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Potential Trade Agreement and the Role of the CJEU

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A Potential Trade Agreement Between the UK and the EU, and the Role of the CJEU

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A potential trade agreement between the UK and the EU

Predictions are always difficult, especially when they relate to the future. In light of most recent developments, however, any talk about a potential trade agreement between the EU and the UK must contain even more than the usual amount of speculation. I would rather stick with what we can know. We do know, for instance, how the intending future parties described their ambitions at the beginning of the year 2020. In the Political Declaration that accompanies the Withdrawal Agreement of January 2020, we read in paragraphs 2 and 3: "The Union and United Kingdom are determined to work together to safeguard the rules-based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests. In that spirit, this declaration establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, …". More specifically, the Political Declaration says in para 21: "with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, …".

For a definition of the term, 'free trade area', we need look no further than the GATT 1947/1994, which in Art. XXIV(8) (b) explains that, "[a] free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories." The expressions, 'customs territories', 'duties', and 'products originating' indicate that the type of commerce that is envisaged in this definition is trade in goods. Accordingly, paras 22 and 23 of the Political Declaration explain that, "[t]he economic partnership should through a Free Trade Agreement ensure no tariffs, fees, charges or quantitative restrictions across all sectors with appropriate and modern accompanying rules of origin, and with ambitious customs arrangements that are in line with the Parties' objectives and principles above."

The Declaration's language here echoes Articles 28(1), 30, 110, and 34/35, 1st alt. TFEU. These provisions outlaw customs duties and charges having equivalent effect, complement this with the prohibition of discriminatory and protective taxation, and finally proscribe quantitative restrictions (commonly referred to as 'quota').

The scheme of the Treaty on the Functioning of the European Union would lead one to wonder whether the parties also envisaged arrangements regarding measures having equivalent effect to quantitative restrictions, as prohibited by the second alternative in Articles 34 and 35 TFEU, respectively. These are not directly addressed, but all the more ambitious is the language in their regard in para 23 of the Political Declaration: "While preserving regulatory autonomy, the Parties will put in place provisions to promote regulatory approaches that are transparent, efficient, promote avoidance of unnecessary

barriers to trade in goods and are compatible to the extent possible. Disciplines on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) should build on and go beyond the respective WTO agreements. Specifically, the TBT disciplines should set out common principles in the fields of standardisation, technical regulations, conformity assessment, accreditation, market surveillance, metrology and labelling."

'Technical barriers to trade' in EU parlance translates into, 'measures having equivalent effect to quantitative restrictions', 'standardisation' and 'technical regulations' are akin to 'harmonisation', and the other terms in this catalogue are also familiar from the workings of the internal market. Especially intriguing is 'metrology': the so-called 'metric martyrs' were always close to the hearts of British Eurosceptics. In a similar vein, the Leader of the House of Commons, Rt Hon Jacob Rees-Mogg, Esq., MP, in July 2019 instructed his staff to use of imperial measures only in documents drawn up in House business. The Political Declaration, by contrast, appears imbued with the spirit of international trade and the necessary compromises it entails.

In all, therefore, while a customs union between the UK and the EU is not an agendum for the negotiations (as it would prevent the UK from concluding trade agreements with third countries), the parties seem (or at least seemed earlier in the year) to want to salvage important other aspects of the free movement of goods. This brings the Court of Justice into the picture, whose jurisprudence has done much to shape the internal market in goods. One of the ways in which it has done so is by finding that the provisions on free movement of goods create rights for individuals which they can invoke in the national courts. In other words, the provisions are directly effective. To avoid encroachment on Prof. Ziegler's contribution, in the following I shall consider the Court's role from the perspective of actions brought by individuals before it, rather than its involvement with disagreements among the parties to a future trade agreement.

The role of the CJEU

Looking back on the UK's membership of the EU and of its predecessor organisations between 1973 and 2020, it is worth highlighting that from the outset, the aim was 'integration through law', just as much as the Withdrawal Agreement embodies 'separation' (thus one of the chapter headings) through law (so far). The prominent role of the Court in the edifice of the EU follows from this emphasis on law rather than on the traditional instruments of international relations, diplomacy and, ultimately, force.

Nevertheless, this focus on shared rules is exactly what made participation in European integration unpalatable to those in the UK who remained wedded to the traditional concept of sovereignty in Britain's dealings with the countries on the continent. In his advice to Prime Minister Harold Macmillan and to Edward Heath, his chief negotiator for accession to the EEC, the Lord Chancellor, Viscount Kilmuir (the former Home Secretary, [Sir] David Maxwell Fyfe), pointed out that as a Member State, the UK would have to accept a decrease in her sovereignty in three areas: legislation through Parliament, treaty-making powers of the Crown (government), and subordination of the British courts within areas of Community law to the ECJ. He warned that, "[t]hese matters should be brought out in the open now because otherwise those who are opposed to the whole idea of the Community will seize on

them with more damaging effect later on."[1] These questions were never properly addressed: not then, nor anytime after. Hindsight is a beautiful thing, but foresight is a grace.

At the root of this is a provision that was in the Treaty from the outset, and is now contained in Article 19(1), 2nd sentence TEU: "the CJEU … shall ensure that in the interpretation and application of this Treaty the law is observed." Crucially for present purposes, international agreements concluded by the EU are part of Union law, and thus in principle within the purview of the CJEU. This follows from the way in which they are created, culminating in a Council decision (in the sense of Article 288 TFEU) for their adoption, Articles 207, 218 TFEU, following, as the case may be, an advisory opinion by the Court, Article 218(11). Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, can serve as an example among many. To this as to all such decisions, the text of the agreement is appended as an integral part. Accordingly, Article 216(2) TFEU provides that, "[a]greements concluded by the Union are binding on the institutions of the Union and on its Member States". This has been reflected, since its beginning in *Haegemann,* in the Court's jurisprudence on international agreements concluded by the E(E)C/EU.

As a consequence, the decision to conclude an international agreement is subject to review under Article 263 TFEU. The question of the validity of the adopting decision can also come before the Court by way of a reference under Article 267 from a national court. The CJEU is further competent to adjudicate under Article 258 on the Commission's allegation (or another Member State's under Article 259) that a Member State has failed to abide by such an agreement. This procedure does not involve individuals. They do not have a right that the Commission or a Member State bring the matter before the Court. Complaints by individuals will, however, often have prompted these applicants to start proceedings.

Above all, under Article 267 the CJEU can also be called upon to interpret the provisions of the agreement. To draw on the example of the EU/Korea FTA again, that agreement contains provisions that are familiar from the Treaty: Article 2.5 FTA (elimination of customs duties) has a parallel in Article 30, 1st alternative TFEU; Article 2.10 FTA (abolition of fees and other charges on imports), in Articles 30, 2nd alt., and 110 TFEU; Article 2.15 FTA (General exceptions), in Article 36 TFEU. Nonetheless, in Article 5(2) FTA, we also read that, "[t]he Member States and the institutions of the Union shall enforce the protection provided for in Articles 10.18 to 10.23 of the Agreement, including at the request of an interested party." More generally and even more clearly, Article 8 FTA decrees that, "[t]he Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals." This is in contrast with Article 4(1)[2] of the Withdrawal Agreement, according to which, "legal or natural persons shall … be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."

[1] Quoted in J Farrell, P Goldsmith, *How to Lose a Referendum,* London 2017, 55, with reference in endnote 22 (p444).

This confirms what the CJEU found in para 49 of its judgment in Case C-366/10 *ATAA,* namely that the EU institutions and the partner country are free to agree what effect the provisions of the agreement are to have in their respective internal legal orders. In the absence of an express provision, the Court will assess that effect in accordance with the criteria set out in in paras 52–55 of said judgment. It will ask, firstly, whether the rule of international law in issue is binding on the European Union at all; secondly, the Court will examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this; finally, the agreement's provisions must be, as regards their content, unconditional and sufficiently precise, and these provisions must not be subject, in their implementation or effects, to the adoption of any subsequent measure.

In its current domestic political climate, the UK is likely to insist that the provisions of any free trade agreement between it and the EU have no direct effect. The UK has a good chance of getting its way because the parties must agree on this question, unless the EU were willing to abandon the whole agreement for the sake of this particular issue. For those cases that might come before the British and Northern Irish courts, the UK could complement this by decreeing that its courts were not to interpret any terms in the free trade agreement that mirror provisions in the TFEU in line with the interpretation by the CJEU of such provisions. (This would be the opposite of what sec 6 of the European Union (Withdrawal) Act 2018 stipulates with regard to retained EU law.)

The national courts of the Member States, by contrast, would not be able to allow individuals directly to enforce provisions in the free trade agreement. In the absence of provisions to the contrary, however, this would not rule out an interpretation of national law in light of the duties incumbent on Member States under the free trade agreement. After all, this agreement remains part of EU law, directly effective or not. As such, it would take precedence over conflicting national law. Concurrent interpretation of national law would stave off the consequence of EU law's asserting its supremacy, namely inapplicability of national law. Against such an interpretation, however, the objection would arise that British manufacturers and exporters and their goods would enjoy benefits under the agreement that had no corollary in the UK's legal system.

In all, this overview has produced little that can be asserted with any certainty. This is only a poignant reflection of the novelty of current developments. In a partial reversal of the trend towards closer international integration that started at Bretton Woods in the last months of the Second World War, Brexit has spawned the first negotiations between developed democracies for economic *dis*-integration. An end to the free movement of persons, and an independent trade policy were supposed to be the two prizes of the UK's leaving the European Union. Unfortunately for the UK, just when it ended its close relationship with its biggest trading partner, the conditions for the conclusion of free trade agreements have become less benign around the world.