

INTERNATIONAL AGREEMENTS CONCLUDED BY THE UK FOLLOWING ITS WITHDRAWAL FROM THE EU

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Abstract

Following the conclusion of the process of withdrawal from the European Union, the United Kingdom of Great Britain and Northern Ireland must now adopt new legislation to cover the areas that were previously regulated by EU law, which has now become inapplicable with regards to the British state. To this purpose, the UK must not only adopt internal acts, but also must conclude international agreements with a variety of actors, including the EU itself, its Member States (on matters that do not fall within the EU's competences), other international organisations, and third countries. This article shall analyse the EU's competence, as an international organisation with legal personality, to conclude agreements, the UK's international standing before its accession to the European Communities and the transfer of trade-related competences towards the supranational level, and the agreements concluded by the United Kingdom in order to regulate matters that, prior to Brexit, were governed either by the EU's secondary law, or by international agreements negotiated and concluded by the Union itself. In addition, the article shall look at potential international agreements that might be concluded by the UK in the future.

Keywords: *exclusive competences, shared competences, international treaties, trade agreements, bilateral agreements.*

1. Introduction

European Union law has several sources, both written and unwritten. Primary law consists of the EU's treaties¹ and the Charter of Fundamental Rights, whilst its secondary law² is comprised of the acts adopted by the Union's institutions as they exercise the competences they are attributed through the treaties. Unwritten sources of EU law include the case-law of the Court of Justice of the EU, and general principles of law. An important written source of EU law, distinct from both primary and secondary law, are the international agreements concluded by the EU with other international organisations and with states, in matters that fall within its exclusive or its shared competences. There is a wide array of subjects on which the EU can conclude international agreements,³ with bilateral agreements on matters concerning trade occupying a prominent role.⁴ As such, there is a growing number of areas where international relations between the EU's Member States and third countries are regulated through the EU, its agreements replacing those that the Member States had concluded in the past, or would have concluded with the third countries in question.

On 31 December 2020 the transition period agreed upon by the United Kingdom and the European Union came to an end, and the process of the UK's withdrawal from the EU was finalised. Consequently, from 1 January 2021 onwards EU law ceases to apply

with regards to the UK, and the British state must work towards filling the legislative gap thus created. At a national level, this can be more easily achieved through the unilateral adoption of legislative acts by the competent authorities; in some cases, that is as simple as recreating the dispositions of a secondary source of EU law through internal laws, considering the framework for the implementation of those dispositions exists already. More complicated is the process of replacing the international agreements concluded by the EU in various matters, particularly those related to trade, where the Union is most active and has successfully concluded numerous agreements, using its economic and political power to negotiate advantageous terms for its Member States. As one of them, the United Kingdom was party to over a thousand such agreements - either bilateral or multilateral - with third countries; following its withdrawal from the EU, British authorities indicated that more than 150 agreements would have to be concluded in order to replace the arrangements existing before Brexit.

2. British international relations prior to the UK's accession to the European Communities

A defining aspect of the United Kingdom's foreign policy, until the second half of the 20th century, was that the British state prioritised its relationship with

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¹ These include the Treaty on the EU (TEU), the Treaty on the Functioning of the EU (TFEU), and the Treaty on the European Atomic Energy Community (Treaty on Euratom). Other sources of primary law are all amending and accession treaties, as well as the protocols annexed to any of the aforementioned treaties.

² Article 288 of the Treaty on the functioning of the European Union lists regulations, directives, and decisions as legal acts with binding force, and opinions and recommendations as acts without binding force.

³ See <https://eur-lex.europa.eu/browse/directories/inter-agree.html> for a repertoire of the international agreements concluded by the EU.

⁴ For more, see Augustina Dumitraşcu, *Dreptul Uniunii Europene și specificitatea acesteia*, Second Edition, Universul Juridic, Bucharest, 2015, p. 142-146.

the members of the Commonwealth above its economic and political connections to continental Europe.

World War II represented a massive economic effort for the UK, which had accrued between 1939-1945 a deficit of approximately 10 billion pounds, with its exports being reduced to just 30% of what they'd been prior to the war.⁵ The USA agreed to grant the UK a loan, under the condition that the British state would sign the Bretton Woods agreement⁶ and would introduce, by mid-1947, a convertibility system for the sterling pound. Despite this economic decline, the United Kingdom wanted to continue projecting a powerful image in the area of foreign policy. Consequently, the British developed an international strategy that focused on three main areas of influence – the Commonwealth, the transatlantic relationship, and the connection to Western Europe. The UK wanted to play an important part with regards to all three areas, and to represent a source of economic and political harmonisation between them,⁷ but it openly prioritised the Commonwealth, due to the associated economic benefits, and the relationship with the USA over that with the Western European states, which the UK thought were on a downward economic trend. This positioning of the UK slowed down considerably its process of accession to the European Communities and economic redressing, after the war.

In the 1950s, the states that had suffered the most due to the war dedicated themselves to the process of reconstruction and cooperation, which led to the strengthening of the ties between them and to economic growth. Simultaneously, the fact that the Commonwealth was becoming less significant, from an economic point of view, together with the demands of the General Agreement on Tariffs and Trade (GATT),⁸ which forbade the sort of preferential treatment that the Commonwealth countries had enjoyed until then, led to the decline of British wealth. In addition, these same states started looking towards the USA for military protection,⁹ whilst the UK itself started relying more and more on it. The phrase 'special relationship' was coined at that time, by Winston Churchill, to describe the rapport between the UK and the USA, and was later used by those who believed that American interests should be given priority over Western European ones, a view even Harold Macmillan, British prime minister between 1957-1963, subscribed to. However, the USA

was interested in helping Western Europe to rebuild after the war, and to recoup its economic losses, and also wanted to cooperate on a military level.¹⁰ At the same time, the USA-UK relationship started experiencing economic and trade difficulties. The USA believed that the British should replace its preferential treatment of the Commonwealth with a reorientation towards the other European states. On the other hand, the UK believed that the Western European states would be an economic burden, its exports towards those states accounting for only 25% of the total British exports.¹¹

As such, the UK refused to take part in the negotiations regarding the creation of the European Coal and Steel Community and, despite initially joining the discussion surrounding the establishing of the European Economic Community and of the European Atomic Energy Community, held at Val-Duchesse in 1956, the British state decided to withdraw before any decisions were made.¹² The UK's unwillingness to take part in the foundation of the European Communities was predicated on several factors: it was considered that joining the Communities would prioritise their members above the states of the Commonwealth, weakening the UK's relationship with the latter; a cooperation system was preferred by the British, compared to an integration one, where several competences would be transferred towards supranational institutions; the UK wanted to take part in a free trade area, not an international organisation with an economic profile and common policies).¹³ However, the UK underestimated Western Europe's capacity to successfully achieve integration in several key areas, such as economy and trade. The founding members of the European Communities chose to create a customs union, with a view to encourage trade, economic growth, and regional stability, and that model quickly proved efficient and advantageous for the Member States.

The UK did participate, in 1960, in the foundation of the European Free Trade Association (EFTA), together with Austria, Denmark, Norway, Portugal, Sweden, and Switzerland. EFTA worked as a classical cooperation organisation, without a customs union and without a transfer of competence towards the supranational level. Whilst this meant that member states didn't have to adopt a common external tariff,

⁵ Wolfram Kaiser, *Using Europe, Abusing the Europeans - Britain and European Integration, 1945-63*, Palgrave Macmillan, 1999, p. 1.

⁶ International monetary system which made possible the creation of the International Monetary Fund and of the International Bank for Reconstruction and Development (IBRD), known today as the World Bank.

⁷ Wolfram Kaiser, *op.cit.*, p. 3.

⁸ The Agreement was signed in 1947, in Geneva, and was intended to promote international trade by means of reducing or even eliminating barriers such as quotas and tariffs. In 1994 the Agreement was replaced by the World Trade Organisation (WTO), which establishes the rules governing international trade for its member states. The UK is one of the founding members of the WTO.

⁹ Wolfram Kaiser, *op. cit.*, p. 5.

¹⁰ To this purpose, the USA, Canada, Belgium, Denmark, France, Iceland, Italy, Luxembourg, Norway, the Netherlands, Portugal, and the UK founded, on 4 April 1949, the North Atlantic Treaty Organisation, in order to ensure mutual assistance in case of aggression. See also Augustin Fuerea, *Manualul Uniunii Europene, Universul Juridic*, Bucharest, 2016, p. 16.

¹¹ Wolfram Kaiser, *op. cit.*, p. 8.

¹² Augustin Fuerea, „BREXIT – trecut, prezent, viitor”, *Curierul judiciar*, nr. 12/2016, C.H. Beck, Bucharest, p. 631.

¹³ Emmanuel Mourlon-Druol, *The UK's EU vote: the 1975 precedent and today's negotiations*, Bruegel Policy Contribution, Issue 2015/08, p. 2.

allowing the UK to continue practising preferential tariffs with regards to the Commonwealth states. However, despite – or because – of this lack of integration and imposition of common policies, the Association did not have the desired economic and political impact, and the UK continued declining, economically, throughout the 1960s. Simultaneously, the European Communities, supported by the USA, proved to be a success, experiencing a notable economic growth and an increased regional stability.

Due to the EFTA failing to represent a true competitor for the EEC, the national economic decline (including the pound's devaluation in 1961), as well as the fact that the Commonwealth states reorientated towards regional trade partners,¹⁴ to the disadvantage of the UK, led to the British state having to adopt a new foreign policy. Consequently, the British prime minister at the time, Harold Macmillan, decided to prioritise the UK-EEC relationship, with a view to joining it and advancing British interests. Finally acceding to the European Communities, in 1973, stopped the economic decline the UK was experiencing, and meant that the British state was ready to transfer competences related to various matters, but trade in particular, towards the Communities' institutions, including competences regarding the conclusion of international agreements concerning said matters. As such, for more than four decades the UK's international trade relations were predominantly regulated through the European Economic Community, now the European Union.

3. The EU's competence regarding the signing of international treaties

The European Communities,¹⁵ as international organisations with distinct legal personalities, have always had the possibility to negotiate and conclude international agreements in the areas where the Treaties conferred those competences upon them. Regarding this matter, the case-law of the Court of Justice has consistently reaffirmed the fact that once such an agreement enters into force, its provisions form an 'integral part' of EU law (previously Community law), and that Member States which fail to adopt the necessary measures for the implementation of said agreement are 'in violation of their obligations under EU law'.¹⁶

Following the entry into force of the Treaty of Lisbon,¹⁷ important modifications were introduced with regards to the European Union's functioning and competences, including its role as an international actor. Article 47 of the Treaty on European Union¹⁸ now states that the Union 'shall have legal personality', meaning that it 'enjoys the right to be represented and to receive the representatives of third states and organizations, the right to conclude treaties, the right to submit claims or to act before an international court or judge, the right to become party to international conventions, and the right to enjoy immunities. It is also subject to legal obligations and responsibility under international law'.¹⁹ The right to conclude treaties and to become party to international conventions is now explicitly regulated in the Treaty on the Functioning of the European Union. Article 2 of the Treaty lays out the Union's exclusive competences – those competences where only it can legislate and adopt legally binding acts.²⁰ The second paragraph states that the EU 'shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' In addition to the agreements that the EU can conclude on matters falling within its exclusive competences, the organisation can also conclude mixed agreements, which have to be ratified by each of the Member States of the EU, in addition to the Union itself. These latter agreements are concluded in areas of shared competences, where the Member States can still legislate.

According to Article 216, the Union is empowered to 'conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' The Court of Justice of the EU's case-law is turned into primary law via the next paragraph, which provides that these agreements 'are binding upon the institutions of the Union and on its Member States.' Article 217 states that the EU is competent to 'conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights

¹⁴ Canada was becoming increasingly closer to the USA, whilst Australia redirected its attention towards its Asian trade partners.

¹⁵ The European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC or Euratom).

¹⁶ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015, p. 338.

¹⁷ The Treaty of Lisbon was signed on 13 December 2007 and came into force on 1 December 2009.

¹⁸ The Treaty of Maastricht, which was signed in 1992 and came into force in 1993. At the time, the Treaty established the European Union as a sui generis entity, whilst the legal personality remained with the European Community, who was thus the one competent to conclude international agreements.

¹⁹ Paul Craig, Gráinne de Búrca, *op.cit.*, p. 322.

²⁰ The Member States can do so if they have been empowered by the Union or if it's necessary for the implementation of Union acts. These exclusive competences include the customs union; the establishing of competition rules necessary for the functioning of the internal market; monetary policy for euro area countries; the conservation of marine biological resources under the common fisheries policy; the common commercial policy.

and obligations, common action and special procedure.’

4. Agreements concluded by the UK in order to regulate its relationships with its international trading partners

Following the UK’s departure from the European Union, the most important legislative gap, in terms of international relations, was left in the area of trade, a natural consequence of the fact that the EU, and the European Community before it, focused on international trade as a primary area of focus. The agreements concluded by the EU are estimated to have covered £117bn of UK exports annually, and included free trade agreements, such as the ones concluded with Canada or Japan, agreements covering more specific arrangements,²¹ and mutual recognition agreements, covering conformity assessments conducted on products to ensure that they meet the necessary safety standards. All these agreements are part of the EU’s legal order, and are legally binding for its Member States; consequently, a withdrawing state must compensate for their inapplicability.

The optimal solution, for the UK, is to conclude new agreements with all the international actors that it had previously worked with as a Member State of the European Union. In cases where it fails to do so, and an agreement is not reached with another country, the rules applicable to the relationship between the two states will be those established by the World Trade Organisation. The UK’s position in the WTO was brought into question by the state’s withdrawal from the EU, because its WTO commitments were tied to that of the EU,²² and there was no precedent for an existing member of the WTO to implement a new, personal set of trading terms.²³ However, on 4 January 2021, following the end of the transition period for the UK’s departure from the EU, a communication was put out, intended to clarify the UK’s position in the WTO.²⁴ The communication drew attention to the fact that the British State was a founding party to the GATT 1947, and an original Member of the WTO, ‘in its own right’, and not just as a Member State of the EU. It specified that, for as long as the UK was a member of the European Union, ‘the United Kingdom’s concessions

and commitments on goods and concessions and specific commitments in services were contained within the schedule of concessions and commitments on goods and schedule of concessions and specific commitments in services of the European Union.’

On the matter of goods, the communication noted that the UK had undertaken five rounds of negotiations and consultations with WTO members, between September 2019 and December 2020, with some of them finalising in an agreement or being ‘in an advanced stage of discussion.’ On the matter of services, it was noted that, following the end of the transition period, an already agreed-upon schedule of concessions and specific commitments would come into force.

On the matter of agreements negotiated and concluded after the establishment of the WTO, to which the UK participated as Member State of the EU and wasn’t a party in its own right, the communication announced that, following the expiry of the transition period, the British state had endeavoured to accede to said agreements, or confirm ‘its continued acceptance and implementation of these agreements.’

By early 2021, the UK had concluded continuity agreements with the most of the states with which it had previously traded as a Member State of the EU, and whilst not all agreements have been fully implemented at a domestic level yet, ‘bridging mechanisms’ have been set in place in order to ensure continuity of trade until they are ratified.²⁵

Some of the newly-concluded agreements of particular interest are those between the UK and Turkey,²⁶ and the UK and Japan,²⁷ respectively.

As Turkey is part of a customs union with EU, the British state could only conclude a continuity agreement with it once the appropriate measures were provided through the UK-EU Trade and Cooperation Agreement.²⁸ The UK-Turkey Free Trade Agreement includes provisions regarding agricultural products (tariff-rate quota based) and industrial goods, processed agricultural products, coal and steel. With regards to origin requirements, the products covered by the FTA are traded free of custom duties only when they originate in one of the states party to the FTA. Consequently, the UK and Turkey will only continue to enjoy tariff preferences for goods that originate in one

²¹ An example would be the UK-Australia Wine Agreement, covering the matter of labelling requirements and recognition of winemaking techniques.

²² The UK was already a member of the European Community when the WTO was founded.

²³ Aakanksha Mishra, ‘A post Brexit UK in the WTO: The UK’s new GATT schedule’, in Jennifer Hillman, Gary Horlick (eds.), *Legal Aspects of Brexit. Implications of the United Kingdom’s Decision to withdraw from the European Union*, Institute of International Economic Law, Washington DC, 2017, p. 13.

²⁴ General Council of the WTO, *End of the UK-EU transition period. Communication from the United Kingdom*, WT/GC/226, 4 January 2021, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/226.pdf&Open=True> (accessed on 10 May 2021).

²⁵ For a list of the UK’s trade agreements with non-EU countries, see <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries> (accessed on 10 May 2021).

²⁶ Available at <https://www.gov.uk/guidance/summary-of-the-uk-turkey-trade-agreement#uk-turkey-trade-agreement> (accessed on 10 May 2021).

²⁷ Available at <https://www.gov.uk/guidance/summary-of-the-uk-japan-comprehensive-economic-partnership-agreement> (accessed on 10 May 2021).

²⁸ Available at [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22021A0430\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22021A0430(01)) (accessed on 10 May 2021).

of the two states. This is a departure from the model a customs union, and is bound to negatively affect the flow of trade.

Another agreement concluded in light of Brexit is the UK-Japan Comprehensive Economic Partnership Agreement (CEPA), which represents a step forward compared to the previously existing EU-Japan Economic Partnership Agreement (EPA), that ruled UK-Japan. Some of the areas where the UK and Japan made progress were financial services (a key domain for the UK) and digital trade (a domain with regards to which the UK has expressed a particular interest, in terms of possible future agreements with other countries). In this latter area, the CEPA makes notable progress, compared to the EPA, providing improvements such as the prohibition of data localization requirements, better cross-border data flows, and better protection of personal data.

On the matter of goods, the UK-Japan CEPA sets out a timeframe of tariff reduction similar to the one existing under the EU-Japan EPA, with certain tariffs scheduled to be eliminated earlier than the EPA provided.

With regards to origin requirements, EU inputs are set for diagonal cumulation, meaning that they can be counted as originating in either the UK or Japan, and paperwork requirements have been reduced, compared to the EPA, thus easing trade between the two states.

5. Conclusions

With regards to the United Kingdom's relationship with other states and international organisations, Brexit's impact was strongest in the area of trade, due to the EU's focus on that specific domain, and the high level of integration achieved, to a point where matters such as the common commercial policy and the customs union are exclusive competences of the EU, and Member States can no longer legislate in those matters, or conclude international agreements.

The UK's main trading partners have been, for decades, the other Member States of the European Union, and the British state's continued trade with them has, for the time being, been ensured through the conclusion of the EU-UK Trade and Cooperation Agreement, but the UK continues to have a considerable task ahead of it in the form of concluding agreements with third states which are not members of the EU, and which all seek to further their own position, and gain as many advantages as possible. Outside of the EU, without having the backing power of a large, prosperous international organisation focused on trade and the well-being of its citizens, the UK is set to negotiate these new agreements from a weakened position, which is set to result (and has done so already, in some cases) in less beneficial provisions for the British state, or even in a lack of agreement, meaning a reversion to WTO rules. As such, it is difficult to identify, for now, the profit and better trading conditions that the UK claimed it would achieve once it was able to negotiate and conclude agreements in its own right, as opposed to a Member State of the EU.

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