

No deal is looking increasingly likely

There was something of a storm in a teacup in the House of Commons on Monday. The Conservative backbencher Jacob Rees-Mogg asked the Prime Minister for an assurance that the European Court of Justice's writ will not run in the UK after March 29th 2019. Mrs May didn't oblige. She replied that "That may mean that we will start off with the ECJ governing the rules that we are part of." This admission that we will "fall under ECJ rules" was all over the papers, but this media frenzy was based on the assumption that the transition period proposed by Mrs May, among others, is a realistic option. In reality, it isn't.

What seems to be the core of the transition proposals is that we continue for a couple of years as a shadow member state. Having repatriated the *acquis* into domestic legislation, we would voluntarily apply the rules of the single market and customs union while in exchange, the EU would treat us like a member state for trade purposes and neither impose any tariffs nor apply the usual rules of inspection for a "third country" at the main ports of entry for UK exports, such as Calais due to our regulatory convergence with the EU.

The flaw in the proposal is that it makes the assumption that the EU will bend its own rules for the sake of an ex-member whose vote to leave dealt it a huge political blow. There is every indication that Mrs May's transitional plan, which so upset Jacob Rees-Mogg, is a non-starter. EU bigwigs have been very courteous but the message has been quite unequivocal – No way to this transitional arrangement, no matter how many times the Prime Minister calls on the EU to show "leadership" and "flexibility."

So what are we left with? In her speech yesterday, Mrs May raised the possibility of there not being a deal in place – transitional or otherwise – by March 2019. “While I believe it is profoundly in all our interests for the negotiations to succeed, it is also our responsibility as a Government to prepare for every eventuality, so that is exactly what we are doing. These white papers also support that work, including setting out steps to minimise disruption for businesses and travellers”, she said. (The white papers to which she refers cover trade and customs.)

Naturally, the Prime Minister stated that this was not what she wanted, going on to say “We are negotiating a deal. We will not have negotiated that deal until, I suspect, close to the end of that period that’s been set aside for it.” In other words, we will keep on talking and hope for some sort of deal eventually, even if the talks go to the wire.

This is not helpful for businesses, who will not have any guidelines to help them prepare for Brexit and will not even know whether a deal is going to happen until the last minute. If they were to take the advice of some commentators, it would be to prepare for no deal being struck. For all Mrs May’s calls for flexibility, that word isn’t to be found in the EU’s vocabulary, as David Davis and his team are beginning to discover. We agreed to the EU’s negotiating timetable – in other words, that an agreement (or at least, reasonable progress towards an agreement) – on the Irish border question, the divorce bill and the rights of EU citizens resident in the UK must come before any talk about trade. We needn’t have done this, but we have and so who can blame the EU for sticking to its guns when there has been very little progress in these three areas?

The repeated rejection of ongoing membership of the European Economic Area, for instance, by re-joining EFTA, has closed off another option and one which has two advantages over the bespoke transitional arrangement which Mrs May is suggesting.

Firstly, it is rooted in reality. We would be signing up to an agreement which the EU has already signed. Secondly, there would be no need to accept the supervision of the ECJ or to be part of the EU's customs union. We would thus be free to strike our own trade deals.

There is also one other intriguing possibility, first raised by George Yarrow of the Regulatory Policy Institute. In his paper, *Brexit and the Single Market*, he claims that on Brexit, the UK would remain a member of the EEA by default. He points out that joining the EU does not automatically mean joining the EEA; a separate accession process is required. Likewise, when Austria, Sweden and Finland left EFTA to join the EU in 1995 (by which time the EEA agreement between the EU and EFTA was in place), they did not have to re-apply to join the EEA. They were already members through having been in EFTA. The default position for the UK on departure, therefore, is that it too would remain an EEA member.

Yarrow's thesis has attracted little attention from either our negotiators or the EU's team. It raises a number of questions but it might possibly offer some answers. While the EU has no interest in exploring it, it would make life a lot easier for David Davis. We would not be under the power of the ECJ but of the EFTA court (which is limited to "EEA-relevant" matters) and could follow Liechtenstein and apply the same restriction on free movement of people, using Articles 112 and 113 of the EEA agreement. At a stroke, we would be in a better transitional position than under Mrs May's proposals – to which the EU is not going to agree anyway.

On the other hand, if Yarrow is wrong and leaving the EU means leaving the EEA, it does mean that time is very short – probably already too short – for any satisfactory arrangement to be in place by March 2019. German manufacturers are being told to prepare for a "very hard Brexit" while the Irish equivalent of HMRC has already reached the conclusion that customs posts will need to be erected between the Republic and

Northern Ireland, even though no one on either side wants to see the return of any sort of visible border.

Yarrow's thesis or an immediate application to re-join EFTA are thus the only two escape routes from the looming cliff edge which no one wants either. The first option is untried and may not stand up legally while the second has been repeatedly rejected in favour of a chimera – namely Mrs May's illusory "transitional arrangement". We are not yet in Private Fraser territory where "we're all doomed", but Mrs May and her party could well be unless they engage in some lateral thinking – and quickly.