

THE UK'S ACCESS TO THE EU'S PREFERENTIAL TRADE ARRANGEMENTS

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Legal Briefings

The position of the UK under the EU's preferential trade agreements following Brexit is likely to become a major complicating factor in the negotiations. UK-based companies that rely on such agreements should be warned of the potential difficulties that may arise.

The EU has approximately 60 preferential trade agreements. These range from the very close such as those integrating the EFTA countries of Norway, Iceland and Liechtenstein into the single market, to those with other developed countries such as Canada and Korea and with developing countries under the Trade and Partnership Agreements with former colonies. There are also a range of trade agreements with neighbouring countries especially with those aspiring to EU membership.

THE IMPACT OF BREXIT ON EU PREFERENTIAL TRADE AGREEMENTS

AS REGARDS THE EU AND THE UK

Brexit has the potential to disrupt the UK's trade with these countries as well as with the EU.

Although the UK may formally remain a party to those of these agreements that are "mixed", meaning that EU Member States are also parties to the agreements alongside the European Union, the EU has taken the position that they will all nonetheless cease to apply to the UK following Brexit. The [negotiating guidelines of the Council](#) of 29 January 2018 state at para 15 that: "During the transition period, and in line with the European Council guidelines of 29 April 2017, the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, while the United Kingdom should however no longer participate in any bodies set up by those agreements."

One reason for this position is that these agreements generally 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 TFEU provides that the EU Treaties cease to apply to the UK upon Brexit, so too will these agreements.

In addition, even mixed EU preferential trade agreements are drafted as bilateral agreements, with the EU side acting as a single party (i.e. "the EU and its Member States on the one part"), and are structured accordingly (e.g. with a two party joint committee to take decisions by consensus). The UK would presumably not want to be bound by decisions taken by a process in which it does not participate.

Accordingly, and for good order, the Article 50 agreement on Brexit is likely to provide for the eventual withdrawal of the UK from all EU agreements.

AS REGARDS THIRD COUNTRIES

The withdrawal of the UK from the EU and consequently from the EU's preferential trade agreements will also impact each third country concerned and render the agreement less advantageous for that third country. That could trigger requests for renegotiation of some parts of the agreements. The third country could claim that without the UK'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 the UK's withdrawal from its obligations under the agreement, as this is a result of a process in which it was not involved.

In addition, the EU 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 UK may grant).

THE "ROLL-OVER" SOLUTION AND ITS COMPLICATIONS

An obvious solution to minimise disruption on all sides would be for the UK and the third countries concerned to conclude a new agreement very similar to that which already exists with the EU, at the same time as the UK's withdrawal from the EU third country agreements takes effect (see our earlier briefing on the UK's access to the EU's preferential trade partners [here](#)). This has been referred to as 'rolling over' the agreements.

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

Ideally, the UK and the EU would use the two year Brexit negotiation period to agree this roll-over with the third country partners on the basis of a joint negotiating position. Eighteen months after the referendum and nearly a year after the notification by the UK of its intention to leave the EU there is no sign of this happening.

While the UK has taken preliminary contact with many third country partners and expressed optimism on the roll-over, the EU appears to have been inactive. This may be because of the divergent interests in the EU but also because the conclusion of international agreements is burdensome and time consuming in the EU.

In any event the roll-over of preferential trade agreements is by no means as simple as the term suggests. These agreements were designed for the EU and often contain quantitative obligations (such as tariff rate quotas) calculated for the EU and provide for participation in EU programs and policies. Perhaps the most serious problem is that they contain cumulation of origin provisions that will no longer be operable without the cooperation of the EU.

In addition, some of these countries have started to indicate that they will request compensation. For example Korea and Chile have stated that they will seek further concessions in return for accepting to continue to apply their agreement with the United Kingdom. The case of Korea is interesting since it has experienced an increasing trade deficit with the EU since the conclusion of its FTA with the EU. It has clearly not benefited as expected and would like to rebalance the agreement. However, the statistics show that the imbalance is not so much with the UK but with the rest of the EU (Korea having a slight surplus in goods trade with the UK but a deficit with the EU as a whole).

THE PROBLEM OF THE TRANSITION PERIOD

The UK has requested a "standstill" transition where EU law would continue to apply in the UK for a transitional period following Brexit (that it prefers to call an "implementation period"). This is designed to avoid a "cliff-edge" change in trading conditions on Brexit day but may in fact simply postpone and aggravate the problem. It also complicates the problem of rolling-over third country agreements.

The EU negotiating guidelines of 29 January 2018 for phase two of the Brexit negotiations accept the concept of a standstill transition but draw the consequence that during the transition period "the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, while the United Kingdom should however no longer participate in any bodies set up by those agreements" (para 15).

While this follows as a matter of international law where the UK remains a party to these mixed agreements, it would not appear to follow in the case of EU-only agreements which are binding on the Member States by virtue of Article 216(2) TFEU, which is of course EU law.

It is however consistent with the concept of a standstill transition that the UK will commit itself in the Withdrawal Agreement with the EU to continue to respect these obligations. The negotiating guidelines go on to specify that "The United Kingdom should take all necessary measures to preserve the integrity of the Single Market and of the Customs Union. The United Kingdom should continue to comply with the Union trade policy. It should also in particular ensure that its customs authorities continue to act in accordance with the mission of EU customs authorities including by collecting Common Customs Tariff duties and by performing all checks required under Union law at the border vis-à-vis other third countries" (para 16).

As explained above, these agreements provide that as regards the Union they apply 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". It would accordingly be open to these third countries to take the view that they are not bound to accord to the UK the trade and other treatment provided for in their agreements.

In any event, since the UK will not be represented in the institutions of such agreements, it will find it difficult to enforce the provisions of these agreements unless it can persuade the EU to accept in the Withdrawal Agreement a commitment to defend the UK's trading position.

The UK may well be in an even weaker position to negotiate with third countries during the transition period than it is now. The transition period is proposed to be two years, which is the same length of time as the duration of the Article 50 negotiation period. The UK has until now accepted the statements of some in the Commission that it is not entitled to commence negotiations with third countries while it is still an EU Member State (this has always been a debatable assertion since such negotiations being about post-Brexit relations would not have interfered with the common commercial policy and could not have been considered to breach the principle of sincere cooperation if the new agreements entered into force once EU law obligations cease). The guidelines soften this position for the period after Brexit and during the transition period since they merely specify that "[d]uring the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union" (para 16). Therefore negotiations and even the signing of agreements will not require "authorisation" from the EU during the transition period which is an improvement in the position that is considered to prevail during the Article 50 negotiations.

Two difficulties remain however: First, few third countries will be eager to negotiate with the UK before they know what relationship it will have with the EU after the transition period. Second, the negotiation of the "roll-over" agreements will require the participation of the EU and probably the adjustment of the corresponding EU-third country agreement. This will take a long time.

The UK has proposed an elegant solution in an undated "[technical note](#)" published recently. The UK proposes an "agreement of the parties to interpret relevant terms in these international agreements, such as "European Union" or "EU Member State", to include the UK." If accepted by third countries, the agreed interpretation approach will be particularly effective in relation to the territorial application clause discussed above. It is defensible that the "territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied" can be understood to cover the UK during the transitional period while it is under an obligation to the EU to continue to apply the EU acquis. However, it will cease to be effective after the end of the transitional period.

CONCLUSION

Eventually the UK may well succeed in negotiating better trade agreements with the rest of the world than it has at present through the EU.

In the near term however, after the end of the transitional period, the maintenance of the existing level of preferential trade access for UK exports to third countries is likely to be difficult. Some trade access is likely to be lost and other access only achieved with delay.

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