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Brexit: to have or not to have a deal? (first episode)

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The Withdrawal agreement, which regulates the status of citizens settled before 1 February 2020 is ensuring the continuation of EU citizen's rights to free movement and residence in the UK ad vitam and vice-versa for the UK citizens settled in the EU. Whether there will be one or more other binding agreements on free trade and other issues between the UK and the EU to enter into force on 1 January 2021 so as to avoid a very damageable "hard Brexit" depends on variables that escape rationality and are therefore unpredictable.

[Brexit: avere o non avere un accordo? (prima puntata)] L'accordo di recesso, che regola lo status dei cittadini stabilitisi prima del 1° febbraio 2020, garantisce il mantenimento ad vitam dei diritti di libera circolazione e di soggiorno dei cittadini dell'UE nel Regno Unito e viceversa per i cittadini britannici stabilitisi nell'UE. Se ci saranno uno o più altri accordi vincolanti sul libero scambio e altre questioni tra il Regno Unito e l'UE che entreranno in vigore il 1° gennaio 2021 per evitare un "hard Brexit" molto dannoso dipende da variabili che sfuggono alla razionalità e sono quindi imprevedibili.

1. Why Deals Matter

At the time of writing (29 November 2020) it is not possible to say whether or not the negotiations between the United Kingdom and the European Union (EU) that began in February of this year will have a positive outcome, i.e. whether or not there will be an agreement on relations between both parties which can enter into force on 1 January 2021. This date is crucial as on 31 December at midnight ends the transitional period during which EU law continued to apply to the United Kingdom as it did before withdrawal - with the

exception of institutional provisions.

Since 1 February 2020 the United Kingdom is not any more a Member State of the EU and that is why it does not have anymore representatives in the institutions, bodies, offices and agencies of the EU and does not participate any more in its decision making system. However, on the basis of the Withdrawal agreement that entered into force on 1 February 2020^[1] until the end of 2020, the UK is a full member of the customs union^[2] and internal market: the free movement of goods, persons, services and capital is ensured, the competition rules still apply; the same is true of all policies other than the monetary policy and those policies rules regarding the absence of internal border controls for persons and shall frame and the common policy on asylum, immigration and external border control of which the UK was exempted according to Protocol (N° 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

At the moment of its entry into force, the Withdrawal agreement became a fully fledged international treaty between the UK on one side and the EU on the other. It will remain into force indefinitely, subject to the rules codified by the Vienna Convention on the Law of the Treaties such as in Article 62 on fundamental change of circumstances. All those provisions of the Withdrawal agreement, which are not strictly dedicated to the withdrawal itself and to the transition period will remain in force and hence the UK should keep a very special relationship wit the EU whatever happens.

For the rest general international law will apply, as well as the treaties to which both the UK and EU are parties, such as the General Agreement on Tariffs and Trade, the Agreement establishing the World Trade Organisation, the Trade-Related aspects of Intellectual Property rights etc., which are usually referred to as WTO rules, and a very important number of multilateral treaties in fields such as environment protection and climate change etc.

Whatever happens, the relationships between the UK and the EU and its Member States will continue to be regulated by international law – treaty and customary law as well as general principles of international law – and submitted to the governance and dispute resolution mechanisms of international law. So why negotiate another deal? Both the EU and the UK have agreed in the Political declaration^[3] that was signed on 24 January 2020 together with the Withdrawal

agreement that they were *«determined to work together to safeguard the rules-based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests»* and therefore to establish *«an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation»*.

In the Absence of a specific free trade agreement (FTA) between the UK and the EU only the WTO rules will apply, which means amongst others that the customs duties and quantitative restrictions to trade as applied between WTO members will apply to the trade of goods and services between both parties, which would imply supplementary costs for both consumers and businesses, sometimes very important ones. Furthermore, as soon as standards for environmental protection, health, safety, security etc. as well as technical standards will be modified either in the EU or in the UK the resulting regulatory divergence will create new impediments to trade.

For the rest of EU policies in which the UK participated, the interdependence due to interlacing of public and private actors in more and more institutionalised networks will break apart with regulatory divergence and if the UK does not participate any more in important governance mechanisms.

The lack of deal(s) between both parties on all those issues will create legal uncertainty, which will be damageable to citizen's businesses, associations etc. as long as new sectorial rules will not be commonly agreed. In all those fields where there are no international agreements between on the one side the UK and on the other the EU or its Member States legal uncertainty will be much higher than in the relations with other non-EU States.

2. The Deal in Force: the Withdrawal Agreement

Whatever happens in the next weeks, deal or no deal, the first deal - the one which was agreed to in 2019 by the European Council and European Parliament as well as the governments led by Teresa May and Boris Johnson - will remain into force: the Withdrawal Agreement.

It is worthwhile stressing that the only change between the text agreed to by Teresa May and the one signed by Boris Johnson regards the mechanism to ensure that no border controls will have to be organised between Northern Ireland and the rest of Ireland. In the version agreed to by Teresa May, but which did not get the necessary support in the House of Commons, the technical solution to the difficulties arising from the necessity to establish customs controls between EU and UK – even without customs duties – was postponed to the negotiations that would start after withdrawal, with a safety clause (backstop) in case no agreement could be reached. Advocates of a “hard Brexit” used this clause as a pretext to refuse the agreement, which the opposition parties also refused because it was promoted by the coalition supporting Teresa May. Instead of the ‘backstop’ the Protocol of Ireland therefore contains a complex mechanism, which in practice means that customs control have to be made on British soil for goods whose final destination is not Northern Ireland before crossing the Irish sea. What was presented by Boris Johnson as a big victory in practice creates a border between Northern Ireland and England, Scotland and Wales; and the British Prime Minister is at pains explaining this.

The Withdrawal agreement itself is in the long run more important than the protocols on Ireland, Gibraltar and the UK sovereign basis in Cyprus. Whereas the latter are mainly concerned with keeping a smooth circulation of goods and persons between some UK and EU territories, the provisions of the Withdrawal agreement that are not only managing withdrawal establish the permanence of a very specific status of the UK with regard to EU law. To cut a long story short, the rights of EU citizens which were settled in the UK and of UK citizens which were settled in the EU on 31 January 2020 will remain the same as they were under EU law before that date *ad vitam*: the right to move and reside freely within the territory of the EU member states and the UK, as guaranteed by primary and secondary EU law, first and above all by Directive 2004/38^[4]. In order to avoid divergence in the interpretation of those provisions, the Withdrawal agreement furthermore provides for the possibility for UK courts to continue making referrals for preliminary rulings to the Court of Justice of the EU until 31 December 2028.

Whatever happens in the next weeks the rights of settled citizens will thus not change. As for UK citizens who settle in the EU as of 1 February 2020, they will

be submitted to Member States' and EU legislation on citizens of third states, amongst which Directive 2003/109 on long term residents^[5] from five years after they settle. EU citizens who want to settle in the UK will be submitted to the new UK legislation which will establish a points-based system of migration. Ongoing negotiations are not dealing with the matter, and it is therefore probable that the situation of EU citizens with regard to immigration in the UK will be worse than that of a number of citizens of other States with which the UK will have a special agreement. Irish citizens are protected by longstanding agreements with the UK.

3. The Deals to Come: Implementing the Political Declaration

The current negotiations, which started at the beginning of February 2020 and were considerably slowed down by the Covid-19 pandemic, are supposed to provide for one or more agreements to implement the Political declaration, i.e. an FTA and a series of sectorial agreements which could be contained in a sole treaty or in more different ones.

If the negotiations were successful in the next days, it seems at first sight that there will not be a single partnership agreement between the UK and the EU, because some of the sectors concerned will necessitate one or more “mixed-agreements” that need to be ratified not only by the UK and the EU, but also by all EU Member States; such ratifications are impossible to happen before 31 December 2020.

This being said, a technical solution exists, provided there is good will and trust. As has happened with the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which is a mixed agreement that has already been ratified by Canada, the EU and nine out of twenty-seven Member States and thus has not yet entered into force. As codified in Article 25 of the Vienna Convention on Provisional application, the CETA contains clauses on provisional application in order to prepare for its entry into force. Any Agreement between the EU and the UK could contain clauses on provisional application, especially maintaining the zero duties and zero quantitative restrictions that are applying to movement of goods until 31 December, as well as provisions on governance.

It has to be stressed that, with or without a deal, customs controls will have to be established as soon as possible after 1 January, be it only because goods coming from third countries that are in free circulation will have to be dealt with.

According to Article 29 TFEU: «*Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges*». This means that Chinese or US products, for instance, that are imported into the UK have to pay duties to the UK customs (or vice-versa for the EU); duties levied in EU ports, airports and other points of entry are transferred by the Member State customs administration to the Commission because they are traditional own resources of the EU budget. Hence if goods enter the UK from third countries two techniques are available: first, the UK authorities do not levy duties, and grant free circulation to the border so that duties will be levied when the good enters the EU territory: this needs border controls. Alternatively, the UK authorities will levy duties and pay them to the European Commission. In both cases, the issue about goods transiting in Great Britain whose final destination is Ireland is an especially difficult one.

An infringement procedure has been started by the European Commission against the UK on 7 March 2019 in case C-213/19 because «*by failing to enter into the accounts the correct amounts of customs duties and to make available the correct amount of traditional own resources and VAT-based own resources in respect of certain imports of textiles and footwear from the People's Republic of China, the United Kingdom*» the UK authorities have generate a loss to the EU budget of: «*EUR 496,025,324.30 in 2017 (until 11 October 2017 included); EUR 646,809,443.80 in 2016; EUR 535,290,329.16 in 2015; EUR 480,098,912.45 in 2014; EUR 325,230,822.55 in 2013; EUR 173,404,943.81 in 2012; EUR 22,777,312.79 in 2011.* » The date of the hearing has been set to 8 December 2020. If the Commission is right, there are only three possible explanations to what happened: corruption of UK customs agents, intentional action of the Government led by David Cameron, or lack of human resources and the consideration that the relevant action was not a priority – my assumption that the latter is the relevant explanation.

This infringement procedure turns the spotlight on the essential ingredient for agreeing on a deal and then managing it: trust. If, retrospectively, the Cameron government cannot be trusted on the management of frontiers, what about the Johnson government?

4. What if There Is No Further Deal: Trust and the Blame Game

As far as information is available, the substance of an agreement between the UK and the EU exists in the shape of a fully fledged text, with final provisions missing only on three issues. The first and foremost issue is the so-called “level playing field” provisions that are foreseen by the Political declaration. What is at stake is avoiding regulatory divergence between the EU and the UK on the substance of regulation applying to goods and services, including competition rules, especially those on State aids according to Article 107 TFEU. The EU demands written binding provisions on substance and governance, but the UK government insists that binding provisions are not respecting sovereignty and that a gentleman’s agreement on the matter is sufficient. The second issue is that of fisheries: the EU wants a pluriannual arrangement keeping access from EU fishers to UK waters and vice-versa; the UK government says it will review fishing rights every year. The third issue is that of governance, especially dispute resolution: the EU wants a system whereby any issue involving the interpretation of EU law will have to be dealt with by a mechanism involving the CJEU – such as the one included in the EU-Ukraine association agreement, for instance; the UK does not want the CJEU to be involved.

In a reason driven world, it is quite feasible to come to some kind of compromise on the three issues. This, however, means that the EU institutions have to trust the UK government, of which several ministers have declared recently that the UK would legitimately breach to a certain extent the Withdrawal agreements if it were necessary to avoid the EU blocking goods essential to its population to enter the Northern Ireland territory... .

At the end of the day, what will matter is the choice made by Prime Minister Boris Johnson and his cabinet after the last round of negotiations between Michel Barnier for the EU and David Frost for the UK. As Barnier always said

during the negotiation of the Withdrawal agreement «*The clock is ticking*»... .

One very interesting opinion, worthwhile quoting, is that of former MEP Brendan Donnelly published on 25 November^[6]: «*Given the poor preparation for the new Brexit formalities at the beginning of 2021, it now seems unavoidable that in the first half of next year there will be considerable and photogenic disruption in and around the ports linked closely to continental Europe. If Johnson has signed an agreement which can be seen to have facilitated this confusion, he will find it hard to escape widespread criticism for his role in the ensuing chaos. Nor will the benefits of any “deal” signed remotely approximate to the supposed benefits of Brexit promised by the Leave campaign in 2016. There would be attractions for the Prime Minister to embrace a “no deal” Brexit which would allow him to blame the EU, at least initially, for the disruption and the government’s poor preparation. This government’s approach to CV-19 has revolved round political positioning and the avoidance of blame. It would not be surprising if it behaved similarly in the concluding moments of the post-Brexit negotiations. CV-19 and the EU would be an attractive pair of villains in governmental self-exculpation next year*».

1. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
2. However, as is the also the case with Turkey, the UK does not participate any more in the decisions establishing customs duties which are adopted by the EU institutions.
3. Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom.
4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
5. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
6. Brendan Donnelly, *Johnson’s Brexit Dilemma: No good outcome in sight, The Federal Trust*, 25/11/2020 <https://fedtrust.co.uk/johnsons-brexit-dilemma-no-good-outcome-in-sight/>