Martin Howe QC

How to Leave the EU

Legal and Trade Priorities for the New Britain

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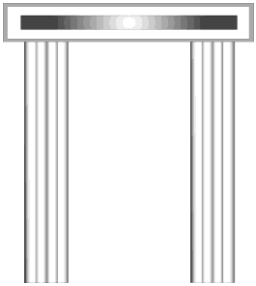

POLITEIA

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Foreword
Sheila Lawlor

Britain voted unequivocally in June 2016 to leave the EU. The government had already pledged in its election manifesto and elsewhere that, whatever the outcome in the referendum, it would abide by the wish expressed in the people's vote 'no ifs, no buts'. As Theresa May, the new prime minister reiterated, 'Brexit means Brexit'.

Behind Britain's vote was the reassertion by people in this country of the right to shape and decide the laws under which they are governed and to hold their rulers to account. EU rule makes such self-determination impossible, as people and politicians have increasingly recognized. As a remedy, some politicians sought in recent years to re-establish the sovereign rights of people through their parliament.[1]

Despite such attempts, developments in the EU and the Eurozone moved rapidly, in accord with the increasing momentum for EU political integration. The consequences were inimical for political and economic security in a number of EU countries. Undemocratic and incompetent EU rule added a severe immigration problem to the already tragic problem of mass unemployment and economic failure in Europe's southern states, especially Spain and Italy, as well as Greece. It was hardly surprising that by 2014 the vote across western EU

[1] Theresa May proposed that EU secondary legislation should be subject to far tighter parliamentary scrutiny, oversight and potential veto in a Politeia publication in 2007, *Restoring Parliamentary Authority: EU Laws and British Scrutiny*, Theresa May & Nicholas Timothy (2007). William Hague, in the run up to the 2010 election promised, in a foreword to the 2009 publication by Martin Howe QC to introduce a sovereignty measure, on which legislation was subsequently introduced in the European Union Act 2011 *Safeguarding Sovereignty*, Martin Howe (2009).
For a discussion of the evolution of the tradition over centuries of Britain's parliamentary government through which people shaped the laws under which they were governed and held rulers to account, see *Ruling the Ruler, Parliament, the People and Britain's Political Identity*, Sheila Lawlor (2016).

showed strong Euroscepticism[2], as it did in Britain itself. It is, however, a tribute to Britain's tradition of freedom that it was in this country that a referendum was promised, so as to allow people to decide on whether Britain would remain in or leave the EU. Thus, across the party political divide the unease by people themselves and shared by their leaders about EU membership came to a head with the referendum, after one of the longest and most thorough public debates of an issue in British policy, with cabinet minister pitted against cabinet minister, party leaders and MPs debating against their own side, mirroring Britain's adversarial parliamentary system. Finally the people decided in June 2016 to leave the EU and its Single Market and to end 'free movement' of EU citizens to Britain.

The stage is therefore set for leaving the Single Market without regrets, and with it the costs and burdens it creates for Britain's producers and consumers. There is no mandate for trying to recreate the status quo, and there should be no attempt to do so, whether by Britain's officials or other members of the pro-EU 'establishment' who lost both the debate and the vote fair and square.

What, practically, should be the next steps to recover powers ceded to the EU for Westminster and establish the constitutional and trading arrangements needed for the mutual benefit of Britain and its trading partners in the world and the EU?

In the pages which follow Martin Howe* QC, one of the country's leading EU lawyers, sets out a clear course for action for the steps needed to withdraw from and replace the EU in law and for prioritising trade. The first task will be to forge a future for free trade across the globe, by taking over existing free trade agreements with third countries to which we belong as EU members and forging new deals with those

[2] The EU's barometer of Euroscepticism, has revealed that over the five year period ending 2012 Euroscepticism in the founder countries as well as Britain had risen significantly, a trend which found political expression in the 2014 Euro elections. http://ec.europa.eu/public_opinion/archives/eb/eb78/eb78_en.htm

where the EU has so far dragged its feet.[3]

It is these free trade agreements which should be the government's main objective. Over 56 per cent of Britain's exports are already with the wider world. While trade arrangements with the EU bloc will also be negotiated, these EU negotiations should be kept in perspective. Most of Britain's trading is already outside the EU, and negotiating deals which enhance this trade will be far simpler and a more rewarding process. There are, says Howe, good reasons for the EU to make a mutually beneficial deal, but if for some reason it fails to do what is in its own interests, Britain should be ready to walk away from the table, by having in place its plan B, trading with the remaining EU bloc under WTO low tariff arrangements. In either event, Britain will, fiscally, be the winner.

The message from the clear legal plan which follows is clear. There are legal precedents for proceeding in such a way that would both effectively restore Britain's sovereignty and people's control over their own laws and put her economic and trading future on a sound footing. It is vital therefore, that neither UK officials nor politicians, should through a mistaken desire to please themselves or Brussels, seek to re-enter the status quo by the back door, when the people have decided to leave it by the front.

Sheila Lawlor,
Director, Politeia.

July 2016

[3] This follows his earlier, 2015, *Zero Plus: The Principles of EU Renegotiation*.

Part 1

Leaving the EU – The Legal Side of How and When

I
Withdrawing from the EU
Modes and Legal Bases

Article 50 of the Treaty on European Union (TEU) [4]

Under Article 50 (see Appendix) any member state can leave the EU. This right may be exercised unilaterally by the member State and is not dependent upon the agreement or cooperation of the EU institutions or other member states. Nor can the remaining member states prevent the withdrawing State's membership coming to an end at a maximum period of 2 years after notice is given (Article 50(3)).

Article 50 authorises and encourages an agreement between the remaining EU and the withdrawing state on '*the arrangements for its withdrawal*' and envisages a '*framework for its future relationship with the Union*'. It provides for the withdrawal agreement to be negotiated in accordance with Article 218(3) TFEU (Treaty on the Functioning of the European Union) which regulates the making of agreements between the Union and third countries, but with the withdrawing state excluded from the Council of Ministers for the purposes of the negotiation. In order to be authorised by the EU, the agreement on withdrawal arrangements needs (1) the consent of the European Parliament, and (2) approval by the Council of Ministers by QMV (see Article 50(2)).

While Article 50 TEU envisages that there will be a 'framework' for the future relationship between the withdrawing State and the EU, it does not specify how that framework will be negotiated and agreed. It seems that that would be achieved via the general treaty provisions authorising agreements between the EU and non-member states. The most relevant of these are Article 207 TFEU which authorises commercial (i.e. trade) agreements, and Article 217 TFEU which authorises association agreements.

[4] Treaty on European Union, originally the Maastricht Treaty of 1993, as amended by the Lisbon Treaty of 2008.

Article 50 TEU raises a number of issues:

What if all is sweetness and light?

If there is good progress and rapid agreement on terms for withdrawal and the future relationship, then the actual date for withdrawal could be brought forward from the end of the 2-year period, since Article 50(3) states that the EU treaties shall cease to apply to the State from the (agreed) date of entry into force of the withdrawal agreement (see Article 50(3)).

One oddity of Article 50, is that it does not explicitly authorise the agreement on the future relationship to be made under its machinery prompting some to suggest it is not possible to conclude an agreement in advance of actual withdrawal. This would mean that the formal steps of agreeing it (as distinct from informally pre-negotiating the intended text) could only take place after the date of actual withdrawal. If such a literalistic argument were upheld, it would be a first in EU law.

Since the withdrawing State will be a 'third state' by the time the future relationship agreement comes into force, there seems no real difficulty in negotiating and approving the agreement under the Treaty provisions dealing with agreements with third states so that the agreement can come seamlessly into force from the date of withdrawal. Denmark was treated as a 'third state' for negotiating agreements between itself and the then EC on matters falling within Denmark's home affairs opt-out Protocol.

What if no agreement can be reached?

In practice a UK agreement on the terms of withdrawal would most likely be linked to reaching agreement at least on the key trade-related terms of the future relationship. It would not be satisfactory *for either party* to conclude the withdrawal arrangements and bring Britain's membership to an end if the future relationship were left up in the air while negotiations of indefinite duration proceeded.

If no withdrawal agreement can be reached, either because the terms of withdrawal themselves are problematic or because a satisfactory framework for the UK's future relationship with the EU cannot be agreed, then under Article 50(3) the UK's membership of the EU would terminate unless both the European Council (acting unanimously) and with UK consent, extended the time.

Some commentators have, strangely in my view, seen this as a negative feature of the Article 50 procedure, for a country withdrawing. Far from that being so, if Article 50 had no time limit, the EU could tie up the withdrawing state in 'years of uncertainty' as those opposed to leaving were prone to allege. Not only is the timing of the initiation of the formal Article 50 procedure under the UK's control (as the withdrawing state), but it allows the UK to set a firm end point beyond which the uncertainty cannot go on.

At the same time, however, *it is vital that the UK recognises that it must be willing to exit the EU on that final date without an agreement if that proves necessary* and then trade with the remaining EU under WTO terms. Under the WTO Agreements (GATT 1994, Article XXIV) each party would be obliged to levy its standard external tariffs on imports of goods from the other party. It seems that in such circumstances (given the EU's average external tariffs), UK producers would face tariffs on their goods exports to the remaining EU that would be substantially less than the UK's current net EU budget contribution. In view of the large trade imbalance in goods, the UK would then levy tariffs on imports from the EU which would be substantially greater, although the amount raised would depend upon the UK's own decisions about what tariffs it would impose after exit on imports under its own uniform tariff policy.

To negotiate a good agreement with the EU, one which serves Britain's interests, it is essential that the UK pursues a twin track policy. While seeking to negotiate a trade agreement with the EU and prepare for its implementation, it must simultaneously prepare for and be in a position to

execute an external trade policy without an agreement with the EU if necessary. This is not because a successful agreement with the EU is unlikely, but because having no alternative plan in the event of no agreement, is a recipe for disaster. The UK would find itself obliged to agree to whatever terms are offered, just as the Greek Prime Minister Alexis Tsipras was over the 2015 bailout terms dictated to Greece. It should also be pointed out that leaving without an agreement in place at the day of exit does not prevent an agreement being reached in the future.

The timing – legal entitlements, practical opportunities.

Under Article 50(1), the decision of the UK to withdraw is governed by its own constitutional requirements. The mandate of the referendum result gives sufficient political and constitutional authority to the Crown to give effect to the decision to withdraw by exercising the Crown prerogative power to give a formal notification to the European Council under Article 50. As a matter of law this prerogative act does not require the consent of parliament.

Not only is it possible, but it is prudent for the UK to engage in a period of planning and of informal pre-negotiation with other member states, before invoking the formal procedure of Article 50 and setting the 2-year timetable running. There will be a significant task in revising UK domestic law in preparation for exit, and even if speeded up by using the regulation-making procedures under section 2(2) of the European Communities Act 1972 it will still be a considerable task. At the same time the UK will need to replace areas where its international relations are currently conducted via the EU with direct international treaty arrangements. This suggests that 2 years may well be a relatively short period in which to prepare for exit, particularly if, as was alleged before the vote, no serious contingency planning has been done inside Whitehall for the eventuality of a Leave vote.

The public rhetoric by some EU leaders in the wake of the referendum against delaying formal notification under Article 50 should not be taken at

face value. Before the referendum German officials meeting British delegations outlined the sort of arrangements after a possible leave vote, with which their country would be happy,[5] and the German Chancellor has made clear that she expects a positive and constructive approach, while also appearing to wish to mollify her EU colleagues. There is every incentive for individual member states, particularly those who export significant proportions of goods to the UK, to 'pre-negotiate', whatever the public 'stance' of leaders anxious to limit what they claim to be the 'damage' caused by Brexit to the EU project.

It would therefore be ill-advised to give formal notice under Article 50 too early, i.e. at a time when the 2-year period would expire before the UK would be ready for exit.

That would most likely lead to a request by the UK to the EU to agree an extension of time, which could well be met by a demand for concessions in return. The only circumstances in which an extension of time should be contemplated would be if an agreement is very close and there is a mutual desire to allow a little more time to close the deal.

A delay between the referendum and giving formal notice cannot, however, be too long. The latest date possible for the process to end is constrained by the UK political timetable so that the process of exit is concluded and wrapped up in good time in advance of the end of the current parliament. Moreover the business community will need reassurance that there is a firm end-date to the process. Complex international negotiations would expand to fill the time available to them and a firm end date is needed in order to bring them to a successful conclusion.

[5] See John Redwood, *Trading Truths? The Treasury, Trade and the City*, pp 3-4, Politeia, 2016.

An agreement or agreements with the EU?

The focus of attention of the UK's future relationship with the EU has been on a trade agreement. There are, however, other areas where it would be mutually beneficial to carry forward on the basis of co-operation and agreement, aspects of current UK-EU arrangements such as sharing intelligence and security cooperation and participating in pan-European higher education or research projects and programmes.

There are also strong arguments against attempting to include trade and non-trade UK/EU agreements in a single all-embracing agreement. Why is this?

(i) Trade arrangements should command priority. Concluding an overall agreement would be more time consuming and difficult, given that agreement would need to be reached on a large range of individual issues before the key provisions on trade could be put into effect.

(ii) The different aspects of an all-encompassing agreement would entail different ratification procedures. A trade agreement of limited scope falling within the EU's common commercial policy could be agreed by the EU alone (i.e. without the individual member states needing to be parties), in some circumstances by QMV rather than unanimity in the Council of Ministers, so long as certain provisions are avoided which might trigger a need for unanimity. On the other hand, agreements covering matters not wholly within EU exclusive competence, which are 'mixed competence' or member state competence, would need each member state to be a treaty signatory. In this case each member state would have to ratify in accordance with its own constitutional procedures. (Note that the fact that the EU Canada FTA is a 'mixed competence' agreement has now enabled Romania to put a spoke in the works by refusing to ratify as a result of a visa dispute between itself and Canada).

(iii) An all-encompassing single agreement (or indeed a series of agreements legally linked together) would create a 'lobster pot' effect

which makes it difficult to withdraw from an area of cooperation or to require its terms to be revised without bringing to an end the entire arrangement between the UK and the EU including its trade related aspects. (Switzerland now finds itself inside such a 'lobster pot' since it unwisely agreed that the migration provisions of its bilateral treaties with the EU be linked with its agreements on free movement of goods and services).

Other Modes of Withdrawal – Procedures and problems

Withdrawal from the EU by treaty amendment

There are other legally possible withdrawal routes. One is for withdrawal from the EU to be by treaty amendment rather than invoking the Article 50 procedure - treaty amendment is the legal mechanism by which new member states join the EU and it is legally possible to use this same mechanism when a member state withdraws.

But while this is legally possible, it is hard to see that it has any advantages compared with the Article 50 procedure and it has obvious disadvantages. There is no time limit laid down and the UK could be strung along for years (paying into the EU budget in the mean time) while terms are negotiated; even assuming terms were to be successfully negotiated, the treaty amendment would then need to be ratified by each of the 27 member states in accordance with its own constitutional requirements. This would at best take further time and at worst result in the UK's withdrawal being stymied by a refusal to ratify in just one member state.

Withdrawal by unilateral breach

Another suggestion is that the UK should ignore Article 50 and withdraw by repealing the European Communities Act 1972. *As a matter of the UK's internal law*, it is correct that parliament could repeal the 1972 Act and end the enforceability of the EU Treaties and directly applicable EU Regulations in the UK courts. But such an action would be a breach of the international obligations of the UK under the EU treaties. The fact that

parliament under UK internal law has the power to do this would not excuse or justify such a breach under international law.

There is no conceivable advantage in taking this course. Under the Article 50 procedure the worst case scenario is that the UK exits the EU at the end of 2 years without a concluded agreement, but having acted entirely lawfully under international law, leaving a basis for future agreement and cooperation. Leaving the EU by unilateral breach would secure no advantage compared with that scenario and would suffer from the very severe disadvantage of demonstrating a wilful disregard for treaty obligations which would make it very difficult to restore the trust needed for future agreement and cooperation.

Next steps

To conclude, the invocation of Article 50 TEU is the only legal and practical route for the UK to withdraw from the EU following the Leave referendum result.

The timing of the formal notice under Article 50(2) should be carefully calibrated first to allow a period of planning and pre-negotiation, and secondly to ensure that by the time of the expiry of the 2-year period in Article 50(3), the UK will have completed all necessary internal and external preparations for withdrawal, and be ready (as a last resort) to exit on that date with viable alternative arrangements ready if there is no agreement with the EU.

II
Before Withdrawal
Amending UK Domestic Law

UK Law and EU Law: The present position

After over 40 years of membership, a large number of UK laws are derived from or affected by EU membership, and these fall into a number of categories.

First, there are 'directly applicable' EU laws, such as EU Regulations and parts of the EU treaties, which have become part of the internal law of the UK and of other Member States, without any action on the part of national legislatures or other authorities. EU 'directly applicable' laws are given legal effect in the UK by Section 2(1) of the European Communities Act 1972. Such laws and treaty provisions would lapse automatically, ceasing to remain part of UK law from the withdrawal date. Rather than leave a vacuum in the law, it would be necessary to have a new domestic law in place to cover the subject matter. For example, it would not be acceptable to have a vacuum in the law on the licensing of medicines if the UK ceases to be covered by Regulation (EC) No 726/2004 on the authorisation and supervision of medicinal products by the European Medicines Agency.

Secondly, many Acts of Parliament implement EU directives or other obligations, and unless something is done about them, these Acts of Parliament would automatically continue in force after the exit date. This might be desirable, but on the other hand it might be preferable either to repeal them or at least to amend them in post-Brexit circumstances. Such decisions would need to be taken on a case-by-case basis – it would not be possible to deal with them all with a single global rule.

Thirdly, numerous UK regulations or other kinds of statutory instruments have been made under Section 2(2) of the European Communities Act 1972 in order to implement directives and other EU obligations. Many of these UK regulations amend Acts of Parliament under the sweeping

‘Henry VIII’ powers conferred by Section 2(2). (A 'Henry VIII' power is one that gives ministers the right to repeal or amend Acts of Parliament. It is named a ‘Henry VIII’ power after the Statute of Proclamations 1539, which gave that King power to legislate by proclamation without recourse to parliament).

This large body of UK regulations implementing EU law could not just be allowed to lapse automatically on exit. It would be necessary to go through them and decide to revoke, keep or amend them, case by case.

Deciding the fate of these three categories of existing EU laws and what if anything to put in their place would be a major exercise and would have to be carried out rapidly. Where the EU-derived law is not actively harmful, there would probably be a presumption in favour of keeping the substance of it in force for the time being where practical, and leaving detailed reform or improvement to the future. In the case of EU laws which will automatically disappear on exit, this would involve replicating the substance of the EU law in the form of domestic legislation which comes into force on and from exit.

Revising and Amending UK laws -The legal process

Rather than carry out such an intensive programme by Acts of Parliament, it would be far simpler to turn to the well-oiled regulation-making power under Section 2(2) of the 1972 Act, and extend it to empower the making of regulations which from the date of exit continue, repeal or amend existing EU-derived domestic law as needed to reflect the new domestic and external trade environment of the UK.

Thus, the ‘Henry VIII’ powers, which have been used to implement the incoming EU law, would be used to unravel EU law. Using such machinery would have the advantage of using the existing system which works through any central government department, or the devolved legislatures within the scope of their own devolved powers.

In order to use the well-tested substance of the legislative machinery the powers of section 2(2) of the European Communities Act 1972 might be written into a new Act dealing with the law after exit. This would allow the 1972 Act to be repealed in its totality from the date of exit.

Preparing for Exit - Other legal provisions

Further changes to UK law would be essential or desirable. The section 2(2) power should be expanded to allow EU laws to be disapplied within the UK in advance of exit if this proves necessary. This might be useful in order to avoid potentially damaging or discriminatory measures introduced by the EU during the two year transition period prior to exit or where it is particularly advantageous to dismantle EU regulations before actual exit.

It is important that the legal position on exit should be clarified. The ECJ or other EU institutions such as the Commission might argue that they continue, post Britain's exit, to have power to take decisions or adjudicate on matters that happened before exit, on for example ECJ cases that are still pending at the date of exit. While some treaties do provide for the continued exercise of powers after a state has withdrawn,[6] Article 50 of the Treaty on European Union does not provide for any continuing right of the ECJ or other institutions to adjudicate on matters that happened before withdrawal. That would not be acceptable, so the 1972 Act should be amended to ensure that acts of the EU institutions taking place after withdrawal are accorded no legal recognition in the UK.

Budgetary powers would need to be addressed. As there may be disagreement over the UK's final years' membership subscription (the budget contribution and 'own resources' payments by the UK), it would be sensible to repeal with immediate effect Section 2(3) of the 1972 Act, which provides for the payment of these sums by officials without the

[6] For example, Article 58(2) of the European Convention on Human Rights provides that the Convention and the jurisdiction of the Strasbourg Human Rights Court continues to apply to withdrawing states in relation to acts taking place before withdrawal.

authority of parliament. Any final payment into the EU would then have to be approved by parliament.

Areas of competence returned by the EU on exit would need to be reviewed in order to decide whether these should be exercised by Westminster or by the devolved legislatures. For example agriculture outside England is within the devolved powers of the Scottish, Welsh and Northern Ireland legislatures but their scope of action is limited because all are required to implement the EU's Common Agricultural Policy, acting not unlike 'branch offices' of Brussels.

The EU's Common Agricultural Policy (CAP) will cease to have effect on exit, but a common UK framework establishing the core principles of agricultural and farm support policy across the UK will be needed. It would not, for example, be acceptable for the Scottish Parliament to give significant subsidies to sheep farmers in Scotland which are not available to sheep farmers in England or Wales so allowing Scottish sheep prices unfairly to undercut other sheep farmers across the whole UK market.

For these reasons a core UK policy is needed to replace of the existing EU CAP. Such a policy would not reduce the scope of the powers of the devolved legislatures but would simply replace existing EU powers (although ritual declarations that devolved parliaments' prerogatives were being usurped might be expected). However, the content of the core UK agricultural policy would no doubt be the subject of negotiation between Westminster and the devolved legislatures and governments. As a net food-importing nation, the UK would have a strong interest in replacing protectionist barriers which drive up food costs for consumers above world market price with other forms of farm support.

Similarly, the disappearance of the EU's Common Fisheries Policy on exit would lead to the UK regaining control of its fisheries up to the boundaries recognised by international law. A sensible conservation-based national fisheries policy would be needed to replace the existing EU policy.

A number of matters are currently governed by international arrangements between the EU and global or regional multilateral treaties. On these matters now the subject of such global or regional treaties Britain could seek to accede to such arrangements directly, in place of via the EU.

The task of amending UK domestic law in preparation for exit is substantial but achievable, given the two-year period for the necessary work to be carried out. It should also be viewed positively in terms of what can be achieved.

In the process of review of UK law, priority should be given to reforming or sweeping away EU-based laws that interfere with the competitiveness and efficiency of the UK economy.

For example, outside the single market and freed from prescriptive harmonising directives, significant reforms could be made to intellectual property laws to extend exemptions, to restrict scope and terms of protection that confer no economic benefits, and to simplify areas of the law that are unnecessarily complex thanks to EU interventions. The EU's insistence that rights owners should be allowed to prevent 'parallel imports' of their own goods from outside the EU could be ended with enormous economic benefits, at one stroke expanding our global trade and reducing prices to UK consumers.

The UK would regain control of migration from other EU states. EU citizens who are settled and productively working here should not be put in fear of being sent home, nor would we wish to damage our economy by excluding highly paid or highly skilled workers, such as highly paid bankers in the City or skilled health workers. But the inflow of low-skilled workers could be restricted in the same way as it is from non-Member States. The UK would certainly want to take more robust measures than are now permitted by EU law to exclude or remove persons suspected of being a danger to the public or engaged in criminal activities.

Part 2

Trading With the World

This section explains how the UK should (i) take over directly the existing free trade relationships with third countries under the existing EU-third country trade agreements, (ii) preserve its free trade relationship with the EFTA countries, (iii) then start negotiating additional and improved free trade agreements in advance of actual exit from the EU to take effect after exit, (iv) how to proceed so as to leave the single market with all its negative consequences and instead maximise the UK's *access to* the single market, and (v) what aims and negotiating tactics should be pursued to seek long term agreement governing trade and other relationships with the remaining EU.

According to the latest figures (2015) the percentage of the UK's exports going to the EU has dropped below 44 per cent as compared with 55 per cent in 1999. This means that our trade outside the EU is now more important to us than our trade with the EU. Therefore we need to concentrate as a priority on our trade relations outside the EU, and treat reaching a deal with the EU as an important but secondary matter.

III
Britain, the EU and Trade Treaties
Present position, future aims

The position under the EU

One consequence of the UK's EU membership has been that many aspects of the UK's external relations have been conducted partly or wholly through the EU. And, because the UK is a member of the EU customs union and common commercial policy, it may not negotiate its own trade agreements with non-member countries, but can only do so as part of the EU. As we have seen repeatedly, the EU has had difficulty in negotiating trade agreements because of the large number of vociferous protectionist special interests within its borders. Nor can the UK decide on the level of tariffs it levies on imports because these are set at a uniform level for the EU under the EU's customs union.

By leaving the EU, the UK can re-assume direct control of its external relations, including trade relations. It will also be able decide the level of tariffs imposed on imports, provided that tariffs on average are no higher than under the EU customs union.

It will be free to negotiate international trade agreements with other countries including the EFTA states. It will be free to make new trade agreements with non-member countries. The process of negotiating new trade deals can be started during the 2-year notice period with a view to bringing them rapidly into force on exit.

Existing EU-third country agreements.

At present both the EU and Member States, including the UK, are parties to the EU's existing free trade agreements. The UK could continue to apply the substantive terms of these agreements on a reciprocal basis after exit unless the counterparty State were actively to object. This will not involve complex renegotiation of existing arrangements.

The first aim therefore should be for the UK to take over directly the existing free trade relationships with third countries under existing EU-third country trade agreements. In the case of such third countries, as the UK is already a party to the EU's external free trade agreements, there would be no need to negotiate new terms with these. Rather it should be proposed that such states agree to the UK representing itself rather than being represented by the EU Commission, and to continue the *existing* free trade terms. These states would have every incentive to continue rather than see tariffs re-imposed on their exports of their goods into the UK market.

At the same time Britain should preserve its free trade relationship with the EFTA countries. (see below pp 37- 40).

The Single Market and the EU.

The UK should leave the Single Market with all its negative attributes. These are discussed in the next chapter. Instead, the UK's aim should be to maximise the UK's *access to* the single market. In particular, any deal which requires the continuation of the single market's harmful 'Fortress Europe' restrictions on our trade with non-EU countries should be avoided.

The UK will also wish to negotiate a trade relationship with the EU which aims to preserve existing trade patterns. As the EU's best customer, one which buys far more from the EU than it sells to the bloc, continuing on the basis of a free trade deal is more in their interests than the UK's.[7] Given the strong incentive for the remaining EU to reach an agreement which avoids the imposition of tariffs on the export of goods to its largest single export market, the UK, it should not be difficult to agree acceptable terms on a mutually beneficial trade deal within the 2-year timetable, whatever the political stance adopted publicly by some EU politicians.

[7] According to the latest figures (2015, ONS 'Pink Book) the UK exported £134.3bn worth of goods to the r-EU but imported £223.0bn. This indicates that the imposition of tariffs on bilateral trade between the UK and the r-EU after Brexit would be very substantially more painful for r-EU exporters than for UK exporters, were it allowed to occur.

In the event of no trade arrangement being reached, the default position or baseline for a UK trade relationship with the remaining EU states would be governed by WTO rules. These provide for non-discrimination in tariffs, and outlaw discriminatory non-tariff measures. From this baseline, and as the remaining EU's largest single export market, the UK would be in a strong position to negotiate a mutually beneficial deal.

But in the meantime the UK should be negotiating additional and improved free trade agreements in advance of actual exit from the EU (which would take effect immediately upon exit) without waiting for progress on negotiations with the EU.

IV
The Single Market

The EU's Single Market is often perceived as a positive feature of the European Union even by many people who are in other respects critical of the EU. However, this perception is often based on an insufficient understanding of what the 'Single Market' actually is. There are a number of different strands or elements, the rules of which determine what the Single Market is. Some of these are beneficial, some are of no particular benefit to the UK and some are downright harmful.

The elements which make up the 'Single Market':

The single or 'internal' market[8] is defined as comprising 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.[9]

The Customs Union and Common Commercial Policy

Benefits and Costs. The EU is a customs union, which benefits free trade because goods are not subject to tariffs when they cross Member State borders in the EU.[10] Belonging to a customs union imposes obligations on Member States, including the UK, to apply the EU common rate of customs tariffs to all goods entering from outside the EU. No individual Member States may raise or lower the rates and this therefore can conflict with a country's own priorities for its trade or production. Nor may Member States conclude trade agreements with non-member countries: such agreements are covered by the EU's 'common commercial policy' which is one of the EU's 'exclusive competences'. Only the EU as a whole

[8] It is called the 'internal market' in the EU Treaties.

[9] Article 26(3) of the Treaty on the Functioning of the European Union (TFEU).

[10] Article 28(1) TFEU states that: 1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.)

can do trade deals with non-EU countries. As a result the different priorities of Member States including the protectionist interests of some of the more powerful Member States, the EU has not been particularly successful in concluding trade agreements with external powers outside its own sphere of client states in Eastern Europe, North Africa and the former colonies of some of its Member States. Moreover belonging to a customs union means that the UK is obliged to impose high tariffs on some goods where the UK has no significant domestic industry to protect - for example, textiles and footwear. As a result UK consumers must pay higher prices for such goods than would be normal on the world market, with the benefit of the higher prices going to the protected industries in other EU states.

Belonging to this customs union is not therefore an unmixed benefit of EU membership. While tariff-free movement of goods does benefit UK consumers and exporters who buy from or sell to other EU Member States, there are also disadvantages. These include (1) having to comply with the EU common customs tariffs which can drive up prices of goods from non-EU states, and (2) being unable to negotiate trade agreements separately from the EU.

Other routes to tariff-free access to the EU's Single Market.

There is another way to secure tariff-free access to the EU Single Market besides being inside a customs union. The best alternative is to have a free trade area (FTA) agreement with it. An FTA does not oblige the signatories to adopt uniform external tariffs in trade with third countries nor to give up their independent ability to do trade deals with them. This is because an FTA *only* applies to goods which originate within the members of the FTA, so the problem of third country exporters avoiding higher tariffs by routing imported goods through one member of the FTA with lower external tariffs does not apply. On the other hand, the customs authorities between the FTA members need to check that goods do originate within the other FTA member (according to 'rules of origin') in order to be entitled to tariff-free access. This is a standard procedure.

A number of European and non-European states enjoy tariff free access to the EU Single Market via free trade agreements, including the EFTA states (Switzerland, Norway, Iceland and Liechtenstein). In fact, all European countries outside the EU have tariff-free access to the EU Single Market under FTAs except Russia and Belarus [also known as Byleorussia]. Currently, the only one major non-EU country within the EU customs union is Turkey.

General rules against barriers to free movement of goods and services

A second important aspect of the EU Single Market is that under the general rules of the Treaty on the Functioning of the European Union (TFEU), Member States may not apply laws or regulations which unjustifiably prevent or discriminate against goods or services imported from other Member States. The ECJ has developed a large body of case law in this field. It should be noted that these general rules apply to governmental regulatory actions and certain actions by private companies.[11]

These general rules on free movement benefit both exporters of goods and services and consumers, since they tend to lower prices and widen choice. There is however no need to be inside the EU Single Market in order to enjoy market access based on these general rules - most of the EU's trade agreements with non-EU members contain some or all of these general rules.

Harmonisation of laws and regulations

The third and more controversial aspect of the Single Market is the harmonisation of laws and regulations. There is little disagreement about the uncontroversial point that differences between laws and regulations

[11] For example they would apply to an attempt to enforce intellectual property rights in one Member State in order to keep out goods which the company which owns the rights has placed on the market in another Member State - normally with the aim of keeping prices higher in the Member State of importation.

which apply to goods and services can act as a barrier to trade. Therefore, having a system where rules and regulations are the same across all Member States can reduce those barriers. However the approach has its problems.

In the first place, under the EU system the pressure to regulate upwards is constant: the most stringent level of regulation among the various Member States tends to be adopted into the common EU regulation and replicated across all Member States. With very limited exceptions, harmonisation measures can be imposed on dissenting Member States by Qualified Majority Vote (QMV). This can have particularly adverse consequences for the UK in certain sectors, notably in financial services where the UK's interests tend to diverge markedly from those of the Eurozone countries who have the power to pass measures under QMV against the UK's opposition.

While it remains true that an exporter who wishes to export goods or services into a market must meet the regulatory standards imposed for that market, the disadvantage for Britain is that only 15 per cent of the UK economy is involved in exports into the EU but 100 per cent of the economy consisting of *sales to the domestic market* and *non-EU export sales* are subject to the Single Market regulatory burden. So, the regulatory burdens and costs associated with membership of the Single Market spread out more widely to impose costs on economic activities outside those which gain any benefit from freer trade into the Single Market. This problem is particularly acute in the case of the UK, because we have the lowest share of exports to other EU states of any major Member State (see p. 40).

Free movement of persons

One of the most controversial building blocks of the EU's Single Market is the right to 'free movement' by EU 'workers'.[12] At the time when the UK

[12] Under Article 45 of TFEU, the free movement of 'workers'.

joined the EEC in 1973 free movement was not controversial because there was comparatively little divergence between standards of living in this country and in other Member States. The fall of the Soviet Union in 1991 and the subsequent accession of former communist Eastern European states with their lower standards of living led to high migration flows into the UK.

While free movement under the EU treaties *is a component of membership of* the Single Market, *it is not an intrinsic or necessary condition of access to the Single Market* for goods and services. The EU's external trade agreements do not in general contain provisions allowing the free movement of workers. The exceptions are in its agreements with the four EFTA states, which were concluded at a time before the mass migration problem from Eastern Europe arose.[13] Here free movement between the EU and EFTA states is the result of membership of the EEA, not on account of their membership of EFTA.

Social policy and employment rights

Workers' rights and social policy are another aspect of the EU Single Market, including health and safety measures, which can be imposed under QMV. If the UK had a free hand in this area of law, it would not lead to a bonfire of workers' rights or the ending of much of the protection on which it had led the way over more than a century. Nonetheless the costs to business can probably be reduced without harming the essential interests of employees by escaping from the detailed and restrictive straitjacket of Single Market rules and their detailed interpretation by the ECJ in decisions which sometimes seem divorced from the real world in which businesses need to compete and earn money in order to pay their workers.

In this area the EU can overrule the UK. The Working Time Directive

[13] For example, the EU/Swiss agreement on free movement was concluded in 2002: Official Journal L 114, 30/04/2002 P. 0006 – 0072.

was imposed against the opposition of the UK when the European Commission re-badged this social measure (against which the UK would have had a veto under the Treaty) as a 'health and safety' measure. Meanwhile there are numerous EU measures in this field, which the ECJ tends to interpret in a very expansive manner The ECJ has recently held that under the working time directive, a worker who falls sick while on holiday is entitled to more holiday time in lieu to compensate.

UK businesses must compete in global markets with companies from countries which do not have these EU-style social rights. Having such rights is not a necessary condition for market access.

Restrictions on trade with non-EU states

Another important but little understood feature of the EU Single Market is the restrictions which Single Market rules impose upon Member States against trade with non-EU states. An example is the ECJ case about licensing of agrochemicals (Case C-100/96 R v. MAFF ex p British Agrochemicals Association [1999] ECR I-1499), where the ECJ ruled that it was contrary to Community law for the UK Ministry of Agriculture to grant licences to products from non-EU countries which were identical to, and from the same source as, agrochemicals licensed here. The UK was as a result compelled to ban the import of these products from a non-EU country because they had not gone through the EU-mandated regulatory system even though there was actually no objective reason at all for excluding them.

The same 'Fortress Europe' mentality also applies in the field of intellectual property, where the ECJ has ruled that trade mark rights can be used by trade mark owners to exclude their own genuine goods from the EU market.[14] In such cases the ECJ interpreted EU law to compel the UK

[14] One example here concerned Tesco, which bought Levi jeans in North America more cheaply than in the UK, imported them to the UK but was then subject to an ECJ ruling which prevented their sale under intellectual property rules. The ECJ ruled that Levi Strauss could use its trade mark rights to prevent the importation and sale of its genuine jeans,

to impose restrictions against imports of goods from non-EU states in circumstances where such restrictions would be contrary to the Single Market rules and principles if it had been a case of trade inside the Single Market. The effect on the market and on consumers is damaging: it allows multinational companies to milk UK consumers for higher prices than they charge in their own home markets. The ECJ's reasons for imposing these restrictions are hard to discern, but seem to stem from a doctrinaire desire to isolate the EU Single Market from world markets.

This is an undoubtedly damaging aspect of the Single Market suffered by countries within the Single Market who are subject its regulatory obligations and to the ECJ's interpretation of those regulatory obligations. Outside the EU, the UK would be free to adopt a much more permissive and pro-free trade approach in its relations with non-EU states, to the benefit of consumers and of industry based here.

Conclusion

Although the 'Single Market' is often portrayed positively in economic terms, in reality it consists of a number of different elements some of which are positive, some of which are more equivocal, and others of which are downright negatives. In this category are the fact that it requires the UK to impose sometimes inappropriate tariffs and prevents the UK from negotiating its own trade agreements, and the 'Fortress Europe' regulatory and intellectual property restrictions against imports from non-EU countries which damage consumers and drive up costs needlessly.

Access to the Single Market would be quite different from *membership of* the Single Market with all the negative aspects which that involves.

because it had not consented to the placing of these particular consignments of jeans on the UK market (Case C-415/99 Levi Strauss & Co v Tesco Stores).

V
What Are We Leaving? What Is Ours to Take When We Go?

The EU and the Common Commercial Policy

The EU is a customs union, not simply a free trade area. In a customs union the members operate a single unified system of customs tariffs and any particular category of goods will be charged the same tariff whether it enters the EU through, e.g. Rotterdam or Felixstowe.

Because the external tariff wall is identical for all, the members of a customs union need to operate as a bloc when they enter into trade agreements involving tariffs with other countries. An agreement to reduce or get rid of tariffs on imports from another country involves the customs union as a whole. Under the common external trade policy in the Treaty of Rome, the European Commission has responsibility for negotiating trade agreements, under the supervision of the Member States. Such agreements may be concluded by the EEC (now the EU) in its own name, which has so-called 'exclusive competence' to conclude agreements with non-member countries falling within the field of the common commercial policy.

The WTO Agreements and 'mixed competence'

Because in practice trade agreements tend to cover broader subject matter than tariffs alone or related matters within the scope of the EEC/EU common commercial policy, individual Member States must also be party to any external agreement. This is called a 'mixed' or 'shared' competence agreement: where part of the competence to conclude the agreement belongs to the EU, but part of it remains with the Member States.

One particularly important series of agreements which involved mixed competence were the World Trade Organisation (WTO) Agreements which were concluded in 1993 as a result of the Uruguay Round Multilateral Trade Negotiations. This linked series of Agreements forms the bedrock of global trade.

Both the individual member states including the UK, and the EU itself, are parties to the WTO Agreements. The respective legal powers of the EC (as it then was) and the Member States were ruled upon by the European Court of Justice in Op 1/94 *Re the Uruguay Round Agreements* [1994] ECR I-5267. The Court rejected a contention by the European Commission that the EC had across-the-board competence to conclude the WTO Agreements in its own name. Although the core provisions of the WTO Agreements relating to trade in goods fell within the EC's exclusive competence under the common commercial policy, the Court ruled that other areas covered by the WTO Agreements relating to services (parts of the General Agreement on Trade in Services - GATS) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) were outside the EC's competence or were areas where the EC's competence was shared with the Member States.

The upshot of this 'mixed competence' arrangement is that the EC/EU is responsible for compliance with, and entitled to the benefit of, certain aspects of the WTO Agreements; while the Member States individually remain responsible for, and entitled to the benefit of, the remaining aspects. The boundary between EC/EU and Member State competences is not stationary and under the Lisbon Treaty the trade-related aspects of intellectual property became part of the EU's commercial policy. While this fluctuating boundary line may be confusing for other WTO members, it is in general accepted by them.[15]

However, the consequences after the UK's vote to leave the EU are straightforward. The EU will cease to have any competence in respect of the UK's trade or other external relations. The UK will automatically assume rights and responsibilities in respect of 100 per cent of its relationship with other members under the WTO Agreements. In addition, trade relations between the UK and the remaining EU ('the r-EU') will

[15] Under the ECJ's Lugano doctrine, the EU acquires external competence in areas where internal EU harmonisation occurs and a shift in competence takes place.

cease to be governed by the EU treaties, and will automatically be governed by the framework of the WTO Agreements - unless a replacement trade agreement is negotiated between the UK and the r-EU which comes into force on exit.

There is no question of the UK having to leave the WTO or to re-apply for membership. The UK is one of the original founding members of the WTO, as laid down by Article XI(1) of the WTO Agreement.[16]

Rights and obligations under the WTO Agreements

The WTO Agreements provide today's framework for global trade. They contain a number of important principles and rules and a mechanism for judging disputes under the World Trade Organisation. At present however, the UK is precluded from resorting to the WTO disputes mechanism in any disagreement with the EU or other Member States by Article 344 of the Treaty on the Functioning of the European Union (TFEU), which states that:

> 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

One of the key principles of the WTO Agreements is non-discrimination in trade relations. WTO members may not, for example, charge different tariffs on goods imported from different countries except in clearly defined, limited circumstances. So on leaving the EU, if no trade agreement were reached between the UK and the r-EU, the r-EU would

[16] *Article XI*: *Original Membership*: The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

apply its standard external tariff rates to imports from the UK.[17] It could not discriminate by charging higher rates to the UK than to other non-EU countries. Similarly, the UK would apply its standard external tariffs to imports from the r-EU.

The UK would not be obliged to charge the same rate of tariffs on its imports as when it was a member of the EU customs union, and would legally have the right to reduce them. The EU has made a number of commitments in multilateral trade talks not to increase its tariffs above certain levels (so-called 'bound tariffs') and it is probably legally the case that the UK on exit would not be bound by these commitments. In principle it could raise its tariffs above the levels of the EU's bound tariffs.

In practice the UK would be unlikely to do so except for exceptional circumstances or as a matter of national policy. As a global trading nation, the UK has a strong interest in the general reduction of tariff levels around the world and would certainly not wish to act in a way which would be against the spirit if not the letter of the WTO Agreements.

When a customs union is formed its overall weighted average of tariffs needs to be the same as or lower than the weighted average of tariffs of its component states.

The UK would wish to apply the same principle when it leaves; i.e. to keep its average tariffs the same as or lower than under the EU's current tariff regime.

This point matters, because the UK, when under no obligation to maintain its tariffs at the same level as now obliged by the EU customs union, will

[17] Under Article XXIV paragraph 5 of GATT 1994, members of the WTO are entitled to form customs unions or free trade areas and to abolish tariffs between themselves without this being regarded as discriminatory against other countries. The EU is a customs union. After Brexit, the UK could therefore maintain a zero tariff regime in both directions between itself and the r-EU either by continuing to belong to the EU customs union or by entering into a free trade agreement.)

be able to lower the cost of living for consumers and to lower costs of imported goods for its industries. At the moment tariffs are often set at a high level to protect industries in other parts of the EU even though this country has no domestic industry to protect, e.g. textiles and clothing, shoes and many kinds of heavily protected agricultural produce. The UK receives no benefit to its own indigenous industry, but pays twice over for the privilege of protecting foreign industries from lower cost competition in the world market. Our consumers pay higher prices than they need for the products concerned, and moreover the tariffs collected at our ports must be paid to the EU as part of its so-called 'own resources'.

The clear and unequivocal benefit of leaving the EU will be the right to set tariffs at levels which suit our own circumstances and probably, as a nation with a bias to free trade, reducing them in many cases. This is a straightforward matter about which the Treasury in its referendum report seems to have been in ignorance. HMT's 2016 study purporting to demonstrate the economic disadvantages of leaving the EU assumed that the UK on leaving the EU would continue to levy tariffs on imports at the same levels as those imposed under the EU customs union, so needlessly punishing our own consumers by forcing them to pay higher prices than available on world markets. Without claiming to be an economist myself, I would point to clear evidence that leaving the EU and adopting a liberal tariff and trade policy will decrease prices and boost GDP.[18]

[18] See Patrick Minford, *Flawed Forecast: The Treasury, the City and Britain's Future*, Politeia, 2016.

VI
Trading with the World
Taking on the 'third country' FTAs

Trade with non EU States. What would change?

The EU has a number of free trade agreements with non-member states. These provide for the elimination of tariffs on trade in most goods, and seek to eliminate or at least reduce non-tariff barriers. A number provide for free trade in services as well as goods. EU Member States (including the UK) are normally parties to these free trade agreements as well as the EU itself under the 'mixed competence' rules.

For those countries outside the EU, at present both the EU and Member States, including the UK, are parties to existing free trade agreements. The UK could continue to apply the substantive terms of these agreements on a reciprocal basis after exit unless the counterparty State were actively to object. This will *not* involve complex renegotiation of existing arrangements.

One example is the 2011 Free Trade agreement with the Republic of Korea. (http://www.lawyersforbritain.org/files/eu-korea-free-trade-agreement-2011.pdf). The EU and the Member States are parties to the treaty.[19]

The substantive obligations in the agreement apply between the Parties. In the case of the obligation to eliminate customs duties (Article 2.5) each party is obliged to eliminate its customs duties in originating goods of the other party.[20]

[19] The definition of the Parties in Article 1.2 refers to the 'mixed competence' explained above: the 'EU Party' is defined as '*the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from*' the EU Treaties.

[20] Article 2.5 '*each Party shall eliminate its customs duties on originating goods of the other Party in accordance with its Schedule included in Annex 2-A.*' The FTA also contains

There would be no difficulty for either the UK or Korea to continue to comply with the substantive obligations of this FTA to each other or for Korea to continue to apply these to the r-EU. Such a course would not need any renegotiation of the substantive provisions of the FTA, but just a statement by the UK that on formally leaving the EU it intended to continue to operate the terms of the FTA between itself and Korea, and one by Korea that it would likewise continue to do so. In respect of procedural provisions involving bilateral joint committees or procedures for settling bilateral disputes, the UK would not continue to be represented by the European Commission or other EU organs in its relations with Korea, so these would need to be operated on a bilateral UK/Korea basis in respect of the UK's obligations under the FTA.

Korea could in theory object to the rolling over of the FTA in this way, but it is impossible to see what reason it would have to do so or what the gain would be if Korea brought to an end the existing free trade relationship between itself and the UK as an EU Member State, prompting the renewed imposition of tariffs on Korea's substantial goods exports to the UK, including cars and electronic goods.

To conclude on the general point, in order to provide for the smooth and continued flow of trade in both directions no new FTA or renegotiation of the substantive terms of the EU-third country FTA would be necessary, rather a simple acknowledgement would be given by the UK and the third country that each would continue to operate its substantive terms on a mutual basis until further notice, and to set up bilateral UK/third country machinery to mirror the bilateral EU/third country machinery of the FTA. Indeed the UK would most likely wish to go further and strengthen and deepen existing FTAs and negotiate new FTAs with other parties. This longer term process would in no way prevent the rolling over of the terms of the existing EU FTAs into UK FTAs.

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mutual obligations regarding freedom to provide services, intellectual property and other matters.

This kind of 'rolling over' of treaty obligations is a familiar process in international law. It happens in cases of 'State succession' where an existing State splits and the component parts wish to continue existing treaty relationships with other States.[21] The exit of the UK from the EU is not legally a case of State succession. The UK will reassume the full powers of its existing Statehood by re-assuming rights and responsibilities for its own international relations in areas at present where its interests are represented via the EU. However, the practical issues involved are very similar and there is a similar mutual interest in preserving the continuity of existing treaty arrangements, particularly those which affect day-to-day existing trade, unless there is some good and concrete reason for changing those arrangements. It follows that the international counterparties to the existing EU FTAs will almost certainly follow general State practice in State succession cases and accept the rolling over of FTA arrangements so that they continue to apply to the UK after Brexit.

[21] For example, when Czechoslovakia split into the separate states of the Czech Republic and Slovakia on 31 December 1992, both new states agreed to assume and continue to honour the treaty obligations of the former State of Czechoslovakia, and other states and international bodies accepted the succession as being effective, where necessary agreeing new machinery for the separate representation of the two new states.

VII
Re-joining EFTA
The European Free Trade Association

The UK was a founder member of the European Free Trade Association (EFTA) in 1960 which operated as a free trade area in Europe alongside the EEC. Its members were the UK, Norway, Sweden, Denmark, Switzerland, Austria, and Portugal. In 1973, the UK and Denmark joined the EEC and as a result withdrew from EFTA. The problem then arose of how Denmark and Britain could continue their free trade relationship with the other EFTA countries given that once in the EEC, a customs union, individual Member States may not belong to a free trade area with external countries (only the customs union as a bloc can do so). The solution found was for the EEC to enter into free trade agreements with the remaining EFTA states, preserving the free-trade relationship between the UK and Denmark and the other EFTA states and expanding it so the EFTA members could enter free trade relations with the other EEC members (the original Six).

When Sweden, Austria and Portugal joined the EEC and as a result withdrew from EFTA, they therefore preserved their free trade relationships with the EFTA states. EFTA now consists of Norway, Iceland, Switzerland and Liechtenstein. It should be stressed that EFTA itself is a separate organisation which regulates itself and negotiates trade deals with other blocs or countries – as it has done with the EU.

However confusion has arisen because three of the remaining EFTA states belong to another organisation, the EEA (European Economic Area Agreement founded in 1992) – Iceland, Liechtenstein and Norway. The EEA agreement enables these EFTA states to participate fully in the single market and covers the four freedoms (goods, capital, services and persons) and the rules on competition and state aid. The aim was a homogenous European Economic Area and for this the EU's single market legislation applies under the EEA agreement in the whole of the EEA. However,

Switzerland declined to join the EEA and as a result the trade relations between itself and the other EFTA States are still governed by the EFTA agreement (now revised and known as the Vaduz Convention). Switzerland went down a different route in reaching other arrangements with the EU though these may be set for review following its recent referendum.

EFTA which remains legally independent of the EU, has been notably more successful than the EU in striking free trade deals around the world. Whereas the EU's more important free trade negotiations continue to be held up by individual Member States' objections, e.g. on account of protectionist inclinations towards their own industries, with for example the Mercosur Latin American bloc,[22] and the USA meeting many and prolonged obstacles. Only recently after protracted discussions did it reach a free trade agreement with Canada. And it should be noted that the EU only concluded its agreement with Korea in 2011. Meanwhile the long awaited Canada-EU trade agreement has been further delayed by the refusal of Romania to ratify the agreement because of a visa dispute with Canada. And in the case of the flagship long drawn out EU-USA attempts to negotiate a Trans Atlantic Trade and Investment Partnership (TTIP), these have been held up by the French position that its film industry should be shielded from competition with Hollywood, one of the USA's most important export industries. As a result of this and other protectionist demands, there have been delays and problems and it is not clear that an EU USA free trade agreement will be concluded.

The lack of success by the EU in negotiating free trade agreements with major export markets may have led the EU to focus on reaching trade agreements with less developed countries in Eastern Europe and

[22] It was reported in April that a group of Member States led by France pressed the EU Commission to delay the restart of the already heavily delayed free trade talks between the EU and Mercosur, the Latin American bloc which includes Brazil and Argentina, on account of the potentially harmful effects of free trade on some sectors of EU agricultural producers who would be exposed to competition from South American producers. El Pais, 26 April 2016.

elsewhere, and a large number of micro-states (Map of EU FTAs). While worthwhile for reasons other than trading self interest to promote the development and political stabilisation of these countries, something which the UK may well wish to continue, these are not major export markets.

EFTA has been more successful than the EU in reaching agreements with large and growing export markets around the world (EFTA Free Trade Map). It has ongoing negotiations with major and growing export markets such as India, Malaysia and Indonesia. Such success by comparison with the EU suggests that these smaller blocs tend to be better than the larger EU in forging trade agreements with other countries.

The revised EFTA convention (the Vaduz Convention) extends beyond free trade in goods, and includes provisions on free trade in services and the free movement of capital and of persons. None of these should be problematical to the UK given that the Vaduz Convention only applies between its members and so would not act as a gateway for the free movement of persons from the r-EU or elsewhere. All four EFTA states have standards of living comparable to or even higher than the UK with high educational standards and high skill economies.

The logical course for the UK would be to apply for readmission to EFTA with a view to its membership taking effect immediately upon EU exit. There seems no reason why the four current EFTA states should not welcome such an application. The EU and its Member States are not parties to the EFTA convention. They would therefore have no say over such an application for membership. Such a course would in the first instance preserve free trade arrangements between the UK and the EFTA states and avoid the risk of, e.g. Swiss exports into the UK being subjected to tariffs (and vice versa). Notably, in 2013, the UK was Switzerland's fifth most important export market in the world (Swiss official website), while the UK was Norway's single most important trading partner receiving 25 per cent of Norway's total exports in that year (Norway official website).

Re-joining EFTA would benefit more than just direct trade relations between the UK and the EFTA states. As well as facilitating and deepening free trade between its own members, by re-joining EFTA, the UK would be able to seek the extension of existing EFTA FTAs to itself, and also to give a large positive impetus in collaboration with its EFTA partners to forging new agreements and extending existing free trade agreements particularly in the area of trade in services.

VIII
The New Deal
Britain, the EU and World Trade

On the rise – Britain's global trade

Over the past 10 to 15 years, the proportion of the UK's trade with the EU has declined dramatically, displaced by the surge in UK trade with the wider world. By 2015 Britain's exports in goods and services to the EU from Britain had fallen to just 44 per cent from 1999 figure of 55 per cent, a trend likely to continue. This points to the fact that Britain's trading future is with the wider world, not the EU – a trend confirmed by the evidence on exports over the past fifteen years. This is no passing phase but a long term and persistent trend likely to continue into the future.

Britain therefore, having voted to leave the EU, must now shape her priorites for trade deals to what is best for global trading interests. Therefore, any deal regarding trade with the EU *must not* interfere with or compromise our global trading interests.

This point is dramatically demonstrated by a comparison of the UK's pattern of trade with that of other EU Member States. According to the comparative study by the official EU statistics body (Eurostat) of the destination of EU exports, to within or outside, the evidence in trade trends is clear: Intra-EU trade in goods - recent trends. By 2013, the percentage of UK exports to other EU states had dropped to 43.6 per cent, lower than any Member State except tiny Malta, indicating a trade pattern significantly out of line with the rest of the EU. It is 18.4 per cent below the EU average of 62 per cent. It represents a major change from the position in 2002 when the UK share of exports to the EU was itself over sixty percent (61 per cent), and when the UK was far closer to the EU average and more typical of the pattern of other Member States.

Such evidence shows why UK interests differ dramatically from those of other EU Member States. *Global trade is much more important* to us than it is to other EU Member States, while our exports to the rest of the EU

are *much less important* to us than any other major EU state - the next major state closest to us in its trading pattern is Italy, which, nonetheless sends over half of its exports, 53.7 per cent, to other EU states.

The EU is a club run mainly for the benefit of members who send most of their exports to each other inside the EU, so the UK because of its trade pattern gets less advantage from its membership than do any of the other members.

The EU's best customer

The other aspect of our trading relationship with the EU is the UK's balance of trade. The UK imports significantly more from the EU than it exports to them, the persistent trend over recent years, one which appears to be strengthening.

According to the latest figures (2015, ONS 'Pink Book') the UK exported £134.3bn worth of goods to the r-EU but imported £223.0bn, a trade gap of -£88.7bn. This means that Britain imports 66 per cent more goods from the EU than it exports to us. This trade gap matters, but not because it is of itself a bad thing: within a country's overall trading pattern there will normally be surpluses with some trading partners and deficits with others, and there is no special reason to aim for a trade balance with each partner. Rather, the trade gap has major implications for negotiating the new trade deal with the remaining EU. Any attempt by the remaining countries to penalise – and thereby inhibit (e.g. by tariffs) – trade between the UK and the r-EU after exit would disproportionately affect EU exporters compared with UK exporters.

Table 1: Intra EU exports of goods compared with Extra EU exports of goods by Member State, 2002 and 2013

	Proportion of trade with EU-28 partners	
	2002	2013
EU-28	68.3%	62.0%
Belgium	75.5%	70.1%
Bulgaria	62.3%	60.1%
Czech Republic	86.3%	81.1%
Denmark	69.9%	63.5%
Germany	63.7%	57.0%
Estonia	81.7%	71.0%
Ireland	66.0%	56.9%
Greece	61.1%	46.6%
Spain	74.9%	63.0%
France	65.2%	59.3%
Croatia	66.1%	59.2%
Italy	61.7%	53.7%
Cyprus	57.8%	58.0%
Latvia	77.8%	66.4%
Lithuania	69.3%	57.4%
Luxembourg	88.3%	81.0%
Hungary	85.4%	77.9%
Malta	47.4%	42.6%
Netherlands	80.5%	75.7%
Austria	76.1%	70.0%
Poland	81.5%	74.8%
Portugal	81.4%	70.3%
Romania	74.1%	69.6%
Slovenia	77.3%	74.9%
Slovakia	90.1%	83.0%
Finland	61.2%	55.3%
Sweden	58.6%	57.7%
United Kingdom	61.4%	43.6%

Source: Eurostat. http://ec.europa.eu/eurostat/statistics-explained/index.php/Intra-EU_trade_in_goods_-_recent_trends

Some EU politicians since the referendum have been trying to deter their own or other Member States' voters from seeking a referendum on EU membership. They have suggested that access to the r-EU single market will not be simple. However their own exporters' interests will in reality dominate their approach to striking a new trade deal: German car workers

and manufacturers and French farmers will want guarantees that their government maintains the preferential arrangements to trade with the UK dependent upon reaching a harmonious and mutually beneficial trade deal with the UK.

Key elements of the trade deal with the EU

A lot of confused thinking exists about what should be the nature of the UK's new trade deal with the EU. It has for instance been mistakenly implied, that a current EU trade agreement should provide the blueprint - the Norwegian, Swiss,[23] Canadian or even Albanian 'model'?

While the EU's existing trade agreements show what has been agreed to in the past, examination of the EU's external trade deals demonstrates that there is no fixed template and no limited 'a la carte' menu for the form of relationship from which other states must choose. The wide variety of the agreements reached simply demonstrates that the EU is willing to negotiate on a case by case basis a deal which suits the mutual interests of itself and the party it is negotiating with. Therefore it is not surprising if agreements negotiated to suit the circumstances and interests of other states with economies that differ from the UK should not be best fits for the UK's interests.

What the UK should press for in terms of a trade related agreement is in fact fairly straightforward and simple, and consists of three main elements:

1. **A free trade agreement**: A free trade agreement allowing for tariff-free entry of goods (in both directions). This is permissible under Article XXIV of GATT as a permissible exception to the rule that WTO members must charge the same tariff rate to all comers. Unlike a customs union, members of a free trade area can decide on the level of standard tariffs charged to non-members of the free trade area. Such a course would allow the UK to charge lower or nil tariffs on goods where there is no substantial UK

[23] It is of course interesting to note that the Western European countries who are outside the EU all seem to be doing very well economically and do not want to convert their existing arrangements into EU membership.

industry to protect, to the benefit of our consumers and industry. The r-EU would have a strong incentive to agree to an FTA deal, given the substantial trade imbalance (above p 7). It should be pointed out that all non-EU territories in Europe have free trade agreements with the EU apart from Belorussia.

2. **General rules on free movement of goods and services**: The general rules of the EU treaties on free movement of goods and services have generally worked well and in the interests of the UK. There would be no difficulty in replicating these general rules in a new EU-UK trade agreement. Already many of the EU's external trade agreements do so. Since these rules benefit consumers in the state of importation, there is a strong case for replicating them and applying them also to goods and services imported from non-EU states.

3. **Continued 'passporting' of goods and services under existing regulations and directives**: The EU currently has a large number of regulations and directives which determine the rules with which goods and service providers must comply as the basis for selling those goods or services in other Member States without further restrictions. Unlike a new candidate applying for an EU trade relationship, the UK is currently compliant with this mass of regulations and directives. This simplifies the basis for a trade deal. Provided neither party changes the relevant rules, passporting would continue after exit in the same way as before. Such a provision would give both parties (us and the r-EU) the right to change the rules in a relevant area – though a rule change might affect the continued passporting rights of businesses exporting from the UK to the r-EU or vice versa. But unlike EEA or EFTA membership, this would not force us into the straightjacket of compulsory compliance with regulatory standards which are costly or which damage our ability to trade with the wider world.

IX
Conclusion

Britain is now poised to leave the EU, with the new prime minister, Theresa May, in place determined to give effect to the referendum decision.

The first step will be to work out how best Britain should use its new freedoms to reform its domestic law, to promote the 56 per cent and growing part of its trade which goes to destinations outside the EU, and to replace its international relationships presently conducted via the EU with direct membership of international treaties and international bodies. None of these steps needs the agreement of or even cooperation from the EU and can and should be progressed without waiting for our relations with the EU to be sorted out.

For the UK's domestic law, the aim should be to concentrate on the areas which yield greatest results, one example being supply side reforms. Chapters I and II propose how this might be done, the timing and arrangements for triggering Article 50, the work, before formal withdrawal, needed to amend UK domestic law effectively and fruitfully, and for returning powers to the UK. Rather than an intensive programme of Acts of Parliament, it would be simpler to use the Henry VIII powers of the 1972 Act to withdraw from EU law, just as they were used to implement it.

For trading globally with countries outside the UK, the aim should be to start with those countries with which the UK currently has special trade deals as a member of the EU bloc. The UK aim should be to 'roll over' the existing Free Trade Agreements (FTAs) with the same substantive terms continuing to apply to the UK after exit. For third countries with whom the EU has no FTA or has experienced delays and difficulty in reaching one, the UK will be more likely to negotiate a rapid trade arrangement on its own, than through the EU with its remaining 27 member states which can

hold up or delay such trade agreements. Take the case of China, for instance with whom Iceland already has such a trade agreement. Reports from China's International Trade and Economic Cooperation Academy and the *China Daily* newspaper, suggest that events will move quickly to a China-UK trade treaty.

From the US, where the EU-US deal has suffered obstacles and delays, Paul Ryan, Speaker of the US House of Representatives, has called for swift negotiations for a trade deal between Britain and the US, one which reflects the special relationship - so contradicting the outgoing President Obama's claim that the UK would be at the 'back of the queue'

This strategy of focussing on Britain's global trade outside the EU, would put the emphasis where it ought to be. This should be to put in place the mechanisms for recovering UK powers from the EU and governing vital trade relations with the rest of the world, to come into immediate effect once formal withdrawal takes place.

It means that in the first instance the UK should *not* focus on the discussions about future relations with the EU: they are bound to suffer from the same delays as have stymied negotiations by the EU to reach a trade deal between the US or for many years, Canada, as each of the remaining 27 member states have different priorities and different agendas. The tendency, evident during the campaign, for Whitehall officials and some senior politicians to reflect the instincts of the EU and their linked organisations, will best be avoided by focusing their efforts on re-establishing domestic law and trading with the rest of the world as the first priority.

Our objectives in negotiating with the EU should then be to reach an agreement with the EU that in all respects is compatible with our domestic and world trading priorities, not the other way round.

Appendix

Article 50 of the Treaty on European Union

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

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In *How to Leave the EU - Legal and Trade Priorities for the New Britain*, Martin Howe QC, proposes when and how Article 50 should be invoked to give the EU notice of departure.

The author, a distinguished EU lawyer, explains that the focus should be on the UK's trade deals globally, with third countries outside the EU. The aim should be to take over free trade deals with such countries to which we are already party, simply replacing the EU with the UK as co-signatory without further elaborate renegotiations. For other new global trade deals, independence from the EU and its remaining 27 Member States, will facilitate the forging of fast and rapid deals.

As for the EU itself, there should be no regrets at leaving the Single Market. Protectionist by nature, the Single Market imposes high costs on UK producers and consumers. They will now benefit from cheaper prices outside the EU. Britain, says the author, should aim for free trade with the EU outside the Single Market, forging the kind of deal already common between the EU and third countries. However, if the EU drags its feet, Britain should be ready to walk away with plan B in place, trading under low tariff WTO rules. In either case the aim should be to have access to the Single Market without belonging to it or being forced to allow free movement of people.

Above all UK officials should not now try to re-enter the EU with its restrictive rules by the back door, when the people have decided to leave it by the front.

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