

**Statement to the Constitutional Affairs Committee of the European Parliament,**

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**Michael Emerson<sup>1</sup>**

## **Which Model for Brexit?**

I will address the question what might be the conceivable content of a comprehensive agreement between the EU and UK over their future relations.

The British government has tried until very recently to say as little as possible about its intentions, since it started with no clear view, and with manifest differences of opinion summarized by the contest between the so-called ‘hard’ or ‘soft’ Brexits, which however have no official definitions.

The Prime Minister has said that there is ‘**no off the shelf model**’, and that she seeks a ‘**bespoke model**’ that is ‘best for Britain’. That may be technically valid since all the EU’s trade and economic cooperation agreements have specific features. But still discussion of models is an effective way to talk about the essence without getting submerged in the detail.

There are five familiar models, each with their qualities, but each suffers from one defect or another for the UK, which validates the ‘no off-the-shelf model’ remark of the Prime Minister. **Simple WTO membership** would mean serious damage to access to the EU market for both goods and services; the **EEA regime** is incompatible with the wish to control immigration; staying in the **customs union** would limit the possibilities to conduct free trade with the rest of the world; the **Swiss model** would not be acceptable for the EU; and the **Canadian model** is not really relevant for a future UK-EU trade deal (it ignores the large amount of EU law with which the UK will probably want to remain compliant) but more for third-country cases.

There is a however new sixth model, namely the **Association Agreement** with neighbouring countries, including the **DCFTA** formula for trade, as for Ukraine<sup>2</sup>. This model is also not suitable for wholesale

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<sup>1</sup> Associate Senior Research Fellow at CEPS, Brussels. More detail behind the present statement is contained in M. Emerson, ‘*Which Model for Europe?*’, CEPS Special Report no 147, October 2016. <https://www.ceps.eu/publications/which-model-brexite>

<sup>2</sup> The Ukraine Association Agreement is explained in detail in M.Emerson and V. Movchan eds., ‘*Deepening EU-Ukraine Relations – What, Why and How?*’ CEPS, 2016. <https://www.ceps.eu/publications/deepening-eu-ukrainian-relations-what-why-and-how>

copying, but it offers some features of potential interest to the UK: a **structure** to frame the forthcoming UK-EU negotiations, a high degree of **single-market inclusion for three of the four freedoms (goods, services, capital, but not labour)**, and **other legal and institutional features** that would be of interest.

While the UK government has been debating its options in secret, 'events' are now forcing the pace, Nissan was threatening to leave the UK, major banks are considering re-location options, for which there are eager candidates, and now there is the judgment of the High Court over Article 50. Media reports say that a large number of MPs want the Article 50 decision to specify a 'soft Brexit' formula.

**Nissan** extracted from the government an assurance that it would not be disadvantaged by whatever outcome. What exactly was promised remains a secret, and whether such an assurance could be legally robust is questionable, since it would seem to require the agreement of the EU. However the business secretary was able to say that the government wanted **'tariff-free trade without bureaucratic impediments'**. That rules out the 'simple WTO' model, but it could mean inclusion in the customs union, but it could also mean also a DCFTA, **or interestingly a combination of customs union and DCFTA.**

The EU's recent **Association Agreements** with its close neighbours have a standard long list of chapters, all well-defined in legal terms, that concern all existing EU competences. The economic content is divided into two categories: first, the formal constituent parts of the Deep and Comprehensive Free Trade Agreements (DCFTAs), and second, a long list of other chapters under the heading 'Economic Cooperation'. The importance of the distinction is that the first elements can be regarded as core requirements for free trade, whereas the second might be approached more selectively.

The DCFTA list involves:

- Zero tariffs
- Customs procedures
- Technical standards and regulations for goods.
- Trade 'remedies'. i.e. anti-dumping
- Competition policy
- Intellectual property rights
- Public procurement
- Trade-related energy rules (e.g. on pricing)
- Basic rules for services
- Taxation (namely VAT)

The UK could presumably agree to maintaining compliance with this list, which would be the EU's minimal conditions for free trade. Of the above, maintenance of **EU customs procedures and technical product standards** would be essential for avoiding the so-called 'bureaucratic impediments' to free trade. However there is an option for adding to the DCFTA model, namely for the UK to remain in the **customs union**.

The Economic Cooperation list includes several chapters that are trade-related, but several that are not.

The trade-related chapters are:

- Financial markets
- Energy policy more broadly
- Transport.
- Environment, including climate
- Consumer protection
- Employment and social policy

A few comments on some of these items. For **financial markets** it is noteworthy that the Ukraine DFCTA retains exactly the same conditions for 'passporting' as in the EU's internal legislation. While Ukraine is nowhere in sight of meeting these conditions, the UK of course is.

Regarding transport, the UK would want to make a **civil aviation agreement** (CAA) with the EU, in order to remain in the single European sky. The model for this exists. For **road haulage** the UK would want to stay closer to the status quo than the restrictive (truck quota) Association Agreement.

On **climate**, the UK will surely intend to remain compliant with the Paris agreement, but will have to work out how far to remain integrated into the EU's mechanisms for implementation.

On **employment and social policy** it is notable that the Brexit minister has said that since EU employment law has not stopped the UK having a flexible labour market he would see no problem in retaining them as UK law. This would be helpful in meeting the 'social dumping' concern.

Among other trade-unrelated chapters, there are several where the UK has the highest interest in minimizing the departure from the status quo, such as for **scientific research, higher education, and many technical agencies of the EU**. The Association Agreement model provides explicitly for participation in these, even 'full participation' as for a member state in the case of Horizon 2020 for scientific research.

Two other parts of the Association Agreement would be of definite interest to the UK. First there are provisions for concern cooperation over foreign, security and defense policy, including possible participation in EU military missions. This would be an open-ended opportunity to cooperate, without specific pre-determined obligations. Second concerns the area of Freedom Security and Justice (FSJ). Here it is notable that the UK has in recent days announce that it wants to continue with the decision taken last year to opt back into around 30 measures for combatting crime and terrorism. It can be expected that an Association Agreement would bring in these provisions, and any other desirable points for cooperation in the FSJ area.

To this long agenda derived from the recent Association Agreements there are three additional elements that are certain or likely to be raised by the EU:

- Movement of people (more or less free)
- Contributions to the EU budget
- Corporation tax

In the Association Agreement model there are simply no provisions for the **free movement of people**, because the EU side feared too much immigration from its neighbours thus creating a precedent for agreeing to three freedoms without the fourth. The UK has not said what it proposes for limiting free movement of people, beyond that various options are being considered. It remains to be seen still whether the negative aspects of the Brexit campaign towards EU immigrants leads many to return home, or to deter new immigrants. One conceivable outcome is that immigration to the UK from the EU may drops drastically in the next year or two, or even turn negative. In which case a safeguard clause like the Swiss agreed with the EU in 1999 could turn out to be relevant. This would allow measures to be taken if there were a renewed surge of immigration. However we also know that the Home Office is considering a range of harder options.

On contributions to the **EU budget** there will presumably be a negotiation, with various parties on the EU side already saying that the UK will have to 'pay', but for what is not clear (for just free trade, or full single market inclusion??). The contributions made by Norway and Switzerland are precedents for any comprehensive inclusion in the single market.

On some accounts the EU might want to demand elements that go beyond its own existing policies. The outstanding candidate here is **corporation tax**, for which within the EU there is no legally binding minimum rate. The UK's current corporation tax is 20%, which is much lower than many member states

that go over 30%, but still much higher than Ireland at 12.5%. While Ireland hangs on to its very low rate in spite of criticism, because it has a veto over EU law in the taxation field, this would not stop the EU from requiring a commitment from the UK not to 'do an Ireland'. There will surely be EU concerns expressed under the label 'social dumping', boosted by the ultra-liberal statements of some Brexit advocates, such as about slashing corporation tax and regulations, or becoming the Hong Kong of Europe.

For 'free trade without bureaucratic impediments' the main open question would be how far the two parties would go beyond the core list (A), in including legally binding provisions for the (B) list above, as well as items of the (C) list.

At the technical level, it may be noted that the Association Agreement model has two potentially useful features. First, much of the **technical legal drafting**, including institutional provisions, that could be carried over if a similar structure were adopted, thus shortening the time needed to assure the technical adequacy of the legal drafting. Second, the Association Agreements provide for a very large degree of '**provisional application**' (indeed for all the DCFTA provisions) from the moment of signature, without waiting for the necessary ratification of the full treaty text by all EU member states and the European Parliament.

There is also talk on the British side about the need for a '**transitional agreement**', but what that might consist of is not evident, presumably meaning something beyond extending the two-year period of Article 50, or the 'provisional application' formula.

Overall the above leads into the fundamental question how far the process would go in replicating the single market content of the European Economic Area, taking into account that the Great Repeal Bill will initially switch or retain all relevant EU law onto the UK's own sovereign jurisprudence. The UK ministers must now be thrashing over where to draw the line on the extent of single market inclusion it wants. The main points of difference between the EEA and Association Agreement model are several. First, whereas the former entails compliance with 100% single market law, the Association Agreements are somewhat more selective in their coverage of the *acquis* for three of the four freedoms and are silent on the fourth freedom (movement of people), second, the Association Agreement model is truly comprehensive, including foreign policy and FSJ matters, whereas the EEA is limited to economic matters; and third, the dispute settlement provisions of the Association Agreements are less reliant on the European Court of Justice.

When making up their minds over this very complex agenda, the UK will try to anticipate the likely response from the EU side in advance of making their pitch. The EU's formal position is to decline to give any advance indication – the UK has to shoot first. However there are some well-known fundamentals of the EU side, notably the aversion to so-called 'cherry-picking'. Overall the idea of a quick and simple agreement on tariff-free trade, which some advocates of Brexit would instinctively like, will not fly. Free trade would for the EU have to be part of a comprehensive agreement, for which the Association Agreement model offers at least a rich template, and useful reference for both sides in deliberating what to aim at.