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*Political management consultancy with expertise in transport and infrastructure*

### **“Brexit means Brexit”**

*Should the United Kingdom [UK] remain a member of the European Union [EU] or leave the European Union?,”* was the question on the referendum ballot paper. All statements from the May administration indicate that the Government will observe the outcome of the vote. The UK is leaving the EU, but what does that mean?

The **Government’s four “*overarching strategic objectives*”** for the UK’s exit negotiations are:

- bringing back control of our laws to Parliament
- bringing back control of decisions over immigration to the UK
- maintaining the strong security cooperation we have with the EU, and
- establishing the freest possible market in goods and services with the EU and the rest of the world.

The first two objectives are incompatible with membership of the EU single market, while the last point indicates that the UK is likely to leave the EU customs union, or, at the very least, recast the nation’s membership.

The Government has made it clear that pretty much all its objectives are negotiable, except Britain taking full control of immigration.

This note aims to try and decipher – as far as the impending, protracted negotiation and the associated geo-politics will allow – the likely outcome for the UK regulatory environment post Brexit.



It is clear that the Brexit deal will be bespoke. As Jean-Claude Juncker conceded recently: *"The British feel too hot in the kitchen... We have to invent a different orbit for those of our European countries who do not want to be part of all the domains..."*

The Government hopes to combine the Article 50 negotiations and the discussion of a future trade deal, although this is at odds with the EU Commission's expressed view (see below).

The Brexit process will be based on two phases:

- i. withdrawal, under Article 50, and
- ii. the end-state, under Article 218. Withdrawal determines the details of the divorce; end-state determines our future relationship with the European Union (EU), as a non-EU country.

The EU Commission's chief negotiator, Michel Barnier, would like to adopt a three-pronged approach to the Brexit negotiations – withdrawal, transition and then a new relationship:

- i. pending issues: UK payments to the EU, border issues and the single market
- ii. post-Brexit transition deal, with
- iii. a final deal or association agreement for any long-term trade relationship only to be discussed after these first two stages have been agreed.

This week, the prime minister hinted at a transitional deal for Brexit, though she stressed it would be an *"implementation"* plan to Brexit.

Any transition phase is likely to be subject to a number of sunset clauses to ensure that Britain does not retain the benefits of EU single market or customs union membership indefinitely, while the shape of the new relationship are due to be sketched out by the prime minister in her Article 50 divorce letter due by the end of March.

### **EU Customs Union**

The EU customs union includes all 28 EU nations, Turkey, Monaco, San Marino, Andorra and non-EU UK territories such as the Channel Islands and concerns the tariff-free trade of goods. For instance, Turkey is in the EU customs union, but is not a member of the EU.

The prime minister's Brexit speech at the Conservative Party annual conference on 2<sup>nd</sup> October and subsequent comments allow inference to be drawn on the likely outcome.



In referring to a Britain “...in which we win trade agreements with old friends and new partners,” she strongly indicates that the UK is likely to leave the EU customs union. Otherwise, the Government would be unable to negotiate trade deals, with the UK tied to the Common External Tariff and unable to decide tariff rates.

Rt Hon David Davis MP has suggested there are four possible options: *"inside the customs union; a 'partially inside' Turkish model; outside with a free trade agreement and a customs arrangement; and completely outside"*.

Shades of grey may arise in the island of Ireland – and other territories – as the Government seeks a customs and trade agreement that reflects the economic and political realities. If a special arrangement is secured, it will no doubt mean excluding the vast majority of crossings made by car, as is the case on the Norwegian-Swedish customs border where checks are sporadic and in effect limited to a few designated crossings. Following this model it likely to involve one set of controls, as the UK and Ireland could operate the controls jointly.

The Government has repeatedly suggested that the UK will seek to be selective about individual sectors it wishes to be covered by any EU customs union arrangement. Others have suggested that the UK may remain in the EU customs union for a transitional period only. While today the CBI has called for *"barrier-free"* access to EU, creating a wish list of industrial sectors covering 80% of UK jobs and economic output – from aviation to chemicals, from agriculture to financial services.

Remaining partially inside the customs union is highly unlikely to allow us to negotiate our own free trade deals.

The Government has indicated that it intends to use EU tariff levels as a starting point in its trade negotiations with the rest of the world. The Department for International Trade has begun preparing the draft schedule of tariffs that it will submit to the World Trade Organisation (WTO). Britain would be free to apply tariffs below the maximum it submits for approval by the WTO's 163 members.

Before the end of the Article 50 negotiations, when the UK leaves the EU customs union, the UK must decide if it wants to apply non-preferential Most Favoured Nation (MFN) tariffs or wants preferential tariffs for UK-EU trade. There is no default, off-the-shelf WTO tariff schedule, if the UK does nothing. Importantly, if the UK chooses to adopt MFN tariffs, regardless of the rates, the EU would have no choice but to impose its Common Customs Tariff on UK trade.



## **The EU Single Market**

The EU single market is one territory without any internal borders or other regulatory obstacles to the free movement of capital, goods, people and services.

Headline negotiation positions like the UK maintaining sovereign control over immigration and not being subjected to the jurisdiction of the European Court of Justice (the arbitration body of the EU single market) – indicate that Britain is leaving the EU single market. The extent of the access to the EU single market will be a core part of the negotiation.

Under European Free Trade Association (EFTA) / European Economic Area (EEA) membership, the UK could be part of the single market, with a possible break “*emergency brake*” on immigration, via the Article 112 'Safeguard measures' of the EEA agreement, which can be invoked unilaterally and has been used for 18 years by an EFTA member country, Liechtenstein, to impose immigration quotas.

It is most likely that restraining the free movement of EU workers will result in the UK pursuing a bi-lateral trade deal similar to Canada's Comprehensive Economic and Trade Agreement (CETA). It should be noted that except for select agricultural products, CETA has removed all tariffs between Canada and the EU.

## **The 'Great Repeal Bill' (The 'Great Retention Bill')**

The European Communities Act 1972 remains in force, though the Government has stated that it intends to repeal the act with a 'Great Repeal Bill', which will “*end European Court of Justice (ECJ) jurisdiction in the UK*”, while also transposing the existing body of EU law into UK law.

When the bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties – to amend, repeal and improve any law it chooses.

It is unclear whether the UK courts will continue to rely on the jurisprudence of the ECJ when interpreting EU law after it has been transposed into UK law.



## Conclusion

Personalities, external events and nearly 40 national and regional assemblies will have a say on the UK-EU agreement over the long period of negotiation, although, on the latter point (see below), the ability to obstruct a pure trade deal is limited.

The UK's leverage is not insignificant and ranges from the country's seat on the UN Security Council, the G20 and the G8; defence and security capabilities; the significant contribution to the EU's budget; the trade deficit with the EU; to criminal justice.

It is likely that the Government's utmost priorities will be the continuation of tariff-free trade on goods and an agreement on 'regulatory equivalence' to replace the 'passport' in financial services. On the former point, it is likely that the country will pursue a CETA-style bi-lateral trade arrangement. It is likely that preferential access – i.e. the freest possible market in goods and services with the EU – is likely to come at a large financial cost in the interim, at the very least, until a free trade bi-lateral deal is agreed.

The politics of any UK-EU agreement are very different to CETA. Canada accounts for only 1.7% of the EU's trade, while the UK accounts for 17% of the EU's exports. The EU's legal machinery mean that a UK-EU trade agreement is unlikely to be held captive by political protests in EU member states. The EU's decision making process for concluding trade agreements are set out in the treaties (Article 207 TFEU)<sup>1</sup> which states that pure trade agreements are decided by qualified majority voting, i.e. with no national vetoes. This was the case with the EU-Singapore agreement and many others. The CETA agreement did not follow this course as it was argued by some member states that some aspects of the agreement went beyond pure trade. There is a chance that this argument could be made again.

True to every EU negotiation, the eventual agreement will be forged in the eleventh hour.

The one certainty is uncertainty. It is a commercial impediment and a negotiating tool.

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E207:en:HTML>

