A UK BREXIT TRANSITION: TO THE UKRAINE MODEL?

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KEY POINTS

- The UK is searching for the framework of post-Brexit trade arrangements with the EU but the EU is limited in the kind of trade arrangements it offers to third countries.
- A new kind of trade agreement with Ukraine has recently become fully operational. A similar agreement may offer a way forward for the UK-EU negotiations. It could combine access to the Single Market, maintenance of, and involvement in, the creation of technical standards, and application of the same norms to procurement and competition, but without the obligations of full membership of the EU.
- The Agreement also offers a "buy in" to other EU policies but these are not conditional on subscribing to the price of full membership of the EU.

INTRODUCTION

There is no clear indication where negotiations will take the EU-UK trade relationship. A clean Brexit from the EU has always been unrealistic[1] and the EU is not flexible in its models of external trade negotiations. Ultimately the nature of EU trade policy is determined by political negotiation between the Member States, with the European Commission mediating the political differences. But there are legal, indeed, constitutional, constraints upon the scope for manoeuvre in the EU external relations policy. In reality, existing models of EU external trade agreements can be broken down into two main types, loosely identified as "near" or "far" trade.[2] What is clear is that, in both forms of external action, the EU has been successful in creating a regulatory magnet where its preferred technical standards dominate trade provisions.

The first set of trade arrangements is based upon close proximity to the EU – a direct neighbourhood policy which involves extending EU regulatory norms to a wider geographical area. This approach is seen in the EEA arrangement with Norway, Iceland and Liechtenstein[3] as well as the agreements with Switzerland.[4] The trade agreement with Turkey is more complicated, resulting in Turkey being part of the EU customs union (with an exclusion for agriculture) and, therefore, a requirement that Turkey adopts EU technical industrial standards.[5]

The second set of trade agreements is used with countries further afield, for example, Canada[6], South Korea[7] and the current negotiations with Japan.[8] These agreements may be viewed as the classic kind of international free trade agreements where the EU is not able to dominate

1 The Prime Minister's September 2017 speech envisages that the UK should negotiate an implementation arrangement for trade until the detail of a permanent relationship has been fully ironed out and implemented: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu

2 The state of play of EU trade agreements and negotiations as at September 2017 can be found at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

3 http://www.efta.int/eea/eea-agreement

4 https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen.html

5 http://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/

6 http://ec.europa.eu/trade/policy/in-focus/ceta/

7 http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/

8 http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/

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the agenda. Regulatory cooperative arrangements refer to international technical standards or international conventions in chapters dedicated to issues such as the environment or intellectual property. In many instances these international standards will have been heavily influenced by the EU.

Beyond these two broad frameworks the EU appears to have little room to manoeuvre. This explains why the demands from the UK to negotiate a new and bespoke trade agreement pose a challenge. The UK has set out that it wants a deep and comprehensive agreement with the EU but it would seem that a bespoke agreement may have to be fashioned out of the existing choices. One model of a new agreement for a state wanting a deep and comprehensive relationship with the EU is the EU-Ukraine Association Agreement that came fully into force on 1 September 2017. This model offers some new ideas on how the UK could access the EU Single Market without the benefits and obligations of full EU membership. This could be described as a "Ukraine plus" model. Aspects the "plus agenda" for the UK would be a discussion of EU Citizenship rights and how to solve the issues of the border between Northern Ireland and Eire.

The model of the EU-Ukraine Association Agreement offers many positive aspects for a framework for the EU-UK trade relationship in the form of tariff-free access for goods and passports for services, and customs cooperation. The immigration issue is dealt with by subjecting the movement of labour to a visa liberalisation[9] and work permit system. Competition, state aid, anti-dumping and public procurement regulation alignment is a necessary part of the agreement. Ukraine also has the option of "buying in" to a number of EU common programmes, for example, the Horizon 2020 research programme as well as EU agencies such as Europol. Ukraine may also choose to participate in a wider set of EU common policies such as transport, environment, employment and consumer protection policies. The agreement envisages future political cooperation in the field of justice and home affairs as well as foreign, security and defence policies.

This paper outlines the major aspects of the EU-Ukraine Association Agreement, suggesting how the Agreement could be a framework for thinking about future UK-EU negotiations. **Part I** explains why the Agreement is an innovative Agreement. **Part II** examines the legal basis of the Agreement. **Part III** examines the new institutional and governance arrangements of the AA, suggesting links with EU agencies and institutions could be valuable in a future post-Brexit deal for the UK. **Part IV** examines the application of conditionality to trade agreements. **Part V** addresses the role of arbitration and the need for a dispute resolution system that is acceptable to the UK and the EU. **Part VI** describes the substance of approximation of Ukrainian law to the EU *acquis* and how this would not be an onerous issue for the UK in unravelling its own relationship with EU law.

I. A NEW TYPE OF INTEGRATION WITHOUT MEMBERSHIP

The EU-Ukraine Association Agreement (AA)[10] is hailed as an innovative form of external action, offering a new type of integration without membership of the EU, for the creation of a Deep and Comprehensive Free Trade Area (DCFTA).[11] But Downes (2017) argues that the agreement is not consonant with the aims of the EU 2004 European Neighbourhood Policy, which strives to avoid creating new divisions in Europe and to promote stability and prosperity within and beyond the borders of the newly-enlarged EU. Indeed, in the Council Decisions implementing the provisional application of the AA in June 2014 there is no mention of Article 8 TEU.[12] Neither is the Agreement consonant with the 2009 Eastern Partnership, described by Füle as aiming to anchor stability, democracy and prosperity to partner states in the European neighbourhood.[13] The Agreement is a mixed agreement in EU law and has only recently been ratified by The Netherlands.[14] However, the political importance of the AA for Ukraine and the EU is revealed in that, since January 2016, the EU and Ukraine have provisionally applied certain Titles of the Agreement.[15]

9 This was achieved by an amendment to the general EU Regulation governing third country visa regulations in the EU: REGULATION 2017/850 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine), OJ L 2017 133/1.

10 The EU-Ukraine AA can be accessed at: http://collections.internetmemory.org/haeu/20160313172652/http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf. See Van der Loo et al. (2014).

11 Bouris and Schumaker (2017); Hoekman et al (2013); Tyushka (2016).

12 Art 8 TEU was introduced by the Treaty of Lisbon 2009 and grants the Union specific competence to conclude Agreements with neighbouring states. Art 8 TEU mentions a clear duty of the Union to "develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on co-operation. The lack of a reference to the "neighbourhood" is due to Ukraine no longer perceiving itself to be a neighbour but a European state.

13 Štefan Füle "EU-Ukraine: Dispelling the Myths About the Association Agreement" Speech by the Commissioner for Enlargement at the international conference "The Way Ahead for the Eastern Partnership" held in Kiev, 11 October 2013. Available at: http://europa.eu/rapid/press-release_SPEECH-13-808_en.htm

14 Szyszczak (2016).

15 Article 486 of the EU-Ukraine AA foresaw difficulties in ratification and allowed for the provisional application of the Agreement. Titles III, V, VI and VII, and the related Annexes and Protocols have been provisionally applied from 1 November 2014; Title IV has been applied from 1 January 2016.

II. THE EU LEGAL BASE

The EU-Ukraine AA was adopted by a Council Decision on 17 March 2014. The EU legal base used is a combination of the Common Foreign and Security Policy legal base (Arts. 31(1) and 37 TEU) and the Association provisions (Art. 217 TFEU)). Both legal bases require unanimity voting in the Council. The combination of CFSP/TFEU legal bases reflects the comprehensive nature of the AA and the continuing bipolarity of the external competence of the EU found in Article 40 TEU. The AA is, therefore, a mixed agreement requiring ratification at the Member State level.

The aim of the AA is to integrate Ukraine into the EU internal market. Thus, a new dimension is the mechanisms by which the relevant EU laws are approximated by Ukraine, alongside the new and sophisticated mechanisms to secure the uniform interpretation and effective implementation of relevant EU legislation in Ukraine.

The EU-Ukraine AA is based on a strict conditionality approach. The Preamble to the Agreement explicitly states that:

> "…political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas."

The link between the third country's performance and the deepening of the EU's engagement is seen in the European Neighbourhood Policy (ENP) and the Eastern Partnership (EaP). But this principle has been applied using soft-law instruments.[16] With Ukraine it is embedded in a legally-binding bilateral agreement.

Even if a new trade agreement with the UK contained a conditionality clause, the current UK terms of membership of the EU should satisfy the values inherent within the EU system. It remains to be seen how far other European values, relating to non-discrimination, environmental concerns, for example, are shelved or watered down once the UK has left the EU.

Already, in clause 5(4) of the EU Withdrawal Bill, currently before Parliament, the Government has shown its hand and indicated that the Charter of Fundamental Rights of the EU[17] will not be incorporated into UK law after Brexit. But this makes legal sense since the Charter only applies when a Member State is implementing EU law. What is lost for the future is the uncertainty of whether the developing jurisprudence on interpreting the text of the Charter, and the possibility of extraterritorial application, will be taken into account by the UK courts after Brexit. There are elements within the Conservative Party that believe that the UK should revise the legal position of human rights protection in the UK, for example, leave the ECHR system and repeal, or replace, the domestic Human Rights Act 1998, but these elements were drowned when Prime Minister May called an early General Election. Any reform of human rights legislation will not take place while Brexit negotiations are ongoing.[18]

III. A NEW INSTITUTIONAL FRAMEWORK

The new dimension to EU external relations is shown in the EU-Ukraine AA with a reinforced institutional framework, enhanced forms of conditionality, and more sophisticated legal mechanisms for the approximation of laws and dispute settlement than has previously been seen in EU Association Agreements.

Annual Summit meetings form the public focal point of the importance of the AA.[19] These have an added symbolic resonance, and provide accountability and transparency to the approximation process. Decision-making takes place within the site of an Association Council composed of Ministers. A Parliamentary Association Committee may make recommendations to the Association Council. This body the power to update and amend the AA Annexes, as well as exchange information on the approximation of laws process.[20] It is assisted by an Association Committee, with a specialized sub-committee, composed of civil servants.[21] These bodies address the technical aspects of approximation of Ukraine's trade laws with the EU *acquis*.

This kind of institutional arrangement may be necessary for a bespoke UK-EU agreement since the UK will have to conform to EU and international technical standards if it wants to trade in global markets.

What is also novel in this new structure is a Civil Society Platform, replicating the involvement of Civil Society in EU policy-making. The Platform is built from members of the European Economic and Social Committee[22]

16 See the essays in Ratka and Spaiser (eds) (2012).

17 Available at: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

18 Christopher Hope, "Britain to be bound by European human rights laws for at least another five years even if Tories win election" 18 May 2017, The Telegraph: http://www.telegraph.co.uk/news/2017/05/18/britain-bound-european-human-rights-laws-least-another-five/

19 Art 460 EU-Ukraine AA.

20 There are 44 Annexes which provide the mechanism for the evolution and response to dynamic changes in EU law and policy.

21 Art 464 EU-Ukraine AA.

22 On the EU side there are 9 EESC members and 6 permanent observers from the European civil society networks (Eurochambres, BusinessEurope, ETUC, Copa-Cogeca, cooperatives Europe, EaP Civil Society Forum. Details of the work to date and Reports can be found at: http://www.eesc.europa.eu/?i=portal.en.ukraine-csp

and representatives of civil society from Ukraine, with fifteen members each from the EU and Ukraine. Chapter 26 of the AA on Civil Society cooperation explains the role of Civil Society in the AA: to ensure social and cultural dialogues and "a better mutual knowledge and understanding between the parties" in areas such as trade and sustainable development. This is an important site for Ukraine to allow civil society a voice in the development of trade, alongside any redistributive effects the impact of trade may bring for Ukraine. The EU has been skilful in developing the role of civil society as part of the balance to executive power in the EU, and the European Commission has been careful to use and coordinate such networks to its advantage to counterbalance the dominance of the political power of the Member States (Szyszczak 2013).

IV. CONDITIONALITY

Hard Core Common Values

The EU-Ukraine AA utilises a conditionality tool to commit Ukraine to the common European values of democracy, the rule of law, respect for human rights and fundamental freedoms. These aspects of fundamental rights conditionality are found in in the European Neighbourhood Policy and are based not only on EU norms but also international norms.[23] The AA distinguishes between a set of hard core common values related to fundamental rights and security and a set of wider principles that are seen as necessary for the AA to function, but not necessarily serious enough to suspend the operation of the AA.[24]

Dialogue and Co-operation on Domestic Reform

There is an additional condition attached to the AA in Article 6 where human rights and fundamental freedoms are also a condition to a "dialogue and cooperation on domestic reform." Similarly in Article 14, human rights and fundamental freedoms are included in cooperation on justice, freedom and security. Here the EU-Ukraine AA is more sophisticated than previous external agreements and refers specifically to the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery."

Access to the EU Internal Market

A different strand of conditionality is seen in relation to the commitment to the DCFTA. Market access to the EU Internal Market will only be available under a strict monitoring procedure, confirming that Ukraine has implemented its commitment to the approximation of its laws to the *acquis*. The monitoring tool is re-utilised from the procedures used in the central and eastern Enlargement process pre-2004. Ukraine is expected to provide reports to the EU according to the approximation deadlines set out in Art 475(2) of the AA. Innovatively, there may be "on-the-spot missions, with the participation of EU bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed."[25] The level of detail and the timetable of the approximation provisions, including provisions to accommodate the dynamic evolution of EU law, is in contrast to earlier PCA and other Association Agreements.[26]

The monitoring procedures are to be discussed within the auspices of the joint bodies and the bodies may adopt recommendations, using a unanimity voting process. The Association Council or the Trade Committee are the only bodies that may decide if there should be further market-opening. This will depend upon whether the DCFTA has been implemented and enforced. Recommendations or decisions of the joint institutions (or if there is a failure to reach an agreement) may not be challenged under the DCFTA dispute settlement procedure.[27]

In addition, there is a list of elements which are not regarded as essential elements but are considered to underpin the relationship between the EU and Ukraine; they are viewed as central to enhancing the relationship but a failure to adhere to them will not trigger the suspension of the AA.[28] Within this list, the principles of a free market economy are a core element underpinning the economic and social development of Ukraine.

The UK would presumably have very few problems in aligning its existing laws to the EU *acquis*. The UK had a good record of implementing EU obligations into domestic law through the European Communities Act 1972. Because the UK currently has a strong lobbying presence in Brussels and weight at the negotiating table, the UK does not normally find itself out-voted when EU legislation is being considered and there have been few cases brought by the European Commission (or other Member States) for non-compliance with EU law. The bulk of EU regulation tends to be adopted by a "copy and paste" process using secondary (delegated) legislation. The ECA 1972 allows for EU law to give rise to direct effect in the national legal system, alongside the controversial quality of bestowing supremacy of EU law over national law. It gives effect to rulings of the European Courts. The EU Withdrawal Bill, if passed, and without amendment, would remove all the provisions guaranteed by the ECA 1972. In order to avoid

23 The Helsinki Final Act, the Charter of Paris for a New Europe, the UN Declaration on Human Rights and the ECHR 1950.

24 Art 478.

25 Art 475(3) AA.

26 Art 474. There are 44 Annexes setting out the detail of approximation.

27 Art 475(6) AA.

28 The principles of free market economy, rule of law, the fight against corruption, the fight against different forms of trans-national crime and terrorism, the promotion of sustainable development and effective multilateralism. Art 3.

a legal vacuum and regulatory gaps, pre-Brexit EU law and European Court judgments remain in force until they are withdrawn or amended by either Government or Parliament.

Pre-Brexit European Court judgments retain their status until they are amended by Government or Parliament or overruled by the UK Supreme Court. The UK courts would have the option to take into account post-Brexit European Court case law. There is some uncertainty as to the status of EU law during any transition or implementation period. Mrs May was silent on this aspect in her September 2017 Florence speech and avoided a question on the point in the Q &A session. The EU would want to retain the status quo during any transitional arrangements. Subsequently the Prime Minister – in a Brexit Statement on 10 October 2017 – told the House of Commons that the UK would be bound by rulings of the Court of Justice of the EU (CJEU).[29]

Clause 9 of the EU Withdrawal Bill grants the UK government *unlimited power* to amend any UK laws to give effect to any post-Brexit agreement that defines the future trade relationship with the EU. Thus the UK government is in a strong position to control the adherence to EU law and future obligations under a new Association trade agreement, and to satisfy any conditionality requirements built into a future agreement. The challenge will be to ensure that any EU recognition of new UK technical standards – and bodies creating and validating such standards – are recognised as appropriate by the EU.

V. COURTS AND DISPUTE RESOLUTION

The role of the European Courts (and indeed the role of the European Commission) in any future trade deal based around the EU-Ukraine AA framework would be one of the most contentious areas to grapple with.[30]

When the EEA Agreement was negotiated the CJEU refused to accept that new judicial institutions could be established within the framework of EU law.[31] An EEA court was proposed, which would have been functionally integrated with the CJEU. When sitting in plenary session the proposed court would have been composed of 5 CJEU Judges and 3 Judges nominated by the EFTA States. In an Opinion[32] on the compatibility with the then EEC Treaty of the new judicial mechanism creating the CJEU held that:

> 'It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the [draft] agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect. Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law.'[33]

After renegotiation, a Surveillance Authority and a Court of Justice (the EFTA Court) were seen as satisfactory and compliant with EU law by the CJEU in Opinion 1/92.[34]

The UK government has set out its views on how future disputes could be resolved in a position paper, *Enforcement and dispute resolution - a future partnership paper* (23 August 2017).[35] This Paper recognises that 'there are a number of additional means [not involving the direct jurisdiction of the CJEU] by which the EU has entered into agreements which offer assurance of effective enforcement and dispute resolution and, where appropriate, avoidance of divergence, without necessitating the direct jurisdiction of the CJEU over a third party' (para 67). An example explicitly recognised in the Paper (at paragraph 20) is the Association Agreement with Ukraine which serves to exemplify where the EU has accepted binding international arbitration mechanisms.

However, in the EU-Ukraine Agreement the arbitration mechanism is geared towards ensuring CJEU supremacy in the interpretation of EU law. Art 322(2) sets out that:

> '[w]here a dispute raises a question of interpretation of a provision of EU law [relating to regulatory approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition), or which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law], the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of

29 https://www.theguardian.com/politics/blog/live/2017/oct/09/snp-conference-sturgeon-says-brexit-developing-disaster-and-case-for-2nd-referendum-getting-difficult-to-resist-politics-live

30 See the BBC News: http://www.bbc.co.uk/news/uk-politics-41426620

31 There are similar issues over the accession of the EU to the ECHR and how to balance the respective competence of the CJEU and the ECtHR.

32 Opinion 1/91 ECR [1991] I-6079.

33 Opinion 1/91 ECR [1991] I-6079, at I-6084.

34 Opinion 1/92 [1992] ECR I-252.

35 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf

> Justice of the European Union shall be binding on the arbitration panel.'

Therefore, this may not be the model that the UK would subscribe to in order to resolve disputes over the interpretation of a post-Brexit trade agreement. Reference to an arbitration panel recognising the UK and the EU as equal partners would presumably be the preferred approach of the UK, requiring the EU to adapt its position on the role of supremacy of EU law in external Treaties as well as the central role of the CJEU in upholding EU law, as set out in Article 19(1) of the Treaty of Lisbon:

> 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.'

VI. THE SUBSTANCE OF APPROXIMATION

Van de Loo et al (2014:14) describe the approximation of Ukrainian law with the EU acquis as a "patchwork".[36] This is because Ukraine is starting from a blank canvas, as well as grappling with many economic and political issues that are not found in the UK. Quite obviously technical barriers to trade occupy an important space, but the AA also focuses heavily on the liberalised industries and on Services, Establishment and Electronic Commerce. These are all sectors where the UK would have little difficulty – and indeed would be welcomed by the sectors – in maintaining the EU regulatory framework. The crunch will come where arrangements are thrashed out for the UK to participate in future standard setting.

In tandem to the general approximation programme, the DCFTA also focuses upon the approximation of public procurement legislation.[37] Once Ukraine has implemented this requirement it will have the novel opportunity of access to the vast EU public procurement market – an opportunity only accorded to third states under the EEA.[38] This may prove to be a major incentive for direct foreign investment as businesses from third country states (which in the future will include the UK) have an incentive to establish in Ukraine, particularly as joint ventures. Such an arrangement would also be welcomed in post-Brexit UK, especially since the EU legislation was heavily influenced by the UK negotiating position wanting a light touch where social procurement was at stake, and has been transposed into UK law through "copy and paste" procedures with little controversy.[39]

In relation to competition law, there appears to be a break in the link between fulfilment of the obligations to approximate domestic law and additional market access. Chapter 10 of the AA has a detailed set of competition law provisions, mirroring the EU provisions on competition law and policy, which must be included in Ukrainian reforms. This is an unusual aspect of the AA; in other sectors, the Annexes are used to work out the detail, with the idea that there can be some flexibility in amendment. The fact that there is a detailed competition chapter in the actual Treaty is novel for EU external relations as well as for international Treaties in general. It reflects the growing interest in including completion (antitrust) chapters in trade agreements as well as cooperation and information exchange networks at the global level. Again, the UK has had few problems in implementing EU competition law in the UK and has a robust regulatory and enforcement environment, often going beyond EU requirements.

A competition chapter in a future EU-UK trade agreement would be welcomed by consumers as well as business.[40] There will be a need for future co-operation between the CMA and the European Commission[41] for many years to come. There will be many historical issues to grapple with, for example: ongoing commitments agreed to under the EU competition and merger rules; the question of how to enforce anti-competitive behaviour pre-Brexit where historical evidence comes to light; as well as the implementation of on-going European Commission and European Court cases on the date of Brexit. There will be future issues including, inter alia, how to tackle anti-competitive conduct by UK firms having an impact on the Single Market and, vice versa, how to enforce UK competition law against firms based in the EU but having an effect on the UK market. The role of State aid will also be a concern for any future trade deal, particularly if it is used to pursue a new industrial policy for the UK.[42]

36 See also Van Elsuwege and Petrov (2014).

37 Art 153 AA. This is a structured implementation programme, divided into Basic Elements, Mandatory Elements and Non-Mandatory elements derived from the EU Public Procurement Directives 2004/18/EC and 2004/17/EC.

38 For a deeper discussion see Sanchez-Graells (2017).

39 See UK Government Guidance EU Procurement Directives and the UK Regulations: https://www.gov.uk/guidance/transposing-eu-procurement-directives

40 The House of Lords' EU Internal Market sub-committee is currently conducting an inquiry into Brexit: competition, see: https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-internal-market-subcommittee/inquiries/parliament-2017/brexit-competition-inquiry/

41 And national competition regulators through the European Competition Network Including any enhancement of the powers of the ECN from the ECN+ : Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market Brussels, 22.3.2017 COM(2017) 142 final, available at: http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf

42 See Erika Szyszczak, "State Aid is On the Agenda: Deal or No Deal", UKTPO Blog, 6 October 2017. Available at: https://blogs.sussex.ac.uk/uktpo/2017/10/06/state-aid/

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CONCLUSION

At first sight the EU-Ukraine AA presents as yet another attempt by the EU to extend its territorial influence into new markets with an even deeper expectation of commitment from Ukraine to adopt the EU regulatory framework and rules (the *acquis*) as a condition of trade. This reinforces the regulatory core of the EU as a major trading bloc and this is not necessarily a problem for Ukraine. Compliance with EU standards will open up international markets for Ukraine in a new geographic trade network.

The research on trade and fragile states is limited but there are clear repercussions of the effects of trade for Ukraine in terms of internal reforms to facilitate trade through new competition, procurement and anti-corruption policies, including enforcement mechanisms. Through the AA, Ukraine insists that it is an equal partner as a "European" state. This alters the cultural as well as the political identity of Ukraine.[43]

Compliance with the EU *acquis* in terms of social and human rights values is not necessarily regressive for Ukraine. The under-development of the social dimension to EU integration has been criticized but the perceived impact of Brexit on UK employment and environmental standards has brought home the value of the use of supranational benchmarks as minimum requirements, especially once it is realised they could be watered down (or even withdrawn) in the future.

This paper is a brief attempt to contribute to the forward-looking discussion of how the UK can unravel its trade relationship with the EU and renegotiate a new relationship. The EU trade agreement with Ukraine reveals that the EU is willing to adapt previous Association Agreements to new circumstances. For the UK, the adoption of this approach would require less unravelling of existing UK laws, but offer some room for independence in negotiating future issues. Such an Agreement provides access to the Single Market, maintains inward investment incentives and provides an attractive location for establishment, especially in the services sector. This is one area the UK is keen to protect. But the EU-Ukraine AA allows the EU to keep the upper hand in setting the agenda, the terms of entry to the EU market and the role of EU law, and the European Court of Justice. Thus, there may need to be a little more flexibility on the part of the EU if this type of Agreement is to serve as a new framework for the future UK trade relationship with the EU.

43 Van der Loo and Van Elsuwege (2012).

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FURTHER INFORMATION

The UK Trade Policy observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

1) initiates, comments on and analyses trade policy proposals for the UK; and

2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

For further information on this theme or the work of the UK Trade Observatory, please contact:

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