

# The Real Brexit that Never Was

*As the scale of the mess that Theresa May has created for herself and the country on Brexit becomes clear, **Nigel Moore** points out that we could have already left the EU while carrying on commercial activities largely as before. Why was this simple, off-the-shelf option not taken?*

It is now two years and four months since the British people voted to leave the European Union. If our politicians had made wiser choices, we could have already left the EU while carrying on commercial activities largely as before.

The UK could have already been well on the way to free trade agreements with old and new trading partners. The UK together with its partners inside the European Free Trade Association (EFTA), the Visegrad countries and the European Commission could have started exploring adaptation of the EEA to better suit emerging needs.

The jurisdiction of the European Court of Justice could have ended. The Common Fisheries Policy could have ended. We could have started limiting freedom of movement to suit our interests. The UK could be once again joining the countries at the top table of the World Trade Organization (WTO) and other global bodies to promote its interests.

None of this has happened, although perfectly feasible – simply through continued membership of the European Economic Area (EEA). Why was this sensible option not taken? Largely because of the antics of David Cameron, Theresa May, and the wider Conservative Party.

## A FINE MESS...

Mr Cameron as prime minister prevented the Civil Service from

preparing a viable and practical exit plan for leaving the political control of the EU. Such a plan would almost certainly have included retaining, even temporarily, membership of the Single Market (and wider EEA) through re-joining EFTA. This would have avoided many of the problems inherent in both no-deal, and Mrs May's unworkable, Brexit-in-name-only Chequers Plan and White Paper. But instead of triggering Article 50 immediately, as he had claimed he would do, Mr Cameron resigned.

Once prime minister, Mrs May dithered and delayed in triggering Article 50. But nor did she use this time to develop a viable exit plan to leave the political EU whilst retaining frictionless trade. Instead, in her speech at Lancaster House on 17 January 2017 she recklessly announced her decision that the UK would also leave the Single Market. Her declared grounds related to control of immigration and the indivisibility of the 'four freedoms' of the Single Market. Whilst this is true for EU Member States, it is untrue for members of EFTA participating in the EEA who can take unilateral action by implementing Article 112 (the Safeguard Measures) in the EEA Agreement.

The Conservative Party has only added to this mess. During their increasingly bitter internecine conflict, the various factions within the party have developed scenarios that are usually poorly informed, and often far from realistic or achievable. This has hampered discussion of the important issues and examination of viable options for leaving the EU.

There are some bizarre claims that need debunking: that frictionless trade is possible in the event of no-deal by falling back on World Trade Organisation (WTO) rules; that a 'bonfire' of EU regulations is possible; and the notion that the EU will cave-in at the last minute.

**WTO 'RULES' DO NOT ENABLE FRICTIONLESS TRADE**

WTO 'rules' are something of a misnomer. These 'rules' are merely basic principles to facilitate international trade. They have to be incorporated into more detailed or prescriptive rules, regulations and laws by WTO members. Perhaps foremost amongst these principles is that of non-discrimination. WTO principles can be circumvented in exceptional circumstances, such as emergencies or for national security.

The WTO does not have powers to enforce its principles (or the resulting laws of WTO members) should they be contravened. However, mechanisms for redress *do* exist in WTO-compliant treaty provisions, although it can take some time (years) before sanctions for loss can be applied by an aggrieved party.

The Single Market (and wider EEA) has a legalistic, top down, centralised bureaucratic structure to control access, conformity assessment, and market surveillance. Protectionist as they are, the EU's laws for the Single Market are WTO-compliant, since they apply equally to all third-countries outside the EEA. Once we've left the EU, the UK will also become a third-country, subject to the same EU/EEA legislation as all other third-countries.

Trying to change status from Single Market member to third-country at short notice would inevitably involve frictions. Exports to the EEA would consequently fall drastically.

## **NO 'BONFIRE' OF GLOBAL REGULATIONS**

It has been estimated by EFTA that 90% of EU regulations affecting the functioning of the Single Market originate from higher global bodies such as the WTO and the International Organization for Standardization (ISO). If we wished to trade internationally whilst being a member of the WTO we would have to retain these regulations, although we could potentially implement the higher-level global standards and principles in

different ways to the EU.

The body of laws governing the Single Market (and wider EEA) amounts to about a quarter of the whole EU *acquis*. Thus, we could potentially amend or scrap the remaining three-quarters of EU laws to suit our interests – whether or not we are in the EEA.

This stands in dramatic contrast to Mrs May's Chequers Plan (and the EU's demands in response), where it is clear that many (if not all existing and future) EU laws will remain and be enforceable within the UK, probably by the European Court of Justice (ECJ).

### **LEGALLY, THE EU CANNOT CAVE IN AT THE LAST MINUTE**

The EU cannot easily change its existing, legally-based arrangements for governing the Single Market to accommodate the UK. This would be an exception that would create a precedent for other third-countries, going against its existing direction of travel over many years. It would also contravene basic WTO principles on non-discrimination.

In addition, there would need to be agreement by all remaining Member States both to amend large amounts of existing EU legislation, and to approve different terms of reference for their negotiating team led by Mr Barnier. At best, the EU could agree to temporary emergency measures to suit its interests, including making severe reciprocal demands of the UK.

Meanwhile Mrs May is becoming increasingly delusional, obdurate and making fruitless efforts to sell her Chequers Plan for Brexit-in-name-only to European leaders. They cannot legally accept it.

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**Note from CIB:** further information about the EEA/EFTA option

as a possible stepping stone to a Clean Brexit is available in our pamphlet Brexit Reset.