

BREXIT - UNITED KINGDOM'S ACCESS TO EUROPEAN UNION'S PREFERENTIAL TRADE PARTNERS

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Legal Briefings - By **Lode Van Den Hende** and **Eric White**

There is much discussion about what kind of trade relationship the United Kingdom will have with the European Union following Brexit. The possibilities range from World Trade Organisation terms applicable in the absence of a negotiated trade relationship to an ambitious trade agreement guaranteeing the United Kingdom nearly the same access to the single market as at present, and a vast range of possibilities in between.

Less often discussed is the trade relationship between the United Kingdom and the approximately 60 third countries with a preferential trade relationship with the European Union from which the United Kingdom, as an EU member state, currently benefits. Brexit will disrupt the United Kingdom's trade with these countries as well as with the European Union

EU preferential agreements

Some of these agreements are 'EU only', meaning that the European Union is the contracting party by virtue of its exclusive competence for trade matters (Article 207 of the Treaty on the Functioning of the European Union (TFEU)). These agreements will no longer apply to the territory of the United Kingdom after Brexit. A recent example of such EU-only agreements is the Interim Partnership Agreement between the European Union on the one hand and Papua New Guinea and Fiji on the other.

However, most of the European Union's preferential agreements are mixed, meaning that the member states are also party to the agreements alongside the European Union. This is because they contain provisions that relate to areas where the competences are shared between the member states and the European Union. Recent examples of such mixed agreements include the EU-Singapore Free Trade Agreement and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Member states often do not allow the European Union to conclude agreements alone in these areas for fear of it becoming an EU-exclusive competence in the future.

The United Kingdom is therefore a party to these mixed agreements and it has been argued that as a result it may continue to benefit even after Brexit. The clearest example of this position is the recently dismissed case of *Adrian Yelland v SSEU*, which sought to establish that the United Kingdom must separately serve notice to leave the European Economic Area Agreement (Article 127 of the agreement), without which it will remain in the single market even after Brexit by virtue of its participation in the agreement.

However, the United Kingdom's continued participation in the European Union's preferential trade agreements appears untenable.

These agreements often include territorial application clauses which stipulate that their provisions apply, on the EU side, to the "territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties". Since Article 50 of the Treaty on European Union provides that the EU treaties cease to apply to the United Kingdom upon Brexit, so too will these agreements.

Further, these agreements are generally drafted as bilateral agreements, with the EU side acting as a single party (ie, "the EU and its Member States on the one part"), and are structured accordingly (eg, with a two-party joint committee to take decisions by consensus). The United Kingdom would presumably not want to be bound by decisions taken by a process in which it does not participate.

For these reasons, the Article 50 Brexit agreement is likely to provide for the withdrawal of the United Kingdom from these mixed agreements.

Leaving process

For both EU-only and mixed agreements, the other parties would need to be notified of the United Kingdom's departure, with the following potential consequences:

- In many cases, this would render the agreement less advantageous for the third country and is likely to trigger requests for renegotiation of some parts of the agreements. The third country could claim that without the United Kingdom's membership the original

agreement is no longer what was agreed, to the extent that it no longer provides preferential access to the UK market. Further, the third country may not accept that the United Kingdom's withdrawal from its obligations under the agreement, as this is a result of a process in which it was not involved.

- The European Union may want to reduce tariff rate quotas accorded under these agreements to take account of the reduced EU market size following Brexit (and the market access that the United Kingdom may grant).
- The United Kingdom will also likely be reluctant to lose the preferential access from which its goods and services benefit in those third countries.

Possible solution

An obvious solution to minimise disruption on all sides would be for the United Kingdom and the third countries concerned to conclude a new agreement very similar to that which already exists with the European Union, at the same time as the United Kingdom's withdrawal from the EU-third-country agreements takes effect. This has been referred to as 'rolling over' the agreements.

This is potentially attractive for both the United Kingdom and the European Union, at least as a transitional solution. It would buy the United Kingdom time to negotiate its own preferential trade agreements and allow the European Union to avoid a situation where the third country would request that the agreement be renegotiated following Brexit.

Ideally, this should all be done during the two-year Brexit negotiation period and on the basis of a joint-negotiating stance of the United Kingdom and the European Union. Some critics object that the United Kingdom has no competence to negotiate with third countries on trade while it is an EU member state. However, Article 207 of the TFEU (on the common commercial policy) and Article 3(a) of the TFEU (on exclusivity) provide only for commercial policy to be common and an EU exclusive competence; they do not prohibit negotiations by a departing member state on agreements that would start applying once it is no longer part of the European Union.

Potential difficulties

The outlined solution presupposes that all parties (the European Union, the third countries and the United Kingdom) wish to continue trade relations with no substantive change.

If substantive change is needed, the relevant EU-third-country agreement will have to be amended, which will in turn require a new ratification process that the European Union will likely want to avoid, especially in the post-CETA environment for trade agreements. In addition, as soon as one party seeks to secure a substantive change, the other is likely to ask for its own adjustments and the resulting negotiating process will take considerable time to play out.

For the United Kingdom, the provisional roll-over arrangement needs to be in place at the time of Brexit – otherwise it loses its attractiveness. The United Kingdom does not have complex treaty ratification procedures and could, in principle, therefore agree through an exchange of letters with the relevant third country that the rights and obligations of the EU-third-country agreement will continue to apply between the United Kingdom and the third country, as though all references to the European Union or the European Union and its member states were references to the United Kingdom.

Of course, all of these agreements were designed for the EU-third-country relationship and take account of many EU policies (eg, agriculture, fisheries, competition and development cooperation). Post-Brexit, the United Kingdom may wish to pursue very different policies, rendering the balance found in the original agreement inappropriate. The third country also made its concessions in exchange for access to the large single market and EU programmes, and as a result may not wish to make the same concessions to the United Kingdom – or may wish for something more in return for doing so.

While many of the obligations in these agreements can be easily copied into the new UK-third-country agreement, it will be more difficult for others. For example:

- Quantitative restrictions (including tariff rate quotas) – in principle, these can be recalculated to reflect the changed situation. Alternative bases exist to do so. UK quotas could be calculated according to the existing distribution of quota, or the average distribution over the period of operation of the agreement. Alternatively, relative volumes of total trade over a defined period could be used. Nonetheless, there are practical difficulties in doing this. Because the European Union is a customs union, it is often difficult to know where imports are actually consumed. However, since the European Union may simply accept to continue to apply the existing level of quotas (so as to avoid renegotiation and ratification), any quota granted by the United Kingdom would be additional and this may facilitate achieving an agreement for the transitional UK-third-country arrangement.
- Financial obligations – a number of the European Union's preferential trade agreements with, in particular, developing third countries include financial obligations on the part of the European Union. This is the case, for instance, of the EU-West Africa Economic Partnership Agreement, which provides for a development programme financed by the European Union and dedicated to assistance in trade, agriculture, infrastructure, energy and capacity building for the West African countries party to the agreement. As for the tariff quotas discussed above, the exact share of the United Kingdom's contribution to these types of programme (if any) will have to be reassessed and agreed.
- Cooperation and participation in other programmes – some of the European Union's preferential trade agreements include cooperation and participation in certain programmes. This is the case, for instance, of the EU-Israel Association Agreement, which provides for scientific and technological cooperation between the two parties. It is

unclear whether the United Kingdom will be able to offer anything equivalent. Since the European Union can be expected not to seek changes to the agreement, it may nonetheless not be necessary for the United Kingdom to offer anything.

- Obligations relating to policies on, for instance, competition, environment and migration – it is unclear whether the United Kingdom will have equivalent policies to those of the European Union post-Brexit. These provisions could be omitted from the roll-over if they are not considered to affect the overall balance of the agreement.
- Decisions taken under the agreement before Brexit – the EU-third-country agreement may contain provisions for taking decisions and making declarations and notifications. The roll-over agreement should specify whether and to what extent these are also rolled over.

Comment

Because of the number and complexity of potential adjustments, a fully-fledged agreement with the third countries involved will be difficult for the United Kingdom to secure in the time available. It may therefore be preferable to simply agree on principles which could be expressed in a notification of Brexit to the third countries and recognised in the reply.

Such a notification would:

- communicate the fact of Brexit;
- express a desire by the United Kingdom to maintain the balance of trade access and preferences and negotiate the details within a defined period (with the European Union implicitly requesting to leave the agreement unchanged);
- for the United Kingdom, set out certain quotas or other adjusted quantitative amounts that will apply in respect of provisions and list the provisions that are not rolled over; and
- for the United Kingdom, designate new contact points and institutions.

The reply would ideally accept the notification and express a desire to work cooperatively.

UK businesses importing or exporting to third countries with which the European Union has a preferential trade agreement should make sure to raise this possibility to their relevant authorities so as to mitigate the potential detrimental impact of Brexit on trade with these countries.

Note: This article was first published in the International Law Office International Trade Newsletter. See [here](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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