ISSN 2723-9195

CERIDAP

Rivista Interdisciplinare sul Diritto delle Amministrazioni Pubbliche

Estratto

Fascicolo
4 / 2020

OTTOBRE - DICEMBRE

The New Brexit Deal: Predictable Outcome of a Lose-Lose Negotiation. A First Glance Assessment of the EU-UK Trade Agreement 24.12.2020 (second episode)

Jacques Ziller

The EU-UK Trade and Cooperation Agreement published on 26 December maintains access to the EU market from the UK and vice-versa, but to a quite lesser extent than EU law did. The approach of the Johnson government to the negotiations have led to a treaty that lacks the main guarantees of legal certainty that EU law was offering with the concepts of uniform application direct effect, primacy and consistent interpretation. Brexit is creating far more losers than winners.

[Il nuovo accordo sulla Brexit: esito prevedibile di un negoziato perdente. Una prima valutazione dell'accordo commerciale UE-Regno Unito del 24.12.2020 (seconda puntata)] L'accordo commerciale e di cooperazione UE-Regno Unito, pubblicato il 26 dicembre, mantiene l'accesso al mercato dell'UE da parte del Regno Unito e viceversa, ma in misura molto minore rispetto a quanto garantito dal diritto dell'Unione europea. L'approccio del governo Johnson ai negoziati ha portato ad un trattato che manca delle principali garanzie di certezza del diritto offerte dal diritto dell'Unione con i concetti di applicazione uniforme, effetto diretto, primato e interpretazione conforme. La Brexit tra creando molti più perdenti che vincitori.

The Deal we Have Now

At the time of writing, two days after the publication[1] of the EU-UK Trade and Cooperation Agreement concluded by the Commission and the UK Government on Christmas Eve 2020, and approved by the Council on 27 December, one can only make a few comments from the perspective of EU Law

and policies. Much more time will be needed for a more thorough assessment, be it only because the agreement as it stands at the end of the year consists of a series of documents that will need to be complemented by several other protocols and declarations. This paper focuses on the issues of market access, which should be maintained as much as possible by the new Deal, and leaves asides numerous other fields, such as fisheries, security and participation in EU Programmes.

First and foremost, the "Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other" (TCA) including protocols – is a document of no less than 1246 pages. Two further agreements have been published at the same time: the "Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for cooperation on the safe and peaceful uses of nuclear energy" (Civil Nuclear Agreement) – a document of 18 pages – and the "Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information" – a document of 8 pages–, together with 26 pages of Declarations. The assessment of those texts will include not only understanding their exact content, but also comparing them with the relevant EU substantive law as embedded in relevant primary and secondary law, in EU international agreements and CJEU jurisprudence on the one hand and the relevant provisions of UK legislation related to Brexit on the other hand.

It goes without saying that the work of Members of European and UK Parliaments will be extremely difficult as they will have a very short time to review these documents before giving consent to ratification. At any rate, there is no room for any amendment because that would entail reopening a negotiation that was very difficult to conclude. It would not be a surprise if the European Parliament wanted to adopt a declaration that might to some extent contradict the spirit of the agreements – as has happened in 1963 with the Elysée Treaty between France and Germany, when the Bundestag adopted a Preamble to the Statute authorising ratification that formally used words and concepts which had been refused by the French President, Charles De Gaulle.

Once signed by both parties, i.e. by the President of the Council of the Union

and by the UK Foreign Secretary or Prime Minister, the agreement will provisionally enter into force on 1 January 2021.

Practically, this first means that there will be no customs duties nor quantitative restrictions on the trading of goods between the EU and the UK, as established in Part Two of the ATC *on Trade, Transport, Fisheries and other Arrangements - Heading One: Trade - Title I: Trade In Goods - Chapter 1: National treatment and market access for goods*. The main relevant provisions relating to the absence of customs duties are Article GOODS.5: *Prohibition of customs duties* : "*Except as otherwise provided for in this Agreement, customs duties on all goods originating in the other Party shall be prohibited*", Article GOODS.6: *Export duties, taxes or other charges* : "1. *A Party may not adopt or maintain any duty, tax or other charge of any kind imposed on, or in connection with, the exportation of a good to the other Party; or any internal tax or other charge on a good exported to the other Party that is in excess of the tax or charge that would be imposed on like goods when destined for domestic consumption.* [...]" and Article GOODS.7: *Fees and formalities*. With regard to quantitative restrictions, the main provisions are in Article GOODS.10: *Import and export restrictions* : "*1. A Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, [...]*". A careful reading of all the provisions is however necessary in order to ensure that it does not amount to maintain the exact conditions of market access that are applicable under the relevant provisions of the TFEU that apply until 31 December 2020. At any rate, from 1 January onwards, customs controls will need to be operated by EU member States' customs services in the same way as customs controls for third countries that are not part of the European Economic Area (Iceland, Liechtenstein and Norway) or the Customs Union (Turkey). As far as VAT is concerned, the ATC provides for administrative cooperation: although it seems that in the present day EU system, where VAT is paid only in the country of final destination of a good – apart from automobiles where it is paid in the country of primary registration –, customs declarations will be needed on exports and imports, as was the case within the EC before 1 January 1993. The ATC includes quite detailed provisions on "Customs and Trade Facilitation" which provide for a system that seems much more cumbersome in terms of customs bureaucracy than what

prevailed before the completion of the internal Market on 31 December 1992.
As far as services and establishment are concerned, the complex new regime of the TCA will have to be examined in detail on a sector-specific basis. At first glance, the provisions on capital movement allow to maintain a system broadly similar to the present one, but only broadly. As has been noted by most commentators, there are no provisions that allow for maintaining the EU system of "passports" for financial services.
On the whole, it is quite impossible to fully understand the ATC without knowledge of the jargon and techniques of international trade law. EU lawyers will be at pains, be it only because the ATC avoids using concepts and wording of EU law such as, for instance, "equivalent effect" in Articles 30 TFEU on customs duties on imports and exports and charges having equivalent effect and 34 TFEU on quantitative restrictions on imports and all measures having equivalent effect.
On the whole, the ATC is a very complex document, as is immediately clear from its numbering which is provisional: each package of provisions has its own designation, e.g. GOODS.1 etc. for trade in goods, CUSTMS.1 etc. for customs and trade facilitation. Furthermore, the ATC is far from being limited to issues related to market access; it includes numerous provisions on cooperation in existing EU programs and also quite detailed provisions on police cooperation, judicial cooperation related to criminal matters, and security.
I submit that the reasons for this complexity are not simply due to the attempt to maintain the regulatory regime deriving from EU membership while suppressing direct effect of EU law, as had been envisaged to a great extent by a large part of the Cabinet of Teresa May, and which was reflected by the Political declaration [2] that was signed on 24 January 2020 together with the Withdrawal agreement. It is largely due to a difference of approach of the two parties.

Damage Control v. Words, Words, Words..., Leading to Losers on Both Sides

Michel Barnier, who had been appointed by Jean-Claude Juncker as Head of the relevant Commission Task Force and then as future Negotiator by the Council, took the habit of introducing his speeches by stating that Brexit was "*a lose-lose*

situation", often adding "*the clock is ticking*". After 47 years of UK integration in the European Communities and Union, it was obvious to any EU lawyer that when the UK left the Customs Union it could not remain fully integrated in the internal market, and that this would generate a series of disruptions and an addition of customs bureaucracy, as well as diminishing certainty on applicable rules, which would strike very hard on small and medium enterprises in all sectors, and generally speaking on business and trade, industrial production, and services and agriculture, including fisheries. The approach of EU negotiators was therefore based on rationality and damage control, trying to replicate the content of the EU regulatory system as much as possible. Previous experience with the association agreement with EFTA countries before Austria, Finland and Sweden accessed the Communities, which culminated in the European Economic Area Treaty that still applies to Norway, Iceland and Liechtenstein, would have been extremely useful if there had been trust in the UK Government, as was to a large extent the case until it appeared that Teresa May did not have the necessary support in the House of Commons and not even in her own party. The Withdrawal agreement that entered into force on 1 February 2020[3] and remains in force for all the provisions that are not strictly related to the transition period, i.e. mainly for the rights of settled citizens and the protocols on Ireland, Gibraltar and the Sovereign Base Areas of the UK in Cyprus, was entirely based on EU law concepts and vocabulary. Although its wording seemed to guarantee the necessary continuity in the understanding of the legal regime of the UK-EU relationship in those matters, the negotiators agreed to keep an important role for the CJEU by allowing for references for preliminary ruling by the UK courts until December 2028 in order to guarantee uniform interpretation of the Agreement by both parties in citizen matters.

On the side of the Boris Johnson government, differently from the rational pragmatism prevailing on the EU side, it seems to an outside observer that only a few slogans prevailed which were deemed to give the Prime Minister and his Cabinet the advantage of having made a success of Brexit in the (very) short run. That approach is particularly obvious in the "Summary" that was published on the UK Government site even before the publication of the full text of the Agreements[4].

"While we made our fair share of compromises during the negotiations, we never

wavered from the goal of restoring national sovereignty - the central purpose of leaving the EU". Indeed, this recalls the referendum of 20 October 2013 where the abstention of more than 68% of the electorate allowed San Marino to maintain its sovereignty by not joining the EU although 50,28 % of the voters voted in favour[5]. As the Summary states in its preamble signed by Boris Johnson, "Most importantly, the agreement provides for the UK to take back control of our laws, affording no role for EU law and no jurisdiction for the European Court of Justice." And in point 6 of the Summary: "The Agreement is based on international law, not EU law. There is no role for the European Court of Justice and no requirements for the UK to continue following EU law." In point 81 "The system that has been agreed upon does not compromise the UK's sovereignty in any area, does not involve the European Court of Justice in any way, and is reciprocal." And further in point 171 "This Agreement includes dispute resolution mechanisms that are appropriate for a relationship between sovereign equals. This means that there is no role for the Court of Justice of the European Union. All these mechanisms are fully reciprocal and equally available to both Parties." On the whole, a dramatic obsession with the European Court of Justice is clearly present within the summary.

All this explains why the new Deal is resorting to the jargon and concepts of international trade law, and carefully avoids the jargon and concepts of EU law. Quite striking from that point of view are two provisions from Part One: Common and Institutional Provisions, Title II: Principles of Interpretation and Definitions.

Article COMPROV.13: Public international law

1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.

3. For greater certainty, an interpretation of this Agreement or any supplementing

agreement given by the courts of either Party shall not be binding on the courts of the other Party."

The wording "for greater certainty" recalls the Protocol (No 30) on the Application of the EU Charter of fundamental Rights to the UK and to Poland in Article 1(2) "In particular, and for the avoidance of doubt, [...]".Protocol n° 30 did not provide for an opt-out of the Charter. Differently Article COMPROV.13 of the ATC, puts in technical jargon the claim of the Johnson government that the CJEU has no role whatsoever in the agreement. Paragraph 2 rightly says there is no obligation but does not forbid the EU to interpret these provisions in accordance with EU law.

While the interpretation by the courts of one Party are not "binding on the courts of the other Party", nothing would forbid UK courts to look at the interpretation of the Agreement by the CJEU. But there is another provision which shows how different from EU law the ATC is as a matter of fact.

Article COMPROV.16: Private rights

1. Without prejudice to Article MOBI.SSC.67 [Protection of individual rights] and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

For EU lawyers this is clearly impeding the reasoning that underpins the CJEU's jurisprudence on direct effect since *van Gend den Loos*. While the UK will therefore not be in a position to guarantee the rights of citizens and business that would derive from the Agreement, one may wonder whether the CJEU will simply dismiss any action based upon the content of the Agreement or rather insist on the necessity of consistent interpretation of EU and Member States' law.

What appears from those provisions is that the ATC does not provide the level of legal certainty achieved in the EU law system by the combination of the procedural tool of referrals for preliminary ruling and the case law on uniform application direct effect, primacy and consistent interpretation. This lack of legal certainty is, I submit, enhanced by *Article FINPROV.8: Termination: "Either Party may terminate this Agreement by written notification through diplomatic*

channels. This Agreement and any supplementing agreement shall cease to be in force on the first day of the twelfth month following the date of notification."
Such a provision might be commonplace in international trade agreements but, in comparison to the EU treaties, it is a striking sign of lack of trust. One may only hope that the successors of Boris Johnson will be able to restore a better relationship between the UK and the EU, even if, I'm afraid, a similar lack of trust also made itself clear between different EU Member States in the wake of growing populism.
Trying to find losers and winners is quite normal with the outcome of a zero-sum negotiation. But as constantly repeated by Barnier, Brexit is a lose-lose situation. The losers are in the first place the citizens – with the exception, to a certain extent, of EU citizens settled in the UK before 1 February 2020 and vice versa[6]. Then come small and medium businesses, who will most suffer from decreased legal certainty and increased bureaucracy: as the French are saying "*Pourquoi faire simple quand on peut faire compliqué*". A big loser seems to be the City, as Boris Johnson preferred a pyrrhic victory on fisheries to a somewhat balanced agreement on financial services. Winners if any are customs intermediaries...
According to *Article FINPROV.11: Entry into force and provisional application,* the Agreement's provisional application is foreseen to last until 28 February 2021, or earlier, if the ratification procedures were to finish before 31 January, or "at another date as decided by the Partnership Council". As far as provisional entry into force is concerned, Annex Inst: Rules of Procedure of The Partnership Council and Committees will apply immediately. Whether this will provide for a smooth functioning will obviously depend upon the degree of political interference by the UK government, as has been demonstrated with the Protocol on Ireland of the Withdrawal agreement.
Furthermore, it is indispensable to point out that the published Agreements already refers to other future agreements that might or should be negotiated after 1 January 2021. It will therefore be quite difficult to have a clear idea of the overall content of the future relationship between the UK and the EU before quite some time. Let us hope that future agreements and amendments to the new Deal of Christmas 2020 will be improvements rather than further complications.

1. The agreement was published on 26 December by the European Commission as ANNEX

to the Recommendation for a Council Decision approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. It was also published a few hours later by the UK Government.

2. Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. See my previous paper of 30 November 2020 "Brexit: to have or not to have a deal".
3. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. See my previous paper of 30 November 2020 "Brexit: to have or not to have a deal".
4. UK-EU TRADE AND COOPERATION AGREEMENT - Summary.
5. Segretaria di Stato per gli Affari Esteri, per la Cooperazione Internazionale e le Telecomunicazioni, San Marino, Risultati relativi al referendum del 20 ottobre 2013 per l'avvio della procedura di adesione all'Unione Europea
6. See my previous paper of 30 November 2020 "Brexit: to have or not to have a deal".