

10 January 2017

## **Brexit: a Negotiating Reality Check**

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Since the June referendum Ministerial statements on Brexit have often implied that the EU27 will concede whatever future trading arrangements the UK requests, because it will be in the EU27's interest to do so. We thought it would be useful to check whether that assumption is realistic. We asked two former ambassadors, one French, one Dutch, for their assessment. Both ambassadors gained extensive experience of EU affairs in the course of long diplomatic careers and retain links to government. Neither is in any sense an Anglophobe.

### A French view

"I do not think the EU 27 will want to "punish" the UK, whatever resentment they may feel for the tone of the referendum campaign or the total disregard for the draft agreement they painfully reached with the UK in February.

What they will seek is to prevent UK withdrawal creating an attractive precedent. They will also want to make sure that their own interests, as Union and as member-states, are safeguarded. In my opinion, what was acceptable to ensure that the UK would remain within the Union will be unacceptable if the UK is leaving: there cannot be any tailor-made status, nor half-membership.

It is up to the UK, when ready, to table the framework for a future relationship that it wishes. But as a third country the UK cannot expect to get the rights and advantages that member-states enjoy. And the EU 27 will want to safeguard the integrity and consistency of the EU's core element: a single market based on the four fundamental freedoms of movement and respect for social, environmental and consumer protection dimensions. In my opinion, there can be no doubt that the EU 27 will stick to that absolute imperative and stay united on that.

Also, access to the single market must mean, for a third country, accepting regulations decided in the last resort by the sole Union, and legally enforced under the ultimate authority of the European Court of Justice.

If UK proposals for a framework for a future relationship fit within these red lines, I guess the EU will be ready to examine whether a transitional period is necessary or not to finalize a formal agreement."

### A Dutch view

"I do not think that the primary aim of the EU 27 will be to make life difficult for the British. Members of the European Council are capable, in the end – I would hope – of thinking and arguing in a less childish way. But I believe that UK ministers are failing to see one simple thing in all its clarity: the 27 cannot assent

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to anything less than the full *acquis communautaire* (essentially the treaties plus implementing legislation and jurisdiction). Even if Sweden, Denmark or Holland were willing to be more forthcoming, it is crystal clear that no one else would be available for that. Not even Germany. Berlin will, as always, side with Paris and is not available to challenge Paris on this issue.

Complications of a legal nature, such as the case now before your Supreme Court and the positions of the Scottish, Northern Irish, Welsh, Gibraltarians etc. are not our problem. They are your problem. What is potentially our problem is the situation the Republic of Ireland finds itself in. Realistically the combination of Ireland and Northern Ireland can only lead to the conclusion that the UK should steer towards a Brexit that is very, very close to the European Economic Area (EEA) arrangements. Brexit will be Brexit, nobody is going to deny that. If you wish Brexit, that's what you will get. But the modalities of this Brexit cannot but point in one direction: remain closely connected with the EU.

Optimists here believe that the British people will in the end opt for staying inside the EU. I dare not pronounce any opinion on that. My bottom line is that the 27 will be unable to agree on anything other than to stick to the *acquis communautaire*."

Since in Britain there has also been talk of compensating for loss of preferential access to the European Economic Area's Single Market (which takes over 50% of British exports of goods and services) by negotiating preferential trade agreements (PTAs) with third countries (Ministers refer to this as "championing free trade"), we have been in touch with a retired Japanese ambassador. His long career gave him senior experience of negotiating PTAs and familiarity with World Trade Organisation (WTO) rules. He, too, is no Anglophobe.

"Japan has negotiated 16 Preferential Trade Agreements (PTAs) since the end of the 1990s.

Each of these negotiations was preceded by a Joint Study (scoping exercise) to determine whether a deal was likely to be achievable. The average duration of the 16 negotiations, including a Joint Study period, was three years and nine months, of which the Joint Study accounted for roughly a quarter.

That average conceals a tendency for there to be a correlation between the size and complexity of a partner's market and the duration of the negotiation. The negotiation with Brunei took 17 months, including the Joint Study; that with Australia eight years and four months.

Concluding and signing a deal is not the end of the story. Additional time is required to complete the ratification process.

PTA negotiations are labour-intensive. In Japan's case they require teams amounting to a minimum of 50 officials, drawn from four ministries. Reasons for this include:

- The tariff schedules of the negotiating partner need to be studied, with a view to agreement on each line. Each schedule will normally contain close to 10,000 lines.
- Rules of origin need to be agreed for each line.
- Study is also needed to understand the partner's legal system on trade related issues (customs procedures, geographical indications, product certification procedures, competition, intellectual property, etc.) as well as regulatory regimes for services when services are also under negotiation.

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The purpose of this study is to ascertain whether the legal system will allow the partner to meet negotiating commitments.

- Domestic stake-holders need to be sounded out and members of the Diet consulted. In the case of major negotiations this process takes place between each negotiating round.

Negotiations can be extremely difficult when the two sides have irreconcilable systems in place, e.g. for automobile certification.

Inevitably any PTA negotiation will entail domestic winners and losers. As a Canadian representative to the WTO once said: “We are all believers in free trade, but as soon as we start discussing how to achieve it we each start asking the other to pay a price for it”. The problem is that the winners and the losers are not the same people. Government has to arbitrate between conflicting interests. That requires time - and sometimes money for programs to soften the blow for those who will lose out.

At a minimum, for a negotiation to succeed, a rough balance of concessions has to be obtained. Calculating that rough balance, e.g. when tariff concessions are being traded for a reduction in non-tariff-barriers or access for service providers, can be extremely difficult.

PTA’s have to cover “substantially all the trade” to qualify for an exemption from GATT non-discrimination rules [Article XXIV.8(b)]. Meeting that standard has proved to be a challenge. There is no agreed WTO definition of what “substantially all the trade” means. Carving out a whole sector, e.g., agriculture, from a PTA would be open to challenge under the WTO Dispute Settlement Understanding, as would limiting a PTA to only one sector, e.g. automobiles.”

Several conclusions can be drawn:

1. The EU27 will be undisposed to indulge the UK. EU27 interests will be paramount.
2. Those interests vary. This means that once the EU27 have agreed a common position, they will find it hard to depart from it.
3. The *acquis communautaire* - notably the indivisibility of the single market’s four freedoms - is likely to be at the core of the EU27’s common position.
4. The EU27 will want to deny the UK more favourable terms outside the EU than as a member of the Union – to avoid a precedent that might encourage others to leave the Union.
5. Since the UK cannot legally embark on PTA negotiations until it has withdrawn from the EU, some years will pass before UK providers of goods and services can acquire preferential access to third country markets in order to compensate, to a greater or lesser extent, for loss of preferential access to the European Economic Area’s Single Market.
6. This suggests that the UK has an economic interest in retaining preferential access to the EEA. The UK also has a political interest in preserving an open border with Ireland, which membership of the EEA would enable.

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