



Theresa May's Deep and Comprehensive Free Trade Agreement

Michael Emerson

In examining May's first attempt to operationally define the UK's future trade relations with the EU, Michael Emerson finds that she draws heavily on the Deep and Comprehensive Free Trade Area model.

In her 30-page [speech](#) on March 2nd, the British Prime Minister has at last set out much, but not all, of the substance so far lacking from the side of the UK. It would have been most suitable as a preliminary to the Article 50 declaration of a year ago. But better late than never. Also it was a welcome relief from the vacuous and totally inadequate speeches of the preceding days by ministers Boris Johnson and David Davies, billed as the Roadmap to Brexit.

Reading between the lines of the Prime Minister's speech, and setting aside the abundant political rhetoric, the text talks in terms that Brussels can understand. May now says that the UK wants a "Deep and Comprehensive Agreement". Looking into the details of the speech, as we do below, it is evident that the Prime Minister is indeed heading towards the model of a Deep and Comprehensive Free Trade Agreement (DCFTA) embedded within a broader Association Agreement (AA), for which the EU has developed a generic model that is applied with differences adapted to individual cases.

Having made her speech, the Prime Minister is essentially saying to the EU "over to you in Brussels now". Given the aim to achieve something under the heading of a Deep and Comprehensive Agreement, the Commission could rapidly prepare a draft comprehensive legal text as a basis for negotiation. The fact that the hundreds of pages of legal language have already been thrashed out on earlier occasions means that progress on the basis of these template materials could be much faster than is often suggested.

The text of her speech calls for "the broadest and deepest possible partnership – covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today". This wording is actually a pointless exaggeration, but not a matter of operational significance. And the Prime Minister's continued rhetoric that there is 'no relevant model' is just political posturing.

Michael Emerson is Associate Senior Research Fellow at CEPS.

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The potentially operational parts of the speech can be presented along the following lines, which has a logical order that Brussels will recognise:

1. Classic free-trade elements, namely no tariffs or quantitative restrictions, as found in any serious FTA (Free Trade Agreement), to which would be added other elements of basic trade law of the WTO under the headings of safeguards and trade remedies.
2. For goods in industrial products, “we must ensure that, as now, products only need to undergo one series of approvals, in one country, to show they meet required regulatory standards”. There should be a comprehensive system of mutual recognition, presumably of conformity assessment procedures. It is said that many regulatory standards are “underpinned by international standards set by non-EU bodies”. It would be more accurate to say that many standards are set jointly by the European standards organisations and their international counterparts, of which the UK is and can continue to be full member in both cases. The exclusively ‘international’ language is chosen presumably to minimise criticism at home of the UK becoming a ‘vassal state’ of the EU.

Given the Prime Minister’s stated concern of being able to have differing standards to achieve common desired outcomes, she could have also mentioned that EU practice allows for the possibility of differing technical standards so long as the “essential requirements” of the EU directive or regulation are met. This added technical detail is not without political significance. Thus, this whole chapter promises to be among the easiest to agree.

3. For agri-food products, the UK will be leaving the Common Agricultural Policy, as is compatible with existing DCFTAs, but there will still be the issue of food safety (sanitary and phyto-sanitary – SPS) regulations on which the text is silent. It would need to be confirmed that these regulations would continue to be applied to permit frictionless trade in agri-food products in a manner analogous to that above for industrial goods. Given the UK’s apparent political allergy to chlorinated chicken from the United States, this chapter too seems not so difficult.
4. For trade to be conducted on fair terms there should be “binding commitments” in “some areas of our regulations like state aid and competition to remain in step with the EU’s”. No problem.
5. For services, the partnership “needs to be deeper than any other Free Trade Agreement ... We should only allow new barriers to be introduced where absolutely necessary.” This will require an “appropriate labour mobility framework” for service providers. There should be continued mutual recognition of professional qualifications. There will be much detailed negotiation over this highly complex field.
6. The agreement “will also need to cover intellectual property and company law to provide legal certainty and coherence”, also implying continued compliance with the EU *acquis*.

7. For labour laws and the environment, “the EU should be confident that we will not engage in a race to the bottom”. The EU may want its confidence to be buttressed by more binding commitments here.
8. For financial services, the Prime Minister mainly says that the Chancellor of the Exchequer will set out next week how financial services should be “part of a deep and comprehensive partnership”, while recognising that this will be without passporting or the single rulebook.
9. For broadcasting services, there should be a mutual recognition agreement.
10. On energy, the UK wants to explore options to continue participation in the EU’s internal energy market, for which (but this is not mentioned) the Energy Community Treaty offers a model.
11. On transport the UK “will want to ensure continuity on air, maritime, rail and road haulage services”, which will entail (but this is not mentioned) continued compliance with the EU *acquis* in this field.
12. In the digital sector, however, the UK will not be part of the EU’s Digital Single Market, where it is “particularly important to have domestic flexibility”. Here the cherry-picking critique is likely to surface.
13. On EU agencies, the UK will want to explore the conditions for remaining in some of them, with three mentioned specifically: the European Medicines Agency, the European Chemicals Agency and the European Civil Aviation Agency. These agencies are open in principle to neighbouring non-member states, but on condition that the EU’s *acquis* in these fields are complied with.
14. The UK should participate in science and research programmes of the EU, as is already possible for non-member states, with appropriate financial contributions (GNP-based). No problem.
15. Similarly, for the EU’s educational and cultural programmes, continued participation will be sought, again with financial contributions. No problem.
16. This long catalogue (as set out more fully in the Annex) prompts questions about differing degrees of legally binding compliance with EU law, as opposed to softer cooperation. In general the strict DCFTA content (Title III) requires legally binding commitments. The long list of chapters under “Economic and Sector Cooperation” (Title V) see greater flexibility however. For some chapters there are lists of EU laws with which the partner would normally remain compliant (e.g. environment, transport); in other cases there is provision for looser cooperation without legally binding commitments (e.g. agricultural policy); and others in which there is scope for cooperation but without obligation (e.g. participation in agencies and programmes). These different categories bear some resemblance to the terms of internal British debate under the so-called “three baskets” heading, i.e. groups of topics subject to different degrees of legally binding commitment. The EU itself already

in its Association Agreements engages in less simplistic absolutism in practice than is sometimes suggested or implied in ‘anti-cherry picking’ speeches.

17. On legal enforcement, rather than total exclusion of the European Court of Justice, here too degrees of compromise emerge. In general terms, “we will need an arbitration mechanism that is completely independent”, for which the WTO and DCFTAs offer well-known models. While leaving the jurisdiction of the European Court of Justice, “where appropriate, our courts will continue to look at the ECJ’s judgements...” And this will apply notably where “Parliament passes an identical law to an EU law”. Since all EU law will continue to apply upon withdrawal, unless repealed, this provision could have a large application for a long time. In addition, where the UK may continue to participate in EU agencies, the formulation is stricter, since “the UK would have to respect the remit of the ECJ in that regard”.
18. The customs union (1). In general, the UK will leave the customs union and seek a partnership to assure “a frictionless border”. There is here only a repetition of the two options earlier suggested. The first would see a special arrangement whereby goods imported into the UK from third countries but intended for the EU market would be subjected to the EU’s tariffs and rules of origin by the UK customs authorities. This would “remove the need for customs processes at the UK-EU border”. The technical feasibility of this proposal has not been established. The second option would see a “highly streamlined customs arrangement”, with jointly agreed steps to minimise frictions to trade. There are possibilities along these lines open to non-member states that follow the Union Customs Code, but these and other ideas are not specified, beyond mention of “trusted traders” schemes and “the most advanced IT solutions”. It is said that these various measures should allow for continuity of the current practice within the EU, whereby declarations for goods moving across borders are not needed, but this sounds implausible (what about rules of origin declarations?).
19. The customs union (2), for the Northern Ireland-Irish border. To avoid a “hard border”, two elements are proposed. The first concerns “smaller traders”, who would continue to operate without restrictions, as they do currently. The second, for “larger traders”, would consist of “streamlined processes, including a trusted traders scheme”. In the face of the logical impossibility of quitting the customs union without installing customs controls, the UK seems to be aiming at a degree of compromise, with minimal rather than zero border controls. The technical as well as political feasibility of such an arrangement remains to be ascertained.
20. The customs union (3). These complicated and unverified ideas for special customs arrangements would of course be unnecessary if the UK stayed in the customs union. There are no reason legal or political reasons for the EU side why this could not be added to the standard DCFTA agenda, even if this has not yet been seen in practice. And this was the main point of the speech on 26 February by the leader of the opposition, Jeremy Corbyn, arguing in favour of staying in the customs union. The main objection to this has

been concern on the UK side to gain freedom to make free trade deals with countries with which the EU has no free trade agreement. The two overwhelmingly most significant cases in point are the US and China. Here the week's other news sees Trump's protectionist measures for steel and aluminium, coupled to his latest tweet that if the EU retaliated, he would want to escalate with punishing measures against EU motorcar exports to the US. As for China, there would be many hazards or impossibilities (e.g. China has never agreed to free trade in services with anyone).

In short, any cost-benefit assessment of leaving the EU customs union looks increasingly unfavourable for the UK. And given the current thin majority held by the May government in the House of Commons, it is conceivable that it could be defeated in the coming weeks or months over excluding the UK's continued membership in the customs union. Given also the unresolved Northern Irish question, there is clearly a scenario under which the Prime Minister could add to her agenda by retaining continued membership of the customs union, rather than face dissolution of parliament and a fresh general election.

Overall, in the eyes of an observer from Brussels, the Prime Minister has now opted for a DCFTA model, with the following structural features (detailed in the Annex):

- a) large access to the single market, most completely for goods, but less so for services, with continued compliance with EU *acquis* where market access is sought;
- b) formal exclusion from the customs union, which however might be reversed;
- c) formal exclusion of free movement of people, but with facilitating measures;
- d) inclusion in various important EU agencies and programmes;
- e) budget contributions restricted to the costs of agencies and programmes; and
- f) the very substantial agenda for security and defence cooperation set out in the Prime Minister's earlier speech at the Munich Security Conference on February 17th

Usually the EU would be inclined to make a single comprehensive Treaty, namely an Association Agreement that would include a DCFTA.

There are various points needing further clarification, and other points which, needless to say, will be subject to difficult negotiations. For the moment the main point is that in substance the UK is moving in the direction of an Association Agreement, including a DCFTA. To make this operational in practice will require a large amount of continued reliance on EU law and policy-making, presumably more than would fit easily with the rhetoric of many Conservative MPs. While their response to the speech has been muted so far, the going may get rougher when the EU provides its detailed response. The Brexit hardliners however seem now to be on the defensive, since their greatest fear would be political discord leading to the scenario mentioned above of dissolution of parliament.

One also has to take note of the two other major speeches delivered in the past week, by former Prime Ministers, Sir John [Major](#) of the Conservative party, and Tony [Blair](#) of the Labour Party. Both of these speeches conclude that it would be better to scrap the entire withdrawal process, or at least to subject it to a concluding vote of Parliament or a second referendum.

Annex

Contents of the Association Agreement and DCFTA model

The following presents what amounts to a standard template, as in the EU-Ukraine and other Association Agreements, in which details differ (as the Prime Minister says, all trade agreements are different), but which contains a well-established structure and a substantial amount of standard legal drafting.

Titles I to III cover general political principles, foreign and security policy, and justice, freedom and security. These could readily build on Prime Minister May's Munich speech of 17 February 2018.

Title IV concerns trade policy and the formal content of the DCFTA, where most of the legally binding commitments would have to be made. Its chapters are:

1. Market access for goods
2. Trade remedies
3. Technical barriers trade (i.e. standards for industrial products)
4. Sanitary and phytosanitary measures
5. Customs and trade facilitation
6. Establishment, trade in services and electronic commerce
7. Current payments and movement of capital
8. Public procurement
9. Intellectual property
10. Competition
11. Trade-related energy
12. Transparency
13. Trade and sustainable development
14. Dispute settlement
15. Mediation mechanism

Title V concerns economic and sector cooperation. This has no less than 28 chapters where there is a much wider range of sectors, subject however to variable intensity of legally binding content. Chapters that correspond to the content of the Prime Minister's speech include:

1. Energy cooperation
6. Environment
7. Transport
9. Science and technology
12. Financial services
13. Company law
15. Audio-visual policy
17. Agriculture
18. Fisheries
19. Consumer protection
20. Employment and social policy
23. Education
27. Cross-border and regional cooperation
28. Participation in EU agencies and programmes

Title VI concerns financial technicalities.

Title VII mainly concerns institutional provisions, for which there are well-tested provisions for Association Councils and Joint Committees.