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France is preparing for a no-deal Brexit. Isn't it too late already?

In a previous article entitled “**Brexit: Troubled negotiations failed. What next?**”, I mentioned the forthcoming adoption of several Ordinances in furtherance of the so-called Enabling Law of January 19, 2019 that authorized the French Government “*to take measures by way of Ordinances to prepare for the United Kingdom's withdrawal from the European Union*”. Since then, six Ordinances were signed between January 23 and February 13, 2019 which underline the urgency and the dangers of a no-deal Brexit, the consequences of which have not be sufficiently anticipated upstream.

The fast-track procedure launched by the French Government even before the vote of the British Parliament that rejected the withdrawal agreement negotiated between the United Kingdom and the European Union made it possible to adopt within an extremely short timeframe these first Ordinances intended to address the consequences of a no-deal Brexit.

In the aforementioned article, I anticipated three scenarios that could prevent or delay the entry into force of Brexit. Following the new setback suffered by Theresa May on February 14, 2019 before the House of Commons, the no-deal Brexit scenario seems the most probable one. It could materialize as early as on March

29, 2019 at midnight, as per the terms of Article 50 of the Treaty on the European Union, or a few weeks later should the European Council unanimously decide to extend this deadline in order to allow the United Kingdom and the 27 EU Member States more time to adopt the legal and regulatory measures that are vital to avoid a too chaotic post-Brexit situation.

If an extension of time is granted, the deadline should not, however, be set after May 23, 2019, date of the next elections to the European Parliament. It would indeed make no sense to have the United Kingdom take part in these elections to exit the European Union a few weeks later.

The first Ordinance dated January 23, 2019 aims at enabling the rapid launch of works of utmost urgency necessary for the restoration of customs, sanitary, phytosanitary and police controls at the borders between France and the United Kingdom. Its objective is to accelerate procedures for the delivery of environmental, urban planning and real estate authorizations and permits required for the construction of buildings and infrastructures that will need to be operational upon the restoration of border checks *"in order to ensure the seamless flow of goods and people"*.

To put it bluntly, the objective is to avoid a big mess at the borders by disregarding restrictive urban planning and zoning rules likely to delay or paralyze the construction of the required infrastructures. And the clock is ticking!

The second Ordinance dated January 30, 2019 aims at ensuring the continued supply of products and materials to the United Kingdom by licensed and authorized providers operating in the defense industry.

The purpose of the third Ordinance dated February 6, 2019 is to address the situation of natural persons and legal entities with respect to the right of entry and residence, social rights, social benefits and the exercise of a professional activity, by creating a specific regime for British nationals who will be living in France on the date on which the United Kingdom exits the European Union.

Among other measures, these British nationals will have up to one year to obtain a residence permit and those who work as public servants in the French administration will keep their status. Those who receive the *Revenu de solidarité active* (minimum income allowance) will continue to be eligible to this allowance for a period of one year. Healthcare coverage under current conditions which derive from European Union law will be maintained for a period of two years.

Yet, the aforementioned derogations regarding the right of residence, the *Revenu de solidarité active* and healthcare coverage can be suspended if the French Government finds out that the United Kingdom does not provide an equivalent treatment to French nationals living in the United Kingdom.

As there is absolutely no guarantee that the French nationals living in the United Kingdom will benefit from an equivalent treatment, the number of naturalization applications filed by British nationals living in France should surge in the coming weeks.

Still in case of a no-deal Brexit, the fourth Ordinance dated February 6, 2019 sets out measures that will allow,

temporarily and subject to reciprocity, individuals domiciled in the United Kingdom, to carry out road transport operations for the movement of goods or people on the French territory.

The provisions of this Ordinance will become effective on the date on which the United Kingdom withdraws from the European Union and will remain in force until 31 December 2019 at the latest. They may be extended up to December 31, 2020 if negotiations were to be opened with the United Kingdom in order to ensure that such negotiations can be concluded.

They may be suspended by Decree if it appears that the British authorities do not adopt similar provisions on their territory.

The fifth Ordinance dated February 6, 2019 includes seven measures to help France prepare for the United Kingdom's withdrawal from the European Union with respect to financial services. These measures will supplement the initiatives taken on the European level at the European Commission's initiative.

Lastly, the sixth Ordinance dated February 13, 2019 challenges the appointment as binational safety structure of the Intergovernmental Commission (IGC) responsible for supervising, in the name and on behalf of the two governments, all matters concerning the construction and operation of the Fixed Link entrusted to the company Eurotunnel.

Indeed, after the United Kingdom's withdrawal from the European Union, the IGC will no longer be able to exercise the functions devolved under European law to a national safety authority since it would no longer be designated by two Member States but one Member State (France) and a non-EU country (the United Kingdom).

The issues addressed by these Ordinances are all examples of the imbroglio created by the withdrawal of the United Kingdom from the European Union with no deal and great unpreparedness; it seems that before October 2018 no one had anticipated the possibility of no withdrawal agreement at all as of March 30, 2019 insofar as the consequences of the absence of any deal appeared so detrimental for the United Kingdom and, to a lesser extent, for the other 27 Member States.

Some commentators see only one way to go: The United Kingdom should join the European Free Trade Association ("EFTA") which already has Norway, Island and Lichtenstein among its members and to which the United Kingdom belonged before joining the European Economic Community ("EEC") in 1973.

In an article entitled "[*Brexit: Issues at stake in troubled negotiations*](#)" published in our April 2017 e-newsletter, I noted that this option had been strongly rejected by Theresa May in a keynote speech delivered on January 17, 2017.

At that time, she summed up what the United Kingdom did not want: *"Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave."*

She then outlined a list of “red lines”, most of them are incompatible with being a member of the European Free Trade Area (“EFTA”) that imposes the obligation to pay contributions to the EU budget and to accept control mechanisms, and implies acceptance to be bound by the case-law of the European Court of Justice.

In the same speech, she advocated the creation of a free trade zone for products and services (in particular financial ones) closest to what currently exists within the EU.

For their part, the other 27 Member States constantly reiterated the position they had unanimously adopted during the Bratislava summit held on September 16, 2017: The European Union has been built on the principle of indivisibility of 4 fundamental freedoms, i.e. the free movement of goods, persons, services and capital. For them, it is thus inconceivable to open up, even partially, the internal market without the free movement of persons between the European Union and the United Kingdom.

This is exactly what is at stake in the discussion on the “backstop” and the ultimate reintroduction of a border with Ireland that was included in the withdrawal agreement concluded between the United Kingdom and the European Union on November 25, 2018 and subsequently rejected by the British Parliament.

According to the United Kingdom, the reintroduction of such a border would threaten the 1998 peace accord that ended the civil war in Northern Ireland.

For the European Union, this domestic issue cannot justify maintaining *de facto* a free trade zone beyond a period of two years without the United Kingdom guaranteeing the free movement of people, contributing to the European budget and accepting to be bound by EU control bodies and the case-law of the European Court of Justice

Almost two years after the United Kingdom’s official announcement that it would withdraw from the European Union and one month ahead of the deadline of March 29, 2019 at midnight – which may potentially be extended by a few weeks – the situation appears as deadlocked as ever.

Problem: The time for Brexit, with or without a deal, is now! While the worst is not certain, it is on everybody’s mind.

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