

Brexit and Trade: What EU and
WTO Rules Imply
Bruegel – GGS, 6 February 2017

BREXIT AND TRADE: AN EU PERSPECTIVE

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Theses

1. Article 50 is *not* about trade : it is about the *divorce*
2. Divorce deal first, EU-UK FTA second
3. As long as the UK is a Member State, it cannot negotiate trade agreements with third countries (*mais soyons pragmatiques*)

The UK's position

- Lancaster House speech Theresa May, 17-1-2017:

“... we do **not seek membership of the Single Market**. Instead we seek the **greatest possible access to it through a new, comprehensive, bold and ambitious Free Trade Agreement**. That Agreement may take in elements of current Single Market arrangements in certain areas – on the export of cars and lorries for example, or the freedom to provide financial services across national borders – as it makes no sense to start again from scratch when Britain and the remaining Member States have adhered to the same rules for so many years... an important part of the new strategic partnership we seek with the EU will be the pursuit of the greatest possible access to the Single Market, on a fully reciprocal basis, through a comprehensive Free Trade Agreement.”

- UK Government White Paper, 2017:

“We will forge a new strategic partnership with the EU, including a **wide reaching, bold and ambitious free trade agreement**, and will seek a mutually beneficial **new customs agreement** with the EU... We will forge ambitious free trade relationships across the world.”

“... we want to have reached an agreement about our future partnership **by the time the two year Article 50 process has concluded**. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest.” (12.2)

Article 50 is *not* about trade (I)

- Rather, it is about “Unionizing” a MS’ exercise of its unilateral withdrawal right under international law
- 4 main parts
 - MS decision to withdraw “in accordance with its own constitutional requirements”
 - Notification / guidelines EC => cf. 27-summit 15-12-2016
 - Negotiation withdrawal agreement (WA)
 - Procedural arrangements: cf. 27-summit
 - Conclusion WA or automatic cessation < 2 yrs
 - Roadblocks to WA
 - “*The Treaties shall cease to apply*”: not based on WA, but on unilateral act of withdrawing MS

Article 50 is *not* about trade (II)

- WA ≠ agreement governing future relationship: = **divorce treaty**
“setting out the arrangements for ... withdrawal, taking account of the framework for ... future relationship with the [EU]”
- Michel Barnier (6-12-2016):
 - Time is short: 15-18 months, target date 10/2018 (5 months for ratifications)
 - “New partnership” to be discussed in broad terms, to give a sense of what future relationship “may” look like
 - “Legally impossible for the EU to negotiate a ‘new partnership’ agreement with the UK – covering trade, foreign policy and other broader issues – before the narrow divorce talks with the UK are complete”
- What will WA cover?
 - Financial aspects: how much does UK get out of EU funds (also projects for longer time) and in return how much does it need to pay under medium-term financial perspectives
 - Single market participation, transitional arrangements on goods, services, rules, authorizations, ...
 - UK participation in foreign relations area, e.g. military missions
 - The 60 billion € issue

If we go for an EU-UK FTA, when and how?

- **When?** Most likely when WA deal is “mainly in place” (no ratifications needed)
- **How?** Regular procedure for negotiating EU trade agreements
 - Cf. CETA: legal basis = Article 43(2), Article 91, Article 100(2), Article 153(2), Article 192(1) and the first subparagraph of Article 207(4), in conjunction with Article 218
 - Cf. also the CETA saga and the issue of mixity: will 38 parliaments become involved?
 - Even provisional application may be cumbersome (remember Belgium)
 - Time-line? CETA took 7 years, EU-Korea 4, ...

What can the UK do as long as EU membership is not terminated?

- Andrew Lilico, op-ed in *The Telegraph* 18/10/2016: “Don’t listen to the Remainers and pessimists. Britain can start doing great trade deals before we leave the EU”
 - ⇔ CCP = exclusive competence EU (Art. 3(1)(e) TFEU)
 - ⇔ Principle of sincere cooperation; conflicts of interest
- UK Chancellor Philip Hammond
 - 31/1/2016 tweet, just before UK PM met US President: “Of course we want to strengthen our trade ties with the very many trade partners we have around the world, but we're very mindful of our obligations under the treaty and we will follow them precisely”
- *Soyons pragmatiques*
 - Balancing of interests required, Union vs UK interest
 - Exploratory talks while in EU, quick negotiation/conclusion when out

Appendix: Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.