinet more or less aligned, but she cannot use this strategy indefinitely, and does not always succeed either, given the abovementioned example of Davis and Johnson resigning.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, accessed on 13/8/2018. Please note that, while often used in the same context, the ‘White Paper’ is not the same as the Chequers deal. The ‘White Paper’ is the comprehensive UK Government’s proposal for a future EU-UK relationship, while the Chequers deal, published a week before the ‘White Paper’, only concerns (mainly trade and customs related) parts of the ‘White Paper’.

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Moreover, as the terms for handling legislation and amendments in Parliament are fixed, she eventually has to come up with a clear position on the outstanding Brexit issues⁴, and later on the Future Relationship. Doing so is further complicated by the fact that the political future of the May-Government is tied with the Northern-Irish Democratic Unionist Party (DUP), which provides her with a narrow majority in the Commons and will want guarantees that Northern Ireland remains an integral part of the UK at some point. PM May thus walks a tightrope.

A Tory ‘coup’

The chances of a ‘coup’ in the Commons led by Tory rebels to soften, harden or revoke Brexit remain rather small. For one, this would require a coalition of Labour MPs and multiple Tory MPs to table and win a vote of no-confidence in PM May. This is unlikely, as the one thing that keeps the Conservatives more or less united is the ‘horror scenario’ of a Labour Government led by Jeremy Corbyn, who is perceived as being a communist. Second, PM May can always raise the stakes of a crucial vote herself by tying her political future as party leader and PM to its outcome, effectively letting Conservative MPs choose between herself as a compromise figure on one side, and an infight in the Tory party (which has no other broadly acceptable candidate) on the other. Making a ‘normal’ vote a confidence vote is nonetheless easier said than done, as the Fixed-term Parliaments Act⁵ requires May to hold a separate vote to trigger a general election, thus she can no longer incorporate it in another bill. The PM can however state that she will resign if she loses a crucial Brexit-vote, that way triggering a messy Conservative leadership election, or the Queen asking someone else to form a Government. That being said, it is quite likely May will not run for party leadership (thus being PM candidate) after the next UK general elections (scheduled to be held on 5 May 2022), due to the fact she risked and lost the Conservatives’ parliamentary majority after her 2017 snap elections. Someone else might then take the lead, with most of the dirty Brexit work already done by Ms May. Unless of course she succeeds in agreeing a widely applauded Brexit strategy. Rumour has it that preparing for a potential leadership challenge was one of the main reasons for Boris Johnson to resign as Foreign Secretary.

⁴ While we agree with the Institute for Government’s paper (https://www.instituteforgovernment.org.uk/sites/default/files/publications/brexit-scenarios-final_0.pdf, p8. Accessed on 23/08/2018) stating that Ms May could win support in the Commons by fudging the Irish border issue with the EU and agreeing on a very vague formulation of the future relationship, this is in fact nothing more than a postponement of the problem and sooner or later negotiators will have to go into detail.

⁵ <http://www.legislation.gov.uk/ukpga/2011/14/contents/enacted/data.htm>, accessed on 23/8/2018.



The abovementioned reasons do not hinder Conservative PMs in voicing their divergent opinions though, including tabling quite a few amendments to Cabinet proposals. On 12 June 2018 for example, PM May and her chief Whip apparently miscalculated Tory support in the Commons for some of the ‘EU Withdrawal Bill’ amendments proposed by Tory rebels and the House of Lords, in particular the one on the ‘meaningful vote’ for Parliament on the final Brexit-deal prepared by Dominic Grieve. As it was unclear whether May would win the vote on Grieve’s amendment, she gave in to the rebels to amend the ‘EU Withdrawal Bill’ and promised Parliament a say over the Brexit negotiations, but only if the negotiations ended in a ‘no-deal scenario’ or the Withdrawal Agreement were to be defeated in Parliament. The original Grieve amendment was subsequently defeated in the Commons on 20 June 2018. A similar drama took place July 16, 2018, when PM May was forced to back four of Jacob Rees-Mogg’s European Research Group’s amendments, narrowly avoiding defeat of her Brexit-proposal by a 3-vote margin⁶. Both U-turns avoided government defeat in Parliament, but as they do not oblige Ms May to aim for a certain Brexit-scenario, it does not in our opinion significantly alter her negotiation position or bargaining power vis-à-vis the EU.

A second Brexit referendum

A second Brexit referendum (which could be a ‘positive’ ‘cliff-edge’ as it could potentially revoke Brexit) has become very unlikely. This is because both Labour and the Conservative party want to avoid being seen as ‘neglecting the will of the people’. PM May said it would be “a gross betrayal of our democracy” to hold a second Brexit referendum⁷. Both parties thus more or less support Brexit, but have quite different views on what the future EU-UK relationship should look like. Moreover, some newspapers and the BBC still keep track of public’s opinion concerning Brexit, and society remains sharply divided over the issue, even after some 100 constituencies had a change of heart last August⁸. Put differently, a second referendum is not guaranteed to result in the UK staying in the EU, apart from the fact that it will be very difficult to pull off before the March 29, 2019 deadline⁹ and that it would spark fierce discussions on the question to be on the ballot.

⁶ <https://www.ft.com/content/a3d2735e-899e-11e8-b18d-0181731a0340>, accessed on 23/08/2018.

⁷ <https://www.bbc.co.uk/news/uk-politics-45385421>, accessed on 06/09/2018.

⁸ <https://www.theguardian.com/politics/2018/aug/11/more-than-100-pro-leave-constituencies-switch-to-remain>, accessed on 23/08/2018.

⁹ <https://www.economist.com/britain/2018/07/19/a-second-brexit-referendum-is-back-in-play>, accessed on 23/8/2018.



Besides, even if the UK would overcome all these hurdles, it would be foolish to assume the EU would just welcome the UK back with open arms and agree accession at the same terms the country currently enjoys. For example, the EU cannot be expected to repeat the UK's budget rebate. Most citizens and economic actors prefer a 'case closed' as soon as possible to get rid of the Brexit-related uncertainty and move on with the UK outside the EU.

A negotiation breakdown

Up last is the possibility of a negotiation breakdown. If the UK and the EU simply can't find an agreement that works for both, for example due to enduring disagreement regarding a solution for the Irish border conundrum (more on this issue under 4.), or the governance of the Withdrawal- or Future Relationship Agreement, the UK (or the EU) can walk away from the negotiations. This would mean a 'cliff-edge' on 29 March 2019, or, if a breakdown occurs during the Future Relationship-talks after said date, after the end of the transition period on December 31st, 2020. Needless to say, such an event would have a disastrous effect on the UK economy, and to a lesser extent the EU economy¹⁰, even disrupting essential supplies to the British economy¹¹. That's why at the UK-side, some safeguards are in place to avoid an 'accidental' 'cliff-edge', at least in the Withdrawal Agreement stage of talks.

At the very least, due to the 'Grieve compromise', Parliament would have to formally vote on a no-deal outcome, which was not the case in the original bill proposed by the Government. In case the Prime Minister would not be able to bring forward the Withdrawal Agreement Bill (thus the EU-UK compromise text needing Parliamentary approval to receive legal force), the EU Withdrawal Act now obliges the Government to making a statement to Parliament on its proposed way forward, together with a neutral motion allowing MPs and peers to take note. If Parliament agrees, the UK heads for a 'cliff-edge' Brexit on 29 March 2019¹². It's only when Parliament would disagree with the Government, that things get confusing. The 'Grieve compromise' again forces the Government to make a statement and lay down a neutral motion. In theory, neutral motions are not amendable, so Parliament could only 'take note' of the Government's motion stating that no agreement has been found.

¹⁰ Due to high exposure (ports and proximity), Belgium would be particularly affected, together with Ireland, Denmark and the Netherlands.

¹¹ https://www.gov.uk/guidance/medicines-supply-contingency-planning-programme?utm_source=006a7039-0408-4b48-ba1e-e47fc83caf75&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate, accessed on 23/08/2018.

¹² https://www.instituteforgovernment.org.uk/sites/default/files/publications/brexit-scenarios-final_0.pdf, accessed on 23/08/2018.



The final decision however lies with the Speaker of the Commons, which could make the motion amendable (or use other mischievous legal options), allowing Parliament to force the Government back to the negotiation table¹³. By law, the Government is obliged to make a statement and table a neutral motion within 5 days when no deal would be found by 21 January 2019, leaving negotiators very little time to (potentially) finalize one (and the EP and Commons to ratify one) before the March 29, 2019 deadline should Parliament decide to send them back; but a breakdown could come earlier of course if talks are going nowhere.

Despite the procedure set out above, the 'Grieve compromise' changes nothing to the fact that 'cliff-edge' remains the default outcome if no agreement can be found in time. This is because if negotiations break down and Parliament sends the Government back to negotiate further with the EU, but the EU refuses to renegotiate (parts of) its proposals for the Withdrawal Agreement, or negotiators run out of time, then a 'cliff-edge' occurs anyway, regardless of an eventual vote in the Commons. Parliament's vote is therefore only relevant in the specific case that sufficient time would be left to send the Government back to renegotiate (parts of) the proposal for the Withdrawal Agreement, and the EU is open to do so.

We think of this scenario as unlikely, but not impossible to happen. It would nevertheless make sense that the EU and the UK would try to conclude an agreement containing at least the bare minimum conditions to avoid chaos. Regarding the Irish border issue for example, the UK last December agreed to a so-called 'fallback' or 'backstop' solution for Northern Ireland, effectively keeping it within the EU's Single Market to guarantee a frictionless border in case of a 'cliff-edge'¹⁴. The same could be expected for criminal matters (warrants) or aviation rights, financial transactions... but this is not guaranteed, and would depend entirely on the goodwill of the EU and in part on unilateral actions of the UK. For trade in goods, a 'cliff-edge' would mean trade under WTO rules, applying the principle of Most Favoured Nation¹⁵, meaning tariffs and border checks, which would hit Belgian ports hard, while also having a smaller negative impact on the Belgian economy in general.

¹³ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>, accessed on 23/08/2018.

¹⁴ https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf, accessed on 23/08/2018.

¹⁵ MFN means that the EU has to award the same tariffs to the UK's imports as it awards to other WTO members not part of the EU or any FTA. The EU only applies these tariffs to a few trading partners, most of the rest of the world benefits from more beneficial access to the EU market.



As talks continue while objections to the other side's offers keep being raised, it has become clear that the October European Council will prove a too strict deadline for an EU-UK deal to be struck. While October was first envisaged for a Withdrawal Agreement deal to leave sufficient time for ratification by the EP and the Commons, mid-November, or "well before the end of the year" seems more realistic now for UK Brexit minister Raab¹⁶. If even December would prove to short, apart from a 'cliff-edge', only one option would remain, being the UK remaining in the EU for a bit longer, by extending the art.50 negotiation period. We discuss this possibility in the next chapter.

2. Extension of the art.50 negotiation period

The second scenario we discuss is an extension of the formal art.50 negotiation period. This possibility is provided for by art.50 itself, which makes it easier to agree upon from a legal point of view compared to extending the transition period. Doing so nonetheless still requires unanimity among the EU27 and the UK. In this scenario the UK would simply remain a member of the EU, including all the rights and obligations that this entails such as ECJ-jurisdiction, Multiannual Financial Framework (MFF)-payments, voting rights.... Last but not least, the UK would be required to organize elections for the European Parliament, in which elected candidates would have a seat for as long the time agreed upon.

If negotiators were to extend the art.50 negotiation period, it would probably only be for a limited period of time, a few weeks to a few months, when both parties are close to an agreement, or to allow the Commons some extra time for the ratification of the Withdrawal Agreement. Doing so would likely shorten the transition period included in the Withdrawal Agreement as this period should end with the current MFF, end of 2020, and extending for a longer period of time would come with a set of difficulties.

The largest stumbling block would likely be the political situation in the UK and Ms. May's Cabinet. According to art.50, the UK leaves the EU two years after stating its intention to withdraw, being 30 March 2019. This would be entirely different if the negotiations were to be extended based on art.50. As mentioned above, in this case the UK would simply remain an EU Member State, pushing forward 'Brexit-day' and leaving the Tories without any kind of 'Brexit-trophy' to show their voters. That would be a very measly result for PM May to defend at home after two years of hard-fought negotiations. Secondly, Ms. May would need to align her Cabinet to support this option.

¹⁶ <https://www.bloomberg.com/news/articles/2018-08-29/u-k-and-eu-said-to-drop-their-october-deadline-for-brexit-deal>, accessed on 29/08/2018.



She circumvented this sheer impossible task a first time by asking the EU for a ‘time-limited implementation period’, which her Cabinet only reluctantly accepted because it provided more time to discuss other, more serious options (and allowed hard Brexiteers to bridge the gap until the technology required for ‘max-fac’ was ready). It is very unlikely she would succeed a second time in doing so without getting any ‘trophy’ in return from the EU, even after the resignations of Johnson and Davis, except maybe when negotiators are close to an agreement or to buy some extra time to allow ratification of the Withdrawal Agreement. Finally, as goes for an extension of the transition period, an extension beyond 2020 under art.50 would probably require very troublesome negotiations regarding an extra financial UK-contribution to the new EU MFF, as without it, the UK would further enjoy the benefits of the EU’s Single Market while not paying its ‘fair share’. That is also the reason why the EU is currently not willing to prolong the negotiations for more than a few weeks via this way.

3. Extension of the transition period

During the March 2018 European Council meeting, heads of state and government agreed with a negotiators proposal to include a transition/implementation period in the Withdrawal Agreement¹⁷ under negotiation. The transition period would bridge the gap between ‘Brexit-day’ (30/3/2019) and the end of the current MFF on December 31st, 2020¹⁸. But only when the Withdrawal Agreement is ratified by the Commons and the EP. During this period, the UK legally would be a third country vis-à-vis the EU. However, via the Withdrawal Agreement, the country voluntarily binds itself to all EU-rules, including paying into the EU-budget and ECJ-jurisdiction (but excluding voting rights for the UK), as to avoid the necessity for businesses to adapt twice to changing rules. This was a rather easy decision to take for the EU, as the UK already promised to make the requested outstanding payments to the EU’s budget (of around 40bn Pound Sterling). It would also buy the EU and the UK some most welcome extra time to negotiate a Future Partnership Agreement, which can only be negotiated in detail, signed and ratified after the UK has become a third-country vis-à-vis the UK, thus after ‘Brexit-day’.

Notwithstanding the abovementioned advantages, extending the transition period when necessary could prove troublesome. This is because art.50 says the UK (or any other EU Member State) stops being a member of the EU 2 years after giving notice of its intention to withdraw, a period which can only be extended (providing more time for negotiations) by unanimity within the EU27, plus the UK. This is not the procedure that the EU and the UK intend to follow however, as this would bring with it the issues discussed in chapter 2.

¹⁷ <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

¹⁸ <http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf>, accessed on 29/08/2018.



Allowing for the initial transition period thus already required some creative thinking from the EU-side, including giving the UK a pro forma 'third country status' after Brexit-day. Further, it was explicitly stated that the transition period would be time-limited. Second and last, the UK would probably be required to pay a share of the new MFF, starting 1/1/2021. PM May already experienced quite fierce opposition from the hard Brexiteers within her Conservative party and Cabinet by giving in to this EU-demand, and adding to the existing bill could open 'Pandora's box', further endangering May's position. Going for this ad-interim scenario would thus certainly prove challenging.

4. A transition period, followed by a comprehensive EU-UK FTA after 2020

This scenario was always proclaimed as the most likely one since the start of the negotiations, which was due to the UK's red lines of leaving the EU's Single Market and Customs Union, no free movement of people, no European Court of Justice (ECJ) jurisdiction... vis-à-vis the EU's red lines of the so-called 'indivisibility of the four freedoms', independent decision making and ECJ-jurisdiction over the EU *acquis communautaire*¹⁹. A comprehensive free trade agreement genre CETA20, 'CETA++' or EU-South Korea seemed the only way to respect both sides sensitivities, but things have changed quite a bit since then, due to the Irish border problem. The major shortcoming of an FTA is that it does not solve the Irish border issue, which is explained in more detail below. Negotiating a new (trade) relationship can only start after the UK becomes a third country, i.e. after the end of March 2019. Experience shows that often many years are needed to negotiate such complex agreements, which is why the EU agreed with the UK on including a transition period in the Withdrawal Agreement.

The Irish border problem

The border between (the Republic of) Ireland and Northern Ireland (part of the UK) will be the only land border between the EU and the UK after Brexit. This poses a problem for historical reasons. After decades of protestant and catholic violence in Northern Ireland, commonly known as 'the Troubles', the UK and Ireland in the 1998 'Good Friday Agreement' agreed that the border between the two countries would be 'frictionless' or 'invisible', thus without any border checks. This was easy to achieve, as both Ireland and the UK were part of the overarching EU, implying no customs checks and a free travel area already existed between them.

¹⁹ <http://www.consilium.europa.eu/media/33507/23-euco-art50-guidelines-nl.pdf>, accessed on 24/08/2018.

²⁰ Comprehensive Economic and Trade Agreement.



After Brexit, the UK will no longer be a member of the EU and leave its Single Market and Customs Union, in principle making border checks necessary again (the free movement of people would be guaranteed by the existing free travel area covering both countries). The EU and the UK committed themselves to find a workable solution for the problem to avoid violence sparking up again, but the UK's red lines of leaving the Single Market and the Customs Union are hard to reconcile with the EU's red line of the 'indivisibility of the four freedoms'. Negotiators could agree to have a border 'down the Irish Sea', but this implies a border between Northern Ireland and the rest of the UK, something of which PM May already said "no UK PM could ever agree to²¹". One could also make the border between Ireland and Northern Ireland 'hard' anew, but this would jeopardize the 'Good Friday Agreement'. How to solve this existential problem has proven to be the most important, sensitive and most difficult issue of the Brexit negotiations.

When 'all else fails', the UK agreed to keep Northern Ireland 'fully aligned' with the EU after Brexit as a backstop solution. The Joint Report²² however did not go into detail as to how this 'invisible' border and 'full alignment' would work in practice. To arrive at an 'operational backstop', the COM made a subsequent proposal to the UK in a protocol of the draft Withdrawal Agreement, which was rejected by the UK negotiators. Whatever solution the EU and the UK may come up with eventually (or not), a simple 'comprehensive FTA' would not be sufficient to tackle this tremendous issue.

Shortcomings of an FTA

For one, an FTA would require UK exporters to the EU (and vice versa) to provide a 'rules of origin' compliance certificate to prove that their products are made up from at least the mutually agreed percentage of UK (or EU) parts. This form, of course, must be checked at the border, which would in turn require customs infrastructure, or at least some kind of in advance digital screening procedure. Moreover, a comprehensive FTA mostly provides access to each other's markets almost, but not without, customs duties. For every good not falling under an EU-UK FTA, border checks are necessary, allowing customs officers to check what kind of goods are being imported and whether duties should be paid. Third and last, regarding non-tariff barriers, regulation for example, equivalence clauses or streamlining of product standards would be required, otherwise border checks are again unavoidable. Concerning services, which are less of a problem for the Irish border problem as they do not tangibly cross the border, the UK always stressed it wants frictionless access to the EU financial services market by recognising both financial services' regulations are equivalent.

²¹ <https://www.bbc.com/news/av/uk-politics-43228485/theresa-may-no-uk-pm-could-ever-agree-with-eu-draft>, accessed on 24/08/2018.

²² https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf, accessed on 27/08/2018.



While the UK lowered its expectations regarding financial services in the 'White Paper', recognising mutual recognition is unpalatable for the EU, it still wants a "new economic and regulatory arrangement with the EU" including "phased adjustments [...] of change²³". This would mean a significant improvement of the EU's existing third country regime but granting such access by means of an FTA would be unprecedented and almost all FTA's contain a 'prudential carve-out' for financial services. It is clear that an FTA would not be able to respect both parties' red lines and ambitions, especially not regarding a 'frictionless border' on the Isle of Ireland.

5. The UK 'White Paper'

The 'White Paper²⁴' is the first overarching UK position paper on the future relationship, however mainly drawing from formerly published position papers on separate topics. Albeit the 'White Paper's' focus is on the future EU-UK relationship, due to the UK wishing to address the Irish border issue via the future relationship, the document inevitably also touches upon aspects of the Withdrawal Agreement under negotiation as well, such as trade and customs, mobility (free movement of people), the role of the ECJ ... As mentioned in the chapter discussing the 'cliff-edge' risk, for the UK to arrive at the 'White Paper' being published, it took the resignation of two senior ministers (Johnson and Davis) and several junior ministers. Most of them argued that the 'White Paper' would pave the way for a Brexit which they considered too 'soft', thus leading to a 'BINA' or 'Brexit-in-name-only'. Conservative backbencher Jacob Rees-Mogg claimed the document would make the UK the EU's 'vassal state'²⁵. The Paper clearly stirs up emotions in the UK, but as it comprises more than 100 pages going into a great number of topics, for this chapter we will only cover a limited selection of these, being trade in goods and the implications for the Irish border, and financial services trade. The EU's reaction to the 'White Paper' concludes this chapter.

²³ UK White Paper p29,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, accessed on 24/08/2018.

²⁴ Formally 'The Future Relationship Between The United Kingdom And The European Union'

²⁵ <https://www.express.co.uk/news/politics/987831/brexit-news-jacob-rees-mogg-brexit-white-paper-eu-commons-latest>.



Trade in goods

The main aim of the UK's proposal concerning trade in goods seems to be avoiding any kind of customs checks at the border (that way achieving a 'frictionless' border on the Isle of Ireland) and maintaining 'just-in-time²⁶' production lines between the EU and the UK and vice versa, while at the same time allowing for an independent UK trade policy. The UK stresses once again that Brexit means leaving the EU's Single Market and Customs Union, "recognising that both parties would not have current levels of access to each other's markets", but is open to a "deep and comprehensive economic partnership between the UK and the EU²⁷". The UK proposes a "free trade area for goods", which would entail a "common rulebook for goods", only containing those rules necessary to allow for frictionless trade. Note that this proposal for a 'common rulebook' does not mean that the UK accepts ECJ-jurisdiction in this matter. It would still allow the Commons to diverge from the 'common rulebook', or choose not to follow an EU-rule-change, however being fully aware that this would mean losing (a proportional part of) EU market access.

To ensure a 'level playing field' between both parties, the UK Government is prepared to commit to a 'common rulebook' on state aid (including the abovementioned caveat), "cooperative arrangements" on competition and "reciprocal commitments to maintain current high standards through non-regression provisions in other areas, such as environmental and employment rules²⁸". The country further intends to end the free movement of services, labour and capital and seeks participation (without voting rights) in EU agencies that facilitate goods being placed on the EU market.

²⁶ In a 'just-in-time' production line, the required amounts of parts needed for production arrive in a constant flow at the production facility, rather than at once in bulk, taking away the need for businesses to stockpile parts, as they are immediately used in the production process upon arrival. This production method can only work in a system of 'global value chains' whereby basic and intermediate goods are produced in countries or regions in which they are cheapest to produce, and then exported quickly and with little or no friction (taxes, administration...) to the country which then assembles the final product, only to potentially be exported again to the country of consumption. Due to the 'four freedoms' the UK and the EU are strongly intertwined that way.

²⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The

²⁸

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The future relationship between the United Kingdom and the European Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf), p14, accessed on 27/08/2018.



The cornerstone of the free trade area would be the “Facilitated Customs Arrangement” (FCA), which would “remove the need for customs checks and controls between the UK and the EU as if in a combined customs territory, while enabling the UK to control tariffs for its own trade with the rest of the world [...]”. The idea is that when the UK applies the EU’s tariffs and trade policy at its border for goods intended for the EU, but applies its own tariffs and policies for goods intended for consumption in the UK, this would remove the need for customs checks. The UK explicitly states that it is not proposing that the EU should do it the other way around to fill the gap, but wants to agree “mechanisms, including institutional oversight, for ensuring that this process is resilient and verifiable²⁹”. The whole process would be smoothed by trusted trader schemes. For goods for which the destination cannot be robustly demonstrated upon arrival, the highest of the EU or UK tariffs would be applicable, with repayment possible after arrival in the lower tariff area. The UK also wants to “explore options to use future advancements in technology to streamline the process”. Last but not least, as a necessary underpinning to the FCA, the UK Government seeks to agree with the EU “an agreement not to impose tariffs, quotas or routine requirements for rules of origin on any UK-EU trade in goods³⁰” guarantying equal treatment for goods coming into EU Member States or the UK from either side.

The UK Government tries to address a number of weaknesses of previous proposals (such as ‘max-fac’) in its Paper. For example, a customs union only allows for duty free access to the customs territory, but border forces still need to check for CE compliancy, sanitary and phyto-sanitary rules..., thus only tackling a small part of border checks. By committing to a ‘common rulebook’, the UK seeks a way to avoid the abovementioned checks. Second, the earlier ‘customs partnership’ model implied that the EU would have to collect the (probably lower) UK tariffs, placing a financial burden on the EU and effectively making the Union contribute to the UK’s competitive advantage. The idea of a sort of customs union in goods only is inspired by the so-called ‘Jersey option³¹’.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p17, accessed on 27/08/2018.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p19, accessed on 27/08/2018.

³¹ <https://www.cer.eu/publications/archive/bulletin-article/2018/holding-out-hope-half-way-brex-it-house>, accessed on 28/08/2018.



This boils down to giving the UK a status inspired by the one the UK's Crown Dependencies (Jersey, Guernsey and the Isle of Man) have vis-à-vis the EU. Jersey for example is only part of the EU for the purposes of free trade in goods (including fisheries and agricultural products) and, according to the Commission, also for 'as far as the UK looks after its external relations³²'. Moreover, Jersey voluntarily copy-pastes the EU's Single Market legislation, due to which it considers itself to be a de facto member of the EU Single Market legislation. For matters regarding customs, Jersey also falls under the jurisdiction of the ECJ, other EU-rules do not apply to the isle. Formally asking for Single Market-membership for goods would be a formidable U-turn of the UK Government, but when carefully read, the 'White Paper' gets quite close already.

Albeit suggesting a 'common rulebook' covering only selected regulation, enhanced with commitments on environmental and employment rules, de facto the UK will be a 'rule-taker' vis-à-vis the EU, except when accepting loss of EU Single Market access. Concerning ECJ-jurisdiction, whereas Jersey only has a limited exposure to the ECJ, the UK proposes to have its courts pay "due regard³³" to relevant ECJ case law when interpreting the 'common rulebook', again a (sensitive) symbolical step away from setting up a new (common) court which pays 'due regard' to ECJ case law, at least for trade in goods. Finally, regarding EU-UK cooperation in external relations and security, the Paper makes an "unconditional commitment" to maintain it, apart from other forms of socio-economic cooperation in the Future Relationship Agreement. Doing so, the UK recognizes this is a very important area of cooperation, as does Jersey, which 'outsources' (part of) its external relations and security policy to the UK and through the UK to the EU. As services do not tangibly cross the border, for solving the Irish border puzzle, the Jersey option, or the UK's 'White Paper's proposal, could probably do the trick, if only when both parties agree to move from their respective red lines.

³² <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2002-3620&language=NL>, accessed on 28/08/2018.

³³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p92, accessed on 28/08/2018.



Trade in financial services

As the UK is world leading in financial services, it comes as no surprise the ‘White Paper’ contains a section specifically covering the sector. The country again recognizes that “the UK and the EU will not have current levels of access to each other’s markets³⁴”, and does no longer ask for a ‘European passport’ or ‘mutual recognition³⁵’ to allow its financial institutions to operate on the EU’s Single Market. Instead, the UK now accepts that it is the EU’s prerogative to decide whether a country’s regulation is equivalent to its own or not. The Government’s new proposition is to agree on an upgraded version of the EU’s third country equivalence regime, as according to the UK, the existing regime does not provide for: “a. institutional dialogue [...]; b. a mediated solution where equivalence is threatened [...]; c. sufficient tools for reciprocal supervisory cooperation [...]; d. some services, where clients in the UK and the EU currently benefit from integrated markets [...]; e. phased adjustments and careful management of the impacts of change³⁶ [...]” This new “economic and regulatory agreement” would be based on “the principle of autonomy for each party over decisions regarding access to its market, with a bilateral framework of treaty-based commitments to underpin the operation of the relationship [...] and that provision is made for the necessary consultation [...] between the parties³⁷.”

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p25, accessed on 28/08/2018.

³⁵ Mutual recognition means that 2 parties (the EU and the UK) recognise each other’s financial regulation as equivalent, allowing financial institutions from both parties (EU banks and the UK’s City) to operate within the other party’s jurisdiction without endangering financial stability there. This was HM Treasury’s original position for financial services trade with the EU. The main problem with this kind of cooperation in financial services is that when services providers operate in the other jurisdiction for some time, they get intertwined with the financial sector in that jurisdiction, making it very difficult for decision makers to cut-off market access for these institutions if necessary.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p29, accessed on 28/08/2018.

³⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p30, accessed on 29/08/2018.



The UK assumes that both parties can start from a position of “reciprocal recognition of equivalence” at the end of the transition period, as the UK’s rules and supervisory structures will be identical to the EU’s at that point. In the Paper, the UK expects a lot from the so-called “regulatory dialogue”-mechanism, intended to manage possible future regulatory divergence. The idea is that before making any regulatory changes, “the UK and the EU should be able to understand and comment on each other’s proposals at an early stage through a structured consultative process of dialogue at political and technical level”. Further, the UK and the EU would need “to commit to reciprocal and close cooperation to protect consumers, financial stability and market integrity with codified procedures for routine cooperation and for coordination in crisis situations³⁸”. To conclude, the UK also envisages an “a. transparent assessment methodology [...]; b. structured withdrawal process [...]; c. long-term stabilisation [...] a presumption against unilateral changes that narrow the terms of existing market access regimes [...]”. When disputes would arise on the binding treaty-based commitments, the UK proposes to refer the case to a to-be-established independent arbitration panel.

The EU’s reception of the ‘White Paper’

Not surprisingly, most, if not all reactions to the UK publishing the Paper were rather lukewarm. The EP’s Brexit Steering Group, presided by former Belgian PM Guy Verhofstadt, published a statement welcoming the Paper “as a step towards establishing a new relationship between the UK and the EU once the UK is no longer a Member State”, while also expressing satisfaction that “the future EU-UK relationship take the form of an Association Agreement. Given this has been the Parliament’s position from the very beginning³⁹”.

The EU’s approach seems to be one of being ‘politely constructive’ vis-à-vis the UK proposal, albeit without wanting to exaggerate expectations. Rejecting the Paper out of hand would have been a dangerous move, as this could have jeopardized PM May’s authority and position in the UK. The bloc has send over many questions over to the UK, with negotiations continuing in the meantime in their new setting (with Dominic Raab as the UK’s Chief Negotiator instead of David Davis).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, p31, accessed on 28/08/2018.

³⁹ <http://www.europarl.europa.eu/news/en/press-room/20180712IPR07806/statement-by-the-brexit-steering-group-on-uk-government-white-paper>, accessed on 29/08/2018.



According to Barnier⁴⁰, questions mainly concerned the proposal for a ‘common rulebook’, the ‘facilitated customs arrangement’ and related topics such as a possible comparative advantage for UK firms after Brexit, the FCA whether or not being in line with the ‘indivisibility of the four freedoms’, and the UK collecting EU duties at its borders⁴¹. All in all, these clearly boil down to excluding ‘cherry picking’ from the UK’s side.

This is not a far-fetched concern, as the ‘White Paper’ contains some questionable proposals in that regard. For example, to isolate trade in goods from the EU’s Single Market framework (see above) could be considered ‘cherry picking’, potentially jeopardizing a level playing field between the EU and the UK. When it comes to financial services trade, the UK’s approach to “enhanced equivalence” would give the country considerable bargaining power early in the legislative process, while binding treaty-based commitments for the methodology for equivalence assessment, as well as for granting and withdrawing equivalence decisions, could restrict the EU’s room for autonomous equivalence assessments.

Finally, granting the UK privileged access to the EU legislative process without the UK being obligated to incorporate EU acts into national legislation would likely be seen as preferential treatment by other third countries, especially EEA or EFTA Member States.

Before concluding this paper, the ensuing table provides an overview of the impact of the scenarios discussed on both parties’ principles.

⁴⁰ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/88890.html>

⁴¹ <https://www.theguardian.com/politics/2018/jul/20/france-minister-nathalie-loiseau-brexit-concessions-theresa-may-commons>, accessed on 29/08/2018.



6. Table: Overview of respect for parties' principles in different Brexit scenarios for the future EU-UK relationship

RESPECT OF POLITICAL PRINCIPLES (RED LINES)				
	SCENARIOS			
	NO DEAL and 'CLIFF-EDGE'	EXT. of art.50 or TRANSITION	COMPREHENSIVE FTA	UK 'WHITE PAPER'
UK PRINCIPLES				
UK regains sovereignty	Y	N	Y	Y
UK indep. trade policy	Y	N	Y	P
Ending free movement of people	Y	N	P	Y
UK access to EU research projects*	N	Y/P/?	P/?	Y
Ending ECJ-jurisdiction in the UK	Y	N	P/?	P
UK access to the EU's financial market	N	Y	N	P
EU PRINCIPLES (INCL. GUIDELINES)				
ECJ-jurisdiction in UK over EU law	N	Y	N	N
UK pays outstanding financial commitments	N	Y	Y	Y
Indiv. 'four EU freedoms' respected	Y	Y	P	N
COMMON PRINCIPLE				
Irish border solved	N	Y	Y°	Y
LEGENDA				
Y	Yes	* The UK wants participate further in EU research projects. The EU accepts this in principle, but only wants to allow the UK to participate on 'third country' basis, not having the same rights (and obligations) as Member States. In case of a comprehensive FTA, the EU will probably allow the UK to participate in certain projects, being a compromise result for the UK, and probably means an UK contribution to the EU budget. In the 'White Paper' scenario, the UK participates fully in EU research projects, for which it pays a fee to the EU, but the EU is objected to this as the UK's level of access would not be in balance with the UK being a 'third country'. In case of extension of art.50 or the transition period, the UK will already be a 'third country' from a legal point of view, but will still pay a part of the future MFF. The EU could thus allow the UK to participate fully, partially or not at all in research projects, making the outcome uncertain.		
N	No			
P	Partial			
?	Unclear	Y°: depending on agreed 'backstop'		



The table above clearly shows that there is no miracle solution for Brexit, as none of the scenarios discussed completely respects both parties red lines. While a 'cliff-edge' might seem tempting for some hard Brexiteers, it would mean no solution for the Irish border issue and losing access to EU research projects, while the UK's City would lose access to the EU's important financial services market. Regarding the EU, the ECJ would lose jurisdiction in the UK over EU law and the UK would not pay its outstanding commitments to the EU. Second, an extension of art.50 is or the transition period would keep the UK within the EU, which would respect the EU's principles, but evidently crosses the UK's red lines. Third, a comprehensive FTA would respect or compromise most of both parties red lines, but would still leave the UK without access to the EU's financial market, and the EU (ECJ) without jurisdiction over EU law in the UK. To conclude, the White Paper comprises a compromise on the UK's principles, but crosses 2 EU red lines in not respecting ECJ jurisdiction over EU law in the UK, and the freedom of people.

7. Conclusion

For the first time since the start of the European project in 1958, one of its Member States decided to exit the bloc. Separating what has been integrating for 45 years is costly and complicated; it is certainly a lose-lose situation, but more so for the UK than for the EU27 and within the EU, more for countries like ours which are heavily exposed to the UK than for those who are not. On the other hand, Brexit forges a remarkable unity among the EU27 to confront the UK at the negotiation table, making other rebellious EU-governments think twice before considering giving up EU-membership. This paper made an 'educated guess' about the outcome by analysing 5 possible scenarios for a future EU-UK relationship. The scenarios discussed in this paper, a 'cliff-edge' leading to a WTO-based trade model, extension of the art.50 negotiation period, an extension of the transition period, a comprehensive EU-UK FTA, and the UK 'White Paper', all have their own pros and cons, but whatever negotiators' choice may be, at least one party will need to move from its red lines at one point to achieve the intended depth of an agreement, while both would be better off if a cooperative Withdrawal Agreement and Future Relationship is found, instead of a no-deal leading to a 'cliff-edge'. For in an ever-changing multipolar world, which today sees the rise of new powers such as India, China and Brazil and the decline of the old ones, Europe and the United States, it is in the interest of both the EU and the UK that they remain 'friends with benefits'. The UK will always remain a European nation.



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