

ABSTRACT

Whilst the legal and economic challenges presented by Brexit are gradually becoming more evident, observations and recommendations are already being drawn from consequences of a “no deal scenario” and particularly the possibilities of entering into a variant of a Free Trade Agreement which should, prevent a “no deal” situation. Such a Free Trade Agreement existing between the current 28 EU Member States and the three EEA European Free Trade Association (EFTA) States Iceland, Liechtenstein and Norway (EEA Internal Market) This paper, amongst other objectives, is aimed at highlighting such proposals which have been put forward to avert a “no deal scenario”. It is obvious that change – and more specifically, fundamental legislative, regulatory overhauls, will require not only the incorporation of expertise from different fields, but also time consuming and costly resources to address the demands of the transitional and implementation periods of such legislatively transformed landscapes.

Certainly, a gradual process of incorporating and adapting to new regulatory and legislative changes and environments – and particularly in respect of economically sensitive related matters, would require not only thorough and dedicated observatory and monitoring periods, but also one which facilitates and encourages a process of greater democratic accountability and transparency to be incorporated into the legislative processes.

Even though Brexit has generated a great degree of economic uncertainty – which has in turn presented challenges – as well as consequences, it also presents opportunities for new actors to engage and influence vital decision making aspects in areas which particularly revolve around information technology, sustainable development, innovation – as well hybrid financial instruments and volatile mediums which are embodied and personified by crypto currencies, derivatives and other complex financial instruments and mediums of exchange - all of which are reflective of a rapidly changing and evolving financial environment.

The challenges now involve to a larger extent, the manner and the degree of relevance to which vital and dominating actors and institutions will be accurately represented and impact future legislations – particularly those which focus around issues relating to trade, environment and sustainable development policies.

Key words: financial services, Brexit, Information Technology, innovation, e commerce, sustainability, GATS

Avoiding a “No Deal” Scenario: Free Trade Agreements, Citizenship and Economic Rights

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Introduction

The importance attributed to the concept of “EU citizenship” was recently brought to the fore during recent Brexit negotiations, whereby it was confirmed as a vital element in the Brexit negotiations – other issues relating primarily to the UK-Irish border, as well as the need to resolve potential internal market issues. Consequences for EU citizens living in the United Kingdom – as well as those UK citizens living in other parts of the European Union and their status in the event of a “no deal” Brexit particularly, constitutes one of the principal agendas – even though this was resolved and appears to have presented less challenges than matters relating to regulatory alignment and the UK-Irish border. The connection between all areas is evident from the underlying basis and objectives of the single market as well as the economic rights which embody freedom of movement within the internal market.

“The notion of EU citizenship started from economic rights, leading to the recognition of rights to all EU citizens, regardless of their economic status, enshrined in the Charter of Fundamental Rights of the European Union. Following Brexit, we expect an opposite development, with a shift from citizens’ rights back to the recognition of specific economic rights to individuals linked to single freedoms of the internal market”²

The above statement may appear to contradict that which was postulated by Circolo et al,³ in their article:

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² Ornella Porchia, “Citizens’ rights in the post Brexit scenario” ERA Forum (2019) 19:585–595 <https://doi.org/10.1007/s12027-018-0545-0>

³ See Circolo, A., Hamulák, O. and Blažo, O. (2018). “Article 50 of the Treaty on European Union: How to Understand the ‘Right’ of the Member State to Withdraw the European Union?”

- Accession and withdrawal are autonomous rights of the states and the membership is their privilege, which cannot be taken away by a decision of an institution or a decision of other Member States.

However, it can be inferred that although the decision of an individual member state to withdraw from the European Union, should not impact on the status and membership of other member states, such a decision should be respected and regarded as the mandate of the citizens of the member state which has chosen and voted to withdraw from the European Union.

The present challenges of the UK’s decision to withdraw from the European Union is even compounded further by the fact that it is an unprecedented one. Given such a unique situation, various deliberations and recommendations have been put forward in the event of a “no deal” Brexit as well as other proposals aimed at averting disastrous and disrupting consequences which could emanate from such a situation.

Fundamental Treaty Freedoms

- Free movement of Capital
- Free movement of Persons
- Free movement of Goods
- Free movement of Services

The free movement of capital is the most recent and broadest of all Treaty freedoms.⁴

“The free movement of capital is the only freedom constituting the single market which is also granted to third countries.”⁵

As well as encompassing areas relating to the free movement of persons, goods, services, and capital, the EEA Agreement also embraces the freedom of establishment,⁶ however, limits⁷ inherent in the Agreement are highlighted by Berger and Badenhoop who propose alternate models as a means of averting a situation which could result in the event that a “no deal” Brexit occurs.

⁴ “The free movement of capital underpins the single market and complements the other three freedoms. It also contributes to economic growth by enabling capital to be invested efficiently and promotes the use of the euro as an international currency, thus contributing to the EU’s role as a global player.” See Arts. 63-66 TFEU.

⁵ See Arts. 63-66 TFEU. http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.3.pdf

⁶ See Articles 8-46 EEA Agreement

⁷ “The upper boundary against which an EU-UK FTA needs to be measured is the EEA Agreement, which creates an internal market between the current 28 EU Member States and the three EEA European Free Trade Association (EFTA) States Iceland, Liechtenstein and Norway (EEA Internal Market).” See Berger, H. and Badenhoop, N. “Financial Services and Brexit: Navigating Towards Future Market Access”, European Business Organization Law Review (2018) at page 702.

Based on the strategic importance of economic considerations, as underlying bases on which the fundamental freedoms are enshrined, it is evident that the economy should also constitute a significant factor which frequently determines and impacts the decisions taken by citizens of individual member states in exercising their democratic rights to vote.

However, how well informed are those citizens in respect of the legislative history and legislation which govern their economic environments – as well as legislative processes which are to impact consequences of their exercised rights?

The results of the 2016 Referendum, which have culminated in current ongoing Brexit negotiations have not only revealed how very uninformed people were as regards matters of their rights under EU law, but also the level of discrepancies between what was actually expected from the results and the outcome of the Referendum AND the actual process which followed thereafter.

A clearer consequence of the reality of Brexit has not only facilitated greater engagements of citizens (UK and EU citizens living in the UK, particularly) in matters relating to their rights and possible consequences of legislation to be introduced in the aftermath of Brexit, but also triggered recommendations in respect of possible benefits or costs to be generated (as well as incurred) in the event of a “deal” or “no deal” scenario.

To what extent are the interests of such citizens adequately represented in the legislative processes at supra national level? More importantly, will the interests of such citizens be adequately accounted for in the advent that fundamental legislation is overhauled and the growing influence of powerful lobbyists impacts considerably on supranational legislation?

Literature Review and Background to the Study

According to Dialer and Richter,⁸ “lobbying plays an important role in a healthy democratic system in terms of policy-making and is a legitimate and essential part of the law-making process. Lobbying is not inherently undemocratic; it is rather a rational response to the problems arising from any knowledge deficit faced by understaffed EU policy-makers, pressed for time and who generally lack the type of policy expertise required for complex legislative decisions”.⁹

⁸ See Dialer, D, and Richter, M. (2018), Lobbying in Europe: Professionals, Politicians, and Institutions Under General Suspicion?

⁹ Also see Crepaz et al., part I, Chapter 4

Furthermore they add that, “ by contrast, interest groups tend to be experts in their specific sectors or fields of activity and possess the type of in-depth policy information required by EU staff.”

The role of non governmental organisations as representatives of interests which primarily relate to important matters of trade, climate and sustainable development policies is also considered to be dominated and vulnerable to powerful influences of multi national corporations and lobbyists which are estimated to spend millions on processes aimed at influencing such supranational legislative decision making processes.¹⁰

It is however, still a controversial¹¹ topic as regards the effectiveness and impact of multinationals - their financing habits, allocations and accountability in respect of delegated funds, on the ability to influence legislative processes as revealed by recent (GDPR) regulations that have been introduced following such prominent cases – and notably that involving Cambridge Analytica.

E Commerce and Data Analytics are rapidly growth sectors of Information Technology which are continually impacting businesses, consumers, as well as legislative procedures on an increasingly, phenomenal rate. Business - consumer relationships have been radically transformed over the last decade – with trade also being impacted by matters relating to privacy, copyright , intellectual property and patents related issues – as well as the traditional move from a focus on products to

¹⁰ According to Dialer and Richter and based on reports obtained by them from several databases:“ Among the 25 biggest spenders are, according to an overview provided by the platform lobbyfacts.eu, 9 companies from the energy sector (e.g., ExxonMobil and Shell) spending in total over €28 million a year on lobbying, 5 from the IT (e.g., Google and Microsoft) and the telecommunication sector (estimated spending €17.5 million), 2 railway and infrastructure companies (€12.9 million), 3 from the financial sector including Deutsche Bank (€8.1 million), 3 car manufacturers (€7.4 million), 1 from the chemical/pharmaceutical sector (€3.2 million), 1 from the tobacco (around €2.4 million), and 1 from the alcohol industry (around €2.4 million).” Further they add that, “even single non-governmental organizations (NGOs) declare lobbying expenses up to € 8 million, while more than 60 NGOs invest more than €1 million in lobbying activities.” “All in all” and in their opinion, “NGOs quite rightly complain that they are massively outspent by corporate interests when it comes to influencing EU legislation.” See Dialer, D, and Richter, M. (2018), Lobbying in Europe: Professionals, Politicians, and Institutions Under General Suspicion?

¹¹ It is also argued that “literature disagrees as to the degree to which interest group resources determine an interest group’s ability to influence policy-makers (Eising: 2007; Klüver: 2012; Cotton:2012).

- The size of lobbying coalitions determines an interest group’s success. Small- and medium-sized enterprises’ (SME) coalition building on the highly contested TTIP negotiations proves this argumentation although lobbying positions of SME representatives differ between Brussels-based SME associations (e.g., “European Small Business Alliance” and “Eurochambres”) and ad hoc initiatives within single member states (Götz, part V, Chap. 27).
- Emphasis on the fact that business interests are only successful where conflict is low and issues remain technical and below the radar of public saliency (Klüver et al. 2015); in Dialer, D, and Richter, M. (2018), Lobbying in Europe: Professionals, Politicians, and Institutions Under General Suspicion?

an approach which takes greater interest in consumer preferences, tastes, their affordability – and their accessibility and relevance to such products.

Consumer tastes and preferences continually impacted by ethical and climate related issues are reflected by vegan choices, eco friendly products and the need for greater consideration of the ecosystem.

Having due regards to the above observations, and the increasingly growing popularity in many European countries, particularly, in respect of biologically grown and environmentally friendly products, it could be argued that there is adequate representation of consumer interests in respect of climate related issues and considerations. However due regard should also be made in respect of the affordability and accessibility of many consumers to such products.

Main Issues to be Addressed

- The need for more representative interests, actors and group participation in legislative processes at supra national level
- The need for greater education of citizens as regards their rights, consequences of their decisions – particularly in respect of vital matters which relate to the accession and withdrawal of an individual member state from an exclusive membership of the European Union
- The need for greater collaboration and coordination between powerful multinational corporations, non governmental organisations and actors in matters relating to trade, climate and economic policy matters – as well as decision making processes.
- Adopting a flexible, responsive and strategic approach which provides for the changing and evolutionary economic environment – whilst embracing other vital facets such as Information Technological advances, innovation, climate change considerations and the need to engage actors who are relevant, reflective and representative of the demands and needs of the modern environment, economy and technologies.

Recommendations

In the paper, “Financial Services and Brexit: Navigating Towards Future Market Access”, Berger and Badenhoop¹², propose five models – within the scope of a Free Trade Agreement whereby it is also added that this scenario (entering an FTA) should prevent a “no deal scenario” – as well as

¹² See Berger, H. and Badenhoop, N. “Financial Services and Brexit: Navigating Towards Future Market Access”, European Business Organization Law Review (2018) 19:679–714 <https://doi.org/10.1007/s40804-018-0124-4>, particularly pages 703 to 711

consequential financial disruptions occasioned by a “no deal” scenario. The five models are as follows :

- FTA without Specific Rules for Financial Services (‘Bare Bones Deal’)
- FTA with Few Specific Rules for Financial Services (‘CETA Model’)
- FTA Granting Market Access via Equivalence Regime (‘Equivalence Plus Model’)
- FTA Granting Full Market Access Based on Alignment (‘Alignment Model’)
- FTA Granting Full Market Access Based on Alignment and Non-alignment (‘Bold and Ambitious’)

Whichever model or proposal is eventually adopted, will require consideration of the importance of coordination between emerging global players, innovative and strategic partnerships, as well as the need incorporate evolving consumer tastes and preferences in an increasingly dominated environment characterized by the influence of phenomenal and revolutionary changes attributed to Information Technology, the Internet Revolution, Artificial Intelligence and blockchain systems – to name a few.

In recommending an “upper boundary against which an EU-UK FTA is to be measured as the EEA Agreement”, which “creates an internal market between the current 28 EU Member States and the three EEA European Free Trade Association (EFTA) States Iceland, Liechtenstein and Norway (EEA Internal Market)”, Berger and Badenhop apparently envisage, continued trade relations between major trade partners, as well as the ideal solution towards the path of convergence without severe financial disruptions and significant costs even in the event of transitional change. However such an agreement should also provide for the engagement and incorporation of emerging global actors and innovative partnerships in relation to matters of trade, climate change, innovation and sustainable development. As discussed in the paper, such engagements could also facilitate a greater degree of representative interests in matters relating to these areas, greater possibilities of attaining sustainable development goals, as well as more transparency and democratic accountability. Such accountability also incorporating the need for greater coordination between all levels and actors involved – in relation also to resource allocation and funding.

The future of financial services¹³ cannot be considered without due attention being accorded to advertising and marketing platforms – as well as mediums of exchange – and particularly those which accord with consumer tastes and preferences. Long term planning in investment based decisions and collaborative partnerships also provide competitive advantages, economies of scale

¹³ See Ojo, M. **Why Credit Ratings Serve a Greater Role in Emerging Economies than Industrial Nations: A Comparative Analysis between Family Firms and Concentrated Ownership Structures in South Asia** in *Financial Market Regulations and Legal Challenges in South Asia*, IGI Global Amit K. Kashyap (Gujarat National Law University, India) and Anjani Singh Tomar (Gujarat National Law University, India) (eds) Release Date: April, 2016. Copyright © 2016. 308 pages.

and greater returns in the sense of conveying, transferring skills, and more importantly preserving and retaining expertise internally between those partnerships.¹⁴

The proposal which is eventually adopted by the United Kingdom could, ultimately, be determined by its potential major trading partners. However, the interests of its citizens – should also be a decisive factor in opting for a model that would avert a “no deal scenario”.

Conclusion

Vital steps have been taken over the years in respect of measures aimed at facilitating transparency in the legislative processes at supra national level – as well as engaging different interest groups in consultative processes.

The need to adapt to consumer preferences – particularly ultimate users of information, products and services is evidenced by sophisticated medium and platforms which have been designed by multinational corporations as a means of gaining greater market shares whilst reflecting a move from the traditional focus placed on products – rather than consumers.

In this same vein the needs and preferences of citizens should constitute the focal point of legislative outputs and documents of consultative and legislative processes. Climate change – as well as organizational cultures, coupled with the impact and influences of information technology should be reflected in legislation in order to adapt to challenges which the economic climate may present as it continually evolves.

It is increasingly being acknowledged that the economy of any member state embraces the preservation of its cultures, its natural resources, as well as intellectual and human capital. Where events occur – such events immensely impacting and resulting in the depletion and migration of human knowledge, capital and investment, then there should definitely be cause for economic concern as well as the need to retain vital human knowledge, expertise – and developing such potential.

The above could occur to a greater extent in the event that Brexit occurs. Conversely it could also happen if Brexit does not take place. For such reasons, it is vital that consequences of a decision are to a greater extent, understood before such decisions are fully or even partial implemented.

¹⁴ See Ojo, M. **E Commerce as a Tool for Resource Expansion: Postal Partnerships, Data Protection Legislation and the Mitigation of Implementation Gaps** in *E-Retailing Challenges and Opportunities in the Global Marketplace* Shailja Dixit (Amity University, India) and Amit Kumar Sinha (Amity University, India) (eds) Release Date: March, 2016. Copyright © 2016. 380 pages.

References

Alexander K (2018) The UK’s third-country status following Brexit: post-Brexit models, third-country equivalence and Switzerland. In: Alexander K, Barnard C, Ferran E, Lang A, Moloney N (eds) *Brexit and financial services—law and policy*. Bloomsbury, Oxford, pp 115–154

Barnard C (2018) The UK financial market: free movement of persons. In: Alexander K, Barnard C, Ferran E, Lang A, Moloney N (eds) *Brexit and financial services—law and policy*. Bloomsbury, Oxford, pp 39–60

Berger, H. and Badenhop, N. “Financial Services and Brexit: Navigating Towards Future Market Access”, *European Business Organization Law Review* (2018) 19:679–714 <https://doi.org/10.1007/s40804-018-0124-4>,

Berger P, Van den Broeke O (2017) Enter Brexit: what is the impact on the financial services Industry? *Int Comp Comm Law Rev* 28:209–216

Circolo, A., Hamulák, O. and Blažo, O. (2018). “Article 50 of the Treaty on European Union: How to Understand the ‘Right’ of the Member State to Withdraw the European Union?”

Dialer, D, and Richter, M. (2018), *Lobbying in Europe: Professionals, Politicians, and Institutions Under General Suspicion?*

EEA Agreement, see particularly Articles 8-46

Eising, R. (2007). Institutional context, organizational resources and strategic choices: Explaining interest group access in the European Union. *European Union Politics*, 8(3), 329–362.

European Parliament. (2017). *Draft Report on budgetary control of financing NGOs from the EU budget (2015/2345(INI))*. Committee on Budgetary Control.

Klüver, H., Braun, C., & Beyers, J. (2015). Legislative lobbying in context: Towards a conceptual framework of interest group lobbying in the European Union. *Journal of European Public Policy*, 22(4), 447–461. <https://doi.org/10.1080/13501763.2015.1008792>

Ojo, M. and Serrano Caballero, E. (2018). FROM NATURE SWAPS TO DOLPHIN SWAPS
The Paris Club, Nature Conservancy and Role of Non Governmental Organizations in
Sustainable Development

Ojo, M (2018). The Neighbor Principle, Principal Agent and Stakeholder Theories: Proposed Model to Address Challenges of Digital and Audit Analytics

Ojo, M (2018). *Critical Audit Matters: The New Auditing Reporting Model*

Ojo, M (2018). *New Auditing Reporting Model: The Final Standard ('AS 3101')*

Ojo, M (2018). *Proposed Model to Address Challenges of Digital and Audit Analytics*

Ojo, M (2018). *Beyond Reasoning, Artificial Intelligence and Data Analytics: Gaming Theories and the Nash Theory of Equilibrium*

Ojo, M (2018). *Engaging Major Players in Data Monitoring and Regulation: Cambridge Analytica, the Game Theory and the Nash Theory of Equilibrium*

Ojo, M (2018). *Defining and Regulating Virtual Currencies: A Task Solely for Regulators?*

Ojo, M. (2016). **Why Credit Ratings Serve a Greater Role in Emerging Economies than Industrial Nations: A Comparative Analysis between Family Firms and Concentrated Ownership Structures in South Asia** in *Financial Market Regulations and Legal Challenges in South Asia*, IGI Global Amit K. Kashyap (Gujarat National Law University, India) and Anjani Singh Tomar (Gujarat National Law University, India) (eds) Release Date: April, 2016. Copyright © 2016. 308 pages.

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Porchia, O. (2019). “Citizens’ rights in the post Brexit scenario” ERA Forum (2019) 19:585–595 <https://doi.org/10.1007/s12027-018-0545-0>

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

TFEU and particularly Articles. 63-66

Yin S (2017). Envisaging a post-Brexit financial services sector under the GATS framework—a case study of Euro clearing. In: Hillman J, Horlick G (eds) *Legal aspects of Brexit*. Institute of International Economic Law, Washington, pp 230–241