
CEEP OPINION – BREXIT, TRADE AND SGIs REFLECTION ON BREXIT AND TRADE: POSSIBLE OPTIONS

Executive summary

- CEEP intends to contribute to the Brexit debate by identifying reflection tracks towards ensuring level-playing field in a post-Brexit EU-UK relationship, in which providers of public services and of SGIs can operate for the benefits of citizens and companies.
- Brexit will have fundamental political, economic and legal consequences for both sides. These consequences will be shaped by the features of the agreement that is currently being negotiated. The two parties will have to reach an agreement in the following three main areas: First, the United Kingdom and the EU will need to agree on the regime for the trade of goods and services. Second, new rules are needed for migration. Third, the United Kingdom needs to be disentangled legally from the European Union (European Union (Withdrawal) Act 2018).
- In this statement, CEEP argues that solutions like the free trade agreement with Canada (CETA) do not justice to the close European ties between the UK and the EU. A comprehensive, but flexible free trade agreement with much EU acquis and deep and comprehensive content, such as the DCFTA currently in force between the EU and Ukraine, seems most likely able to meet interconnection requirements between both countries and to foster cooperation and common policy-making in the future. Therefore, it is highly desirable for the economic prosperity of the EU and the UK.
- The future trade negotiations for free trade agreements like the DCFTA should respect environmental, social and security standards. Especially, the possibility to amend the agreement in view of political or economic developments is crucial given the geographic, historical, political and economic relations between the European Union member states and the United Kingdom. A DCFTA oriented agreement can assure a high degree of access to the EU single market, at least for trade in goods, but not necessarily for movement of people and services.

INTRODUCTION AND AIM

With its national and sectoral members, CEEP (European Centre of Employers and Enterprises providing Public Services and Services of General Interest) is active in most of the EU Member States, including the UK. Those UK-based members will be directly impacted by Brexit, whilst others, based in the EU27, have reported fears regarding the operations they currently have running in the UK. Strongly in favour of maintaining good relations and tight links between the UK and the EU, CEEP members have started to identify possible future trade models between the EU and the UK.

CEEP believes that those considerations will have to be done early in the process, to make sure that providers of services of general interest will be able to take the necessary measures to adapt and keep providing quality services to customers. Public Procurement will be a peculiarly important area to consider in the Brexit negotiations and in future trade models between EU and UK, which should ensure that providers of public services can still access goods and services from both sides of the Channel.

This CEEP-opinion will give a contribution to the Brexit debate by identifying reflection tracks towards ensuring a level-playing field after Brexit, on which providers of public services and of SGIs can operate, for the benefits of citizens and companies. Too often, the role of efficient and effective public services is overlooked, while they are a cornerstone of our common welfare systems. Industrial policy cannot succeed and trade can impossibly take place without a reliable public services infrastructure, just as social rights cannot happen without strong public services. Public services are too often 'taken for granted'. Therefore, we need to stress the importance of safeguarding the essential role of public services and SGIs in the future relationship between the United Kingdom and the European Union and to develop a specific economic model to deliver affordable SGIs and guarantee universal access.

In this statement, CEEP will argue that a comprehensive, but flexible free trade agreement is highly desirable for the economic prosperity of both parties and should be able to foster cooperation and common policy making in the future.

CONTEXT OF THE NEGOTIATIONS

UNITED KINGDOM REMAINS AN EUROPEAN COUNTRY

The United Kingdom notified the European Council on 29 March 2017 of its intention to withdraw from the European Union and from the European Atomic Energy Community. With the withdrawal from the EU, the British government implements a historical, unique act: while hitherto the European policy paradigm actively promoted the integration and further expansion of the Union, for the first time in history, the citizens of an EU member state actively decided to follow a different path.

As one of the architects of the European Trade Association (EFTA), UK was already in 1960 closely interlinked with the economies of the other member countries. Thus, from a historical point of view, the United Kingdom was one of the creators of the European project, even though it was not a founding member of the European Community, joining as late as 1973.

It is without doubt, that UK is part of Europe. It is part of a common system of values. It is part of a European identity deeply rooted in history. It is part of a consistent and shared economic and geographic area. European values and ideas were not only adapted but also established and influenced by UK. This self-evident role in Europe now seems to be shifting in the context of the negotiations. In defiance of the long and close ties of UK and Europe, some negotiators are considering inter alia solutions like free trade agreements that have hitherto merely regulated the EU's trade relations with non-European countries solely, such as the recent agreement with Canada (CETA). However, such a kind of agreement does not do justice to the already close European ties in, for example, the social, cultural, scientific and educational area.

CURRENT STATUS QUO OF NEGOTIATIONS

After declaring its intention to leave the European Union according to Art 50 TFEU on 29 March 2017, the United Kingdom government and the European Union negotiate the terms of Britain's exit and its future relations with the EU in the next two years. EU-membership of the United Kingdom will end on 29 March 2019, and, trade relations will fall back on World Trade Organisation (WTO) rules. In this sense, finding a solution in the negotiations along with an agreement before then is critical for both negotiating parties.

Brexit will have fundamental political, economic and legal consequences for both sides. These consequences will be shaped by the agreement that is currently being negotiated.

Among other areas, the two negotiating parties will have to reach an agreement on the following three main issues:

- First, the United Kingdom and the EU will need to agree on the regime for the trade of goods and services.
- Second, new rules are needed for migration.
- Third, the United Kingdom needs to be disentangled legally and financially from the European Union (Brexit Bill).

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

BASIC BILATERAL AGREEMENTS

There is a wide range of possible scenarios for the outcome of the negotiations. In the following section, CEEP will discuss and sketch the most important options on the table.

In general, every option between (1) the membership of the European Economic Area (EEA: “very soft Brexit”), and (2) membership only of the World Trade Organization (WTO: “hard Brexit”) with no preferential trading relationship with the EU is a feasible outcome of the negotiation. In between there are many variants under the broad heading (3) of preferential arrangements, including free trade areas.

However, Prime Minister May’s speech of 2 March 2018 narrows the field considerably, with a declared preference for a “Comprehensive Free Trade Agreement” (CFTA) and an explicit statement that existing models such as Norway and Canada models will not work and won’t be accepted by the UK government.

EUROPEAN ECONOMIC AREA (EEA)

The UK could accede to the European Economic Area (EEA) as a non-member state like Norway. In this case, UK would not be an eurozone member state, but with full inclusion in the single market for all four freedoms and all EEA-relevant regulatory legislation by the EU. However, the UK government has indicated its desire to impose meaningful controls on immigration from the EU. This seems to imply that a “soft” Brexit, in which the UK remains a participant in the European Economic Area and the Single Market, is no possibility and was clearly denied from Prime Minister May in her speech of 2 March. The EEA could also be combined with membership of the EU’s customs union, making this model effectively very close to the present legal situation. This option is clearly excluded by the UK and the present EEA non-member states, because they value their freedom to make their own trade deals with the rest of the world.

WORLD TRADE ORGANISATION (WTO)

If no agreement is reached on the terms of the future relationship, then only the WTO framework will restrict the mutual imposition of tariffs. In this case the UK’s public services providers would face many more reservations limiting their access to the EU market, compared to the still incompletely liberalised Single Market regime. For both sides, a rollback of the WTO-basis would be neither economically nor politically a good solution.

PREFERENTIAL MODELS

Over the years, the EU has concluded many trade, cooperation and partnership agreements with comprehensive and complex content. There are quite a few conceivable options to consider. However, for practical purposes, these should be reduced to a manageable number of scenarios, which are namely the (3.1) “Swiss model”, (3.2) CETA (Canada) and (3.3) DCFTA (Ukraine).

SWISS MODEL

Switzerland and the EU entered into a long and complex process of negotiating many sector-specific agreements, which had the effect of reconstituting much of the content of the EEA agreement. Because of its complexity and “cherry-picking” aspect, the EU would exclude this model. It was also not mentioned by Prime Minister May in her speech of 2 March.

COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

The agreement with Canada is a model of a comprehensive free trade agreement with an advanced industrial economy outside Europe. CETA goes considerably beyond WTO-GATS provisions (mobility for workers, mutual recognition of professionals, removal of some restrictions in financial and maritime transport services, public procurement). It also opens public procurement markets (see CEEP position paper on CETA²). The main point of comparison with the other model cited is that CETA goes substantially beyond a simple free trade agreement but avoids any commitments by Canada to approximate EU legislation (or vice versa), and leaves much of the furthering of market access to the future processes of negotiation. Over and above that, CETA is based on only one contract which doesn’t allow to amend annexes to it. This is a fundamental difference between conventions like the European Free Trade Association or the DCFTA (see further below).

All in all, CETA is therefore less deep, legally binding and certain than the DCFTA. Although much discussed in the UK debate, Prime Minister May clearly denied this option in her 2 March speech, because it would not give the UK the desired breadth or depth of market access the UK wants. The UK will retain all EU market law from the very beginning of withdrawal, and surely continue compliance with much of it to ensure good access to the EU market. Even if it is more comprehensive than a simple free trade agreement, it shouldn’t be considered as an option, especially, because there is no EU acquis content.

² <https://www.ceep.eu/wp-content/uploads/2016/04/CEEP-Position-Paper-on-CETA.pdf>

DEEP AND COMPREHENSIVE FREE TRADE AGREEMENT (DCFTA)

The new Association Agreements that came into force in 2016 between the EU and Ukraine, Georgia and Moldova are characterised by their comprehensive political and economic content, and inclusion of DCFTAs, which could lead to a high degree of inclusion in the single market.

The DCFTAs match for the biggest part of EU acquis. They are thus a category apart from the most advanced agreements with non-European countries. DCFTAs can assure a high degree of access to the EU Single Market, at least for trade in goods, but not necessarily for people and services. For some service sectors the DCFTA offers the possibility of “full internal market treatment”, conditional on full compliance with the EU acquis, notably for financial and telecommunications services. Besides, the DCFTA (as the EEA) provide for the possibility to amend annexes to it. In consequence, the DCFTA is much more flexible facing changing basis or new political or economic developments than CETA.

The use of a negative list approach for commitment in liberalisation of services increases legal uncertainty regarding the appropriate coverage of possible market barriers linked to the provision of SGEIs. The DCFTA, on the contrary, is based on a positive-list approach for commitments in market access and national treatment for services to fully preserve the right to regulate of competent authorities, which faces better the strong interconnections between the two negotiators.

DCFTA and Single Market

A DCFTA between the EU and UK could lead to a high degree of inclusion in the single market for three of the four freedoms (free movement of goods, service and capital, but not people)³. The EU’s doctrine that all four freedoms are indivisible is thus applied to the EU itself and the EEA, but not between the EU and other (even close) countries. In this context, environmental, social and security standards of the EU and its member countries are a CEEP red line in any Brexit deal. Common regulatory standards will also be an integral part of any solution for financial services: it is of paramount importance that newly developed financial regulations are not undermined through any Brexit deal.

To ensure these standards, the DCFTA framework requires, despite its general benefits, some modifications. These are necessary considering the deep interconnections between the UK and the EU. Therefore, the general post-Brexit EU-UK framework orientated on the DCFTA should especially observe the following aspects: safeguarding Services of General Economic Interest (SGEIs) by respecting the ‘gold standard’⁴.

First, Member States (national, regional and local authorities) must retain the general competence and complete discretion to define, provide, commission and organise Services of General Interest (SGIs), as well as funding them. The role of European institutions in this respect should only be one of a control instance.

³ [Directorate general for internal policies, An Assessment of the Economic Impact of Brexit of the EU27 \(IP/A/IMCO/2016-13\).](#)

⁴ [See CEEP Opinion on EU-Trade Agreements.](#)

The rules of competition and of the internal market should only apply if not hindering the fulfilment of SGEIs' specific mission (Article 106 TFEU). Furthermore, competent authorities should remain free to choose the modes of management: 'regie', 'in house', externalised, etc. The European institutions should be neutral regarding the ownership of undertakings providing SGEIs. In addition to these aspects, the standards of quality, security, affordability, equal treatment, the promotion of universal access and of users' rights must be implemented for all SGEIs, as foreseen by protocol 26.

DCFTA and Dispute Settlement Mechanism

The last important issue treats the inclusion of a well-functioning, unquestioned and transparent dispute settlement mechanism. The more recent EU practice makes use of the WTO system, by providing for a dispute panel which has jurisdiction to hear disputes. It is highly questionable whether the WTO system would have the capacity to deal with the complexity of the demands of both negotiators. CEEP stresses the necessity to avoid vague and broad definitions (such as the notions of "investment" and "fair and equal treatment" in CETA) and a too narrow approach to the right to regulate, lack of transparency, parallel proceedings, conflicts of interest in the nomination of arbitrators and the absence of any appellate mechanism.

The DCFTA would benefit from a strong dispute settlement mechanism, particularly in a version which offers more than CETA in terms of addressing issues of regulatory convergence and recognition. In this sense, the dispute settlement in the future EU-UK-agreement should contain the following aspects:

- established and recognised law enforcement principles, e.g. possibilities of remedies, public disclosure of information and holding of public hearings,
- creation of a real appellate mechanism and of a binding and exclusive code of conduct for arbitrators.
- clear references to the ILO conventions and to the Organisation for Economic Co-operation and Development (OECD) Guidelines on social corporate responsibility would help safeguard European social standards.
- the principle of local and regional self-government (Article 4(2) TEU), the principle of subsidiarity and the principle of proportionality (Article 5 (3)), in particular in the area of public services must be guaranteed, special rights for private international investors.
- the decision-making and regulatory right of the regional and local authorities in the area of public services must be guaranteed
- the Multilateral Investment Court System, proposed by the European Commission and negotiated in the Council of the European Union⁵, should be part of the future agreement. It goes in the right direction to guarantee fairer and more transparent procedures and a better protection of the right to regulate. Economic interests should not prevent competent authorities at national, regional and local levels to take regulatory actions in the general interest.

BUILDING A COMPLETE FRAMEWORK

Based on the previous explanation, CEEP underlines that the European Union and UK need to build a complete framework which reflects (as well) the UK objectives considering as tight economic and political interconnections as possible. Owing to its deep and comprehensive content, with much EU acquis, a trade agreement orientated at the DCFTA seems most likely to meet the above-mentioned EU-UK-interconnection requirements. Especially, the possibility to amend the agreement in view of political or economic developments is crucial, given the geographic, historical, political and economic relations between the European Union member states and the United Kingdom.

Any EU-UK trade agreement should consider the fact that SGIs and SGIEs are critical to economic activity and thus for trade to occur at all; in general, the future relationship between the UK and the EU should respect and maintain the key role of Public Services, SGI and SGIE providers in any socio-economic model. From the perspective of Public Services providers and local and regional authorities represented at EU level by CEEP, following concerns are thus paramount to ensure that SGI providers both from the EU and from UK remain able to carry out their mission of general interest:

- any post-Brexit EU-UK trade agreement should be based a positive list approach and include a robust review mechanism able to take stock of future political, social, economic or legal evolutions; it should provide for minimum standard-setting on relevant aspects of public services provision as well (e.g. consumer rights, social, environmental or regulatory standards),
- the discretionary power and the autonomy of local and regional authorities as to the structure, management and financing of SGI or SGIE provision (“regie”, “in house”, externalised etc.) should remain intact on both sides and receive protection through ad-hoc safeguard clauses,
- an EU-UK trade deal should aim as much as possible at promoting sustainable trade (in terms of fostering sustainable jobs and maintaining ambitious environmental and social standards), e.g. through an explicit mention or inclusion of the SDGs in it,
- the overall transparency and inclusion of citizens, stakeholders, intermediate bodies and organised civil society should remain central throughout the process of political decision-making, negotiating, designing and implementing the future EU-UK trade relationship.