Briefing

European Parliament

INTERNAL MARKET AND CONSUMER PROTECTION

The Consequences of Brexit for the Customs Union and the Internal Market Acquis for Goods

KEY FINDINGS

- The consequences of Brexit depend on the model which will be adopted for the future relationship between the EU and the UK. These models should be compared with a respect to **a number of different parameters**, which are not confined to substantive trade rules **but include also questions of legal effect and dispute settlement.**
- There are very substantial differences between, on the one hand, the EU Membership and EEA models; and on the other the WTO/FTA models. Those differences are focused on **the approach to regulatory convergence and to the legal effects of the agreements and their enforcement**

1. INTRODUCTION

This briefing paper examines, from a legal perspective, the consequences Brexit may have for the internal market *acquis* in the field of trade in goods, and for the customs union. This examination requires a comparison of the different options for the post-Brexit EU-UK economic relationship. The general direction of travel of defining that relationship has become clearer in recent weeks: a deep and comprehensive trade agreement. [1] If this route continues to be followed, it will mean that the UK will not maintain its current participation in EU internal market law, for example in an arrangement comparable to the European Economic Area (EEA). [2] The UK Government's political red lines - leaving the jurisdiction of the Court of Justice of the European Union (CJEU), and abandoning free movement of persons - preclude continued internal market membership. This briefing paper nevertheless includes the EEA as a potential model, if only because it further illuminates the different consequences of the various models which could be adopted.

The deep and comprehensive trade agreement would appear to be closer to the most comprehensive free-trade agreements (FTAs) which the EU has hitherto negotiated. This briefing paper looks at two instances, namely the Comprehensive Economic and Trade Agreement (CETA), with Canada; [3] and the Deep and Comprehensive Free Trade Area (DCFTA), with Ukraine. [4]

If no agreement on the future relationship were to be concluded between the EU and the UK, trade would need to be conducted under WTO rules, which offer the basic international framework. The briefing paper includes an examination of the consequences for the internal market and the customs union under this WTO model.

This briefing paper does not, as such, focus on issues raised by the transition from full membership to the new relationship. It appears to be accepted that the new agreement with

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the UK will need to be concluded after the UK has left the EU, raising questions about the rules governing trade in the period between withdrawal and entry into force of a new agreement. [5] The transition would be regulated in the withdrawal agreement, negotiated under Article 50 TEU. It is clear though that, for trade in goods to continue to be conducted under some kind of preferential framework, transition arrangements will need to be as specific and comprehensive as those that will be part of the future trade agreement. The varied consequences, set out in this paper, are therefore also relevant to the transition. The author expresses his concern that this is insufficiently appreciated.

A comparison of the various models demands focus, perspective, and a framework. The following section sets out a series of parameters which are considered paramount for an examination of the consequences of Brexit for the internal market *acquis* and for the customs union.

2. PARAMETERS

The subsequent analysis will focus on the parameters set out below. Whilst clearly non-exhaustive, the author considers that these parameters capture some of the main differences between the various models, in terms of legal consequences for the customs union and for the internal market *acquis*. They are not limited to the substantive regulation of the trade and economic relationship between the EU and the UK, but include general legal characteristics of the various models.

In what follows the paper succinctly describes these parameters, and summarizes the current legal position under the EU Treaties - i.e. the default position of EU membership. This will enable the paper to contrast the various models with this default position.

Basic rules free trade (regulatory / tax)

In the area of trade in goods, the EU Treaties, the FTAs which the EU concludes, and the WTO Agreement each provide for a number of basic principles governing trade in goods. Those principles focus on both regulatory and taxation matters, which are invariably distinguished.

Under EU law, Articles 34-36 TFEU provide for the basic legal framework for free trade in goods, as regards regulatory matters. They prohibit all "measures having equivalent effect" to quantitative restrictions on imports or exports; and set out a number of public policy exceptions. There is abundant CJEU case law on these provisions, which are interpreted broadly so as to cover any measures liable to hinder trade, directly or indirectly, actually or potentially. [6] One of the major accomplishments of this case law is the finding, in *Cassis de Dijon*, that also indistinctly applicable measures (such as general domestic product regulations) are caught by these provisions, and need a proper public policy justification. [7] Whether it is the marketing rules of a liqueur; [8] the ingredients of beer or pasta; [9] or even the prohibition on the use of jet skis on lakes: [10] they are subject to examination and justification wherever they affect intra-EU trade. [11]

On the tax side, Article 110 TFEU enshrines a principle of non-discrimination, in the sense that no Member State may impose taxes which discriminate against imports or which offer indirect protection of domestic products. Again there is a whole body of CJEU case law on the matter. [12]

Harmonization and internal market acquis

The above basic principles governing intra-EU trade are inadequate for creating a genuine internal market: it is part and parcel of those principles that divergent product and trade regulations are permissible, provided they are genuinely aimed at non-economic public policy goals, and are proportionate. A Member State may, for example, adopt its own regulations on drinks packaging which are aimed at protecting the environment. [13] But it is obvious that such divergent product and trade regulations may hinder intra-EU trade. The Treaty principles are therefore complemented by a programme of harmonization of these product and trade

regulations, to the extent necessary to achieve fuller free trade, without compromising the policy goals underpinning the divergent national regulations. This harmonization is normally undertaken by way of Directives, which approximate national regulations to the extent necessary to allow for free trade. They are complemented by, and incorporate the principle of mutual recognition (see the next parameter).

The legal basis for this harmonization process is Article 114 TFEU. Notwithstanding the fact that this provision provides some room for derogations from the harmonized regulations, [14] the internal market directives adopted on that basis are a key and legally powerful tool for market integration. It should be borne in mind that regulatory barriers to trade (non-tariff barriers) are more significant, and more difficult to tackle than tariffs in a low-tariff world.

Mutual recognition

The principle of mutual recognition is a pillar of the EU internal market. It embodies the insight that the EU cannot and should not exhaustively harmonize all product and trade regulations. As such, it is linked - and indeed a part of - the above parameters of basic free trade rules and harmonization directives. The principle was established in *Cassis de Dijon*, [15] and is an essential element of internal market directives. As a rule, the directives provide (a) that Member States must ensure that all products placed on their market comply with the requirements of the relevant directive; and (b) that products which comply can be imported and marketed freely. In the absence of exhaustive product harmonization, the Member States may impose requirements over and above those of the relevant directive, as far as domestic products are concerned. But they have to accept imported products, produced in other Member States, as long as they comply with the directive. The "extra" national requirements cannot hinder imports from other Member States, and the regulations of other Member States are recognized as equivalent.

Legal effect

EU law is directly effective and, in case of conflict, prevails over national law. [16] The direct effect and primacy of EU law extend to the above Treaty principles regarding free trade, and to the internal market directives. Whilst EU directives have vertical but not horizontal direct effect (meaning that an unimplemented directive cannot impose obligations on a private party), [17] internal market directives are mainly relevant in vertical terms: any trader can rely on a directive against any national authorities. Direct effect and primacy are exceptionally powerful enforcement tools, because they can be relied upon in any dispute and before any domestic court or tribunal.

Dispute settlement

EU internal market law is enforced by domestic courts and tribunals, in cooperation with the CJEU, to which questions of EU law can or must be referred (Article 267 TFEU; highest courts are under an obligation to refer, lower courts are not). Enforcement is thereby decentralized. In addition, the Commission is able to bring Member States before the CJEU, where they fail to comply with their EU law obligations (Article 258 TFEU). Where a Member State persists in its non-compliance, a financial penalty can be imposed (Article 259 TFEU). It is also possible (but in practice rare) for a Member State to challenge the trade regulations of another Member State, directly before the CJEU. [18] All of this means that companies and traders have a number of options to challenge trade barriers: they can institute legal proceedings themselves, or complain to the Commission. It should be added that where a Member State's breach of EU internal market law amounts to a "sufficiently serious" violation, traders can claim damages. [19]

Tariffs

The EU is a full customs union, meaning that there are no tariffs on intra-EU trade in goods, or indeed any "charges" having equivalent effect (Article 28 TFEU). This prohibition covers both industrial and agricultural goods. As a customs union, the EU has a uniform external tariff.

Rules of origin

It is a basic characteristic of FTAs that the participating countries continue to have divergent trade policies regarding non-participating countries. Indeed that is, under Article XXIV GATT, the feature which distinguishes FTAs from customs unions. The tariff-free trade for which an FTA provides is therefore limited to products originating in the participating countries. If it were not, there would be major risks of trade deflection: products originating outside the FTA would enter the markets covered by the FTA through the participating country with the lowest external tariffs.

As the EU is a full customs union, with a wholly uniform external trade policy, there is no need for any rules of origin. Free internal market circulation extends to both products originating in the EU and those which have been imported from outside (Article 29 TFEU).

Customs border

The EU internal market is defined as an area without internal frontiers (Article 26(2) TFEU). Because of the principle of free circulation, described above, there is no need for any customs checks at intra-EU borders.

Trade defence

WTO rules allow certain so-called trade defence instruments to be deployed. The main one, in practice, is anti-dumping policy. This instrument allows for the imposition of extra customs duties ("anti-dumping duties"), where products are imported below their "normal value" and where such imports cause injury to domestic industries. Other trade defence instruments are concerned with subsidies (where again "countervailing duties" can be imposed), and with safeguard measures. The latter usually consist of quantitative restrictions which are imposed where imports cause serious injury to a domestic industry.

None of those trade defence instruments are applied in intra-EU trade. Subsidies can be tackled through the EU's state aid rules, and there is no scope for anti-dumping duties or safeguard measures.

External trade policies

As mentioned, an FTA is characterized by the maintenance of divergent external trade policies. These divergent policies concern tariffs and other trade matters (including trade defence), as well as the conclusion of FTAs or agreements establishing a customs union. The EU has one, uniform external trade policy - its common commercial policy (see Article 207 TFEU).

3. THE WTO MODEL

If the UK were to leave the EU without an agreement establishing a new FTA or a customs union, both parties would need to trade with each other under the fallback option of WTO rules. For that to happen, the UK will need to establish itself as a full, independent member of the WTO. That requires a number of steps, which this paper does not aim to examine. [20] In what follows the paper looks at what trading under WTO terms means for the parameters identified above.

Basic rules free trade

On paper the WTO's basic rules on free trade in goods are not very different from the corresponding TFEU principles. Those rules can be found in the GATT, and have not been modified since 1947. On the regulatory side, the main principle is one of non-discrimination, set out in Article I GATT (most-favoured-nation treatment) and in Article III (national treatment). There is extensive case law, particularly on the latter provision. In addition, Article XI GATT prohibits quantitative restrictions. There is a general exceptions clause in Article XX, which refers to a number of public policy exceptions.

In practice, the main difference with EU law is that the WTO case law is focused on identifying cases of discrimination against imported products, and does not attempt to capture mere regulatory divergence. This is a crucial distinction which, together with the fact that the WTO does not aim to harmonize national regulations, means that the WTO is not concerned with market integration.

On the tax side the WTO rules (Article III:2 GATT) are near identical to Article 110 TFEU. However, the relevant CJEU case law is arguably wider in its approach to discriminatory or protective taxation than the WTO case law.

Harmonization

The WTO agreements do not aim to harmonize trade or product regulations (with the exception of the TRIPs Agreement, which effectively constitutes an instrument of worldwide harmonization of intellectual property law). The WTO institutions do not have the power to adopt measures achieving such harmonization, and there is nothing in WTO law which could be compared to EU harmonization directives. The only harmonization instrument is an indirect one. Both the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) contain provisions requiring WTO members to use relevant international standards – where they exist – and to derogate from such standards only to the extent necessary to achieve certain public policy goals (TBT; see Article 2.4), or to achieve higher standards of health protection (SPS; see Article 3.1). The effect of these provisions is that voluntary international standards effectively become binding, but with room for derogations. However, the indirect harmonization which these provisions achieve is nowhere near the scale and depth of the EU's harmonization of trade and product regulations.

Mutual recognition

Under WTO law, there is no principle of mutual recognition in the field of trade in goods.

Legal effect

The legal effects of WTO law are generally confined to international law. The CJEU has excluded the direct effect of WTO law, which means that the WTO agreements cannot be relied upon before national courts or the CJEU itself, except in cases where those agreements could be an aid to interpretation of EU or national law. [21] Other jurisdictions adopt a similar approach, and there are next to no examples of jurisdictions where WTO provisions can be relied upon to set aside, disapply, or overrule provisions of domestic law. The enforcement of WTO law is confined to the international level, in particular the WTO's own system of dispute settlement.

Once the UK establishes itself as a "full" WTO member, the legal effect of WTO law in the UK will depend on whether the UK Parliament adopts legislation incorporating WTO law in domestic law. In the absence of such legislation, it will be impossible to rely on WTO law before UK courts. Given the lack of direct (or self-executing) effect of WTO law in the EU, the US, and elsewhere around the world, it is unlikely that Parliament will incorporate WTO law.

Dispute settlement

The WTO has its own dispute settlement system, which functions effectively, particularly when compared with other systems of international dispute settlement. It is however an inter-State system, with no room for any independent action by private parties. Companies and traders need to convince their governments to bring a WTO case, and the WTO dispute settlement system does not have anywhere near the capacity of the EU's decentralized enforcement system, which operates through national courts and tribunals.

Trade between the EU and the UK under WTO terms would therefore mean that companies and traders will not, on their own, be able to ensure the proper application of the relevant rules by legal means.

Tariffs

Trade on WTO terms means that both the EU and the UK are required to impose their tariff schedules, on an MFN basis. In the absence of an FTA or a customs union, there is no way around this.

Rules of origin

Trade on WTO terms means there is no need for any specific rules of origin.

Customs border

Trade on WTO terms also means the establishment of a full customs border between the EU and the UK (including between the Republic of Ireland and Northern Ireland). The EU will need to apply all of its customs legislation to imports from the UK, in the same way as such legislation is applied to any other imports from countries with which there is no trade agreement. Obviously, the EU could in its legislation provide for some exceptions, even in the absence of an agreement, but it would need to be careful not to violate the MFN principle: any advantages it gives to trade with the UK will need to be extended to other WTO members.

Trade defence

Trade on WTO terms means that the EU's trade defence instruments could be employed against imports from the UK. Anti-dumping and anti-subsidy cases would definitely not be excluded. In the absence of State aid disciplines extending to the UK, one may assume that particularly the anti-subsidy instrument could be used to tackle UK subsidies which distort trade with the EU.

External trade policies

Trade on WTO terms finally means that both the EU and the UK are free to develop and implement their own external trade policies. In particular, they are each free to conclude FTAs or agreements establishing customs unions.

4. THE EEA MODEL

The EEA model comes closest to full EU membership, as far as the internal market is concerned. It was expressly designed to extend the internal market to the EFTA countries, in as homogeneous a way as possible. However, the EEA is not a customs union, which affects some of the parameters below.

Basic rules free trade

Those rules are near identical to the relevant TFEU provisions.

Harmonization

EEA members need to implement the EU internal market *acquis*. There are institutional mechanisms to this effect. In practice, the bulk of the EU's internal market harmonization programme is extended to the EEA. However, the EEA members do not have rights of co-decision on new EU internal market instruments, and are merely consulted at the conception stage.

Mutual recognition

The principle of mutual recognition, as established by the CJEU, is part of the EEA *acquis*. The EFTA Court, which interprets the EEA Agreement, takes great pains to remain as close as possible in its case law to CJEU precedent.

Legal effect

In contrast with EU law, EEA law does not benefit from direct effect and primacy. The EEA Agreement is a standard international agreement, whose domestic legal effect depends on the relevant principles and acts of each contracting party. If the trade relationship between the EU and the UK were to be governed by the EEA Agreement, the effect of that agreement in UK law would depend on whether it is incorporated, by an Act of Parliament.

In EU law, the EEA Agreement is recognized as having direct effect. This means it can be relied upon by companies and traders to enforce their EEA rights, including in the sphere of trade in goods. [22] In light of this established case law, the EU could be expected to insist that the EEA Agreement be incorporated in UK domestic law, if the EEA model were to be adopted (which, as mentioned, is most unlikely at this point in time).

Dispute settlement

The EEA has its own system of dispute settlement, which operates through the EFTA Court. Courts and tribunals in the EFTA parties to the EEA Agreement (Norway, Iceland and Liechtenstein) are able to refer questions of EEA law to the EFTA Court. However, there is no obligation for any such courts to make use of this procedure, and it has been noted that the Norwegian courts (Norway being by far the largest country of the three) have been reluctant to refer cases. [23] The reason for this appears to be that the EFTA Court mimics the case law of the CJEU as much as possible, and that the Norwegian courts consider that they can apply CJEU precedent on their own.

The EFTA Court also has jurisdiction to hear cases which the EFTA Surveillance Authority brings against these EEA parties, for failure to comply with their obligations.

Tariffs

The EEA is an FTA, which means that there are no tariffs on trade between the contracting parties, with the exception of agricultural and fishery products.

Rules of origin

The EEA has its own set of rules of origin, set out in Protocol 4 to the agreement. It may be added that this Protocol provides for so-called diagonal cumulation of origin (Article 3), which means that there is a pan-European system of origin determination. This protects supply chains involving EU Member States, the EEA parties, Switzerland, Turkey, and Southern European states participating in the Stabilisation and Association Process. [24]

Customs border

Because the EEA is an FTA, and not a customs union, there is a customs border between the EEA parties and the EU. However, the EEA Agreement has a chapter and a Protocol on customs cooperation and trade facilitation. [25] The aim is to simplify border controls and formalities.

Trade defence

The EEA Agreement excludes the use of trade defence instruments, but Protocol 13 limits that exclusion to those areas of the EEA Agreement where the EU *acquis* is fully integrated. Anti-dumping duties have been adopted as regards Norwegian salmon, [26] apparently on the basis that the EEA Agreement does not provide for free trade in fish.

External trade policies

The EEA parties remain free to develop and implement their own external trade policies.

5. THE FTA MODELS (CETA AND DCFTA)

Both CETA with Canada and the DCFTA with Ukraine are FTAs. CETA is a standard FTA, whereas the DCFTA is an association agreement, aiming to establish cooperation with Ukraine across a wider range of fields. They are treated together here to avoid too much repetition, even if there are substantial differences between the two agreements.

Basic rules free trade

CETA and the DCFTA both make reference to the WTO rules and principles. They do not, in contrast with the EEA, extend the EU internal market principles to trade between the EU and, respectively, Canada and Ukraine.

Harmonization

CETA does not contain mechanisms for the harmonization of trade and product regulations between the EU and Canada. The DCFTA, by contrast, provides for some level of harmonization. For example, Article 56(1) commits Ukraine "to gradually achieve conformity with EU technical regulations and EU standardisation, metrology, accreditation, conformity assessment procedures and the market surveillance system"; it must "incorporate the relevant *acquis* into its legislation" (Art 56(2)(i). Article 64 concerns regulatory approximation as regards sanitary and phytosanitary and animal welfare legislation.

Mutual recognition

CETA does not include mutual recognition, but addresses issue of equivalence in its chapter on regulatory cooperation. The relevant provisions do not however establish a general principle of mutual recognition or equivalence. The DCFTA includes provisions on e.g. an agreement on conformity assessment and acceptance of industrial products (Article 57); and on "equivalence" (Article 66) as regards SPS measures. Effectively, therefore, the implementation of the agreement may lead to a degree of mutual recognition. This is linked to the approximation exercise referred to above.

Legal effect

Article 30.6 of CETA excludes "private rights". The provisions of CETA do not confer any rights on private parties, and the agreement cannot be construed as permitting it to be directly invoked in the domestic legal systems of the parties. In other words, the direct effect of CETA is excluded by its very terms, and it can be assumed that neither party intends to incorporate the agreement in its domestic law.

The DCFTA does not exclude direct effect, but Article 7 of the Council's Decision on provisional application includes language similar to Article 30.6 CETA. [27] In other words, the EU is clarifying in its process of concluding the agreement that it regards direct effect as excluded.

Both approaches are in line with what is becoming consistent EU policy to arrange for the exclusion of direct effect, one way or the other. [28]

Dispute settlement

CETA Article 29 provides for a system of dispute settlement comparable to the WTO system, in the sense that a panel of arbitrators can be appointed to rule on a dispute. Chapter 14 of Title IV of the DCFTA does likewise. Like the WTO system, these procedures are *inter* parties, and do not involve private parties.

Tariffs

Both CETA and the DCFTA provide for tariff-free trade in both industrial and agricultural products, with few and very limited exceptions.

Rules of origin

CETA and the DCFTA each have their own system of rules of origin. Neither of them provides for the kind of cumulation which characterizes the EEA Agreement.

Customs border

Both CETA and the DCFTA contain provisions on customs and trade facilitation.

Trade defence

Both CETA and the DCFTA allow for the standard trade defence instruments to be deployed.

External trade policies

Both agreements allow the contracting parties to maintain their own external trade policies.

6. LEGAL CERTAINTY AND TRANSITION

Before comparing the different models in the next section, and drawing some conclusions, it may be useful to draw attention to the sequencing of negotiations, as well as the possibility of the withdrawal negotiations collapsing.

The EU's current thinking is that the Art 50 agreement will be limited to the terms of withdrawal, and will not determine the future trade and economic relationship. The negotiation and conclusion of that second agreement are expected to take more than 2 years, and arrangements will therefore need to be made for a transitional period.

Such a transition is required because otherwise the EU and the UK will need to trade on WTO terms - that would of course also be the case if there was no withdrawal agreement. What some of those terms are is set out in generic terms above, in the section on the WTO model. It may nevertheless be useful to focus a little on some of the actual, real-world consequences, with reference to some of the parameters on which this briefing paper focuses:

- The UK would need to establish itself as a full WTO member, with its own tariff schedules. Even if the UK were to adopt the current EU schedules, and other WTO members were not to raise objections to this, trade between the EU and the UK would of course be subject to customs duties. Those duties vary, according to sectors and products. They are generally lower for industrial products and higher for agricultural products. Tariff rate quotas raise specific issues, because they require agreement between the EU and the UK on how to divide them, and how to apply them in mutual trade. Moreover, tariffs on trade in industrial products, even where lower, will interfere

hugely with established supply chains, and risk creating cumulative effects on the price of finished products consisting of components sourced in different EU Member States which may have travelled up and down.

- EU and UK producers and traders will lose the benefit of the principle of mutual recognition, in particular as established in EU internal market legislation. The negative effects will be far more substantial for UK producers: even if they continue to produce to EU standards, as laid down in EU legislation, they will also need to comply with the varying national standards of the 27 EU Member States, because the principle of mutual recognition will no longer operate. For EU producers and traders, by contrast, there is the risk that UK standards diverge from EU standards. However, the UK's market is much smaller than that of the EU 27, and there would be only one additional (namely UK) standard. Note that with divergent standards may come divergent conformity assessment processes.
- A customs border between the EU and the UK will need to be introduced. In the absence of special arrangements, there will need to be a "hard" land border in Ireland (between the Republic and Northern Ireland), and customs checks will be required for trade across the Channel and through airports.
- There will be no dispute settlement mechanisms, other than those established in WTO law. These mechanisms work only prospectively; they are limited in their capacity; and they cannot be triggered by private actors.

There are of course many other effects linked to trading on WTO terms, without further agreements between the EU and the UK: as regards trade in services, investment, free movement of persons, and other current forms of cooperation covered by EU policies (police and criminal justice cooperation; judicial cooperation in civil and commercial matters; international sanctions; etc). Those effects are not within the scope of this briefing paper.

All this raises questions of legal certainty, legitimate expectations, and transition. Legal certainty and legitimate expectations are protected under EU law, and the EU is therefore under an obligation to do all it can to ensure a proper transition which enables producers and traders to adapt to the new terms of trade. [29] However, it cannot force the UK to conclude a new trade agreement, or even a withdrawal agreement. Nor can it force the UK to choose for a particular type of transition. Nevertheless, the optimal transition, for EU producers and traders, would be for the UK to remain within the internal market, in one way or other.

In the absence of such transitional arrangements, the EU could consider compensation schemes for market participants affected by Brexit. However, WTO law would discipline such schemes through its Agreement on Subsidies and Countervailing measures. That agreement prohibits export subsidies, and the UK could make use of WTO dispute settlement or adopt countervailing duties.

7. COMPARISON AND CONCLUSIONS

The table below summarises the comparison of the various parameters for the models included in this briefing paper:

Table 1 : Comparison

	EEA	WTO	DCFTA	CETA
Rules	Member	WTO	WTO	WTO
Harmonization	x	-	Partial	-
Mutual Recognition	x	-	Partial	Potential
Legal Effect	Domestic	International	International	International
Dispute Settlement	EFTA Court	International	International	International
Tariffs	Some	X	Some	Some
Rules of Origin	x	x	x	x
Customs Border	x	x	x	x
Trade Defence	x	x	x	x
External Trade Policy	Free	Free	Free	Free

What stands out is that the differences are not confined to the substantive rules on free trade, or the presence of tariffs and rules of origin. In a world where the most significant barriers to trade are of a regulatory nature, there are very substantial differences between EU Membership and the EEA model, on the one hand, and the WTO and FTA models on the other. Those differences concern, first, the approach to harmonization and mutual recognition (or equivalence). In contrast with the membership/EEA model, the WTO/FTA models do not aim to overcome regulatory barriers to trade in goods by a process of harmonization, combined with mutual recognition. There is no real regulatory convergence. Moreover, the WTO/FTA models are also completely different as regards their legal effects and enforcement tools. They do not decentralise enforcement and dispute settlement, but keep both at an intergovernmental level. In an age of globalization, those downsides are not to be underestimated.

[1] See the UK Article 50 notification letter : see European Council Press Releases and Statements, "Statement by the European Council (Art. 50) on the UK notification", No. 159/17, 29 Mar 2017, www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/

[2] For the text of the EEA Agreement, see http://www.efta.int/Legal-Text/EEA-Agreement-1327#main-content

[3] For the text of CETA, see http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[4] For the text of the DCFTA, see http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900

[5] See the UK letter, cited above note 1 ; and see Council of the European Union, "Draft guidelines following the United Kingdom's notification under Article 50 TEU", 31 Mar. 2017, XT 21001/17.

[6] Case 8/74 *Dassonville* [1974] ECR 837.

[7] Case 120/78 *Rewe* [1979] ECR 649.

[8] ibid

[9] Case 178/84 *Commission v Germany* [1987] ECR1227 and Case 407/85 *3 Glocken* [1988] ECR 4233.

[10] Case C-142/05 *Mickelsson* [2009] ECR I-336.

[11] C Barnard, *The Substantive Law of the EU – The Four Freedoms* (4th ed, OUP 2013), ch 6.

[12] Ibid, ch 2.

[13] Case 302/86 *Commission v Denmark* [1988] ECR 4607.

[14] I Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar 2013).

[15] Cited above note 7.

[16] Case 26/62 *Van Gend en Loos* [1963] ECR 3 and Case 6/64 *Costa v Enel* [1964] ECR 1141

[17] Case C-91/92 *Faccini Dori* [1994] ECR I-3352.

[18] For an example see Case C-388/95 *Belgium v Spain (Rioja)* [2000] ECR I-3123.

[19] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

[20] See House of Lords EU Committee, *Brexit: the options for trade*, 5th Report of Session 2016-17, HL Paper 72, pp 53-57.

[21] For a detailed analysis of the relevant principles and case law, see P Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011), ch 9.

[22] See e.g. Case C-150/07 *Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061.

[23] H H Fredriksen and C Franklin, "Of Pragmatism and Principles: The EEA Agreement 20 Years On" (2015) 52 CMLRev 629, at 673-674.

[24] Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Kosovo under UNSC Resolution 1244/99.

[25] Chapter 3 and Protocol 10.

[26] Council Regulation (EC) No 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway OJ L 334M , 12.12.2008, p. 699–749 (MT).

[27] Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) OJ L 278/1, 20.9.2014, p. 1.

[28] A Semertzi, "The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements" (2014) 51 CMLRev 1125.

[29] Cf P Eeckhout and E Frantziou, "Brexit and Art 50 TEU: A Constitutionalist Reading", forthcoming 54 (2017) Common Market Law Review.

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