



Department of Political Science

Chair of European Union Law

# Post-Brexit EU-UK Bilateral Relations: a deal-by-deal overview

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## Table of Contents

1. Introduction	
1.1. Article 50 TEU.....	4
1.2. Expected Economic Consequences of Brexit.....	7
2. EFTA and the European Economic Area	
2.1. Introduction.....	11
2.2. A Contextualized History of EFTA and the EEA.....	12
2.3. Institutional and Procedural Aspects of the EEA/EFTA Complex.....	14
2.3.1. The EEA Council.....	15
2.3.2. The EEA Joint Committee (EEAJC).....	16
2.3.3. EEA Joint Parliamentary and Consultative Committees.....	17
2.3.4. Judicial and Rule Enforcement: EFTA SA and Court.....	17
2.4. On the Free Movement of Persons and Likelihood of the Deal.....	20
2.4.1. Free Movement of Persons.....	20
2.4.2. Likelihood of the Deal.....	22
3. A Deep and Comprehensive Free Trade Agreement (DCFTA)	
3.1. Introduction.....	26
3.2. Legal Considerations.....	26
3.3. EU DCFTAs: Content and Scope.....	28
3.3.1. Tariff Barriers.....	28
3.3.2. Trade in Services.....	29
3.3.3. Intellectual Property Rights (IPRs).....	31
3.3.4. Investment Law.....	32
3.3.5. Competition Law.....	33
3.4. Likelihood of the Deal.....	33
4. A EU-UK Customs Union	
4.1. Introduction.....	36
4.2. Legal Considerations.....	36
4.3. The EU-Turkey Customs Union.....	37
4.4. The EU-UK Customs Union.....	38
4.5. Likelihood of the Deal.....	39
5. No Deal: Trade Under WTO Law	
5.1. Introduction.....	41
5.2. WTO Law and Its Immediate Effects.....	41

5.3. Post-Brexit British Rights and Obligations.....	44
5.4. New Schedules: Renegotiation vs Rectification.....	45
5.5. Likelihood and Main Characteristics of the No-Deal Scenario.....	46
6. Conclusion: Summary and What Lies Ahead	
6.1. Summary of the Options.....	48
6.2. What Lies Ahead.....	50
7. Bibliography.....	53

## 1. Introduction

### 1.1 Article 50 TEU

On March 29<sup>th</sup> 2017, after a successful referendum<sup>1</sup>, the British government formally notified the European Council of its intention trigger article 50 of the Treaty on European Union (TEU), therefore withdrawing its membership from the European Union (EU) and the European Atomic Energy Community (EURATOM). Under art. 50(2) the two parties are bound to negotiate – but not to conclude – a withdrawal agreement:

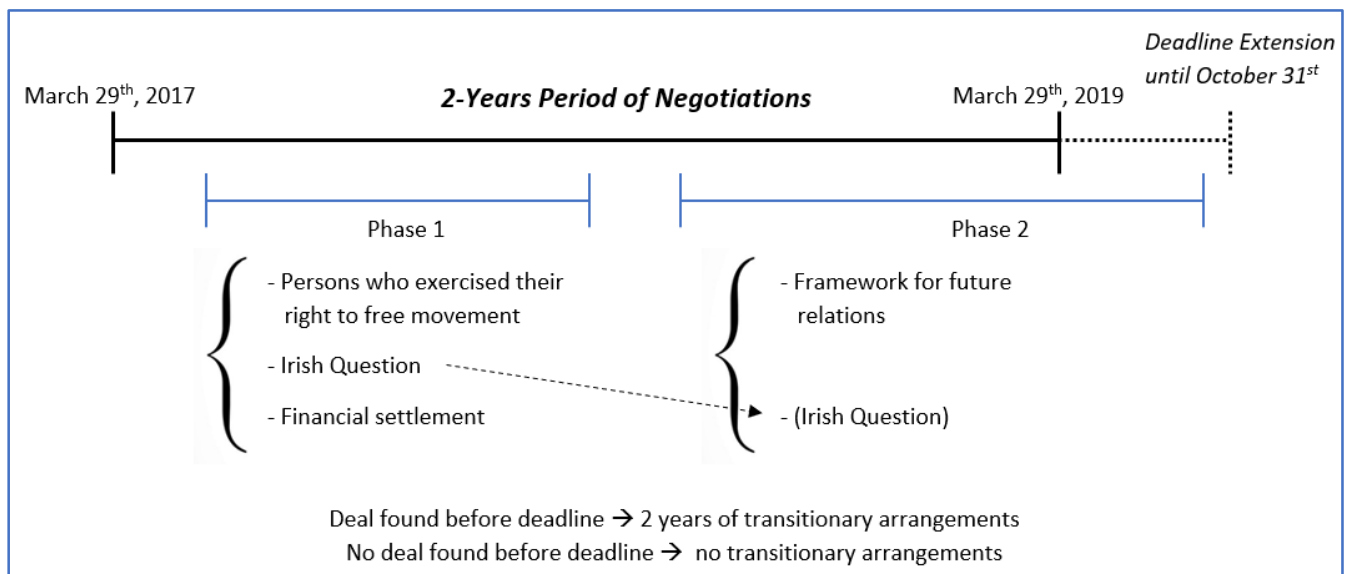
*“A Member State which decides to withdraw shall notify the European Council of its intentions. In the light of the guidelines provided for by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of 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.”*

Thus, from the day of notification (March 29<sup>th</sup>, 2017), the two parties shall have a period of two years during which they will negotiate and attempt to conclude an agreement which sets out the arrangements for the UK’s withdrawal from the Union and lays down the basis for future bilateral relations. Importantly, the Agreement can only be ratified once the United Kingdom has become a third country, i.e. after the two years-period has expired. The European Union has decided on a phased approach to negotiations<sup>2</sup>, with the first phase focusing on the most pressing and immediate issues resulting from the withdrawal and the second focusing on the framework for future bilateral relations.

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<sup>1</sup> United Kingdom European Union membership referendum, June 23<sup>rd</sup> 2016, turnout: 72.21%, “Leave” votes: 51.89%, “Remain” votes: 48.11%.

<sup>2</sup> Special Meeting of the European Council (Art. 50) (29 April 2017) – Guidelines.



(Source: Author's elaboration)

The first phase has dealt with main three aspects: (1) the status and rights derived from EU law, at the date of withdrawal, of EU and UK businesses and citizens and their families, affected by the UK's withdrawal, (2) the Irish question, (3) the financial settlement for British commitments expected under treaty obligations. The drafted Withdrawal Agreement settles the above issues in the following manner: UK and EU citizens will receive reciprocal protection from the two entities, so as "to enable the effective exercise of rights derived from Union law and based on past life choices"<sup>3</sup>. Given the complexities and political implications of a future settlement, the Irish Question will be dealt with in the second phase of negotiations<sup>4</sup>. Finally, the financial settlement will "be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union."<sup>5</sup>

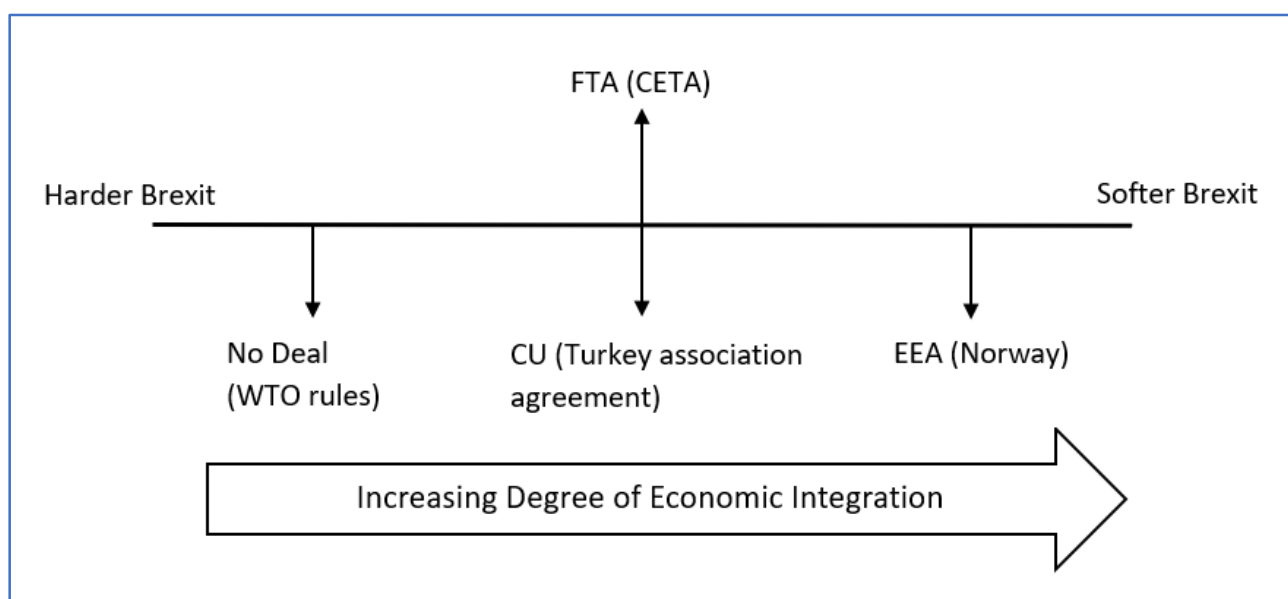
As the first phase reached its conclusion, attention shifted towards the more sensible topic: the framework for future relations between the EU and the UK. Here, the economic dimension has been the most hotly debated, as lawmakers and experts on both sides struggle to find consensus on a solution that satisfies the red lines of the United Kingdom and the conditions of the European Union, but also because a hard Brexit scenario would result in the creation of an external border between the Union and the United Kingdom which would coincide with the border between Northern Ireland and the Republic of Ireland. The agreement draft has been endorsed by all 27 Member States of the EU, by the EU and by British Prime Minister Theresa May, however it needs

<sup>3</sup> Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, December 8<sup>th</sup>, TF50, 2017.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

to be approved by the British Parliament<sup>6</sup>. It is in the House of Commons that the draft has found opposition and so far there does not seem to be a solution in sight. At the time of writing, the UK has been granted a deadline extension until October 31<sup>st</sup><sup>7</sup>. If, by the time of the deadline, the UK has not been able to find (i.e. to approve in the House of Commons, with a simple majority) a deal to refer to the Union, then a “no deal” scenario is the most likely outcome<sup>8</sup>. On the other hand, where a solution is found, then a two-year transition period is likely to be agreed upon, this will allow the UK to transition to proper third country status. Thus, the future relationship between the Union and the UK will take one of three forms, on a decreasing scale of economic integration, the agreement settling economic relations may be: a part in the European Economic Area Agreement (which would imply, *inter alia*, joining the European Free Trade Association (EFTA)), an association or free trade agreement (FTA) built on the image of CETA (the EU’s trade agreement with Canada) or of the Customs Union created with Turkey, or finally a no-deal scenario where the economic relations between the two actors are governed by public international law and WTO rules:



(Source: Author’s re-elaboration of Hix, 2018<sup>9</sup>)

<sup>6</sup> For a review of the institutional and procedural aspects of Brexit negotiations, see “Negotiating Brexit: Institutional and Procedural Aspects”, on R. Schütze, *European Union Law*, 2018, p. 857.

<sup>7</sup> Note from General Secretariat of the Council to Delegations, Special meeting of the European Council (Art. 50) (10 April 2019) – Conclusions, p.2.

<sup>8</sup> This scenario has already been considered by the European Commission, see “Statement by the European Commission on the vote on the Withdrawal Agreement in the House of Commons”, European Commission – Statement/19/1914. March 2019.

<sup>9</sup> S. Hix, *Brexit: Where is the EU-UK Relationship Heading?* in *Journal of Common Market Studies*, 2018.

## 1.2 Expected Economic Consequences of Brexit

The academic community seems to be almost entirely in agreement on the economic consequences of Brexit<sup>10</sup>. Dhingra et al. provide a very thorough analysis of the phenomenon, and conclude that in the most optimistic scenario, where Britain remains in the Single Market (through EFTA membership), the total change in English welfare would be -1.34%, which would translate in an income change per household of -£893. On the other hand, a pessimistic (hard) Brexit would have a change in welfare of -2.66%, equaling to a change in income per household of -£1,773:

Panel A: optimistic soft Brexit scenario

Total welfare change -1.34%

Income change per household -£893

Panel B: pessimistic hard Brexit scenario

Total welfare change -2.66%

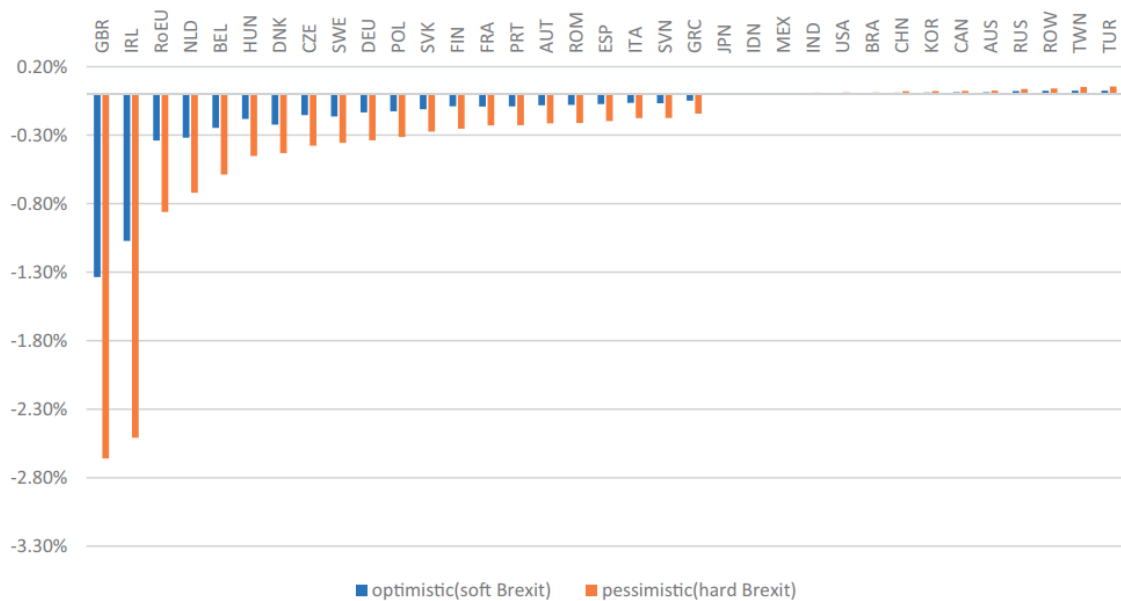
Income change per household -£1,773

*Notes:* Counterfactuals changes in welfare, measured by consumption equivalent as specified by Equation (5) with  $\rho = 0.96$ . Fiscal benefit information comes from HM Treasury (2013). EU is defined as EU 28 minus the UK and Croatia. Panel A shows an optimistic soft Brexit scenario where UK could negotiate a deal like Norway and tariffs remain zero. But NTBs increase to one-fourth of the reducible barriers faced by US exporters to the EU (2.77% increase). Further, the UK does not benefit from further integration of EU where NTBs will fall 20% faster than in the rest of the world (5.63% lower in 10 years). For the fiscal effect, we assume that UK could save 17% from the fiscal contribution to the EU (same as Norway) which is 0.09% of UK GDP. Panel B shows a pessimistic hard Brexit scenario where the UK and EU impose MFN tariffs on each other (Table 1). NTBs increase to three-fourth of the reducible barriers faced by US exporters to the EU (8.31% increase). Further, the UK is excluded from further integration of EU where NTBs will fall 40% faster than in the rest of the world (12.65% lower in 10 years). For the fiscal effect, we assume that the UK saves more on fiscal contribution to EU budget which is 0.31% of UK GDP.

(Source: Dhingra et al., 2017)

The change in welfare by country also is worth mentioning, it can be summarized in the following figure:

<sup>10</sup> Only “Economists for Brexit” has produced an expectation of increasing GDP (+ 4%) in the post-Brexit UK, but they seem to be an outlier and have received criticism for their economic model (see for example “Economists for Brexit: A Critique” by T. Sampson et Al.).



**Figure 1. Welfare loss by country**

*Notes:* The figure plots the welfare loss by country for the optimistic and pessimistic scenario. Assumptions are the same as the notes to Table 3. We assume that the other EU countries have to fill the budget hole left by the UK proportionally to their GDP. This brings them a net fiscal loss of 0.015% in the optimistic case and 0.051% in the pessimistic case. The list of countries can be found in Table A1.

(Source: *Ibid.*)

Van Reenen considers that many other “in between scenarios” can be modelled, and calculates that in all of them there remains losses in welfare ranging from 1% to 3%<sup>11</sup>. Additionally, the “Unilateral Trade Liberalization” scenario is a possibility: here the UK would abolish all import tariffs and let globalized markets buy its goods. In this instance the costs of (hard) Brexit would fall “from 2.7% to 2.4%. The reasons for this is that rising trade costs after Brexit will primarily come from non-tariff barriers. Since the UK will inevitably continue trading with the EU due to the law of trade gravity, this means that [it] will have fewer imports and exports.”<sup>12</sup>

Oxford Economics<sup>13</sup> predicts that in the best case scenario there would be a 0.1% loss in GDP, with an increase in business investment of £2.4 bn and a rise in income per person amounting to £40. By contrast, the worst case shows a loss in GDP of 4%, consisting in a fall in business investment of £21.1 bn and a fall in income per person amounting to £1000.

<sup>11</sup> J. Van Reenen, Brexit and the Future of Globalization, Centre for Economic Performance Special Paper no. 35, 2017, p. 6.

<sup>12</sup> *Ibid.*

<sup>13</sup> Assessing the Implications of Brexit, Executive Summary, Oxford Economics, 2016.



Ebell and Warren<sup>14</sup> analyze the long-term economic impact of leaving the EU, their predictions begin with 2016 and end with a deadline set on 2030. The results are, for a Soft Brexit:

<b>Implications of Soft Brexit (EEA Solution)</b>	<b>2016</b>	<b>By 2030</b>
<b>Change in GDP</b>	-1,5%	-2,1%
<b>Change in Real Wages for Households</b>	-2,2%	-3,2%
<b>Change in Consumption</b>	-2,4%	-3,3%
<b>Change in Private Sector Investments</b>	-0,6%	-0,7%

*(Source: Author's elaboration, data from Ebell and Warren, 2016)*

and for a Hard Brexit:

<b>Implications of Hard Brexit (WTO Solution)</b>	<b>2016</b>	<b>By 2030</b>
<b>Change in Total Trade</b>	-20,7%	-29,2%
<b>Change in GDP</b>	-2,7%	-3,7%
<b>Change in Real Wages for Households</b>	-4,6%	-6,3%
<b>Change in Consumption</b>	-4,0%	-5,4%

*(Source: Author's elaboration, data from Ebell and Warren, 2016)*

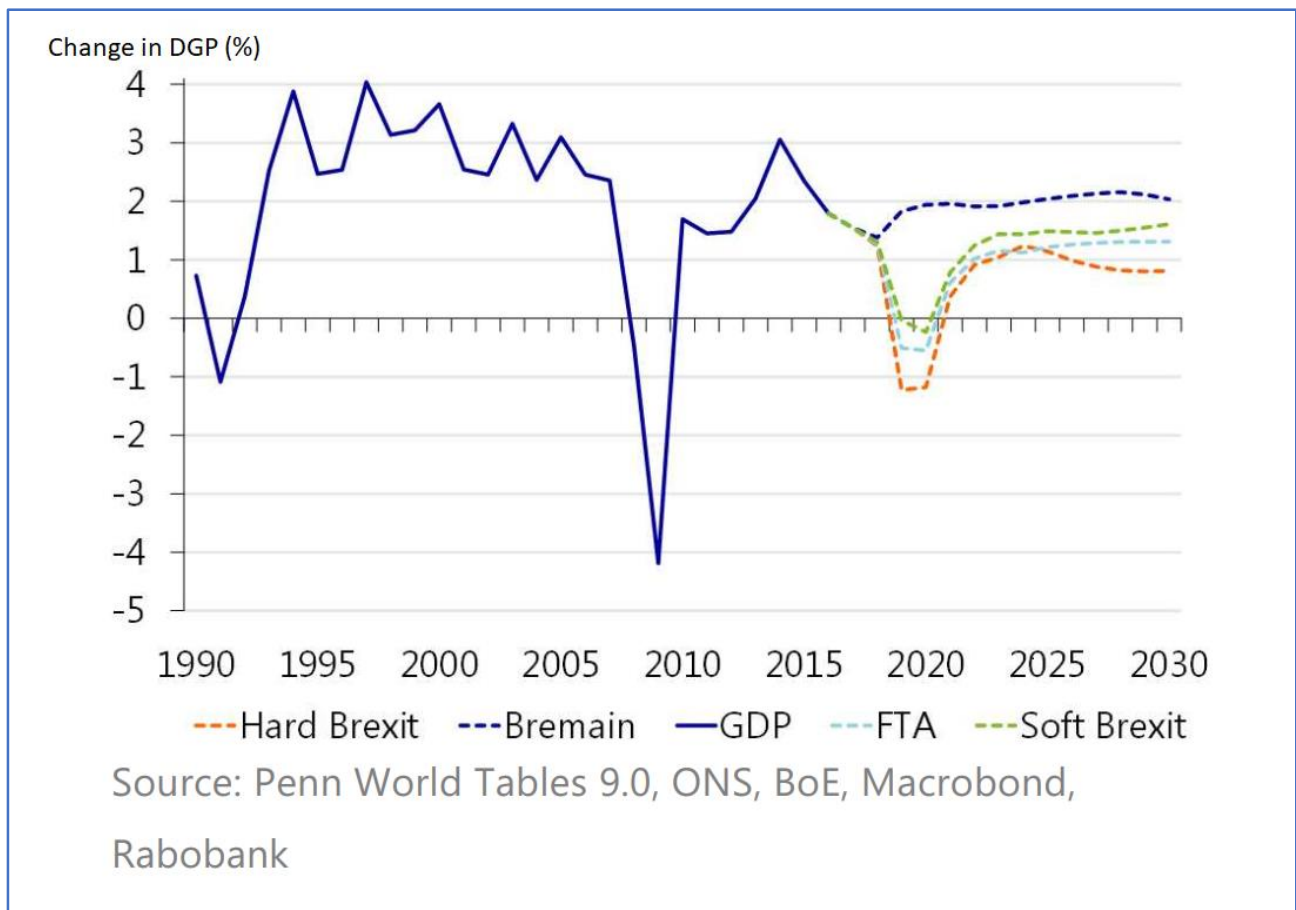
Given these studies, we can expect at the very least a slowdown of the British economy, accompanied by a good probability of recession (see fig. below). Admittedly, we should mention that while studies on the short and medium run can be used as a relatively reliable source, some commentators have pointed out that an “econometric modelling which attempts to forecasts long-term trends in growth out to 2030 is largely meaningless due to ... uncertainties”<sup>15</sup> such as those in “social-economic policies, the uncertain trend in world economic integration and also the changing political and possibly military landscapes in the world”<sup>16</sup>. Nonetheless, “the EU holds all the bargaining cards, since in the absence of agreement, the default outcome is a ‘no deal’ that would be disastrous for the UK.”<sup>17</sup>

<sup>14</sup> M. Ebell et J. Warren, The Long-term Economic Impact of Leaving the EU, in National Institute for Economic Review, 2016.

<sup>15</sup> W. W. Chang, Brexit and Its Economic Consequences, in The World Economy, 2017, p. 12.

<sup>16</sup> Ibid.

<sup>17</sup> M. Emerson, The Brexit ‘Future Relationship’: not a deal but a half-blind date, in CEPS commentary, 2018, p.1.



(Source: Erken et Al., 2017)

In the next chapters the three possible deals will be explored as potential answers to the question of which will be the next trade agreement between the EU and the UK. Notably, even in the event where no deal is found during the negotiation period, we can expect the two sides to work on an agreement in the near future, as both parties would benefit from an arrangement that goes beyond the outdated set of rules of the WTO, particularly in a moment in the history of this institution when negotiations for the Doha Round have stalled.

## 2. EFTA and the European Economic Area

### 2.1 Introduction

In what constitutes the most desirable scenario for the European Union, the UK would become a party to the European Economic Area Agreement (EEAA), which would require it to join the European Free Trade Association (EFTA). This scenario represents the highest level of economic integration *sauf* EU membership, since the EEA is an international agreement which establishes a highly developed regional economic (free trade) area extending the European Single Market (ESM) to non-EU member States, allowing them to participate in it while at the same time requiring them to abide by its rules and their enforcement mechanism. In this scenario “For all intents and purposes, the UK would remain in the EU internal market.”<sup>18</sup>, which “consists of the basic freedoms, provided for by the founding Treaties, and covering the free movement of both products (goods and services) and factors of production (capital and labour). They are implemented and complemented by extensive EU legislation, aimed mostly at harmonizing domestic laws to the level required to ensure adequate convergence.”<sup>19</sup> In order to join the EEA, membership of the EU or of EFTA is required<sup>20</sup>, this is not merely a political condition, it rather stems from the institutional outlook of the EEA, as ensuring the common market’s functioning requires a considerable degree of coordination, particularly in the areas of rule-enforcement and legislative harmonization: the unique structure of EFTA allows for this kind of ‘enhanced convergence’ through the use of joint committees, ambassadorial meetings and a specialized Court. The EEA is currently made up of the EU 27<sup>21</sup> Member States (not counting the exiting UK) and three out of four EFTA States: Norway, Lichtenstein and Iceland; the fourth EFTA nation, Switzerland, has rejected the EEA Agreement in the 1992 referendum<sup>22</sup>, and participates in the internal market through a series of bilateral agreements with the EU<sup>23</sup>. It continues to be an EFTA member.

This chapter will explore the EEA/EFTA solution, first by looking at the history of the Association and of the Agreement, it will then analyze the institutional outlook and the mechanisms of rule enforcement and harmonization of regulations between the two regional organizations.

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<sup>18</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, p. 17.

<sup>19</sup> Ibid., p. 7.

<sup>20</sup> Articles 126 and 128, European Economic Area Agreement.

<sup>21</sup> Croatia, the newest member of the Union has finished negotiating its accession to the EEA in November 2013 and is currently provisionally applying the agreement pending its ratification by all EEA member states.

<sup>22</sup> 1992, December 6<sup>th</sup> Swiss referendum: federal resolution on the European Economic Area. Turnout: 78.7%, votes for: 49.7%, votes against: 50.3%.

<sup>23</sup> Bilateral Agreements I (in effect June 1<sup>st</sup> 2002), Bilateral Agreements II (in effect March 1<sup>st</sup> 2008).

Lastly, the political likelihood of this deal being chosen by the English government will be presented.

## 2.2 A Contextualized History of EFTA and the EEA

While the creation of the European Economic Area occurred relatively recently, dating back to the 1992 Agreement on the European Economic Area<sup>24</sup>, the European Free Trade Association has had a much longer history. EFTA was founded in 1959 by Austria, Denmark, Norway, Portugal<sup>25</sup>, Sweden, Switzerland and the United Kingdom. The Association was created as the second of the two main European trade blocs, and it was thus in competition with the European Economic Community (which would later evolve into the EU) both in terms of economic performance and political aspirations. “While sizes, business structure and foreign policy orientation constituted significant lines of division, the six countries shared the fear that the economic split of Western Europe could harm their trade with the EEC. Against this backdrop, Sir John Colson, on behalf of the British government, proposed the creation of what was to become EFTA.”<sup>26</sup>.

The subsequent development of the organization can, according to Rye<sup>27</sup>, be divided into three periods. The formative period begins with the creation of EFTA (1960) and ends with the departure of the United Kingdom and Denmark (1973): during these years EFTA’s internal free trade area was completed<sup>28</sup> and the gap between EFTA and the EC was bridged through the ratification of bilateral agreements between the two organizations<sup>29</sup>. The second period goes from the entry into force of the 1973 bilateral agreements to 1989, when the then-President of the European Commission Jacques Delors proposed a “more structured partnership”<sup>30</sup> with EFTA countries “with common decision-making and administrative institutions”<sup>31</sup>, it is in this time frame that EFTA stepped up *vis-à-vis* the European Community, developing its relationship with the EC to the point where it would become integral part of the European internal market. Finally, 1989 marks the start of the last period, which is still ongoing today. It is characterized by the expansion of relations with the European Union, particularly through the 1992 European Economic Area

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<sup>24</sup> Text available at <https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAAgreement.pdf>

<sup>25</sup> Portugal participated to the talks as an observer, whereas Greece and Turkey had not been invited.

<sup>26</sup> L. Rye, *The European Free Trade Association. Formation Completion and Expansion*, 2018, p. 4.

<sup>27</sup> Ibid.

<sup>28</sup> Convention Establishing the European Free Trade Association, Article 2b,.

<sup>29</sup> In two years each EFTA Nation ratified two Agreements: one with the EC and one with the ECSC (European Coal and Steel Community), most of these entered into force on January 1<sup>st</sup> 1973, and by July 1<sup>st</sup> 1977 virtually all trade all trade in industrial products between the sixteen countries concerned was free of tariffs.

<sup>30</sup> Address given by Jacques Delors to the European Parliament (17 January 1989), available at [https://www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable_en.pdf).

<sup>31</sup> Ibid.

Agreement, and the consequent continuous expansion mandated by the dynamism of such agreement<sup>32</sup>. Notably, this period also sees the creation of EFTA's own global network consisting in a series of FTAs with states outside the European Union, which begins with Turkey's (1992)<sup>33</sup> and that has today reached 27 agreements, covering 38 countries. Since its creation, several nations have joined EFTA and then left it to join the EEC first and the EU later. Fig.1 shows the change in membership count throughout the years.

Fig. 1: EFTA Membership through the years:



(Source: Author's elaboration)

The EEA, as already stated, was established in 1992 via the EEA Agreement. The need for this type of arrangement became clear to the EFTA nations when the EEC nations approved the 1984 Single European Act, which set as the main objective the establishment of the European Single Market (ESM) by 1992. The Act brought new challenges to trade between the EEC and EFTA, as the creation of the ESM meant that EFTA nations would have faced, by 1992, trade barriers which had instead been removed among EEC nations: this put industries and firms in EFTA countries at a clear disadvantage *vis-à-vis* those in the EEC, weakening their competitiveness and

<sup>32</sup> On the dynamic expansion of the internal market throughout EFTA, see 2.3.

<sup>33</sup> Free Trade Agreement between the EFTA States and the Republic of Turkey, in force since April 1<sup>st</sup> 1992.

damaging the EFTA internal market. Unsurprisingly, then, Jacques Delors' 1989 proposal to create a European Economic Space (renamed European Economic Area during the negotiations) was warmly welcomed by EFTA, and in a very small time frame the two blocks negotiated the agreement which came to be in 1992, exactly when the European Single Market was supposed to be completed<sup>34</sup>. Article 128 of the Agreement reads:

*“Any European State becoming member of the Community shall, and the Swiss Confederation or any European State becoming member of EFTA may, apply to become a party to this agreement. It shall address its application to the EFTA Council.”*

this means that any country joining the EU will become a party to the EEA, and that any country joining or already part of EFTA may apply for membership, thus leading to an enlargement of the Area. So far, there are 31 signatory states of the Agreement, they are referred to as the EEA 31.

### 2.3 Institutional and Procedural Aspects of the EEA/EFTA Complex

“The EEA is not an international organization but an economic area that brings together the EU and its 28 Member States on the one and the three EFTA-states on the other side, covering the four fundamental freedoms. In line with this economic focus, the EEA furthermore covers the directly trade related areas of competition, state aid and transportation policy. Furthermore, it also covers horizontal policies related to the four freedoms, such as social policy, consumer protection, environment and company law”<sup>35</sup>. The Agreement in and of itself does not regulate all these spheres, rather, its Annexes which are constantly updated and rank on its same level, make up the biggest share of relevant substantive law. Ensuring the smooth functioning of a system where “the same piece of legislation is simultaneously being applied within the boundaries of the supranational framework and in a third country”<sup>36</sup> requires the constant work and coordination needed for harmonization and rapid implementation of each new rule that is added to the *Acquis Communautaire*. To this end, the EEA Agreement sets up four joint political bodies where officials from EEA-EFTA States<sup>37</sup> and the EU meet and discuss how to maintain the Annexes up to date *vis-à-vis* the EU treaties. Additionally, the “1994 Agreement between the EFTA States on the

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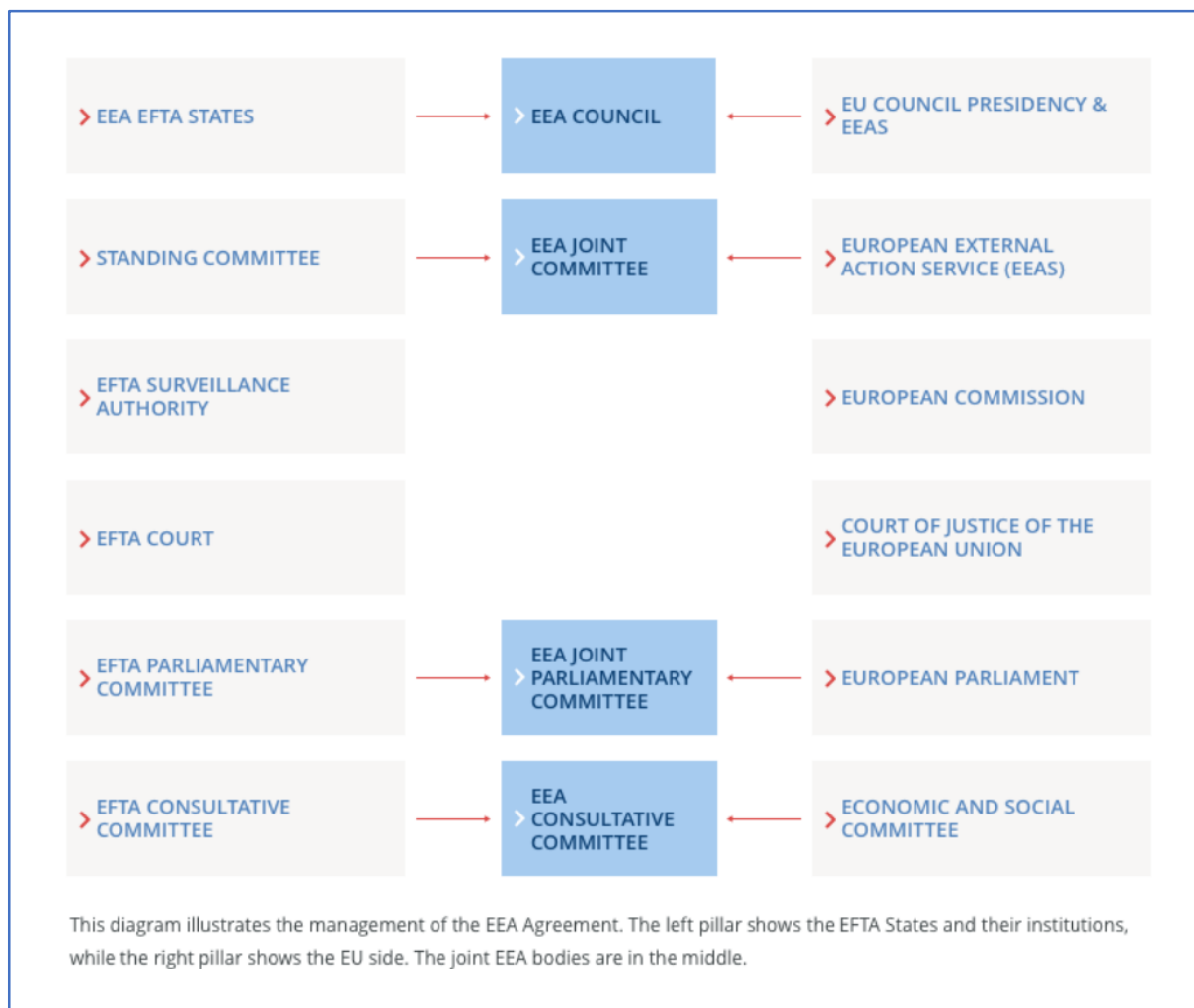
<sup>34</sup> The ESM would be launched on January 1<sup>st</sup>, 1993.

<sup>35</sup> C. Schewe & D. Lipsens, From EFTA to EC/EU and Back to EFTA? The European Economic Area (EEA) As a Possible Scenario for the UK-EU Relations After Brexit, in D. R. Troitiño, T. Kerikmäe, A. Chochia, Brexit: History, Reasoning and Perspectives, 2018, p. 3-4.

<sup>36</sup> A. Lazowski, Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union, in Common Market Law Review, 2008, p. 11.

<sup>37</sup> Here “EEA-EFTA States” refers to the three EFTA Nations that are parties to the EEA Agreement (Norway, Lichtenstein, Iceland), saying simply “EFTA States” would be erroneous as Switzerland is part of EFTA but not of the EEA.

Establishment of a Surveillance Authority and a Court of Justice”<sup>38</sup> establishes the EFTA Surveillance Authority (SA) and the EFTA Court, whose tasks and functioning within EFTA mirror, respectively, the enforcement and judicial roles of the Commission and ECJ in the EU. The setup of the EEA institutions has been called a 2-pillar structure, and it is often represented in the following way:



(Source: <https://www.efta.int/eea/eea-institutions>)

### 2.3.1 The EEA Council

The Council, made up on the EU side by members of the Commission (represented by European External Action Service officers)<sup>39</sup> and national ministers from the Council of the European Union; and on the EFTA side by the foreign ministers of the EEA-EFTA nations, is established by EEAA art.s 89-90. The Council is “responsible for giving the political impetus in the

<sup>38</sup> Text available at <https://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols/Surveillance-and-Court-Agreement-consolidated.pdf>.

<sup>39</sup> European Economic Area Agreement, Article 90(1).

implementation of this Agreement and laying down the general guidelines for the EEA Joint Committee.”<sup>40</sup>, it meets twice a year<sup>41</sup> and it acts “by agreement between the Community, on the one hand, and the EFTA States, on the other”.<sup>42</sup>

### 2.3.2 The EEA Joint Committee (EEAJC)

One of the pivotal bodies of the EEA, the Joint Committee plays a central role in securing the homogeneity of the EEA Treaty: it is responsible for the legislative process within the Area. The EFTA Court defined it as “designed to function as an institution working in pursuit of the common interest of the Community side and the EFTA side”<sup>43</sup>. The body is composed on the EU side of members of the European Commission, which are represented by officers from the European External Actions Service (EEAS) and on the EFTA side by state representatives, usually at ambassadorial level. An observer from the Surveillance Authority also participates in the meetings<sup>44</sup>. The Committee is assisted in its work by five subcommittees on the free movement of goods (I), free movement of capital and services including company law (II), free movement of persons (III), horizontal and flaking policies (IV), legal and institutional matters (V). Meetings are held on a regular basis and decisions are taken by consensus. Procedural obligations are found in EEAA art.s 99,102,103,104. The first of these states that:

*“As soon as new legislation is being drawn up by the EC Commission in a field which is governed by this Agreement, the Commission shall informally seek advice from experts of the EFTA States in the same way as it seeks advice from the EC Member States for the elaboration of its proposals.”*<sup>45</sup>

Thus, the JC will draft and approve amendments to the Annexes which secure homogeneity of the EEAA with the relevant EU law<sup>46</sup>. In those instances where difficulties in finding a consensus are found, the EEA Joint Committee “shall examine all further possibilities to maintain the good functioning of this agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation”<sup>47</sup>. Furthermore, “If, at the end of the time

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<sup>40</sup> Ibid., Article 89(1).

<sup>41</sup> Ibid., Article 91(2).

<sup>42</sup> Ibid., Article 90(2).

<sup>43</sup> Case E-6/01, *CIBA Specialty Chemical Waters Treatment Ltd. And Others v. Norway* (EFTA Court Rep. [2002] par. 281).

<sup>44</sup> Decision of the EEA Joint Committee No 1/94 Adopting the Rules of Procedure, Article 1(3): “A representative of the EFTA Surveillance Authority shall be invited to take part in meetings of the EEA Joint Committee as an observer. The EEA Joint Committee may, however, decide to deliberate without the presence of the Representative of the EFTA Surveillance Authority. ...”.

<sup>45</sup> European Economic Area Agreement, Article 99(1).

<sup>46</sup> Ibid., Article 102(1).

<sup>47</sup> Ibid., Article 102(4)



limit [6 months following the entry into force of the relevant legislation]..., the EEA Joint Committee has not taken a decision on an amendment of an Annex to this Agreement, the affected part thereof, as determined in accordance with paragraph 2, is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee.”<sup>48</sup> This suspension procedure has never been necessary, as consensus has always been found, in part thanks to the other consultative and forum-providing organs, namely the Standing Committee of the EFTA States, the EEA Joint Parliamentary Committee and the EEA Consultative Committee.

### 2.3.3 EEA Joint Parliamentary and Consultative Committees

The Joint Parliamentary Committee is established by EEA Article 95: “... It shall be composed of equal members of, on the one hand, members of the European Parliament and, on the other hand, members of Parliaments of the EFTA States. ...”<sup>49</sup>, its task shall be to “contribute, through dialogue and debate, to a better understanding between the Community and the EFTA States in the fields covered by this Agreement.”<sup>50</sup>. Through reports and resolutions, the Parliamentary Committee monitors and scrutinizes EEA-relevant EU policies and decisions adopted by the Joint Committee.

The Consultative Committee is established by EEA Article 96(2): “... an EEA Consultative Committee is hereby established. It shall be composed of equal numbers of, on the one hand, members of the Economic and Social Committee of the Community, and, on the other, members of the EFTA Consultative Committee. The EEA Committee may express its views in the form of reports or resolutions, as appropriate.”<sup>51</sup> Its role is to “strengthen contacts between social partners in the EEA, to cooperate in an organized and regular manner to enhance awareness of the economic and social aspects of the EEA, and to provide input through resolutions into deliberations of other EEA bodies”<sup>52</sup>. Meetings are held once a year.

### 2.3.4 Judicial and Rule Enforcement: EFTA SA and Court

Article 108 of the Agreement establishes both the EFTA Surveillance Authority (SA) and the EFTA Court. The former is responsible “for ensuring the fulfilment of obligations under this Agreement”<sup>53</sup>, its powers mirror those of the EU Commission under TFEU articles 258, 259 and

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid., Article 95(1).

<sup>50</sup> Ibid., Paragraph 3.

<sup>51</sup> European Economic Area Agreement, Article 96(2).

<sup>52</sup> EFTA Website: <https://www.efta.int/eea/eea-institutions/eea-consultative-committee>.

<sup>53</sup> European Economic Area Agreement, Article 108(1).

260, and it can in fact initiate infringement procedures in the fields of public procurement<sup>54</sup>, state aid<sup>55</sup> and competition<sup>56</sup>. Under article 109, the SA and the European Commission are bound to “cooperate, exchange information and consult each other”<sup>57</sup> to make sure that compliance with the agreement(s) is ensured at all times. Finally, article 110 confers binding nature to the decisions of the SA.

The EFTA Court is the highest judicial authority among EFTA countries, its jurisdiction is limited to non-EU EEA contracting parties, it has competence in actions concerning the surveillance procedure<sup>58</sup>, appeals concerning decisions in competition taken by the SA<sup>59</sup>, and settlement of disputes between EFTA countries<sup>60</sup>. In addition, under art. 34 of the SCA, the Court may give advisory opinions on the interpretation of the EEA Agreement. This is one area where the functioning of the EFTA Court differs from that of the ECJ: advisory opinions of the former are not binding in nature, although every country that has ever requested one has always followed its reasoning and Baudenbacher assumes that not doing so would otherwise lead to a violation of the EEA Agreement, since the contracting parties have assumed “... the obligation to arrive ... at a uniform interpretation and application of this EEA Agreement...”<sup>61</sup>. Similarly to the ECJ’s own rules, article 36 SCA lays down the rules for accessing the Court, stating that “Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.”<sup>62</sup>.

Being part of the Single Market does not mean accepting the characteristic EU law features of direct effect and primacy (over national law), part of the appeal of the EEA solution is, in fact, the guarantee of retainment of legal autonomy from the *sui generis* European legal order and, consequently, of immunity from the jurisdiction of the ECJ. These are all guaranteed in the EEA Agreement. However, the close relationship between the EEA Agreement and the EU treaties has important implications in this area and it is therefore worth exploring. While it has been explained

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<sup>54</sup> Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Protocol 2.

<sup>55</sup> Ibid., Protocol 3.

<sup>56</sup> Ibid., Protocol 4.

<sup>57</sup> Ibid., Article 109(2).

<sup>58</sup> Ibid., Article 108(2)(a).

<sup>59</sup> Ibid., Article 108(2)(b).

<sup>60</sup> Ibid., Article 108(2)(c).

<sup>61</sup> C. Baudenbacher, The EFTA Court – an example of Judicialization of international economic law, in *European Law Review*, 2003.

<sup>62</sup> Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Article 36.

that the ECJ has jurisdiction over EU institutions and EU Member States, and that the EFTA Court has jurisdiction over non-EU EEA parties, the ECJ has made it clear in its Opinion 2/13 on EU accession to the ECHR that “it will not accept that an international jurisdiction is given authority to interpret a body of norms and rules which are identical or closely analogous to EU law.”<sup>63</sup>, the reason being that “the EU, like any other Contracting Party, *would be subject to external control* to ensure the observance of [said body of norms]. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms [of that authority]. ... any action by the [authority] *must not have the effect of binding the EU and its institutions*, ... ”<sup>64</sup>. This stalemate is solved through a compromise between the two Courts: on one hand the ECJ retains its supremacy, ensuring the integrity of the European legal order, on the other hand, EEA articles 105, 106 and 107 are dedicated to the principle of legal homogeneity and aim at ensuring that in its work the EFTA Court considers relevant CJEU case law, so that the treaties are interpreted in the same way by the two Courts. Furthermore, article 6 of the same treaty states that the provisions of the EEA Agreement are to be “interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.”<sup>65</sup>; and article 3(2) of the SCA imposes the same obligation on the EFTA Court for ECJ rulings “given after the date of signature of the EEA Agreement”<sup>66</sup>. As Baudenbacher observes, while the EFTA Court may adopt its own case law in cases where substantial considerations are found against ECJ case law, “the requirement to pay due account as expressed in Article 3(2) SCA will ensure that new ECJ case law will be adopted in most cases”<sup>67</sup>.

Article 6 EEA does not have the effect of importing the principle of direct effect from EU law as originally codified in *Van Gend en Loos*<sup>68</sup> and *Costa v E.N.EL.*<sup>69</sup>, as a matter of fact, “Article 7(a) EEA concerning incorporation of regulations and protocol 35 on the implementation of EEA rules clearly suggests that the EU law principles of direct effect and primacy are not part of

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<sup>63</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, p. 11.

<sup>64</sup> ECJ, Opinion 2/13 on EU accession to the ECHR, 2014, par. 181, emphasis added.

<sup>65</sup> European Economic Area Agreement, Article 6.

<sup>66</sup> Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Article 3(2).

<sup>67</sup> C. Baudenbacher, Between homogeneity and independence: the legal position of the EFTA court in the European economic area, in *Columbia Journal of International Law*, 2003.

<sup>68</sup> Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1962).

<sup>69</sup> Case 6-64, *Flaminio Costa v E.N.EL.*, 1964.

EEA law”<sup>70</sup>. By contrast, a system without direct effect would leave individuals legally weaker as they would not be able to invoke their rights in court, and this would not be compatible with the commitments to protect to protect individuals, found under different forms in the EEA Agreement<sup>71</sup>. Therefore, in *Restamark* the Court created a doctrine of quasi-direct effect, ruling that individuals do have the possibility to invoke rights derived from provisions of the EEA Agreement, if said provisions are unconditional and sufficiently precise<sup>72</sup>. The Court subsequently hinted at the extension of direct effect to non-implemented provisions in *Irish Bank*, where it reinstated the obligation of national authorities “to do whatever lies within [their] competence, having regard to the whole body of rules of national law”<sup>73</sup>, to ensure the respect of EEA law. The reasoning found in the argument on direct effect is used again for the concept of primacy of EEA law: the Court held in *Einarsson* that “where a provision of national law is incompatible with Article 14 EEA, and that Article has been implemented in national law, a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that *the implemented EEA rule shall prevail*”<sup>74</sup>. Finally, in *Sveinbjörnsdóttir* (1998) the EFTA Court explicitly recognized the principle of state liability: “It follows from Article 7 and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers. However, the principle of state liability must be seen as an integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State Liability”<sup>75</sup>.

## 2.4 On the Free Movement of Persons and Likelihood of the Deal

### 2.4.1 Free Movement of Persons

Because the EEA solution allows the UK to remain in the single market, issues such as the future regulation of trade in goods and/or trade in services, which would constitute a hindrance in a potential FTA, customs union or hard Brexit, do not arise. On the other hand, the 4 freedoms all come together under EEA law and the UK has made it clear that it will not give up sovereignty in

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<sup>70</sup> H.H. Fredriksen & C. Franklin, Of Pragmatism and Principles: the EEA Agreement 20 Years On, in *Common Market Law Review*, 2015.

<sup>71</sup> See for instance EEA articles 1, 3, and the 8<sup>th</sup> recital to the preamble, but also consider, notwithstanding article 7(a) and Protocol 35, the object and purpose of the Agreement itself.

<sup>72</sup> Case E-1/94 *Restamark*, 1994, par. 77.

<sup>73</sup> Case E-18/11, *Irish Bank*, 2012, par. 124.

<sup>74</sup> Case E-1/01 *Einarsson*, 2002, par. 55., emphasis added.

<sup>75</sup> Case E-9/97 *Sveinbjörnsdóttir*, 1998, par. 63.

the realm of immigration. Nonetheless, the obligations that it would be bound by under the EEA Agreement in this sensitive area are worth exploring.

The free movement of persons is established through EEA art.s 28 and 31: the former covers the movement of workers whereas the latter grants freedom of establishment (i.e. self-employed persons). Their wording mirrors, unsurprisingly, that of TFEU art.s 45 and 49 which respectively cover the same freedoms in the EU. The definition of worker is provided by the ECJ in *Trojani* (2004): “any person who pursues activities which are real and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is [...] that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”<sup>76</sup>. Under the co-operative procedure of Articles 34 SCA and 267 TFEU (on preliminary rulings) the assessment of the rights and duties of a potential worker relates to the factual elements in the case at hand, which is essentially a matter for national courts to decide<sup>77</sup>. In doing so, the courts must however base their analysis on clear and objective criteria<sup>78</sup> and cannot interpret the notion of worker restrictively<sup>79</sup>. The Court has made this last point clear by rejecting, in multiple instances, arguments that the article does not apply because: the services performed are not of an economic nature<sup>80</sup>, because of the nature of motives that prompt workers of to seek employment in a Member State (provided that they pursue an effective and genuine activity)<sup>81</sup>, because the situation at hand is not “commercially typical”<sup>82</sup>, because of the short duration of the employment period<sup>83</sup> (again, provided the pursuit of an effective and genuine activity), because the employment yields an income lower than the minimum required for subsistence<sup>84</sup> or because the employment does not normally go beyond 18, 12 or 10 hours a week<sup>85</sup>. For the purpose of EEA law, none of these elements are decisive in establishing whether the person in question is a worker.

The free movement of persons within the EEA is subsequently expanded through Directive 2004/38. The directive, which became EEA law after the relevant 2007 EEA Joint Committee

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<sup>76</sup> Case C-456/02 *Trojani* [2004] ECR I-7573, par. 15.

<sup>77</sup> C. Baudenbacher, *The Handbook of EEA Law*, p. 475.

<sup>78</sup> Case C-413/01 *Ninno-Orasche* [2003] ECR I-1387, par. 27.

<sup>79</sup> Case 53/81 [1982] ECR 1035 *Levin*.

<sup>80</sup> Case 66/85 *Lawrie Blum* [1986] ECR 2121, par. 20.

<sup>81</sup> Case 53/81 [1982] ECR 1035 *Levin*.

<sup>82</sup> Case 196/87 *Brown* [1988] ECR 3205, par. 21.

<sup>83</sup> Case C-337-97 *Meeusen* [1999] ECR I-3289, par. 14.

<sup>84</sup> Case 53/81 [1982] ECR 1035 *Levin*, par. 15-16.

<sup>85</sup> Respectively: Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, par. 7 and 17 ; Case 139/85 *Kempf* [1986] ECR 1741, par. 2 and 16 ; Cases 171/88 *Rinner-Kuehn* [1989] ECR 2743, par. 16.

decision<sup>86</sup>, re-affirms the provisions of EEA art.s 28 and 31 and extends the right to stay in a third country “for a period up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.”<sup>87</sup> However, in order to avoid migratory movements aimed solely at enjoying the more generous social benefits of another (Member) State, the right of free movement of persons that are not employed or seeking employment intended as a genuine and effective occupational activity, is subject to limitations: under articles 24(2) inactive citizens shall not receive social benefits during the allowed 3 months and under article 7 were they to decide on extending their stay they would have to prove their economic self-sufficiency so as to demonstrate that they do not constitute a burden for the social assistance system of the host State.

Notably, the Court has recognized some “justified restrictions” to the free movement of persons: “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”<sup>88</sup> Furthermore, a measure that affects the right of free movement of a citizen and that is discriminatory in character can be justified on the grounds of public policy, public security and public health<sup>89</sup>.

#### 2.4.2 Likelihood of Deal

Plenty of studies suggest that joining the EEA would be in the best interest of the UK’s economy, as “membership of the Single Market facilitates trade with other members by removing tariffs and quotas and by reducing non-tariff barriers such as differing technical specifications and labelling requirements. Unlike the customs union, which is relevant only for trade in goods, the single market covers both goods and services.”<sup>90</sup> There are, however, clear political obstacles on the road to EEA membership. *In primis*, the UK would need to join EFTA, which would require consent of all EFTA nations<sup>91</sup>. The joining of the actual EEA Agreement would consist in an

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<sup>86</sup> Decision of the EEA Joint Committee No. 158/2007 of December 7<sup>th</sup> 2007.

<sup>87</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Article 6.

<sup>88</sup> Case C-55/94 Gebhard [1995] ECR I-4165, par. 37.

<sup>89</sup> European Economic Area Agreement, Article 28(3).

<sup>90</sup> The European Economic Area, House of Commons briefing paper, 2018, p.23.

<sup>91</sup> Under article 56 of the EFTA Convention “any State may accede to the Convention provided that the EFTA Council decides to approve its accession, on such terms and conditions as may be set out in that decision.” The article does not explicitly say that that unanimous consent is required, however given the expected impact that the British economy would have on the comparatively smaller economies of the EFTA nations, it is likely that the EFTA Council would decide by unanimity.

amendment to the latter, which would necessitate the consent of all EEA/EFTA countries, of all EU Member States and of the EU itself, since the EEAA is a mixed agreement. The consent of the EFTA nations should not be taken for granted: the EU's Directorate General for External Relations observes that "the UK's participation in the EEA, on the EFTA side, would create even greater imbalance between the participants. The size of the UK economy and population is many times the size of the combined economies and populations of the three other members. The UK would risk dominating EFTA and the EEA in ways which the other EFTA states may not prefer"<sup>92</sup>. The same study from the DG explains that the implications of EEA membership would be, for the British side, five: 1) no participation in decision-making (but some form of participation in decision-shaping), 2) contributions to the EU's cohesion fund, 3) no requirement to accept the direct effect and primacy of EU law, 4) no direct ECJ jurisdiction (role of EFTA Court), 5) a general safeguard clause<sup>93</sup>. A similar study but on the other end of the negotiation table highlights that the UK would need to accept the free movement of persons (along with the other 3 freedoms), it would have to accept the role of rule-taker rather than rule-maker, it would have to accept the jurisdiction of the EFTA Court, which follows fairly strictly that of the CJEU, and since EEA members are outside the EU customs union, exports to the EU would have to comply with customs procedures and Rules of Origin<sup>94</sup>.

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<sup>92</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018 p. 18.

<sup>93</sup> Ibid.

<sup>94</sup> The European Economic Area, House of Commons briefing paper, 2018.

### Input into EU legislation as an EEA or EU member

Opportunities to influence	In the EEA	In the EU
<b>Global institutions</b> , some of which set down detailed global standards, while others set out political guidelines for regulation.	Independent seat on all trade and standard-setting bodies.	Represented by the EU in most bodies but UK has own seat at G20 Financial Stability Board and Basel Committee on Banking Standards.
<b>The European Council</b> of EU leaders which sets out the EU's strategic and legislative priorities.	No representation. The EEA Council, comprised of the EEA/ EFTA states and the EU, meets twice a year and provides political impetus for the development of the EEA Agreement.	UK has a veto.
<b>European Commission</b> which proposes legislation.	No EU Commissioner or nationals working in the Commission. Representation and input via expert working groups, committees and comments on legislative proposals.	The UK has a European Commissioner, British nationals in the Commission and is represented in its expert working groups and committees.
<b>European Parliament and Council of Ministers</b> which amend and adopt legislation.	No representation. Can lobby friendly governments and MEPs. The EEA Joint Parliamentary Committee is a forum to allow national parliamentarians from EEA/EFTA states and MEPs to discuss the EEA agreement.	UK ministers vote in the Council of Ministers and UK has 73 MEPs in the European Parliament.
<b>EEA Joint Committee</b> which incorporates EU legislation into the EEA agreement.	EEA state can contest EEA relevance, negotiate amendments or veto.	European Commission represents EU and plays an important role in deciding which EU acts are to be incorporated into the EEA Agreement.
<b>Implementation in member state</b>	Can delay implementation with prospect of EU legal action. Can refuse to implement (i.e. veto)	Can delay implementation with prospect of EU legal action.
<b>Law in force</b>	Monitoring and enforcement by the EFTA Surveillance Authority and the EFTA Court. In order to guarantee homogeneity between the EU's Court of Justice and the EFTA Court jurisprudence, the EFTA Court follows the relevant case law of the ECJ. No judge at the ECJ.	Monitored and enforced by the European Commission and ECJ. The UK has a judge at the ECJ and as one of the largest member states it also has a permanent Advocate-General.

This author would argue that complications arising from economic imbalances between the UK's economy and those of the other EFTA nations would indeed be cause for complications in the British accession to the regional Association. The question of rule-taking and rule-making, by contrast, cannot be predicted: if the UK does manage to enter EFTA, then it would theoretically have a veto power on every single drafted annex to the EEAA, so while it would hardly be a rule-



maker<sup>95</sup>, it would certainly be in the position to refuse the status of rule-taker. The financial contribution to the EU's cohesion fund, on the other hand, is non-negotiable, and in the best case scenario the UK may achieve a "softer bill" (like it had previously happened with the re-negotiation of financial contributions in 1985) but it would have to pay nonetheless. Direct effect and primacy of EU law would be avoided, although as explained in the previous paragraphs there would certainly be some instances of quasi-direct effect and of primacy of a number of provisions. The same goes for the jurisdiction of the ECJ: the UK would avoid the Court's authority as it would be bound by EFTA Court rulings only, these however would be made with respect to relevant ECJ case law. The most problematic issue would be that of the free movement of persons, as Open Europe observes: "Firstly, it is a poor fit when set against the Leave side's key argument during the referendum campaign: restoring full control over UK immigration policy, ..." <sup>96</sup>, this is particularly important because the four freedoms of the Single Market are, in the EU's perspective, indivisible as they make up a cornerstone of European integration and a fundamental pillar of the Single Market's integrity. Furthermore, being outside the customs union would result in a hard border in the Irish Question, which would have to be solved through subsequent negotiations specific to this matter. Unless one of the two sides gives up on at least one of its red lines, there is little chance that the EEA solution – as much as it would be economically desirable – be chosen as the final deal.

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<sup>95</sup> Rule-making is intended as belonging to the EU legislator, since the EEA Joint Committee does not have a say in what provisions are drafted in the EU, it only votes on the annexes which translate EU law into EEA law.

<sup>96</sup> As the UK searches for a post-Brexit plan, is the EEA a viable option? Open Europe, 2016.

### 3. A Deep and Comprehensive Free Trade Agreement (DCFTA)

#### 3.1 Introduction

*Ipso facto* compromises, free trade agreements (FTAs) form a substantial part of the EU's economic flourishing. One of the possible relations between the Union and a post-Brexit UK could indeed be a treaty that covers, sector by sector, all aspects of trade between the two. Here too the EU is global leader having 36 FTAs in force, 11 provisionally applied (awaiting full ratification), 1 signed (awaiting application), 5 finalized (concluded negotiations, awaiting signature) and 12 under negotiation. The current foreign strategy of the Union – the Global Europe Strategy – departs from FTAs based on traditional multilateralism based on the consolidation of WTO rules, and puts a renewed emphasis on bilateralism and competitive liberalization<sup>97</sup>, the result are the so-called Deep and Comprehensive Free Trade Agreements, and recent examples include the 2010 European Union-South Korea Free Trade Agreement<sup>98</sup> and the 2016 Comprehensive Economic and Trade Agreement (CETA) with Canada<sup>99</sup>. “the EU's strategy to further facilitate its own access to foreign markets consists essentially of entering into deep FTAs that are comprehensive insofar as they are not limited to tariffs but extend to ‘non-tariff barriers [...], including services, intellectual property, SPS, TBT, public procurement, competition and investment’”<sup>100</sup>.

This chapter will first present some early legal considerations to the potential agreement, it will then move on to generally present the content the Union's deep and comprehensive free trade agreements in an attempt to determine what type of trade provisions are more likely to be expected in a EU-UK DCFTA. Finally, some political observations on the feasibility of this solution will be illustrated.

#### 3.2 Legal Considerations

Before looking at the content of a potential agreement, some legal observations must be made. *In primis*, the European treaties allow for two types of international agreements: ‘ordinary’ and mixed agreements. Article 47 TEU confers the Union (international) legal personality<sup>101</sup>, making it a subject of international law and giving it the power to negotiate and conclude international agreements on its own behalf (i.e. without involvement of the member states). The

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<sup>97</sup> Also found in the United States' FTA policy, competitive liberalization seeks to enhance the position of the negotiating state vis-à-vis its competitors.

<sup>98</sup> In force from December 13<sup>th</sup> 2015.

<sup>99</sup> Provisionally in force since September 21<sup>st</sup> 2017.

<sup>100</sup> Billy A. Melo Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford University Press, 2016, p.34.

<sup>101</sup> Treaty on the European Union, Article 47: “The Union shall have legal personality”.

degree to which the Union may act without the participation of its MSs depends on what type of competence it has been given by them (through the Treaties) in the subject area relevant for the hypothetical treaty. Generally speaking, the EU enjoys exclusive competence in areas related to the economy and the single market (among others), as these usually fall within the Common Commercial Policy (CCP). In its Opinion 2/15 on the EU-Singapore FTA (EUSFTA) the ECJ further delineated the domain of the CCP giving it relatively wide scope while at the same time noting that the latter is not unlimited. In the context of recent FTAs two limitations are especially relevant: one related to investor protection and one related to harmonization and convergence of regulations.

In the first aspect the ECJ found that only *direct* foreign investment (FDI) falls within the CCP: “in Article 207(1) TFEU there is an unequivocal expression of their [the FEU Treaty’s framers’] intention not to include other foreign investment in the common commercial policy. Accordingly, commitments vis-à-vis a third State relating to other foreign direct investment do not fall within exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU”<sup>102</sup>. Therefore, concluding an agreement which covers forms of foreign investment that are not direct<sup>103</sup> would involve the consent of all Member States resulting in a mixed agreement, as the competence required to do so is shared in nature<sup>104</sup>. Furthermore, the dispute settlement body created in the context of EUSFTA’s investor protection system sets up a “bridge” that allows to bring claims directly to the international level (bypassing the exhaustion of local remedies), “Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States’ consent. It follows that approval of [...] the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and its Member States.”<sup>105</sup>. Again, the consequence is that an agreement that includes investor protection will most likely be mixed.

The second limitation revolves around provisions on harmonization and regulation convergence: the ECJ found in the same opinion that provisions creating minimum standards on social and environmental protection may be included in the treaty on the basis of the EU’s CCP, however these “are intended not to regulate the levels of social and environmental protection in the Parties’ respective territory but to govern trade between the European Union and the Republic of

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<sup>102</sup> CJEU, Opinion 2/15 on the EU-Singapore FTA, par.83.

<sup>103</sup> E.g. ‘portfolio investment’ such as transactions in equity, securities and debt structures.

<sup>104</sup> CJEU, Opinion 2/15 on the EU-Singapore FTA, par. 240-241.

<sup>105</sup> Ibid. par. 292-293.

Singapore”<sup>106</sup>, implying that “an EU-UK system to guarantee continued convergence – whether called harmonization or alignment – does in all likelihood not come within the EU’s exclusive CCP competence.”<sup>107</sup>. Both of these limitations and their consequences point to the conclusion that an FTA between the EU and the UK would in all likelihood acquire the form of a mixed agreement, which would involve the consent of all Member States and would likely take several years to conclude, especially considering that CETA required seven years to negotiate and even after being signed in 2016 it is still going through ratification<sup>108</sup> by all the parties involved.

Another crucial element of the FTA solution is that according to the Union<sup>109</sup> there would have to be strong legal guarantees that the convergence in regulation is “meaningful”, and these guarantees would have to extend the enforcement of the agreement all the way to the domestic level. Additionally, the jurisdiction of the ECJ would need to be recognized, as for reasons already explained in the first chapter<sup>110</sup>, the Court must have “ultimate authority to interpret the product and market regulations with which the UK has agreed to converge”<sup>111</sup> and would not accept the jurisdiction of an EU-UK settlement dispute system.

### 3.3 EU DCFTAs: Content and Scope

#### 3.3.1 Tariff Barriers

The EU has approached tariff barriers in its FTAs with a clear strategy: “In terms of tariffs, [...] the EU aim of ensuring consistency with WTO rules requires that ‘substantially’ all trade is covered (Art. XXIV, GATT 1994).”<sup>112</sup> ‘Substantially all trade’ is intended as broadly as possible, with no less than 90% of trade coverage being accepted and recent agreements (with South Korea, Colombia-Peru and Central America) nearing 98%. Notably, sensitive sectors such as agriculture and fisheries are usually excluded. Trade in goods would therefore likely be sorted out: this the one area where FTAs usually manage to be successful and considering the status of EU-UK trade

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<sup>106</sup> Ibid. par. 166.

<sup>107</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, p.21.

<sup>108</sup> As of May 2018.

<sup>109</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, pp. 21-22.

<sup>110</sup> See Par. 2.3.4.

<sup>111</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, p. 23.

<sup>112</sup> S. Woolcock, EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation Towards Commercial Aims, in European Law Journal, 2014, p.7.

relations pre-Brexit (see fig. below), a future FTA is likely to abolish tariff barriers in trade in goods almost completely, if not entirely.

**Table 2 – UK goods and services trade shares (2015) <sup>3</sup>**

	Share of exports		Share of imports	
	Goods	Services	Goods	Services
EU countries	47%	39%	54%	49%
Rest of the world	53%	61%	46%	51%
Total	100%	100%	100%	100%

Source: ONS, UK trade: Mar 2016 (10 May 2016):

<http://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/mar2016>; Institute for Fiscal Studies, *The EU Single Market: The Value of Membership Versus Access for the UK* (August 2016), p 7

(Source: EU DG for External Relations, 2018)

### 3.3.2. Trade in Services

Trade in services also follows strict yet simple lines: “All of the EU DCFTAs contain rules that apply to specific services sectors and impose a number of regulatory disciplines that go beyond the mere requirement of non-discrimination. These regulatory principles are, however, largely inspired by the rules included in WTO instruments.”<sup>113</sup> Thus, provisions on financial services follow the GATS Annex on Financial Services, those on government procurement are modelled after an affirmation or re-affirmation of the GPA and the telecommunication services sector is regulated in the same fashion as the GATS Reference Paper for Telecommunications Services does (though in this case some complementary provisions are usually present). WTO instruments define trade in services through four modes of supply, as follows:

Mode	Definition	Example
<b>1: Cross-border</b>	Services supplied from the territory of one WTO member into the territory of any other member.	A user in country A receives services from abroad through its telecommunications or postal infrastructure.
<b>2: Consumption abroad</b>	Services supplied in the territory of one WTO member to the service consumer of any other member.	Nationals of country A have moved abroad as tourists, students, or patients to consume the respective services.
<b>3: Commercial presence</b>	Services supplied by a service supplier of one WTO member, through commercial presence, in the territory of any other member.	The service is provided within country A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and

<sup>113</sup> B. A. M. Araujo, *The EU Deep Trade Agenda: Law and Policy*, Conclusion, 2016, p. 3.

		— controlled company (bank, hotel group, construction company, etc.).
<b>4: Presence of natural persons</b>	Services supplied by a service supplier of one WTO member, through the presence of natural persons of a Member in the territory of any other Member.	A foreign national provides a service within country A as an independent supplier (e.g. consultant, health worker) or employee of a service supplier (e.g. consultancy firm, hospital, construction company).

*(Source: Author's elaboration<sup>114</sup>)*

While the regulation of this sector in FTAs is a priority for the EU, it is also a particularly difficult and complex one: “First, certain services sectors are no-go areas because of political sensitivities involved, namely cultural services [...]. Secondly, most of the commitments relate to Modes 2 and 3 of Service delivery”<sup>115</sup> with Mode 1 almost being excluded by the EU due to inadequate levels of consumer protection provided abroad<sup>116</sup>, and Mode 4 presenting the fewest commitments on the EU side because of the potential impact of liberalization of labour mobility on national immigration policies<sup>117</sup>. Normally, DCFTAs follow the liberalization model of the GATS, in which “market access or national treatment obligations apply only to the extent that specific commitments have been scheduled”<sup>118</sup>, i.e. positively listed. The exception to this trend is CETA: the FTA with Canada is influenced by the North American Free Trade Agreement (NAFTA) and adopts a negative listing. NAFTA also provides the differing structure of CETA: whereas EU DCFTAs present one chapter specifically covering trade in services and investment, CETA contains separate chapters on cross-border, supply of services, presence of natural persons, telecommunications and financial services. In terms of content EU DCFTAs present “extensive Mode 2 and 3 commitments in areas where the EU has strong offensive interests, including telecommunications, environmental, transport, construction, financial, retail, insurance, and professional services such as accounting and legal services”<sup>119</sup>. Mode 4 liberalization is more of an hybrid, depending on the contracting party: KOREU FTA, for instance, shows no commitments for independent professionals or contractual service suppliers, the EU-Indonesia and Colombia-Peru FTAs on the other hand contain provisions more ambitious than even those presented by the EU at the Doha Round. Finally, “Certain areas are excluded outright from the Services Chapters, such as government procurement (covered in a

<sup>114</sup> Definitions provided for in GATS Art. I:2

<sup>115</sup> B. A. M. Araujo, *The EU Deep Trade Agenda: Law and Policy, Services*, 2016, p. 86.

<sup>116</sup> R. J. Langhammer, *The EU Offer of Service Trade Liberalization in the Doha Round: Evidence of a Not-Yet-Perfect Customs Union*, in *Journal of Common Market Studies*, 2005, p. 6.

<sup>117</sup> B. Hoekman, A. Mattoo, A. Sapir, *The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?* in *Oxford Review of Economic Policy*, 2007, pp. 364-365.

<sup>118</sup> B. A. M. Araujo, *The EU Deep Trade Agenda: Law and Policy, Services*, 2016, p. 89.

<sup>119</sup> *Ibid.*

separate chapter), services supplied in the exercise of governmental authority, subsidies or grants and measures relating to movement of persons in general”<sup>120</sup>.

### 3.3.3 Intellectual Property Rights (IPRs)

The EU exports its own specifications and regulations only in cases where international standards are deemed insufficient for its own interests, e.g. when WTO negotiation rounds fail to reach a consensus, which is the case for intellectual property rights (IPRs). Under standard WTO law, IPRs are regulated through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In short, the TRIPS presents three main features: standards for property rights, an enforcement mechanism, and a dispute settlement body. Minimum standards are set in Part II of the Agreement, which provides that each party must implement and respect IP protection in 7 distinctive fields: copyright and related rights including computer programs and databases, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, undisclosed information including trade secrets and test data. In particular, the main elements of protection are the subject matter eligible for protection, the scope of rights to be conferred, permissible exceptions to those rights, and the minimum duration of protection<sup>121</sup>. The rest of the TRIPS deals with domestic procedural obligations and remedies for the enforcement of IPRs (Part III) and dispute prevention and settlement (Part V). EU DCFTAs are very aggressive in terms of IPRs. All of them contain one section on this area, each of which can subsequently be divided into three categories of provisions: those on civil proceedings, those on border measures and those on the liability of online service providers. The cases of KOREUFTA and EUSFTA also show some additional dynamism in the evolution of FTAs insofar as they contain provisions drawn from the failed Anti-Counterfeiting Trade Agreement (ACTA)<sup>122</sup>, and in the case of the Korean Agreement this is particularly interesting as that also contains provisions on criminal enforcement of IP rights, making it the only global FTA to address this area in detail, an area which is still unregulated under EU law<sup>123</sup>. “In those areas where existing international agreements are not perceived to go far enough (geographical indications and enforcement of IP rights), the EU has transposed significant parts of its own legislation into EU DCFTAs. IP is therefore one area where the EU certainly lives up to its reputation as an exporter of norms.”<sup>124</sup>

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<sup>120</sup> Ibid., p. 90.

<sup>121</sup> World Trade Organization, ‘Module 1: Introduction to the TRIPS Agreement’.

<sup>122</sup> ACTA’s failure can be summarized in *very broad* terms through the words of British MEP David Martin: “The intended benefits of this international agreement are far outweighed by the potential threats to civil liberties”.

<sup>123</sup> This has reflected negatively on the Commission, which has been accused of trying to bypass the ordinary legislative procedure by binding Member States through international agreements.

<sup>124</sup> B. A. M. Araujo, *The EU Deep Trade Agenda, Intellectual Property Rights*, 2016, p. 45.

### 3.3.4 Investment Law

Investment law has historically been more difficult to agree upon because of diverging views among FTA parties. So far, the Union has concluded two trade agreements containing provisions on investment: CETA and the EU-Singapore FTA (EUSFTA). Such low number is due to the fact that the EU has acquired exclusive competence in this field only in 2010<sup>125</sup>, which makes it relatively new area of practice for the Union's CCP. Globally, international laws regulating cross-border investments have seen an active evolution only in the last 30-40 years: until the 1980s, developing countries opposed themselves to agreements on this matter by arguing that provisions on investor protection were not balanced by those on investor responsibility<sup>126</sup>. Their attitude changed in the early 80s, partly due to the establishment of the Washington consensus and the neoliberal paradigm, and partly due to the 1980s debt crisis. The proliferation of international investment agreements (IIAs) prompted the creation of "model" treaties, that are templates which can be used as basis for the draft of each new treaty, with the US BIT (bilateral investment treaty) model being one of the most successful. "Thus far, the EU has decided against developing an EU Model BIT text, instead favouring a flexible approach to negotiating investment protection issues. The content of the investment chapters included in the EU DCFTAs varies depending on the identity of the contracting party and the political environment surrounding the negotiations."<sup>127</sup> Whilst new-generation investment agreements reach non-indifferent levels of complexity, it is possible to describe them as attempts to bring balance to the originally unfair treaties of the 80s and 90s, as proved by "the limiting of the scope of the chapter, the circumscription of substantive standards [...], the omission of problematic obligations typically included in IIAs (e.g. umbrella clauses), and the development of new procedural safeguards in the context of [investor-state dispute settlement]"<sup>128</sup>. In absence of an EU BIT Model, DCFTAs have mainly adopted the wording of the US template<sup>129</sup>, albeit choosing a different route with regards to "the scope of application of the investment protection chapters and the procedural aspects, which have been reformed significantly in light of the colossal opposition to ISDS within the EU"<sup>130</sup>.

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<sup>125</sup> CJEU, Opinion 2/15 on the EU-Singapore FTA.

<sup>126</sup> P. Muchlinski, 2013, *The Role of Preferential Trade and Investment Agreements in International Investment Law: From Unforeseen Historical Developments to an Uncertain Future*, in R. Hofmann, S. Schill and C.J. Tams, *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Baden-Baden: Nomos Verlagsgesellschaft), p. 211 – 227.

<sup>127</sup> B. A. M. Araujo, *The EU Deep Trade Agenda*, 2016, Investment, p. 28-29.

<sup>128</sup> *Ibid.*, p. 29.

<sup>129</sup> Specifically, this refers to the 2012 US Model Bilateral Investment Treaty, available at: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>130</sup> B. A. M. Araujo, *The EU Deep Trade Agenda*, Investment, 2016, p. 29.



### 3.3.5 Competition Law

In the context of competition regulation, “linking trade and competition is typically presented as one of the most striking examples of [the EU’s] deep trade agenda”<sup>131</sup>. The Union has approached external anti-trust laws in the same manner as the internal ones, by allowing private economic agents into regulated markets and thus maximizing the benefits on economic efficiency on one hand and consumer welfare on the other. Admittedly, FTAs provisions here present some differences: being phrased in more board terms, they provide “no legal obligations on the parties to prohibit anti-competitive practices that impede market regulation”<sup>132</sup>, and while principles such as non-discrimination and transparency are recognized, there are no guidelines on how to apply them<sup>133</sup>. The internal opposition to the creation of an investor-state settlement body also weakens the strength of these chapters, rendering them deficient of a dispute settlement mechanism and emphasizing their state of quasi-soft law.

### 3.4 Likelihood of Deal

Few will argue that a DCFTA is not the most likely solution for post-Brexit bilateral relations: the British White Paper on Brexit outcomes explicitly states in its Principle 8 that “The Government will prioritize securing the freest and most frictionless trade possible in all goods and services between the UK and the EU. We will not be seeking membership of the Single Market, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement.”<sup>134</sup> The high value placed on an FTA is explained by the fact that a treaty of this kind essentially allows the UK to fully retain sovereignty in its immigration policies. It is thus not a matter of how likely this treaty is, as much as it is a matter of how *deep* and how *comprehensive* the agreement would be. *In primis*, and as already presented<sup>135</sup>, an agreement that is by all intents and purposes deep and comprehensive is highly unlikely to come within the Union’s exclusive competence under the Common Commercial Policy (CCP). Therefore, the involvement of all Member States in the negotiation of a mixed agreement is sure to extend the length of the negotiations considerably on one hand, and to make the content of sector-specific chapters quite unpredictable on the other: indeed, the complexities stemming from the interplay of political interests and economic lobbying at such high levels and with such high number of players have the potential to turn this agreement into a ‘superficial’ treaty

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<sup>131</sup> B. A. M. Araujo, *The EU Deep Trade Agenda, Competition*, 2016, p. 26.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> HM Government, *The United Kingdom’s Exit from and new partnership with the European Union*, 2017, p. 35.

<sup>135</sup> See 3.1.

that could not in practice be called deep or comprehensive; however, where political alignment between the two executives were to happen, then on the basis of past (economic) interactions between the EU and the UK, the EU-UK DCFTA could become their most advanced international economic agreement yet. Even then however, while tariff barriers to trade in goods would be sorted out easily, “Some kind of convergence/recognition system would be indispensable if the DCFTA is to be meaningful as regards trade in service”. As the figure below shows, in 2017 the UK exported to the EU £107.8 billion in services and imported £81 bn:

UK service exports to the EU, 2017		
	£ billions	% of total
Other business services	31.0	28.2%
Financial	25.9	23.6%
Travel	19.1	17.4%
Telecommunications, computer and information services	9.1	8.3%
Transportation	7.2	6.5%
Insurance & Pension	6.9	6.3%
Intellectual Property	6.0	5.4%
Construction	1.1	1.0%
Personal, cultural and recreational	1.0	0.9%
Government	0.5	0.5%
Source: ONS, Pink Book		

UK service imports from the EU, 2017		
	£ billions	% of total
Travel	35.0	42.8%
Other business services	15.4	18.9%
Transportation	11.6	14.1%
Telecommunications, computer and information services	6.4	7.8%
Financial	5.2	6.4%
Intellectual Property	3.1	3.8%
Government	1.8	2.2%
Construction	1.2	1.4%
Insurance & Pension	1.0	1.2%
Personal, cultural and recreational	0.3	0.4%
Source: ONS, Pink Book		

(Source: House of Commons Library, 2019<sup>136</sup>)

This could represent one of the biggest complications, if not the very fulcrum of the negotiations: even CETA, a highly advanced FTA of the Union, covers very little in terms of services, the main reason being the diverging Canadian and European regulations of service products and markets. The British government may advocate for an ‘ambitious and comprehensive’ FTA that secures ‘the freest and most frictionless trade possible’ but beyond a certain point this is unachievable without deeper regulatory convergence and harmonization. As some scholars have observed, “It is not clear, however, how the UK can maintain the advantages of the internal free movement of goods and services, including the uniform regulations which ‘underpin the provision and high standards of goods and services’, while rejecting all existing models of association with the EU. The single market is based on common regulation and standards (effected through unification, harmonization or mutual recognition of equivalence), and single supervision by the EU regulatory authorities to make the abolition of internal barriers both possible and effective. By being out of the Single Market, the UK would either face barriers to its non-conforming exports or have to accept those

<sup>136</sup> House of Commons Library, Statistics on UK-EU Trade, 2019.

standards with little to say on their adoption and updating, as is the case for the EEA members and Switzerland”<sup>137</sup>. The White Paper also mentions “a new customs agreement”, which in the grander picture is also a contradiction: no mistake can be made here, as any customs agreement that is not a customs union does not entail frictionless trade, and a customs union proper would not allow the UK to conduct its own independent trade policy, which was one the object of many Brexit slogans and is today one of the British red lines. To put it in simpler terms: based on the current political demands of the parties, the (DC)FTA is without doubt the most likely deal, however whether the agreement would be satisfactory in content and scope is anything but guaranteed, and even in the best case scenario, i.e. the one where the DCFTA is a highly advanced agreement, it still comes, from an economic standpoint, *extremely* short when compared to the EEA solution, and this may in the end lead either British politicians or their electorate to believe that this may not, after all, be the best solution.

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<sup>137</sup> G. Sacerdoti, The Prospects: The UK Trade Regime with the EU and the World, p.75, in F. Fabbrini, The Law & Politics of Brexit, 2017.

## 4. A EU-UK Customs Union

### 4.1 Introduction

In the Balassa stages of economic integration, an FTA (of which DCFTAs constitute essentially a more advanced version) is characterized by “the abolition of customs duties and quantitative restrictions on trade in goods between member states; lack of ‘positive’ integration elements, no creation of common institutions or regulations”<sup>138</sup>, in short: the lowest level of economic integration. Customs unions (CU) follow as the next stage of integration, being presented as “the FTA [model] enhanced by a common customs tariff which is usually accompanied the unification of trade policy of the group towards third countries; lack of elements of ‘positive’ integration”<sup>139</sup>. Because Balassa gave such commentary in 1961, the text does not mention trade in services, whose market has grown exponentially since the year of publication. Thus, a more up to date definition of CUs reads “a common market attains the free movement of products, services and factors of production accompanied by necessary positive integration for the CM to function properly”<sup>140</sup>.

In the history of the EU (and all its previous forms and configurations) only one CU can be used to foresee what a UK-EU customs union would entail for the two parties. This is the EU-Turkey CU, established by the 1995 decision of the EC-Turkey Association Council<sup>141</sup>, in the framework of negotiating Turkey’s accession to the EU back in the 90s. After presenting some legal considerations, the Turkish model will be shortly presented, so as to show which dangers are hid in the CU solution for post-Brexit UK.

### 4.2 Legal Considerations

A potential customs union would be created through an ordinary treaty, which means that the same legal considerations would apply as those found in the FTA case<sup>142</sup>. Thus, were the CU to be limited to customs and tariff arrangements, then it could be negotiated by the EU alone without the involvement of its Member States. Economically, it would by no means be a favourable deal, as it would lose most of the convergence and harmonization present in current EU-UK, unless

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<sup>138</sup> M. Śliwińska, Integration Character of the CETA Agreement, in *Acta Universitatis Lodziensis: Folia Economica*, 2018, p. 3.

<sup>139</sup> *Ibid.*

<sup>140</sup> J. Pelkmans, *European Integration: Methods and Economic Analysis*, New York, 2006, II ed., p.8.

<sup>141</sup> Decision No 1/95 Of The EC-TURKEY Association Council of December 22<sup>nd</sup> 1995 on implementing the final phase of the Customs Union (96/142/EC), text available at: [https://www.avrupa.info.tr/sites/default/files/2016-09/Custom\\_Union\\_des\\_ENG\\_0.pdf](https://www.avrupa.info.tr/sites/default/files/2016-09/Custom_Union_des_ENG_0.pdf).

<sup>142</sup> See 3.2.

some additional factors are added. This addition would not be feasible. It is clear that the GATT/WTO legal framework does not allow partial or sectoral customs unions: GATT article XXIV(8) permits the creation of ‘a single customs territory’ covering ‘substantially all trade’, where ‘substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union’, thus creating the obligation of one single external customs tariff and policy. “Any attempt to [create a partial or sectoral union] would open up space for claims, by any and all WTO members, against both the EU and the UK, for MFN treatment.”<sup>143</sup>

#### 4.3 The EU-Turkey Customs Union

It is almost ironic that an agreement which was originally created to advance Turkey towards EU membership is today used as the reference model for a potential EU-UK customs union created in the context of the British exit from said union. Nonetheless, the CU option is currently being debated as one of the more likely deals, being advocated by the opposition leader Corbyn<sup>144</sup> whilst receiving mixed opinions from the academic community. In its current (obsolete) setting, several design flaws can be observed in the mentioned customs union. Firstly, its scope is severely limited: in achieving customs-free trade, it “excludes services, right of establishment, public procurement and agriculture (except processed agricultural products). Its primary function is to remove tariffs on goods, but it does little to reduce or abolish non-tariff barriers (NTBs)”<sup>145</sup>, which are left almost untouched. Turkey’s influence within the treaty is also gravely reduced: Ankara effectively accepts and adopts the EU’s Common External Tariff and it does not have a seat at EU’s FTAs negotiation tables, meaning that it also has to accept the results of the EU’s Common Commercial Policy and respect whichever new regulations the EU creates through said agreements. “All these decisions are made by the EU with little or no consideration of Turkey’s concerns and strategic interests.”<sup>146</sup> There is, furthermore, a so-called ‘external asymmetry’ between the two entities: any nation that stipulates a free-trade agreement with the European Union has no incentive to do the same with Turkey, as it automatically gains access to Turkish markets through the CU that the EU has with Turkey. This does not, however, work in both directions as Turkey does not have

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<sup>143</sup> European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, Future trade relations between the EU and the UK: options after Brexit, Study requested by the INTA committee, 2018, p. 20.

<sup>144</sup> J. Brunsden, Corbyn’s customs union plan – what it might mean, in Financial Times, 2018.

<sup>145</sup> F. Hakura, EU-Turkey Customs Union: Prospects for Modernization and Lessons for Brexit, in Chatham House Briefing, 2018, p. 3.

<sup>146</sup> Ibid.

access to the markets of those nations that conclude FTAs with the EU, resulting in net losses for Turkey:

<b>Long-term welfare effects after the TTIP</b> <b>in %</b>					
EU average	Germany	USA	Turkey	Non-TTIP	Global average
3.90	3.50	4.90	– 1.50	– 1.00	1.60

Source: Felbermayr *et al.* (2015).

(Source: E. Yalcin, 2016<sup>147</sup>)

Regulatory exclusions and challenges still remain between the EU and Turkey as regulations are often not covered by the CU. For instance, national authorities within European territory (namely Greek and Bulgarian ones) are still entitled to inspect Turkish goods if these follow standards not accepted by the EU, as is the case of Turkish conformity assessments. “While the free movement of goods is a cornerstone of the CU, the transport underpinning that movement is not. Consequently, the 60,000 Turkish-registered goods vehicles that enter the EU each year at the Greek and Bulgarian borders face administrative hurdles.”<sup>148</sup> This has resulted in some cases in queues of 17 kilometers before borders, whose crossing has taken more than 30 hours.<sup>149</sup> Finally, Turkish business presence in the EU is hindered by strict visa policies, which also affect Turkish haulers who regularly cross the border. It goes without saying that Turkey is not satisfied with this treaty, but the Commission clearly serves the interest of the Union and its Member States; as it finds itself in a better position, it is difficult to see a future where concessions are made at the expense of EU countries.

#### 4.4 The EU-UK Customs Union

What can the UK learn from the Turkish customs union? “First, the Turkish experience has demonstrated how the EU actively guards its institutional and legislative sovereignty, as well as its decision-making autonomy. Turkey has had to endure asymmetries regarding the non-application of some EU FTAs. The UK could face similar difficulties.”<sup>150</sup> The United Kingdom would be nothing more than an ‘associated state’, sitting on a secondary plain with respect to proper EU Member States, and it would be difficult to change such status as any form of special treatment towards the

<sup>147</sup> E. Yalcin, EU-Turkish Customs Union: A Reasonable Roadmap, in CESifo Forum, 2016, p. 3.

<sup>148</sup> Ibid., p. 4.

<sup>149</sup> M. Srivastava & A. Barker, Turkey border gridlock hints at pain to come to Brexit Bremain, in Financial Times, 2017.

<sup>150</sup> F. Hakura, EU-Turkey Customs Union: Prospects for Modernization and Lessons for Brexit, in Chatham House Briefing, 2018, p. 13.

UK would provide Turkey with solid bases for demanding similar concessions. Furthermore, and perhaps more importantly, not only are customs unions limited to trade in goods, thus excluding the ever-more important sector of services, but “the benefits of a CU alone in resolving border challenges are sometimes overstated.”<sup>151</sup> It is true that the union would resolve the need of convoluted rules of origin, however regulatory barriers, and therefore checks and inspections at the border would remain, slowing down the crossing of a border across which trade would not be able to be called ‘frictionless’ by any means. On a legal dimension the Turkish case shows how the deeply rooted desire of rejecting the jurisdiction of the ECJ may be a mistake: it has been shown in *Istanbul Lojistik Ltd v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság (2017)*<sup>152</sup> how the teleological interpretation of the ECJ has allowed Turkey to be treated essentially as an EU Member State for the purpose of trade in goods, thus denying Hungary the right to levy taxes against the former. Here it should be noted that while positive in outcome, these kinds of intervention on behalf of the ECJ are fairly expensive and time-consuming, and should not be relied upon as guarantees of protection from obstacles to trade such as the ones in the mentioned case. Worth of note is also the potential slow-down in reforms due to politics and bureaucracy, which could jeopardize the keeping up to date of the treaty, eventually leading to the same backwardness and shortcomings of the Turkish CU.

#### 4.5 Likelihood of the Deal

A customs union is preferred by some because it imposes very few obligations on the affected parties. Accordingly, this come with very little advantages, which in short are the cancellation of customs duties and tariffs on trade in goods, and the consequent abolition of rules of origin within the CU. In this outcome the UK would finally be able to retain sovereignty in the domain of immigration and its trade in goods with the EU would be sorted out, with the exception of regular controls at the border, which would slow down the overall speed of circulation of goods (increasing costs thereof). Additionally, if the UK were to reject the jurisdiction of the ECJ it would be vulnerable to all kinds of restriction on road haulage, a legal tool which could be politicized very easily. It is true that the UK would be able to conclude its own FTAs with third countries: “Being in a customs union with the EU does not prevent the UK from striking its own trade deals – including the area of services, something of a new frontier for international trade agreements. But it becomes much more complicated. Most importantly, the UK could not agree anything that contradicts the EU’s own negotiations with third countries, as this would threaten the customs union’s principle of

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<sup>151</sup> Ibid., p. 14.

<sup>152</sup> For a comprehensive overview of the case see Court of Justice of the European Union, Press Release no 107/17, 2017.

common external tariff.”<sup>153</sup> All of this would happen without the UK having any say in EU’s negotiations of new agreements. As already presented, partial or sectoral customs unions are not allowed under WTO law, so any substantial modification of the treaty model is also ruled out. This is particularly relevant because similarly to the European Union, post-Brexit UK would not have a static trade policy. “While a customs union is considered to be a more advanced form of economic integration than a free-trade area for its potential to create internal free circulation and external institute capacity, the form itself is incredibly inflexible for a longer term relationship between major trading partners, at least when they do not wish to represent a common negotiating presence”<sup>154</sup>. Considering these elements, the customs union option is as likely to be chosen as it is unlikely to be a final solution to post-Brexit English issues. It does not address the Irish question and it does not allow the English economy to flourish in frictionless trade, it indirectly binds the UK’s capacity to enter into FTAs with third parties setting in stone limits to London’s ability to strike new deals, limits over which the UK has no say. The likelihood of this deal resides more in the political need for a resolution of post-referendum chaos, than in the economic need for a proper solution to post-Brexit international trade.

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<sup>153</sup> J. Brunsden, Corbyn’s customs union plan – what it might mean, in Financial Times, 2018.

<sup>154</sup> J. H. Mathis, Happy Golden Anniversary EU-Turkey Customs Union, in Legal Issues of Economic Integration, 2013, p. 4.



## 5. No Deal: Trade Under WTO Law

### 5.1 Introduction

On June 7<sup>th</sup> 2019 Theresa May's resignation as Prime Minister will be effective<sup>155</sup>: after having failed to lead the United Kingdom through an orderly Brexit, she has given in to internal pressure and from then on the negotiations will be carried over by a new Prime Minister. This comes in a time when the EU has almost extinguished its patience, with several deadlines having been met and extended, several votes within the House of Commons having (re-)sent Westminster back to the drawing board, and the end of the Juncker Commission's mandate having been reached. The event of a no-deal exit has never been closer. After having considered all the possible options in the previous chapters, this last one will analyze trade under WTO rules.

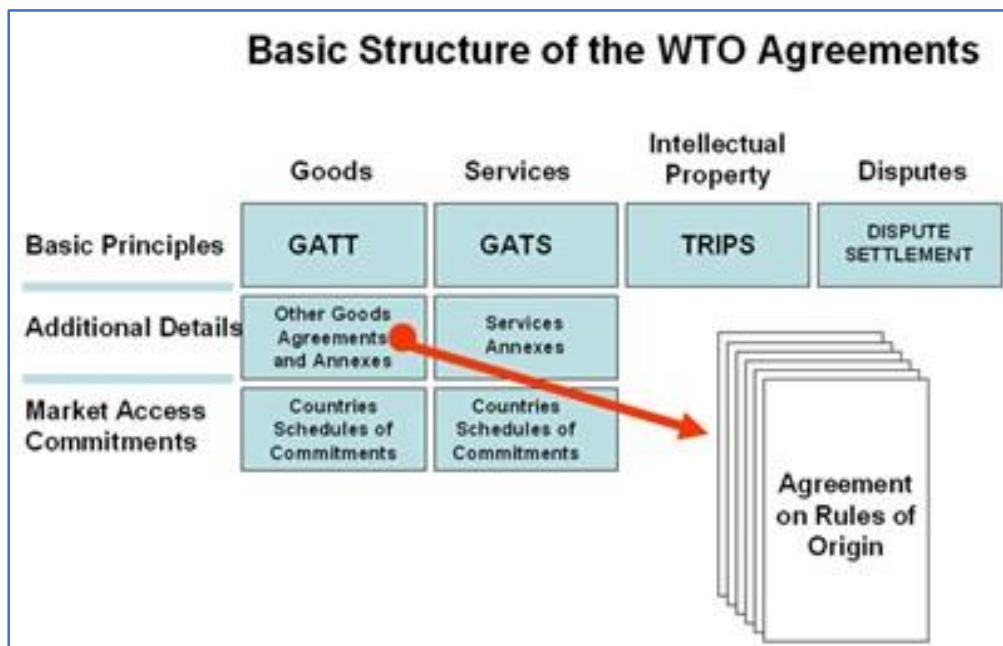
### 5.2 WTO Law and its Immediate Effects

Both the UK and the EU (along with all its Member States) are members of the World Trade Organization, and in the absence of an FTA or an international agreement, they would be bound by the rules set up by its instruments, namely the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The governance of global trade is articulated through a basic set of rules based on non-discrimination, from which two fundamental principles stem. The very first article of the GATT and the second article of the GATS lay down the principle of 'General Most-Favoured Nation', stating that with regards to tariffs and duties on imports or exports each contracting party shall treat any other party *as well as* it treats its most-favoured nation. The third article of the GATT and article XVII of the GATS codify the principle of National Treatment<sup>156</sup>, according to which any product, right, service or service supplier must be treated like its domestic equivalent. These translate, *in absentia* of a commercial agreement recognized by the WTO, in the obligation to impose the same regulatory standards on all WTO Member States, both internally and externally.

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<sup>155</sup> G. Parker, J. Pickard & S. Payne, Theresa May resigns after Brexit Failure, in Financial Times, 2019.

<sup>156</sup> In full: National treatment on Internal Taxation and Regulation.



(Source: R. Oulds, 2017<sup>157</sup>)

Thus, every nation chooses its own set of tariffs and quotas to impose on all other WTO parties, and these are commonly known as that nation's WTO schedules. In the English case these rules alone would have two immediate consequences: first, any type of tariff rate that is currently set (which constitute a non-indifferent source of wealth for the nation and provide economic stability to its markets) would be temporarily changed (possibly to zero) for as much time as London needs to decide its new schedules. The unilateral trade liberalization scenario mentioned in the first chapter of this work<sup>158</sup> and analyzed by Van Reenen consists a post-Brexit UK setting its schedules to zero in a radical change of the British economy. The second immediate consequence would be that the UK would be subject to the schedules of every other nation it trades with, and given that roughly half of its imports and exports are with the EU (see fig. below), it would be heavily affected by the latter's trade regulations.

<sup>157</sup> R. Oulds, Another Nail in the Coffin of the Single Market, in The Bruges Group, 2017.

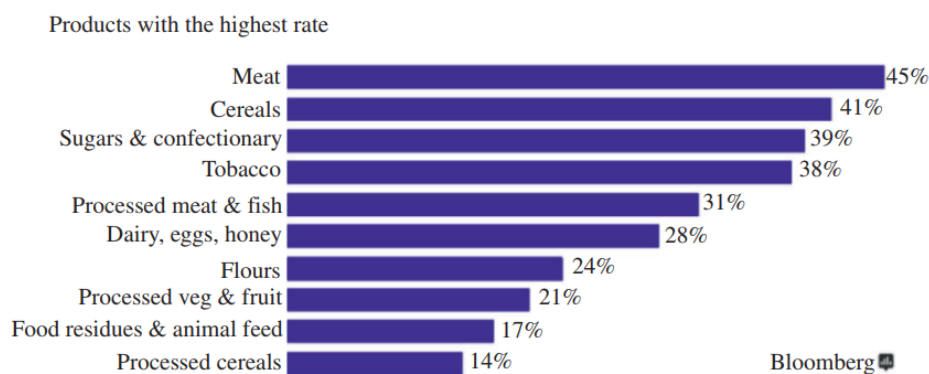
<sup>158</sup> See 1.2.



**FIGURE 5** The UK's top 10 trading partners Jan–Nov 2016

(Source: Chang, 2017<sup>159</sup>)

Furthermore, all of the treaties to which the UK is a party to, and which have been concluded by the EU acting alone (for instance through the Common Commercial Policy), will cease to be effective for the English side, leaving the UK subject to all the former contracting parties' WTO schedules. Such effect might even extend to EU mixed agreements to which the UK is a contracting party, although this will change depending on a case by case basis. The more noteworthy tariffs to be met in a no deal scenario are illustrated by the following figure:



**FIGURE 6** UK would face EU's WTO tariffs rates in case of no deal on trade

Note: Average tariffs for the product groups

Source: Mish Talk (2017) and Economic and Social Research Institute. [Colour figure can be viewed at wileyonline library.com]

(Source: *Ibid.*, p.14)

<sup>159</sup> W. W. Chang, Brexit and Its Economic Consequences, in *The World Economy*, 2017, p. 13.

“Under a hard Brexit ‘WTO rules’ scenario, without mutual recognition agreements for product standards, it is unlikely that UK products could enter the EU without further checks at the border. Over time, if there is divergence between UK and EU standards, UK businesses would need to produce two different product lines – one for the UK and one for the EU – which would increase costs and reduce competitiveness. The impacts of non-tariff barriers would be larger for the service sector, which makes up 80% of the UK economy. Access to the single EU aviation market requires headquarters and majority shareholdings to be located within the EU so that it can have regulatory oversight on safety. UK service exporters would also suffer from the loss of ‘passporting’ rights for financial services, as well as reduced access for other service providers like legal and accountancy services.”<sup>160</sup> While the regulation of trade in goods is mostly limited to tariffs (as in, a maximum level of tariffs per good), that of agricultural goods, which make up a particularly sensitive area for the EU and its Common Agricultural Policy (CAP), extends to “tariff rate quotas, limits on export subsidies, or domestic support. In relation to trade in services, commitments consist of market access and national treatment commitments on a sector-by-sector basis and according to the four GATS modes of supply [...] With regard to the EU’s services schedules, commitments may apply to all Member States or be differentiated between them. These are referred to as quantifiable rights and obligations, and are likely to become the most challenging matter to settle from a WTO law perspective.”<sup>161</sup>

### 5.3 Post-Brexit British Rights and Obligations

There exist two kinds of rights and obligations which would have to be sorted out after Brexit: *erga omnes partes* rights and *quantifiable* rights. The former include obligations such as those described above, namely the most favoured nation (MFN) and national treatment standards (NTS). “Arguably, the rights and obligations that apply on an *erga omnes partes* basis – such as those contained under the WTO Marrakesh Agreement, the GATT (except for Art. II: Schedules of Concessions), the General Agreement on Trade in Services (GATS) (except for Art. XX: Schedules of Specific Commitments), the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the Dispute Settlement Understanding (DSU) – would not be problematic to transpose to the UK after Brexit. If so, these rights and obligations will be fully applicable to the UK as from the date the withdrawal from the EU takes effect.”<sup>162</sup> *Quantifiable* rights on the other hand might very well constitute the most complex aspect of transitioning to trade under WTO rules: English

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<sup>160</sup> S. Dhingra, Factsheet: no deal – the WTO option, in *The UK in a Changing Europe*, 2017.

<sup>161</sup> F. Baetens, “No Deal Is Better Than a Bad Deal? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net, in *Common Market Law Review*, 2018, p. 8-9.

<sup>162</sup> *Ibid.*, p. 7.

quantifiable rights are entangled with those of the EU, to the point where they are basically the same set of obligations. Because of this legal relationship WTO Director-General Azevêdo has stated that once it leaves the internal market the UK is not going to have “defined terms in the WTO for its trade in goods and services [since it] only had these commitments as an EU member. Key aspects of the EU’s terms of trade could not simply be cut and pasted for the UK. Therefore, important elements would need to be negotiated.”<sup>163</sup> The challenge would reside in the fact that each trade measure would have to be negotiated, and the list of such measures includes, for example, maximum tariff levels for goods; tariff-rate quotas, limit on export subsidies and domestic subsidies for agricultural goods; market access and national treatment for services (the latter being based on the 4 modes of service supply<sup>164</sup>). The renegotiation would have to be conducted by bearing in mind that commitments “have to be granted on a non-discriminatory basis to all WTO members in compliance with the MFN and national treatment provisions. Other rules that will govern the trade relationship between the UK and all WTO members (including the EU and its Member States) include limitations on tariffs, prohibition on quantitative restrictions, anti-dumping, subsidies and countervailing measures, and safeguards”<sup>165</sup>.

#### 5.4 New Schedules: Renegotiation vs Rectification

Whereas most of the general attention seems to be directed towards EU-UK negotiations, it is also worth remembering that in a no-deal scenario the UK would find itself in an entirely different round of negotiations: that with the WTO and its Member States. The question is how, or rather through which procedure, would the UK be giving effect to its new schedules. The options are two: renegotiation or rectification. A rectification would be based on the *Procedures for Modifications and Rectification of Schedules of Tariff Concessions* and on the *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, respectively for goods and services. The renegotiation procedure could be the more tempting option as it “can proceed over the objections of relevant WTO members”<sup>166</sup>, although any affected WTO Member could in theory retaliate with its own new set of schedules variation. Thus, while easier in technical terms, the renegotiation route is expected to consist in lengthy negotiations and potentially even an exchange of retaliatory measures, where an accord is not found between on or more WTO members on one side and the UK on the other. The result would be that while *erga omnes partes* obligations

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<sup>163</sup> Azevêdo’s address to the World Trade Symposium, London, 2016.

<sup>164</sup> Presented in 3.2.2.

<sup>165</sup> F. Baetens, “No Deal Is Better Than a Bad Deal? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net, in *Common Market Law Review*, 2018, p. 9.

<sup>166</sup> Bar Council Brexit Working Group, *The Brexit papers: WTO*, 3rd ed., 2017, p. 5.

will not create any bilateral issue any will in all likelihood be given effect through a rectification which applies the same rules to everyone, specific commitments and quantifiable obligations will not find a solution in this procedure. Thus, “The schedules of concessions and commitments on market access, as well as the list of exemption from the MFN treatment obligation will have to be reset and resubmitted. The new schedules and lists will have to be accepted by consensus by the other WTO parties, who could also decide to veto the UK’s proposals. What is generally expected is that certain tariff commitments will be transposed from the EU Schedule into the UK’s new schedule through the rectification process but that complications might arise where the UK’s rights correspond to (part of) a right or obligation, determined on a quantified basis, which is currently set out in the EU’s schedules.”<sup>167</sup> Some particular measures, such as tariff-import quotas (which are shared between the EU, the UK and third countries) would have to be redistributed between the EU and the UK in what is expected to be yet another unsurprisingly long negotiation period.

### 5.5 Likelihood and Main Characteristics of the No-Deal Scenario

With the EEA option being ruled out on the basis of political demands and the FTA option receiving little attention because of its unlikelihood to be deep and comprehensive enough, the Brexit deal looks to be going to concertize itself in either a customs union or in a no-deal at all. It remains to be seen who will be the new leader of the Conservative party and what kind of strategy he/she will pursue, however based on how long the negotiations have been protracted and on the political outset of the EU itself, the no-deal scenario appears to be slightly more likely than the CU option. As explained in this chapter, a no deal would have the UK shift its focus from negotiations with the EU to the negotiations with the WTO, changing the number of parties involved from 30 to 163. It goes without saying that in this scenario immigration would be 100% under the control of the UK, however this would hardly constitute in a victory if the obstacles to frictionless trade under WTO rules are considered. The UK would have to choose its new schedules and would have to do so by bearing in mind that the same set of regulations would be applied to all 163 WTO Members. There is no doubt that even where the UK finds little to no opposition to its new rates, negotiations will take a painfully long period of time. Once new schedules are found, their effect could be achieved either through a rectification or a renegotiation of the WTO treaties: *erga omnes partes* obligations are likely to be empowered through a rectification as this is a simpler procedure and those obligations will not meet any substantial opposition, because of their universal nature. Specific commitments and *quantifiable* rights will need to go through close examination and require

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<sup>167</sup> F. Baetens, “No Deal Is Better Than a Bad Deal? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net, in Common Market Law Review, 2018, p. 15.

consensus of all WTO Members in what will likely be a lengthy process. Though not examined here, EU-wide value chains, agricultural policies, the use of the WTO Dispute Settlement Mechanism as opposed to the ECJ and the nature of mixed agreements will also require new dispositions and will be added to the list of “Global Britain” ’s challenges. Finally, the Irish border would surely see the re-creation of border checks. In short “the WTO fall-back option falls far short of providing an adequate safety net, even for trade matters”<sup>168</sup>.

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<sup>168</sup> Ibid., p. 39.

## 6. Conclusion: Summary and What Lies Ahead

Three possible Brexit deals have been considered: the joining of the European Economic Area, the creation of a Deep and Comprehensive Free Trade Agreement, and the creation of a EU-UK customs union. Lastly, in the event where no accord is found, a brief presentation of the most immediate characteristics of the transition to and of trade under WTO rules has been provided. This concluding chapter will first present a summary of these 4 scenarios, and will then move on to some speculation as to what the future holds for the UK, the EU and international trade related to them.

### 6.1 Summary of the Options

The order of presentation has followed that of a decreasing degree of economic integration, starting with the EEA option, followed by the FTA and CU options and finally the no-deal scenario.

The EEA has presented itself as the most economically desirable scenario for both parties: it entails, for the UK, remaining in the Single Market but giving up sovereignty in immigration, detaching from the EU legal order and the ECJ jurisdiction but accepting that of the EFTA Court and indirectly some of the ECJ's powers, entering the institutional architecture of the European Free Trade Association (and potentially benefiting from its FTA network) giving up the position of rule-maker but also possibly refusing that of rule-taker through veto powers. Economic forecasts show that the EEA deal is the only one that does not result in substantial damages to the English economy, both in the short term and long term (though long term forecasts have been criticized on the basis that too many variables are at play and consequently may not be reliable enough). By contrast, political positions forecast that the hard lines on immigration sovereignty first and legal autonomy second, will not be renounced to, making this solution highly unlikely to be chosen. Notably, the EEA deal is the only one that directly solves the Irish question.

The FTA option would see the two sides negotiate a commercial agreement which, according to British official papers, would aim at achieving frictionless trade while maintaining English presence in the internal market. Here perhaps the most over-looked aspect would be that the deal is in all likelihood going to be mixed in nature. Thus, before we can even begin to judge whether it is beneficial to either side, long negotiation between the EU and the UK, and the UK and each EU Member State will have to take place. This will occur in a political climate where European populism is perhaps at its peak and states seem to be more and more oriented towards national interests rather than multilateral cooperation. In terms of content of the deal itself, while trade in goods would be easily sorted out, trade in services (one of the most important sectors of the British economy) would hardly be settled, as any successful form of coordination in the regulation



of cross-border service supply would require levels of economic integration that the UK downright rejects, mainly because of its stance on immigration control. Thus, intellectual property rights, competition law and investment law are all at risk of not being included, the latter particularly so as the EU is deeply opposed to investor-state dispute settlement mechanisms, and a lack thereof would render any related provision practically soft law. In short, the FTA option may be a viable solution but it is unlikely to cover enough sectors to result in a deep or comprehensive agreement, therefore requiring further accords in the future. The Irish question also remains unsettled in the FTA deal.

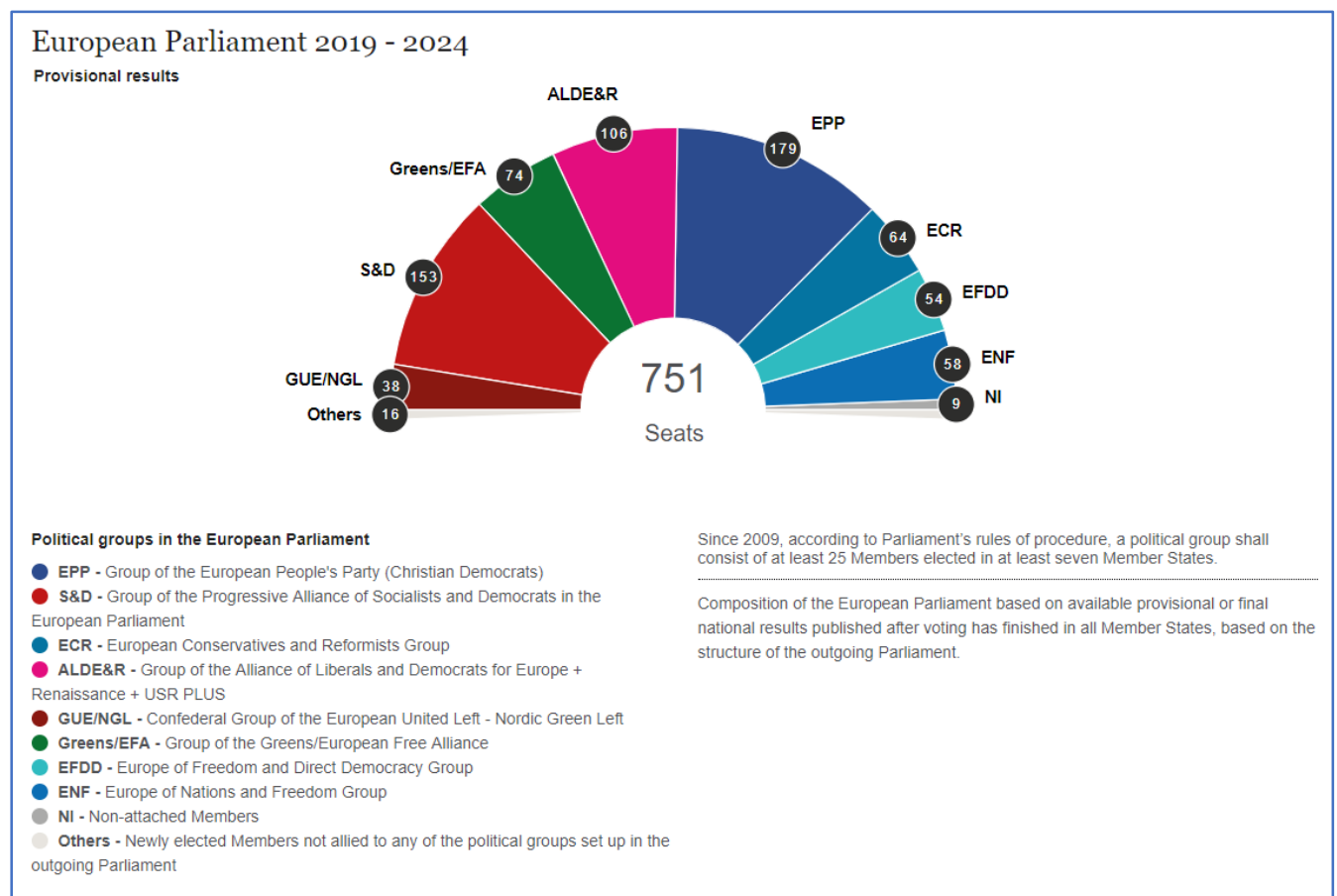
The customs union plan has only recently received attention, after general consensus has agreed on the difficulties revolving around the EEA and FTA options. A CU would create a customs-free internal trade area. Much like the FTA deal, a CU would be limited to trade in goods, with the exception that a modification (e.g. the addition of rules for trade in services) of the CU model is not allowed under WTO law. A CU would give the UK the status of ‘associated state’, putting it on a secondary level with respect to EU Member States. Furthermore, it would bind the UK to all standards and regulations that the EU accords with third parties through FTAs, and would do so without letting the UK have a say in how these FTAs are concluded. Breaking these rules would go against the principle of common external tariff of the CU, making the UK liable for prosecution in the WTO Settlement Dispute Mechanism. Additionally, and similarly to the case of Turkey, any third party that gains access to the EU’s market through any type of deal, would also gain access to the British market through the customs union, without the latter having reciprocal access to the formers’. Checks at customs and borders would remain (though reduced in magnitude), they would slow down the circulation of goods (impeding frictionless trade), and the possibility of setting restrictions on road haulage would provide the affected countries with economic tools that could very easily be politicized. In addition to the many sectors that would be regulated through WTO rules, the CU option does not provide any detail as far as the Irish question is concerned and subsequent negotiations specific to this matter would be required.

Trade under WTO will demand painfully long periods of negotiation. The UK would need to set its own WTO Schedules, and would have to do so by bearing in mind that all of them apply indiscriminately to all WTO Member States. The UK would accordingly face the schedules of all other states it trades with, particularly those of the EU, with whom it conducts half of its international trade, and will continue to do so due to the model of trade gravity. *Erga omnes partes* obligations would not constitute an issue in the negotiations as they are the same with every nation, so the UK would transpose them from the current schedules bundles and give them effect through the rectification procedure. *Quantifiable rights* on the other hand would need to be renegotiated in

yet another lengthy process. Immigration sovereignty would be retained and the Irish question would witness the establishment of border checks (i.e. the worst case possible). The likelihood of this scenario is high: unless the new tory leadership manages to find a satisfactory deal with its European counterpart (which is also to be re-appointed), the deadline will expire and the two sides will be on their own. This scenario entails the biggest damages to British economy, which will start to get back on track only after it has sorted out its schedules and can start concluding new trade deals with nations around the world. The wave of populism that has caught Europe will likely render multilateral cooperation such as the one needed in this scenario particularly difficult.

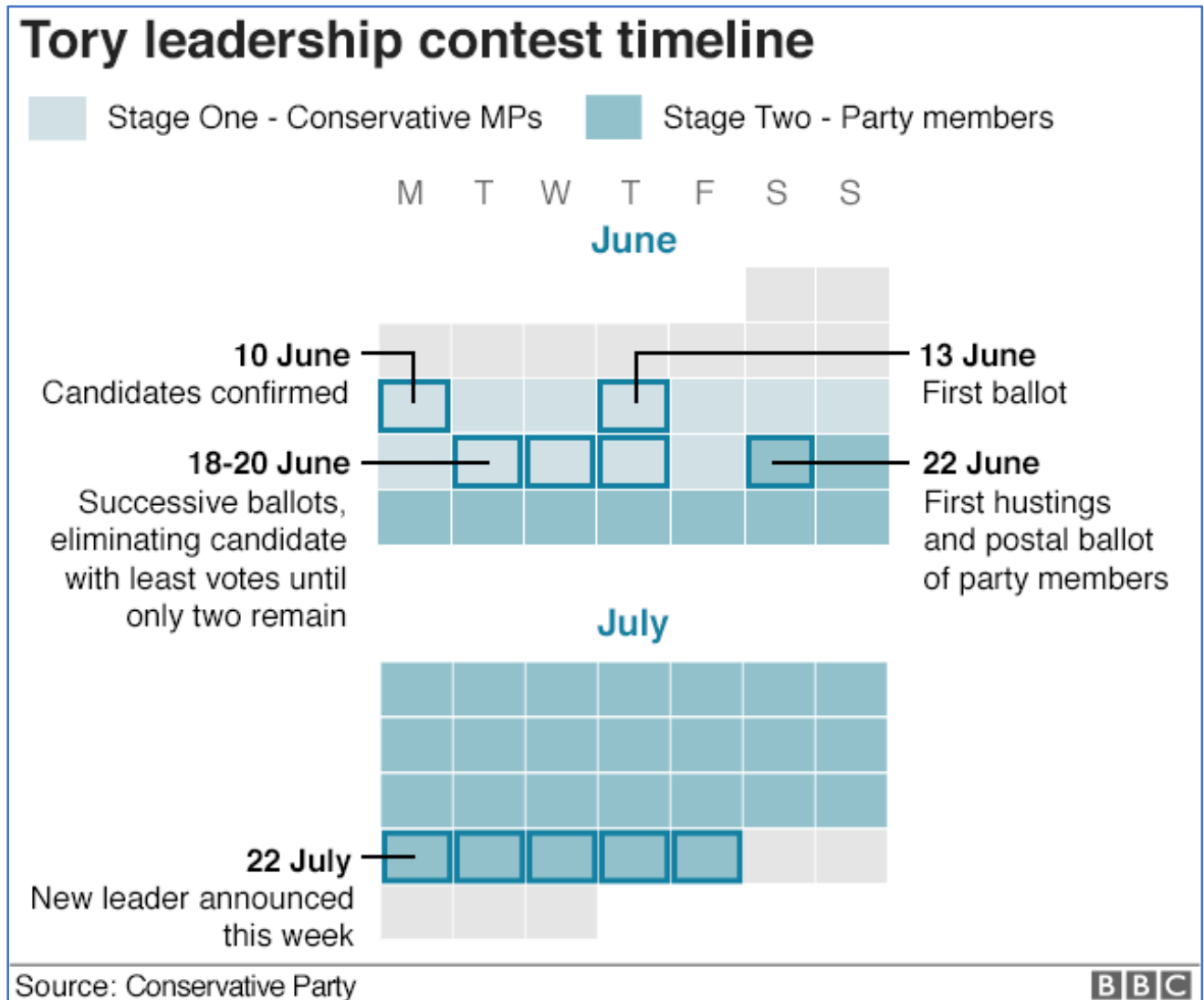
## 6.2 What Lies Ahead

Brexit talks have been suspended due to the political elections in the EU and the resignation of (former) Prime Minister Theresa May. These two events may present an entirely different set of political blocks in the negotiations that will take place between now and the deadline expiration date, October 31<sup>st</sup>. With a reconfiguration of the European Parliament, a new Commission will also be appointed, one which will bring Brexit to its conclusion. Thus, a Commission President has to be picked by the European Council, probably among the spitzenkandidaten of the parties that will have gained the majority in Parliament, with its new configuration being:



(Source: [election-results.eu](http://election-results.eu))

It is still unclear which majority will be formed as it will be a coalition, and considering the number of parties involved it is not possible to say, at this moment, which coalition will have enough vote to present its candidate, who will then create a new Commission. On the English side, a list of ten candidates has been published<sup>169</sup>, with the eventual PM being chosen through the following procedure, to be announced the week of July 22<sup>nd</sup>:



It is therefore certain that there will not be a new deal for at least two months<sup>170</sup>, which will leave three months to negotiate a withdrawal deal. At the same time, some European leaders have warned that there will be no more deadline extensions, with French President Emmanuel Macron stating that “it is a big mistake to procrastinate” and “this is the final [...] deadline because I don’t want to have the new Commission and this new executive deal with [this]”<sup>171</sup>. In the scenario where no

<sup>169</sup> BBC, Tory leadership: 10 final contenders named in race to No 10, 2019.

<sup>170</sup> As of July 11<sup>th</sup>.

<sup>171</sup> M. Rose, Macron wants October 31 as “final” deadline for Brexit, in Reuters, 2019.

extension is granted, the only way to avoid the no-deal option is represented by a “repeal of the repeal” i.e. a rollback of the withdrawal procedure, backed by a new political referendum. This would constitute the last resort to avoid the damage brought about by trade under WTO rules. It is not as unlikely as some believe, especially considering that after months of political uncertainties, polls show that enough people would be in favour of a new referendum<sup>172</sup>. With the conservative government mandate lasting until 2022, however, there is little chance that a new referendum will be called. Based on the current political climate, Brexit can be expected to assume its “hardest” form, i.e. a UK leaving the EU without any deal.

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<sup>172</sup> J. Edwards, Polls show Brexit regret is so strong that 'Remain' would win a second referendum by 9 points, Business Insider, 2019.

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## Riassunto in Italiano

### Introduzione

Il 29 marzo 2017, dopo un referendum popolare, il governo inglese ha notificato il consiglio europeo della propria intenzione di attivare l'articolo 50 del Trattato sull'Unione Europea, dando inizio alla procedura di ritiro dalla UE. In virtù dell'articolo citato, le due parti sono obbligate a negoziare (ma non a concludere) un accordo che getti le basi per le relazioni bilaterali future. La scadenza del periodo di negoziazione di tale accordo, inizialmente fissata a due anni dalla notifica, è stata estesa fino al 31 ottobre 2019. Mentre temi del tipo la condizione legale di coloro che hanno esercitato il loro diritto di libero movimento in Europa e il pagamento inglese dei fondi europei sono stati risolti con relativa facilità, la questione irlandese e quale tipo di relazione commerciale ci sarà tra UK e UE sono due argomenti sui quali ancora non si è riusciti a trovare un accordo. Da un punto di vista economico, l'accordo commerciale sarà particolarmente importante poiché avrà un impatto sostanziale sull'economia inglese. Le opzioni sono quattro, e sono elencate in base ad un livello decrescente di integrazione economica: entrare nell'area economica europea attraverso il relativo trattato (il che implicherebbe entrare nell'associazione europea di libero scambio, EFTA), stringere un trattato di libero scambio con modello di riferimento il trattato tra Unione Europea e Canada (CETA), creare un'unione doganale UE-UK, o infine nel caso in cui nessun accordo viene raggiunto, condurre il commercio sulla base delle regole dell'Organizzazione Mondiale del Commercio (WTO). Indicando con la nozione "soft Brexit" uno scenario in cui rimangono alti livelli di integrazione economica, e con "hard Brexit" uno scenario in cui non vi è nessuna integrazione economica (i.e. commercio dettato dalle regole della WTO), diversi esperti economici hanno tentato di prevedere l'impatto di tali possibili sviluppi sull'economia inglese. Dunque, ci si può aspettare, nel migliore dei casi, una diminuzione della produttività inglese, accompagnata da una buona probabilità di recessione. Salvo il caso in cui il Regno Unito rimane nel mercato interno, il PIL inglese subirà forti contrazioni, sia nel breve che nel lungo termine. Nelle negoziazioni la UE si trova in una situazione di forte vantaggio, poiché una "hard Brexit" sarebbe disastrosa per il Regno Unito.

## L'area economica europea

In questo scenario alti livelli di integrazione economica rimarrebbero tra il Regno Unito e l'Unione Europea: Londra entrerebbe a far parte dell'Associazione Europea di Libero Scambio (EFTA), dove insieme a Norvegia, Lichtenstein e Islanda, parteciperebbe al mercato interno europeo attraverso la ratificazione del trattato sull'area economica europea (EEA). L'entrata in EFTA sarebbe necessaria poiché salvaguardare l'omogeneità delle leggi che regolano il commercio nell'area sopra citata richiede un coordinamento e un sistema di rapida implementazione delle regole che vengono aggiunte all'acquis comunitario particolarmente avanzato. Ciò è possibile in EFTA grazie ai suoi organi di consultazione e ai suoi meccanismi di applicazione delle provvigioni contenute nel trattato sull'EEA e nei suoi annessi. Gli organi in questione sono il consiglio della EEA, il comitato congiunto della EEA, le commissioni congiunte parlamentari e consultative della EEA, l'autorità di sorveglianza e la corte EFTA. Il consiglio della EEA rappresenta l'esecutivo della EEA e getta le basi del motore politico dell'area. La commissione congiunta della EEA è potenzialmente l'organo più importante in quanto si occupa di tenere aggiornati gli annessi al trattato sulla EEA in relazione ai trattati europei, garantendo l'omogeneità legale delle due fonti di diritto. Le due commissioni congiunte parlamentare e consultativa promuovono il dialogo tra le due parti (EFTA ed UE) mettendo a disposizione dei fora dove i rispettivi ufficiali possono scambiare opinioni e discutere iniziative. L'autorità di sorveglianza ha la stessa funzione in EFTA che la Commissione Europea ha nella UE, si occupa infatti di assicurare che tutte le parti seguano le regole relative al mercato interno ed ha il potere di iniziare procedure di infrazione, che vengono portate davanti la corte EFTA. Quest'ultima rappresenta il giudiziario della EFTA ed ha giurisdizione sui paesi EFTA facenti parte della EEA. Legalmente parlando, entrare nel complesso EEA/EFTA implicherebbe il tanto desiderato abbandono della giurisdizione della Corte Europea di Giustizia (ECJ) sul Regno Unito e il distacco inglese dall'ordine legale europeo, due delle rivendicazioni principali durante la campagna referendaria. Tuttavia, data la vicinanza delle corti e dei due sistemi legali, il Regno Unito sarebbe comunque soggetto, indirettamente, al potere della ECJ: poiché quest'ultima non accetta che un'altra autorità sia in grado di interpretare la legge europea, le decisioni della corte EFTA sono prese in osservanza delle decisioni della ECJ e di conseguenza ne emulano i giudizi. In oltre, i principi di effetto diretto e supremazia tipici

del diritto europeo sarebbero inapplicabili nel Regno Unito, fatta eccezione per casi specifici. A causa delle rivendicazioni politiche di Londra, principalmente il recupero della sovranità nazionale nell'ambito dell'immigrazione (dove nella UE è obbligata a permettere la libera circolazione di persone) e il rifiuto della giurisdizione della ECJ e dell'effetto legale del diritto europeo, rendono l'opzione di entrare a far parte della EEA altamente improbabile, sebbene questa implichi l'impatto economico meno problematico per il Regno Unito.

### L'accordo commerciale "profondo e completo"

Un accordo commerciale simile al CETA rappresenta la seconda opzione per il clima bilaterale post-Brexit. In primis, tale accordo sarebbe "misto", ovvero richiederebbe la ratifica dell'unione e di tutti i suoi membri, poiché un accordo che copre diverse aree commerciali (e.g. il commercio dei servizi o i diritti di proprietà intellettuale) non rientra nelle competenze esclusive dell'Unione. Di conseguenza le negoziazioni sarebbero particolarmente lunghe dato che il governo inglese dovrebbe aprire, in pratica, 29 dialoghi diversi: uno per ogni membro UE, più la UE stessa. Nel tentativo di prevedere quale sarebbe il contenuto del trattato sarebbe, una breve revisione dei tratti UE più recenti è stata effettuata. Dunque, il commercio di beni sarebbe facile da regolare grazie all'abolizione di dazi doganali e di tasse simili. Il commercio dei servizi, d'altra parte, costituirebbe un problema, poiché tale mercato è particolarmente difficile da regolare a causa dell'intangibilità di un servizio. Inoltre, per il Regno Unito i servizi rappresentano una parte non-indifferente dell'economia avendo esportato 108 miliardi di sterline ed importato 81 miliardi, solo nel 2017. Qualsiasi tipo di tentativo di regolare questo mercato attraverso un trattato commerciale richiederebbe dei livelli di integrazione economica che comprometterebbero la sovranità inglese nel dominio dell'immigrazione e l'indipendenza inglese dal sistema legale europeo. Altri settori come per esempio anti-trust, investimenti, proprietà intellettuali... sono ugualmente a rischio. Di conseguenza, sembra che sebbene l'opzione del trattato commerciale sia politicamente allettante, in realtà il contenuto del trattato sarebbe altamente deludente, poiché non coprirebbe molti dei settori importanti per entrambe le parti. È necessario menzionare anche che il governo inglese ha dichiarato il suo intento di creare un trattato che includa un accordo doganale che creerebbe un commercio

“senza frizione”, il che è ugualmente una contraddizione: nessun frainteso può essere permesso in questo caso, poiché qualsiasi accordo doganale che non sia un’unione doganale non permetterebbe un commercio senza frizione, ed un’unione doganale vera e propria non permetterebbe al Regno Unito di condurre la propria politica internazionale commerciale, un’altra delle rivendicazioni principali della campagna referendaria. In conclusione, questa opzione è altamente realizzabile ma i suoi riscontri reali sarebbero minimi e non offrirebbero nessuna soluzione reale ai problemi economici di una Regno Unito fuori dalla UE.

### Un’unione doganale

Un’unione doganale consisterebbe in un accordo commerciale su base regionale dove verrebbero abbattute le barriere commerciali sulla libera circolazione delle merci e dove verrebbe istituita una tariffa doganale esterna comune. In questo caso il modello di riferimento è l’unione doganale tra UE e Turchia. Anche qui si tratterebbe di un accordo misto, ovvero di lunghe negoziazioni tra più parti. Un’unione doganale sarebbe un’opzione allettante poiché crea poche obbligazioni per il Regno Unito, ma allo stesso tempo fornirebbe pochi vantaggi. La rimozione alle barriere al libero scambio di merci sarebbe benvenuta, ma la creazione di una tariffa doganale esterna comune negherebbe a Londra la sua capacità di condurre una politica commerciale internazionale propria. Inoltre, tra i vari svantaggi di questa soluzione sarebbe il fatto che qualsiasi terza parte che stringe un accordo commerciale con la UE otterrebbe accesso al mercato europeo ed al mercato inglese (attraverso l’unione doganale), ma dall’altra parte il Regno Unito non otterrebbe accesso al mercato di detta terza parte, poiché non avrebbe nessun contatto con essa. La stipulazione di trattati con terze parti da parte dell’Inghilterra sarebbe possibile ma particolarmente difficile, poiché i vari standard e regolamenti europei dovrebbero essere rispettati da tali trattati, al fine di non infrangere la tariffa doganale esterna comune. La pena per tale infrazione sarebbe decisa dal pannello responsabile, parte della WTO. Modifiche del modello di tale unione doganale non sarebbero ammesse dalla WTO. La questione irlandese non sarebbe risolta e i benefici economici sarebbero quasi insignificanti se paragonati alle difficoltà politiche che li accompagnano. Il Regno Unito sarebbe su una dimensione

secondaria rispetto alla UE e ne soffrirebbe poiché quest'ultima sarebbe sempre in una posizione di forza rispetto a Londra. Questa soluzione sarebbe desiderata solamente a causa del chaos politico post-referendum e non provvederebbe delle risoluzioni efficaci alle problematiche economiche più critiche. Vi è anche un potenziale fattore burocratico che potrebbe contribuire al rallentamento delle procedure necessarie per far sì che l'unione funzioni fluidamente e che potrebbe portare allo stesso livello di arretratezza che caratterizza l'unione tra Turchia e UE.

Nessun accordo: commercio sotto le regole WTO

Nel caso in cui nessun accordo viene raggiunto, essendo sia UE che UK membri della WTO, il loro commercio sarebbe dettato dalle regole base dell'organizzazione mondiale del commercio. Dunque, il governo inglese dovrebbe scegliere le sue liste di tariffe su importi ed esporti che verrebbero applicate in ugual modo a tutti i restanti paesi della WTO. Dal momento che metà del commercio internazionale inglese avviene con la UE, e poiché tale statistica rimarrà la stessa a causa del gravity trade model, l'Inghilterra si troverebbe ad affrontare le tariffe scelte dalla UE. Nel (lungo) periodo durante il quale Londra sceglie le sue tariffe vi sarebbero delle liste temporanee, probabilmente simili a quello che il Regno Unito ha (avuto) come membro UE. Tutti i trattati di cui il UK è parte, e che sono stati conclusi dalla UE in base alla sua competenza esclusiva, cesserebbero di essere in effetto per l'Inghilterra, e tale fenomeno potrebbero estendersi anche ai trattati misti di cui il Regno Unito è parte. Senza accordi su riconoscimento reciproco di standard sui beni, è improbabile che prodotti inglesi possano entrare nella UE senza ulteriori controlli alle dogane. Con il tempo, se c'è divergenza tra standard inglesi ed europei, le imprese inglesi potrebbero dover produrre due linee di prodotti diverse, una per la UE e una per il mercato domestico, e ciò aumenterebbe i costi e ridurrebbe la competitività delle attività oltre la Manica. L'impatto di non-tariff barriers (NTBs) sarebbe molto largo per il settore dei servizi, che consiste nell'80% dell'economia inglese. Esportatori inglesi di servizi risentirebbero anche della perdita di diritti basati sul libero movimento delle persone, cosiddetti "passporting" rights, per servizi finanziari da una parte, e per servizi legali e di consultazioni di contabilità dall'altra. Nonostante tutte queste complicazioni, le posizioni politiche delle due parti

sembrano indicare questo scenario come quello più probabile. Né la UE né il governo inglese sembrano intenzionati a rinunciare a una parte delle loro rivendicazioni, rendendo una “hard Brexit” l’opzione con più supporto.

#### Conclusione: previsioni per il futuro prossimo

Con le dimissioni del Primo Ministro inglese May e le elezioni politiche del parlamento europeo, che voterà sulla nuova Commissione, i nuovi esecutivi delle due parti potrebbero cambiare completamente. Ciononostante, la scadenza per evitare un’uscita senza accordo è fra pochi mesi, e prima che i nuovi ufficiali vengano eletti ulteriore tempo lascerà solo due o tre mesi al massimo per negoziare un accordo. Allo stesso tempo diversi capi di stato europei hanno espresso la loro intenzione di non dare ulteriori estensioni alla scadenza, facendo sì che l’unica scelta rimanente sia quella della “hard Brexit”. Un nuovo referendum inglese è ugualmente escluso a causa del controllo della camera inglese da parte del partito conservatore, che subirebbe un’incredibile sconfitta politica se decidesse di annullare l’intero processo di ritiro. Dato l’attuale clima politico, sembra che nessun accordo verrà stipulato e UE ed UK andranno per le loro strade individualmente.