



Theresa May's Brexit model: many questions, not least 'why Leave?'

Michael Emerson

The British government has finally published a detailed, 98-page White Paper on what kind of future relationship with the EU it would like to see. It deserves a thorough analysis, which we will produce in due course. But here are our first impressions in brief.

Canada, Norway, or Ukraine. These three countries' arrangements with the EU have been the most discussed as conceivable models for Brexit.

At a first level of approximation, the White Paper model is clearly not like the Canadian CETA, since it involves much deeper integration with the EU.

And it is clearly not like the Norway model, as in being part of the European Economic Area, since it does not cover all the four freedoms and the single market.

As some of us have been saying for some time, when the UK government moves beyond simplistic slogans and confronts the realities of negotiation with the EU, it would find itself converging on some variant of the Ukraine model for an Association Agreement and Deep and Comprehensive Free Trade Area. And so it emerges in the White Paper, which shares the following large set of common characteristics with the Ukraine model: free trade in goods, more limited provisions for services, no freedom of movement for people, very limited contributions to the EU budget, extensive participation or cooperation in sectoral policies, EU agencies and programmes, law enforcement and criminal affairs, security and defence, and with similar institutional arrangements. But there are of course important differences, to which we now turn.

The Facilitated Customs Arrangement (FCA). This proposal is the major innovation, but a highly problematic one, which seeks to reconcile the irreconcilable, namely to gain the freedom to determine independent trade policy deals with third countries, while still operating 'as if' in the customs union with the EU. More precisely it is proposed that imports into the UK from third countries would be subject to the UK's (future) tariff regime for goods 'intended' for the UK market, while goods 'intended'

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for the EU market would be subject to EU tariffs. Thus the ‘circle is squared’. At least that is the idea. But this encounters the very serious problem of how to determine where goods are ‘intended’ with necessary fiscal-contractual certainty, and without requiring new and heavy bureaucratic burdens.

The Northern Ireland back-stop. In order to assure that there will be no hard border between Northern Ireland and the Republic a ‘backstop’ agreement was made in December 2017, such that in the absence of another agreed solution Northern Ireland would remain under the EU’s single market regime. The White Paper ‘expects’ that there will be no need for the backstop, presumably relying on the FCA to solve the problem, which is questionable. Of course the simplest solution would be for the UK to remain in the customs union.

The bulk of the White Paper. There is a huge catalogue of EU laws, policies and instruments that the White Paper addresses systematically, but still only sketchily. The full legal text of the Association Agreement with Ukraine runs to two thousand pages, and Brexit will need something similar. In any case, in accordance with Article 50, the future relationship does not have to be agreed before withdrawal, and will take years to negotiate, with the transition period maintaining the status quo in the meantime.

The White Paper treats the many sectoral policies and instruments of the EU with varying degrees of ambition and precision, including:

- Upfront commitment to remain exactly compliant with EU law. This is reserved mainly for trade in goods.
- For services and other single market chapters there is a wide range of formulations, ranging from the decision to be ‘out’ of the ‘passporting’ regime for financial services and ‘out’ of the free movement of people, through to the wish for other sectors to retain still clear-cut participation, or to the exploring of options, or to looser commitments to remain broadly in line with EU law, or just to avoid ‘regressive’ policy changes.
- For the domains of freedom, security and justice, and foreign security and defence policies the broad thrust is to seek participatory arrangements that would be deeper than any existing third country model.

There is therefore a huge agenda of aspects requiring clarification and negotiation. While the UK’s starting position is made up of so many items, all with their specificities, some observers in Brussels are distilling this, somewhat ironically but with good reason, as: ‘the UK has been ‘in’, but with many opt-outs, and now it wants to be ‘out’ with many opt-ins. This encapsulates the fundamental problem that the purpose of Brexit, beyond the ideas of the ‘hard Brexit’ minority, has not been at all clear.

Conclusions. In retrospect, the White Paper is a document that would have served well as consultative Green Paper two years ago, before the triggering of Article 50. It certainly would have provided a rich basis for consultation of all stakeholders in the UK and EU. Today it reveals how painfully the UK government has tried to filter its preferences into the outlines of a draft Association Agreement. The next practical question, however, is how the EU may respond (its position may become clear this week).

In any case, as already mentioned, negotiations over the future relationship do not have to be concluded before withdrawal. One could imagine a two-step process.

In a first step, the customs union issue has to be resolved before withdrawal, *inter alia* because of the Irish/Northern Irish border question. The Facilitated Customs Arrangement has convinced no-one. The EU could well say at this stage: “please make your choice between being ‘in’ or ‘out’ of the customs union. There is no fudging this issue with a complicated compromise”. The EU could judge that there is no point in entering into detailed negotiations over the rest of the huge landscape of issues without clearing this up first. Since it is not clear whether the government could survive clarification of the customs union question, the EU would also want to check that it has a stable negotiating partner, which of course it wants to see.

In a second step, the White Paper could otherwise (aside from the customs union question) be taken as a basis to begin negotiations. The major issue for the Commission would be how far to push for more precise legal conditions for the many sectoral policies where the formulations of the White Paper are loose, and to determine whether this could be agreed with the UK. Then there will be the overarching question for the EU whether the sum of the many parts is consistent with its doctrines about indivisibility of the four freedoms and anti-cherry picking, which however are sometimes exaggerated (for example neither of the agreements with Canada or Ukraine cover all four freedoms). In addition, the EU’s basic mercantilist interests would be content with a regime of free trade for goods, but not services, since the EU has a large surplus with the UK for the former but a deficit for the latter.

The final question goes back to the UK as a body politic. The White Paper represents the first serious information from the government to the nation about what kind of Brexit it proposes. A reader of the White Paper will be struck by the vast array of policies, programmes and instruments where the government wishes to remain very close to the EU and to continue participating in many activities and agencies. The White Paper process, while all too belated, is at least revealing how much the UK has become positively integrated with the rest of the EU, and how much there is to lose. The proposal is thus tending towards a medium-soft Brexit, albeit still with many uncertainties.

It also leaves unanswered the principal question: if this is what Brexit is to be, why leave? The hard Brexiteers have their answer: the White Paper reduces the UK into being a ‘vassal state’. The UK would do better to walk away with ‘no deal’. But there is a large majority in parliament and an overwhelming majority of business and civil society leaders who consider that a ‘no deal’ would be disastrous, while opinion polls (YouGov) indicate that a second referendum would see reversal of the small majority to leave, partly for demographic reasons (with more young ‘remainers’ and fewer old ‘leavers’ voting) and partly because some voters have changed their minds to make a more informed choice.

Overall therefore, Brexit has become now a three scenario affair: (1) a ‘medium-soft Brexit’ following the White Paper, but whose feasibility for both London and Brussels is uncertain, (2) a very hard ‘no deal’ Brexit, if the internal Tory party opposition to the present government were to prevail at any time up until the end of the transition period, and (3) a ‘no Brexit’ outcome, if the incredible political chaos in London leads to second referendum, revealing a majority for revoking the Article 50 procedure and reverting to the status quo.