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From the Board: The EU–UK Future Relationship: A Trade or Governance Agreement?

1 A NEW PARTNERSHIP AGREEMENT

It was perhaps predictable. On 25 February 2020, the Council of the European Union (EU) authorized¹ the opening of negotiations for a ‘new partnership agreement’ (NPA) with the United Kingdom (UK). Attached to the authorization were forty-six pages of negotiating directives (NDs), covering ‘trade and economic cooperation, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence and thematic areas of cooperation’.² While outlining the bases for the desired future partnership, the EU’s document also included a comprehensive wish list of EU Member States for their relations with the UK – from establishing EU law as the controlling legal order governing UK access to security-relevant satellite data from the Galileo project³ to EU fishers’ demand to continue to be able to fish in UK waters under currently applicable conditions⁴ to Greece’s demand for ‘the return or restitution of unlawfully removed cultural objects to their countries of origin’.⁵

Two days later, the UK Prime Minister presented to the UK Parliament a thirty-page document⁶ outlining the UK’s approach to Negotiations over its future relationship with the EU (TUKAN). UKAN foresees a stand-alone ‘Comprehensive Free Trade Agreement’ (CFTA) between the UK and the EU, ‘supplemented by a range of other international agreements covering, principally, fisheries, law enforcement and judicial cooperation in criminal

¹ EU Council, *EU-UK Relations: Council Gives Go-Ahead for Talks to Start and Adopts Negotiating Directives* (25 Feb. 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/02/25/eu-uk-relations-council-gives-go-ahead-for-talks-to-start-and-adopts-negotiating-directives/> (accessed 27 Feb. 2020).

² NDs, para. 7.

³ NDs, para. 140.

⁴ NDs, para. 88.

⁵ NDs, para. 33.

⁶ Prime Minister’s Office, 10 Downing Street, *Our Approach to the Future Relationship with the EU* (27 Feb. 2020), <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu> (accessed 27 Feb. 2020).

matters, transport, and energy'.⁷ The key goal of the proposed CFTA is to 'ensure there are no tariffs, fees, charges and quantitative restrictions on trade' between the parties.⁸

As regards the core of the future relationship – the economic partnership – the two documents present starkly divergent visions. Drawing inspiration from EU agreements with Canada, Japan, the United States, South Korea, New Zealand, and Chile, the UKAN proposes 'a relationship based on friendly cooperation between sovereign equals', in which each party maintains 'legal autonomy' and 'control of its own laws and political life', with no role for the Union's regulatory standards or governance structures, in particular the Court of Justice of the European Union (CJEU).⁹

The EU Negotiating Directives set up quite a different vision, on two levels: substantively, by proposing that the NPA contain so-called 'level playing field' commitments, which would require the UK's regulatory framework to remain on pace with that of the EU (even if it formally diverges from the latter); procedurally, by setting up a governance structure to permit updating the level playing field commitments to match Union standards, foreseeing unilateral remedies in case the UK falls behind on these commitments, and delegating to the CJEU decisions on the interpretation of EU law.

2 THE LEVEL PLAYING FIELD PROVISIONS: STANDARDS AND (UNILATERAL) REMEDIES

The EU Negotiating Directives condition the elimination of barriers to trade (or rather their non-increase) to the UK's acceptance of commitments over the so-called level playing field. In both substance and form, these commitments go beyond the sustainable development commitments in existing EU free trade agreements (FTAs) with Canada, Japan, or South Korea. Substantively, recent EU FTAs tend to include provisions requiring adoption of minimum standards with respect to labour and social rights, environmental preservation, and the fight against climate change. In these fields, these agreements usually combine requiring the incorporation of certain internationally agreed standards, such as those of the core conventions of the International Labour Organization, with demanding that each party complies with its own labour and environmental regulations. The proposed NPA level playing field section would go beyond these commitments. It would require the UK to establish or maintain legal disciplines not only in traditional sustainable development areas but

⁷ UKAN, at 19.

⁸ UKAN, at 5.

⁹ UKAN, at 3.

also in the fields of state aid and competition law, state-owned enterprises, and taxation. For both the sustainable development and the economic level playing field commitments, the EU Negotiating Directives propose not only the adoption of ‘common standards’ at the time the NPA is signed but also that of ‘corresponding high standards over time with Union standards as a reference point’.¹⁰

This seems to fall short of full ‘dynamic alignment’, a mechanism used in the EU’s so-called Deep and Comprehensive Free Trade Agreements (DCFTAs) with Ukraine, Georgia and Moldova. Through dynamic alignment, the EU’s counterpart is not limited to committing to adopt rules and standards equivalent to those of the EU but commits to ‘regulatory approximation’, adopting EU rules wholesale, including any subsequent modifications that EU institutions might make, through legislation or interpretation, to the relevant regulatory framework. In exchange for dynamic alignment, a DCFTA partner gains full access to the EU market, without the need for regulatory checks. The EU Negotiating Directives, while leaving open the door for such an arrangement (‘wider sectoral cooperation’),¹¹ overall propose a lower level of integration: the adoption of ‘correspondingly high levels of protection’,¹² requiring an equivalence of objectives and outcomes but not the adoption of common means of attaining these objectives and outcomes.

As a matter of form, sustainable development chapters of existing EU FTAs have been criticized for not being enforceable in that, while they are subject to impartial dispute settlement, there is no provision authorizing trade retaliation in case of non-compliance with the adjudicators’ decisions. Whether or not these criticisms are founded, the Negotiating Directives propose a break with this trend. They provide that the NPA level-playing field commitments should be subject to adjudication and that dispute settlement should provide for ‘appropriate remedies’,¹³ empowering the parties to respond to non-compliance with adjudicators’ decisions by taking ‘proportionate and temporary measures, including suspension of [a party’s] obligations within the scope of the envisaged partnership as well as any supplementing agreements’.¹⁴ Potential retaliation would thus not be restricted to the sector in which non-compliance took place but could be implemented as cross-retaliation, with reciprocal non-performance by the aggrieved party of its commitments under other areas covered by the NPA.

Additionally, the EU Negotiating Directives propose that the EU should be able to apply ‘autonomous, including interim, measures’ – presumably, unilateral measures not subject to prior adjudication – in order ‘to react quickly to disruptions of the equal conditions of competition in relevant areas, with Union standards as a

¹⁰ NDs, para. 94.

¹¹ NDs, para. 17.

¹² *Ibid.*

¹³ NDs, para. 94.

¹⁴ NDs, para. 161.

reference point'.¹⁵ Such a mechanism would extend to the level playing field provisions the logic of trade remedies, such as anti-dumping and anti-subsidy countervailing duties (which the Negotiating Directives propose to preserve in EU–UK relations),¹⁶ whereby each party is empowered to react unilaterally to the emergence of circumstances that are harmful to its domestic industry, leaving it up to the affected party to pursue adjudication in case it believes the unilateral remedies are unwarranted or disproportionate. In this case, a unilateral finding by the EU that the UK has failed to comply with level playing field obligations (including those that establish EU standards as the reference point) would allow the EU to respond by taking 'autonomous' (i.e. unilateral), presumably trade-restrictive, measures.

3 THE GOVERNANCE STRUCTURE: INTERGOVERNMENTAL AND COMMUNITY INSTITUTIONS

In addition to substantive provisions, the EU Negotiating Directives propose endowing the NPA with a governance structure that involves essentially three institutions. First is a purely intergovernmental organ, the governing body, composed of representatives of the EU and the UK and deciding by consensus, tasked with managing and supervising the implementation and operation of the NPA. The sole indication of the tasks of the governing body in the Negotiating Directives is that it should be able to modify the level playing field commitments over time to ensure that the 'high levels of protection' remain up to date, presumably to keep them aligned with EU standards.¹⁷ Since consensus-based decisions mean that each party is able to block a decision without providing a justification, the governing body in principle preserves the autonomy of the parties and gives each of them control over the evolution of their commitments.

The second institution is arbitration panels, to which both the governing body and each party individually can refer disputes, defined as 'any matter concerning the operation of the envisaged partnership'.¹⁸ Arbitration panels are independent third-party adjudicators, a common fixture of trade agreements everywhere to which the alternative is 'bilateral dispute settlement', i.e. unilateral interpretation by each party of its rights, with claims of violation being addressed through political negotiations under the threat of retaliation. While panels are themselves independent, what their independence means is that they apply the commitments that were entered into by the parties. Thus, if the level playing field provisions establish that on certain matters the NPA provisions are to be updated by the governing body to keep pace with

¹⁵ NDs, para. 94.

¹⁶ NDs, para. 23.

¹⁷ NDs, para. 95.

¹⁸ NDs, para. 158.

increases in EU standards, inaction by the governing body (whose decisions the UK may block) may not prevent the arbitration panel from finding that the UK's substantive obligation remains to keep pace with EU standards – governing body decisions being a coordination and expectation-setting mechanism rather than a requirement for the updating of the UK's obligations.

Finally, the EU Negotiating Directives foresee a role for the CJEU in the governance of the agreement. This role arises whenever a dispute between the parties raises a question of interpretation of EU law, requiring the arbitration panel, on its own motion or at the request of either party, to refer the question to the CJEU, 'as the sole arbiter of Union law'.¹⁹ The CJEU's ruling would then be binding on the arbitration panel, which would be required to 'decide the dispute in accordance with the ruling given by the CJEU'.²⁰

The CJEU's role would not necessarily work to the disadvantage of the UK. If a dispute concerns the implementation of EU rules by the Commission or a Member State in a manner that the UK believes violates EU law, for example, referring the issue to the CJEU would allow it to decide against the interpretation advanced by the Commission or the Member State. This decision would not only be binding on the panel but would be directly applicable in the legal order of EU Member States, giving the UK the ability to de facto request a CJEU judgment with direct effect and obviating the need for post-ruling negotiations and threats of retaliation. The CJEU's track record shows that it is more than ready to condemn Member State policies that in its judgment violate, to the detriment of non-Member States, either EU law or EU FTAs.²¹

Where the CJEU's role proves trickier is in areas in which the NPA itself, or subsequent NPA-grounded rules, incorporates by reference rules and standards of EU law. NPA provisions relating to human, animal or plant health, for example, may follow the Negotiating Directives' objective of 'uphold[ing] the application of the precautionary principle in the Union as set out in the Treaty on the Functioning of the European Union'.²² Depending on the wording of the NPA, a determination on whether a certain regulatory choice infringes the NPA may depend not only on whether this choice is, in the abstract, a legitimate application of the precautionary principle – which seeks to give governments wider, rather than narrower, discretion – but also on whether the application of the precautionary principle contradicts the harmonization measures adopted at EU level on the basis of the precautionary principle. Thus, while the CJEU will not in principle have a role in the interpretation

¹⁹ NDs, para. 160.

²⁰ *Ibid.*

²¹ See İlke Göçmen, *Revealing the Potential of the EU–Turkey Customs Union: Case C-65/16, Istanbul Lojistik*, 19 October 2017, ECLI:EU: C:2017:770, 45 LIEI 289 (2018).

²² NDs, para. 30.

of the NPA per se, to the extent that the NPA incorporates portions of the EU legal framework, the interpretation of the corresponding provisions, and therefore of the extent of the UK's obligations, will be left to the CJEU.

In other words, while much has been made in the UK of the role of the CJEU, this role is not problematic per se, and may even work to the advantage of the UK. The CJEU's role becomes challenging to the extent that it accompanies a commitment by the EU's counterpart to adopt EU laws and regulations as part of a bilateral agreement in which the parties are otherwise on equal footing. The EU appears to believe that demanding such adoption is warranted in its dealings with countries in its 'near neighbourhood', which it sees not as counterparts in a purely bilateral trade agreements but as natural candidates for integration into the EU's economic governance structures.²³ Seen from this perspective, the dynamic alignment commitments in DCFTAs appear not as the ostensible signs of an unequal bilateral treaty but as the voiceless choreography to be performed by a new entrant to the communitarian European stage, in preparation for the moment of full alignment, when the new entrant will be able to add its voice to the European chorus. The question, then, is how this approach will resonate with a singer whose declared aim is to leave the band and go solo.

4 A WAR OF SLIDES: BETWEEN TRADE AND GOVERNANCE

As if to illustrate the point, days before the Negotiating Directives were formally issued, a short 'slides war' took place between the UK Prime Minister's Press Office and the European Commission. The Press Office fired the opening shot on Twitter, tweeting the famed 'staircase chart' circulated in late 2017²⁴ by Michel Barnier, the European Commission's Chief Negotiator in the Task Force for Relations with the United Kingdom (UKTF). The staircase chart foresaw, among the options for the EU–UK future relationship, a purely bilateral FTA of the type the EU has with Korea or Canada. Indeed, the chart appeared to imply that this would be the expected outcome of the UK's decision to avoid any regulatory alignment or trade policy coordination with the EU. These FTAs, on which the UK based its proposed CFTA, are 'shallow' in that they cover essentially mutual tariff elimination or reduction, provide only aspirationally for regulatory cooperation, do not feature any expectation of adoption by the other party of EU standards, and as a consequence do not provide for CJEU involvement. The Press Office's tweet stated that the slides

²³ See, in this issue, Marja-Liisa Öberg, *Internal Market Acquis as a Tool in EU External Relations: From Integration to Disintegration*, 47 LIEI (2020).

²⁴ European Commission Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Art. 50) (15 Dec. 2017), https://ec.europa.eu/commission/sites/beta-political/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf.

implied that ‘a Canada type FTA was the only available relationship for the UK’, claiming that the EU’s new position was that such a shallow FTA was ‘not on offer after all’.²⁵

The next day, the Commission’s UKTF replied by publicizing a new document, entitled ‘Trade Agreements: Geography and trade intensity’,²⁶ consisting of a graph comparing the UK’s distance from the EU and level of bilateral trade with those of other EU FTA partners. The graph sought to contrast ‘close’ EU partners, such as Switzerland, Turkey and Norway, with ‘distant’ ones, such as Canada, Korea or Japan. In a section entitled ‘UK is different from other trade partners’, the UKTF claimed that ‘economic interconnectedness and geographic proximity are such that it is in our mutual interest to agree on fair competition standards between us, as well as on their effective enforcement’. In another section, entitled ‘Background’, the UKTF argued that this point had been clearly stated by the EU institutions in their negotiating positions from early 2017.

The divergent positions of the UK and the EU not only reveal different objectives with respect to the specific economic relationship they seek for the future but also stem from fundamentally different perspectives with regard to the purpose and effects of trade agreements. The UK’s vision for the CFTA trusts that trade agreements can and should remain limited to what is sometimes called ‘negative integration’: the elimination of ostensible barriers to trade (essentially, tariffs and quotas) and the ad hoc adoption of mutual recognition schemes by the parties, which accept imported products from each other while still determining individually their regulatory framework. This hands-off approach finds favour not only with those who believe in deregulated capitalism but also, and perhaps paradoxically, with some on the left, who esteem that international agreements have become too intrusive and hamper state ‘regulatory autonomy’, including its ability to provide subsidies and conduct industrial policy.

The EU’s vision has a different starting point. For the EU, negative integration with regulatory autonomy, i.e. without somewhat harmonized rules and standards, creates incentives for a regulatory race to the bottom, in which each party is competing with its trade partners to adopt the most efficient (i.e. the least costly for companies) set of disciplines on issues such as the environment, labour, competition, and taxation. This race to the bottom is viewed as incentivizing not efficient governments but regulation-shopping by companies, rewarding with short-term economic advantages those states that impose the least costly regulatory requirements at the expense of other states and even the regulating state’s own population.

²⁵ No 10 Press Office, *Tweet* (18 Feb. 2020), <https://twitter.com/Number10press/status/1229893225663602693> (accessed 27 Feb. 2020).

²⁶ UKTF, *Trade Agreements: Geography and Trade Intensity* (19 Feb. 2020), https://ec.europa.eu/info/sites/info/files/cwp-20200218-trade-geography_en_0.pdf (accessed 27 Feb. 2020).

Regardless of the short-term redistributive boon a state might experience, over time the race to the bottom would lead to a tragedy of the commons scenario, in which each party's attempt to lower its own domestic regulatory costs leads to an overall loss for all the states parties, to the advantage of companies that are able to move around their production site or tax residence, and to the serious detriment of environmental protection, the share of labour in overall income, and the overall amount of taxation available to governments to spend in fulfilling the economic and social needs of citizens.

The challenge posed by the EU's vision of economic integration is that it cannot take place without a common regulatory framework and institutions for dynamic adaptation. The common regulatory framework limits each party's regulatory sovereignty in favour of commonly adopted standards. To avoid the tragedy of the commons scenario, common institutions, required to ensure the adaptation of the common regulatory framework to new demands and situations, must almost by definition be able to make decisions other than by full consensus among the parties – hence the panoply of EU institutions and decision-making procedures. The project of positive integration thus depends on each party accepting that it will no longer be able to define autonomously its own domestic regulations. Given that ultimately *any* regulation generates externalities, the states entering into positive integration arrangements must be willing to trade their right to individually opt out of commitments (to *exit*) for the right to have a say (a *voice*) in shaping the collectively determined regulatory framework which will allow them to overcome the tragedy of the commons scenario.

The key objective underlying the UKAN has been repeatedly mentioned by those in the United Kingdom who promoted withdrawal from the EU: the desire to withdraw the UK from the EU's shared regulatory framework. The common theme among many of their statements was that it was possible to withdraw from the EU's institutional apparatus while keeping market access through a de-institutionalized and regulation-neutral trade agreement, such as that proposed for the CFTA. From the EU's perspective, however, this institutional and regulatory framework is not an optional accessory to economic integration but an essential component of an integration scheme that keeps governments in control – collectively rather than individually – of the integration process and their economic structure. Seen from this perspective, the British government's professed vision of integration without governance, in which a free-trading UK would go around the world entering into bilateral agreements that eliminate mutual barriers to trade while preserving each party's right to determine autonomously its domestic policies, does not lead to greater sovereignty but to a sovereignty that is illusory and whose necessary implication is the race to the bottom and a loss of collective political power vis-à-vis capital.

With negotiations on the EU–UK future relationship promising to extend throughout the year, there may be scope for compromise if the parties abandon their positions of principle and approach the negotiations on the basis of specific economic interests. If they stick to the visions underlying their opening documents, on the other hand, it is difficult to see how any middle ground is possible.

*G.V.,
February 2020*

