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Making the Most of Brexit Freedoms

David Collins

I Introduction

The lengthy and legally complicated process through which the UK left the EU put unprecedented strain on the country's democratic institutions, testing the limits of parliament, the courts, the civil service and the media. Brexit has also been expensive and socially divisive. This is precisely why the benefits of leaving the EU must be actualized – they will not happen on their own. While it will take time, Brexit can be a success for the UK, both in terms of enabling better regulations at home and by expanding the potential for freer trade with other nations. This short publication will outline how this might be achieved, starting with the need to remove the legacy of ineffectual EU laws, then turning to improvements in trading relations with the EU itself followed by efforts to negotiate and update international trade treaties.

II Delivering the Benefits of Brexit

It is often claimed that the UK is the fifth largest economy in the world. While this is true in an absolute sense, on a per-capita basis, which is more meaningful in terms of capturing quality of life, the UK ranks a much less impressive 24th.¹ The country's poor standard of living, at least compared to many other developed countries, may partly be explained by low rates of investment on capital as well as on research and development.² Recent rises in corporate and personal tax, now among the highest in the world, are also disincentivizing growth. We are already seeing how the windfall profit tax on energy companies has discouraged economic activity in the North Sea, almost certainly prolonging the UK's stagnation. Meanwhile more money is being spent by the state than ever before without measurable improvements in service. The NHS in particular has shown a breath-taking capacity to consume public resources without generating better outcomes.

¹ <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD> (accessed December 2022)

² M Ben-Gad, 'Hunt's Autumn Statement: what happened to the "E" in "PPE"?' Institute of Economic Affairs (17 November 2022)

While the legacy of the UK's membership in the EU is only partly to blame for some these problems, it is equally misleading to suggest that leaving the EU is the root cause of the UK's struggles. Today we see an increasing tendency to make statements like 'Brexit has failed' or 'the UK is worse off since Brexit.' Neither is demonstrably true, as has been proven by several highly credible studies.³ But even if these statements were true, as many appear to believe, it is still far too early to pass judgment on Brexit. The full advantages of leaving the EU can be grasped, but this will take many years. In a sense the process is only just beginning.

The Brexit Freedoms Bill,⁴ introduced earlier this year in the House of Commons, is a key part of this process. The Bill represents an opportunity to deliver pro-growth regulation by eliminating the wasteful vestiges of EU law. It can help bring about efficiencies to the UK economy, potentially counteracting some of the high-tax, low growth policies that the present government has embraced. Reforming some of the financial services regulations inherited from the EU, including the labyrinthine Markets in Financial Instruments Mifid II,⁵ would be a good start.⁶ We should be encouraged that the government appears to be taking this seriously with Chancellor Jeremy Hunt's recent announcement of the Edinburgh Reforms to financial services. The EU's cumbersome data protection framework, the General Data Protection Regulation (GDPR) should be abandoned in favour of a home grown, lighter touch data protection regime designed which is manageable for firms of all sizes. The UK should also consider repealing the EU Port Services Regulation,⁷ which was drafted with publicly owned ports in mind, as are dominant in the EU, as opposed to predominately privately owned ports in the UK. It is another example of how our inherited EU regulatory landscape is not fit for purpose. To be clear there is nothing inherently wrong with EU law. If the old EU rules work, they should be kept, but if they do not, they must go.

While breaking free from the EU's regulatory shackles is probably the single greatest advantage of Brexit, another important benefit of Brexit is the opportunity it has created in international trade. The establishment of an independent trade policy and with it, the UK's ability to strike preferential free trade agreements (FTAs), must be pursued with vigour. Free

³ Notably G Gudgin, J Jessop and H Western 'What Impact is Brexit Having on the UK Economy' Briefings for Britain (13 October 2022)

⁴ Retained EU Law (Revocation and Reform) Bill 156, (House of Commons, Session 2022-23)

⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) Document 32014L0065

⁶ See e.g. B Reynolds, 'Restoring UK Law: Freeing the UK's Global Financial Market' Politeia (8 February 2021)

⁷ Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017

trade benefits everyone, delivering lower prices and higher standards of living at a time when many are struggling. But the process can take time as trading partners adapt to changing regulatory environments and establish new supply chains, particularly when there have been disruptions due to the twin disasters of the Covid-19 pandemic and Russia's invasion of Ukraine.

III Trade with the EU

The EU is still the most important of the UK's trading partners and there is no reason to expect that this will change in the near future. The UK-EU Trade and Cooperation Agreement (TCA), concluded at the end of 2019 and entering into force the year after, should be seen as the beginning of a new relationship with the EU, not the end point of an old one. The TCA, at nearly 1000 pages, was a massive achievement that significantly reduced the trade barriers that would have existed between the UK and the EU after Brexit under World Trade Organization (WTO) rules, keeping tariffs at zero on almost all products. This is one of the reasons why trade between the UK and the EU is at or near to historic levels. But it is true that the TCA is deficient in many areas. Frustratingly, there is no automatic recognition of health and safety standards on UK exports. Mutual recognition in services, such as professional qualifications, is also missing.

It is important to recognize, though, that like most FTAs, the TCA is not a static instrument. It has future negotiations built into it and as such it is a "living agreement," complete with specialized committees with the remit to further liberalization on a wide range of issues. To give one example, the TCA's Committee on Services, Investment and Digital Trade, which has met twice (in October 2021 and October 2022), has made some progress in opening up trade in services. The committee has undertaken preparatory technical work for reviewing recommendations for mutual recognition submitted by professional bodies. It also received a joint recommendation for a Mutual Recognition Agreement (MRA) from the Architects Council of Europe and the UK Architects Registration Board, potentially precluding the need for requalification or other procedural impediments to cross-border delivery of services in that field.⁸ It is a small step, but one which is indicative of a direction of travel

⁸ The second Trade Specialised Committee on Services, Investment and Digital Trade under the EU-UK Trade and Cooperation Agreement Brussels, 20 October 2022 13:30 – 16:00 (BST) / 14.30-17.00 (CEST) Borchette Center and via videoconference: Joint Minutes

towards less burdensome regulation of trade in other, more important sectors, such as legal services.

Though it is sometimes alleged that the UK's trading relations with the EU might get worse, for example because the withdrawal of equivalence for data protection rules, what tends to be forgotten is that trade relations with the EU can also get *better*. The responsibility of our current and future government is to continue to negotiate for greater market access with the EU through the framework that the TCA has created, starting with the Joint Committee overseeing the implementation of the agreement in its entirety. Emphatically this does not require re-joining the EU or the Single Market.

IV Non-EU Trade

Trade with the EU is only part of the picture. The EU forms an ever-shrinking component of the global economy, and this is why we must look elsewhere for growth. The UK must continue its push to negotiate, sign and ratify FTAs with other countries. Most of the work so far in this area has been rolling over old EU treaties, like the ones with Canada and Japan. There have been a handful of new FTAs too, but more are needed.

Testifying before the International Trade Parliamentary Committee in late November, Kemi Badenoch, the Secretary of State for International Trade, rightly pointed out that the benefits of the UK's post-Brexit trade agreements with third countries (non-EU) have yet to be realized. Yet we have heard many news stories about how some of the UK's new trade deals were disadvantageous to the country's interests. These accusations are mostly false, but failures to get better deals were due to pressure from domestic lobby groups, especially in relation to agriculture. Worryingly, there are reports that the UK's accession to the 11-nation mega-regional Comprehensive Progressive Trans-Pacific Partnership (CPTPP), a centrepiece of the Global Britain strategy, is in trouble because the UK's agricultural 'offer' is insufficient.⁹ It is astounding that those who seek protectionism in this field are often the same voices who lament high prices on food and the 'cost of living crisis.' This is a good reminder that accession to the CPTPP must not be taken for granted – the UK must demonstrate a willingness to open its markets sufficiently to make it an attractive partner.¹⁰ While open trade benefits both importers

⁹ C Horseman, 'London's 2022 CPTPP Accession Hopes Fade' *Borderlex* (28 September 2022)

¹⁰ D Collins, 'The UK's Accession to the Comprehensive Progressive Trans-Pacific Partnership (CPTPP): Legal Obligations and Political Economy' *International Trade Law and Regulation* [forthcoming, 2023:1]

and exporters, few countries will give away access to their market access without equivalent gains. Some industries will resist being exposed to the rigours of international competition.

Negotiating trade agreements is consequently a difficult and time-consuming process. Prime Minister Rishi Sunak is right to caution that the UK should not rush into signing trade treaties for the sake of it, with the much-delayed Indian FTA a good example. Some of the UK's new FTAs will not go as far as we might wish, perhaps in relation to services, which tend not to be as thoroughly liberalized as goods and which are more important to the UK economy. But as living agreements with procedures in place for ongoing collaboration, these agreements can also be improved on over time. In addition to networks of subject-specific committees, most FTAs also have renegotiation clauses designed to adapt to changing conditions and reflect on the need for existing barriers, ideally improving relations over time.¹¹

For international commitments to take effect they must be adopted into the domestic legal system. An important step here is the UK's Electronic Trade Documents (ETD) Bill¹², introduced this year in the House of Lords. This legislation could be key in capturing some of the gains from trade that the country has not yet been realized. Under the ETD Bill, businesses will not be required to use physical paper on customs invoices, saving them time and money. This will also help minimize trade friction at borders, potentially working towards resolving ongoing problems in relation to Northern Ireland, which remains inside the EU's regulatory sphere. Much like how payment transactions were reshaped by fintech, trade in goods can be transformed through distributed ledger technology, making it more efficient, sustainable and without the need for extensive infrastructure at borders.

The ETD Bill, which should go into force next year, also complements the digital chapters of the FTAs that the UK has concluded so far.¹³ Digital trade is, along with services, one of the most vital growth areas of the UK's economy.¹⁴ The absence of legislation in the sphere of trade documentation is undermining the UK's ability to take full advantage of its FTAs with countries like Australia, New Zealand and Singapore which contain provisions on e-invoicing, e-contracts, and new forms of e-signatures.¹⁵ In addition to improving its handling

¹¹ See further, TJ Park, *Incomplete International Investment Agreements* (Elgar, 2022)

¹² HL Bill 57 (12 October 2022)

¹³ E.g. the UK-Singapore Digital Economy Agreement (DEA) (25 February 2022) ARTICLE 8.61-A (on digital invoicing)

¹⁴ D Collins, 'The UK, The WTO and Global Trade: Leading Reform on Services Trade' Politeia (22 July 2022)

¹⁵ J Psarska, 'The Electronic Trade Documents Bill Paves the Way for Digital Trade' TechUK (13 October 2022)

of data, which underpins the delivery of many services,¹⁶ the UK must embrace new technologies that make shipping goods across international borders easier by reducing the cost of customs compliance, arguably representing a greater drag on global commerce than tariffs. In this way, international treaties commitments can instigate changes in the domestic regulatory environment, addressing some of the burdensome red-tape which legislation like the Brexit Freedoms Bill was designed to rectify.

The UK must also use its status as an independent member of the WTO to help drive the multilateral agenda towards greater trade liberalization. Among the most important tasks here is the Joint Statement Initiative (JSI) on Electronic Commerce, of which the UK is an active participant. The JSI aims to achieve standardized global rules on digital policy issues, such as cross-border data flows and data localisation, online consumer protection and privacy and network neutrality. Additionally, as it appears now that reform to the WTO's Appellate Body will not be forthcoming, the UK should consider joining the Multi Party Interim Appeal Arbitration Arrangement, now supported by more than 50 WTO members including the EU, Canada and Japan. This process should help maintain consistency and legitimacy in the application of WTO rules when disputes arise.

V Conclusion

The opportunities presented by the Brexit Freedoms Bill should be seized upon to help bring about efficiencies to the UK economy, potentially counteracting some of the high-tax, low growth policies which have been put in place by the current government. A focus on improving trade with the EU and the rest of the world can also contribute to this goal. FTAs, like the TCA with the EU, should be seen as the beginning of improved relations, not end points. There is much cause for optimism should the government stay the course and follow through with its plans to deliver the best of Brexit.

¹⁶ Collins, above n 13