

THE UNITED KINGDOM'S RIGHT TO NEGOTIATE FREE TRADE AGREEMENTS BEFORE LEAVING THE EUROPEAN UNION

The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

Article 8.1, Treaty of European Union

Introduction

- 1 Since the United Kingdom's referendum vote to leave the European Union, it has been suggested that the UK may not negotiate future free trade agreements ('FTAs') with countries outside the EU while it remains a member state. This paper argues that this view has no support from the EU Treaties or the Court of Justice of the European Union; and that the EU has no competence to prevent the UK negotiating and entering into FTAs with third countries providing that they may not come into force until the UK withdraws from the EU.
- 2 After her appointment as prime minister, Theresa May created a Department for International Trade ('DfIT'). Among its primary purposes is to 'develop[e] and negotiate[e] [FTAs] and market access deals with non-EU countries';¹ and, shortly after its inception, it was duly reported that DfIT had entered into informal negotiations with third countries with the objective of negotiating FTAs 'ready to sign' once the UK was no longer bound by its treaty obligations with the EU.² It has since been reported that the European Commission is considering proceedings against the UK in the event it commences these negotiations.³
- 3 Until it concludes its negotiations for the terms of its withdrawal and terminates its membership of the EU, the UK remains a member of the EU customs union and the Union retains exclusive competence over external trade, including agreements between it (as a union) and third countries.⁴ Once it leaves the Union, it will be a neighbour in the '*area of prosperity... characterised by close and peaceful relations based on co-operation.*'
- 4 The UK's reported (or putative) negotiations with third countries have the express object of securing FTAs, which would come into force only once the UK is neither a member of the customs union nor bound by the competences of the EU. There is

¹ 'About Us', Department for International Trade: <https://www.gov.uk/government/organisations/department-for-international-trade/about>

² 'Cabinet aims to have trade deals in place before Brexit', *Financial Times*, 17.7.2016

³ Britain could be fined millions of pounds if it tries to negotiate trade agreements before leaving the EU', *Independent on Sunday*, 18.9.2016: <http://www.independent.co.uk/news/uk/home-news/brexit-britain-fined-negotiate-trade-agreements-deals-before-leaving-european-union-commission-a7314816.html>

⁴ Treaty for the Functioning of the European Union ('TFEU'), Art 3 (1) (a). The consolidated Treaty of European Union (TEU) and TFEU can be found here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228848/7310.pdf

no question that, once outside the Union (assuming that the UK did not agree to remain in the customs union⁵), the UK would be permitted to enter into treaties to secure FTAs. But to what extent do negotiations to secure that object breach the UK's treaty obligations while it remains a member of the Union?

- 5 In the absence of any article of the EU Treaties providing for these circumstances or any precedent for a member state withdrawing from the Union⁶, it is necessary to consider whether the EU Treaties, in accordance with the norms of interpretation applied, provide a legal basis for prohibiting such negotiations.

The Union Treaties, Interpretation and Enforcement

- 6 The Treaty of Lisbon amended and consolidated the treaties governing the constitution, objectives, competences and workings of the EU: the Treaty of European Union ('TEU') and the Treaty for the Functioning of the European Union ('TFEU'). The TEU is concerned with the aims, objectives and constitution of the Union, the TFEU with its functions and the operation of its competences.
- 7 The Court of Justice of the European Union ('the CJEU'⁷) applies a particular approach to the interpretation of the treaty obligations of EU member states, somewhat at variance with other international courts.⁸ In particular, it puts greater weight on 'the objectives of the provision in question, in particular... as regards essential provisions of the founding treaties'.⁹
- 8 Where it considers that a member state has breached its obligations under the EU Treaties, the Commission may deliver an opinion as to the nature of that breach and action that must be taken to remedy it.¹⁰ This opinion can be delivered of its own initiative or at the request of another member state.¹¹ In the event the member state does not take the action demanded by the Commission, either the Commission or another member state may bring the matter before the CJEU.¹²
- 9 In addition to its power to order that the member state cease acting in breach of its obligations, the CJEU may impose interim measures before it decides whether a member state is in breach, including ordering that the member state desist from the act that is said to breach its treaty obligations.¹³

⁵ Turkey, which is not a member of the EU, has negotiated membership of the EU Customs Union. Norway, Iceland and Liechtenstein, which are members of the European Economic Area, are not members of the customs union.

⁶ Greenland, a territory of the Kingdom of Denmark, withdrew from the EU in 1985 but did not have the authority to negotiate international treaties and withdrew through a Treaty between Denmark and other then members of the EU.

⁷ Formerly known as the European Court of Justice (ECJ).

⁸ In particular, those applying the rubric of interpretation set out in Art 31 para 2 of the Vienna Convention on the Laws of Treaties, 1969

⁹ P Eeckhout, *External Relations of the European Union* (Oxford, OUP, 2004), at p 257.

¹⁰ Art 258, TFEU

¹¹ The latter course being pursuant to Art 259, TFEU

¹² *Ibid*

¹³ Arts 278/279 TFEU

The Relevance of a Termination Provision in the Treaties

- 10 Until the Treaty of Lisbon, the EEC/EC treaties that preceded the TEU did not provide for any means by which membership of the Communities might be terminated. The provision that was introduced by Lisbon, Article 50 of the TEU, provides a mechanism for withdrawal by a member state that is not dependent upon the consent of the Union or the remaining member states: a member state will leave automatically once terms of withdrawal have been agreed, after two years or after such longer period as the member states (sitting as the Council) unanimously agree.¹⁴
- 11 The significance of this express provision for terminating membership of the Union is, in the context of trade negotiations, twofold. First, while the object of the Union is the ‘ever closer union’ of the peoples of Europe within the EU, it can no longer be suggested that a member state’s decision to accede to the EU treaties was intended to be irrevocable (even if, which is almost certainly the case, it could not be¹⁵). Compare, for example, the Treaty and Acts of Union of England and Scotland, both of which expressed the intention that their union would be permanent not merely in their preambles but in the body of the treaty and legislation.¹⁶
- 12 Secondly, Article 50 envisages a period during which a member state will be engaged in negotiations with other member states and Union institutions regarding the terms upon which it will withdraw from the Treaties. The giving of notification under Article 50 will inevitably lead to termination (either two years after notification or at the successful completion of negotiations). Moreover, given that notification under Art 50 may only be given after a member state has decided to withdraw from the Union ‘in accordance with the its own constitutional arrangements’¹⁷, it must also be envisaged that there will be a period *before* notification within which a decision is being made to withdraw and after that decision has been made until it is communicated to the European Council under Article 50. In the United Kingdom there is controversy over whether the decision to give notice under Article 50 can be made by the Crown exercising its prerogative or only through an Act of Parliament.¹⁸
- 13 Thus, it was within the contemplation of the parties ratifying the EU treaties that a member state may leave it and that it would remain a member of the Union while it was negotiating terms of withdrawal.

¹⁴ Art 50 (3) TEU.

¹⁵ Given the right to self-determination of member states of the EU: see the Montevideo Convention on the Rights and Duties of States, 1933

¹⁶ ‘That the two Kingdoms of England and Scotland shall... for ever after be united into one Kingdom’: Art 1, [English] Act of Union with Scotland 1706; ‘That the Two Kingdoms of Scotland and England... hereof and forever after be United into One Kingdom’: Art 1, [Scottish] Act of Union with England 1707.

¹⁷ Art 50 (1) and (2), TEU

¹⁸ A question the High Court and (in the likely event either side appeals) the Supreme Court will have to resolve in view of a legal challenge. See further ‘The Invoking of Article 50’, House of Lords Select Committee on the Constitution, 13.9.2016 (and the citation of opinions on both sides at p 6):

<http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>

The Duty of Co-operation in External Relations

- 14 The provisions of the EU Treaties directly concerning its exclusive competence over the customs union are the following Articles of the TFEU: 2 (1), which provides for exclusive competence over areas where only the Union can act or legislate other than where it empowers member states to do so; 3 (1) (a), providing that the customs union is an area of exclusive competence; and 32, setting out the objectives of the Commission when carrying out tasks related to it, including the promotion of trade between member states and third countries.
- 15 These articles are applied in the wider context of the Union's objects. Three are of particular note. First, the object of promoting 'economic, social and territorial cohesion, and solidarity among Member States'.¹⁹ Secondly, that of sincere co-operation between member states, who must: 'in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'; take 'appropriate measures... to ensure the fulfilment of the obligations arising out of the Treaties'; and 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.²⁰ The third object, cited at the outset of this article, is the creation of an 'area of prosperity and good neighbourliness' between the EU and neighbouring countries, of which the UK would be one in the event it leaves the Union.²¹
- 16 The Union's exclusive and shared competence to negotiate and enter into external treaties, and over the subject matter of other treaties to which it is not directly a party, has been the subject of a number of determinations by the ECJ and (later) the CJEU.
- 17 In the *Open Skies* cases, the UK and other member states were found to be in breach of their treaty obligations by negotiating the successor to a bi-lateral treaty (concerning the right of airlines to fly from outside their 'home' country to the United States) that preceded the UK's membership of the EU.²² The ECJ declared that such a treaty was unlawful as it caused discrimination between member states and corporations within the EU by giving that advantage only to airlines based in member states that had entered into such bi-lateral treaties.
- 18 Even steps taken by member states in treaty negotiations with third countries may breach their treaty obligations. Thus, making a proposal within negotiations for a regulatory convention (multi-lateral treaty) without seeking the consent of the Commission is a breach of the duty of sincere co-operation, when the subject of the convention is one of shared competence between the Union and the member states; and, in one case,

'[t]he unilateral action on the part of the Kingdom of Sweden thus resulted in splitting the international representation of the Community as regards the listing of [particular chemicals] under the Stockholm Convention, which is

¹⁹ Art 3.3 TEU

²⁰ Art 4.3, TEU

²¹ Art 8.1, TEU

²² *Commission v United Kingdom* [2002] ECR I-9855, C-466/98 (and related cases)

*contrary to the obligation of unity in international representation of the Community which arises out of the duty of cooperation in good faith in Article 10 EC...*²³

and

*'Where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community'*²⁴

- 19 In a subject over which the Union has exclusive competence, the Commission must approve any amendments proposed by a member state in convention negotiations; and this is so even where only a limited number of member states are parties to the convention and the EU is not.²⁵
- 20 In each of these cases the CJEU's decision, that the Commission's approval was needed, was predicated on the right of all member states to come to a collective view before deciding on its negotiating position (or mandating the negotiating position of the member states that are members of particular conventions). The breaches of the duty of sincere co-operation were acts preventing this collective decision making by the member states in areas of shared or exclusive competence. Moreover, the Commission's role, both in the enforcement of this duty and in requiring that it authorise negotiating positions, is to protect all member states from the harm of being unable to reach common positions. Sincere co-operation within external relations does not exist in a vacuum, it is a means of protecting the exclusive and shared competences.

Application of the Duty of Co-operation to Negotiations for FTAs Conditional upon Withdrawal

- 21 The above cases show the wide protection the CJEU has applied to the exclusive and shared competences of the Union, but no more. While that protection was wide, the application of the duty of co-operation was narrow, relating directly to the protection of the Union competences and (in the *Open Skies* cases) the prevention of discrimination against corporations within the Union. The CJEU cases are not precedent for the existence of a looser conception of the co-operation duty applying to member states' negotiations of treaties within the exclusive competence of that member state: no actions have been brought or declarations made on the basis that negotiations or treaties in areas of external competence

²³ *European Commission v Kingdom of Sweden* - [2010] All ER (D) 143 (Apr), at para 55

²⁴ *Ibid*, para 73, which also cited *Ruling 1/78* [1978] ECR 2151, paragraphs 34 to 36 (by analogy with the EAEC Treaty); *Opinion 2/91* [1993] ECR I-1061, paragraph 36; *Opinion 1/94* [1994] ECR I-5267, paragraph 108; and *Case C-25/94 Commission v Council* [1996] ECR I 1469, paragraph 48

²⁵ *European Commission v Greece* [2009] ECR I-701

- remaining within the powers of the member states, rather than the Union might, in some wider sense, damage the Union's interests.
- 22 The European Union has no competence to negotiate or conclude trade or other agreements which will bind a Member State after the date when it withdraws from the Union and the EU treaties cease to apply to it. The competence to conclude treaties or other international agreements binding the State after that date, whether on trade or other matters, belongs solely and exclusively to the State itself. Therefore, the negotiation and signing of an international agreement which comes into force from or after the date of the State's exit from the EU cannot conflict directly with the powers of the EU under either its exclusive or shared competences: the EU has no such powers. An analogy in domestic law is an employee who gives notice to an employer and then enters into a new employment contract to come into force the day after his notice period expires. The contract with the new employer does not conflict with the contract with the old employer, regardless of the date on which it is entered into.
- 23 Since negotiations by member states of treaties in areas of their exclusive competence do not breach the application of the co-operation principle, as expounded in the CJEU cases, neither would negotiations for future FTAs where their coming into force was conditional upon the member state no longer being bound by EU competences. Other member states would have neither the right nor the expectation that the UK would adopt a common EU position in negotiations concerning its future external relations after it ceased to be a member; and they must be assumed to expect that a member state using the process of withdrawal they have all (by treaty) created would use the period of its withdrawal to provide for its future economic prosperity.
- 24 In itself, this is a sufficient answer to the question which this article is addressing: these negotiations would *not* breach the EU competences and would not be in breach of the UK's duty of co-operation. There is, moreover, good reason why the co-operation duty cannot be applied more widely to the external relations of member state outside the field of EU competences. Were it otherwise, any treaties within the exclusive competence of a member states might be open to the suggestion that they were in some way contrary to the objects of the Union. Were the 'goalposts' to be moved in such a way, the protection of the exclusive competence of member states could become almost meaningless.
- 25 If (as seems to have been implicitly threatened in some recent public statements) the European Commission were to seek to object to the UK taking steps to negotiate and conclude FTAs with non-member states which come into force after the UK's exit from the EU, it would be going beyond the boundaries of the duty of co-operation expounded in the judgments of the CJEU to date. Nor is there any credible policy reason for such a wider application of the co-operation duty: steps taken to provide for the future prosperity of a withdrawing member state after exit do not damage the economic interests of the Union and are neither insincere nor unco-operative. Again, an analogy from domestic law is that an employee who negotiates a new contract of employment to come into force after expiry of his notice period does not thereby breach his duty of good faith towards his current employer.

- 26 Not only is there no reason to regard such negotiations as contrary to the EU's objectives, there is a strong reason to regard them as positively supportive of the EU's treaty objective under Article 8.1 to promote an area of "prosperity and good neighbourliness". The EU's objectives are to promote not merely economic cohesion benefiting from external trade treaties within its territories, but an area of prosperity extending outside the EU to its neighbours. As much as member states have a duty to co-operate and to respect the Union's competences, the Union and other member states have an equal duty of co-operation with members going through the process of withdrawal; and each must expect to be treated with sincere co-operation and respect before withdrawal and neighbourliness and friendship afterwards.
- 27 It has been suggested that different conditions may apply to 'formal' and 'informal' (or 'scoping') negotiations for FTAs. There is no basis for this in law. Any step taken with the objective of securing a treaty has the same legal object; and any such step would equally be either in breach of the UK's treaty obligations or outside the scope of the treaties (in view of the negotiations being conditional upon the UK's withdrawal from the EU and its customs union). For the reasons explained above, such a step is clearly not a breach of the UK's treaty obligations, whether it is informal negotiations, formal negotiations, or the formal signature and ratification of a treaty that could only come into effect after the date of withdrawal from the EU. All are equally compatible with the withdrawing member state's duties under the treaties towards the EU and other member states.
- 28 Moreover, there is no reason to think that the UK is in a different position before and after it notifies the Union of its intention to withdraw pursuant to Article 50 TEU. For as much as the (at least apparent) inevitability of withdrawal is provided for by that provision, so does it also anticipate a period before notification during which a decision is being made as to when it will be made. The above considerations apply as much to that period as to the period between notification and withdrawal.
- 29 Negotiating trading agreements whose execution is conditional upon withdrawal from the EU would not breach a member state's treaty obligations. Rather, any steps taken to damage the future prosperity of a fellow member state and future neighbour would be contrary to the objectives of the Union.

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Field Court Chambers, Gray's Inn
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