

"Ukraine Plus" as a model for Brexit

Comments on Theresa May's Brexit Plan



On 17 January 2017, the British Prime Minister, Theresa May, announced her objectives for the UK's future relationship with the EU. She ruled out staying in the internal market. Her plans amount to a hard Brexit.

After May's speech, the "Norwegian" and "Swiss" models can be ruled out as a basis for the future relationship between the United Kingdom and the EU. The EU's agreement with the Ukraine comes closest to meeting British objectives. It provides for reciprocal market access, without freedom of movement, and collaboration on security and defence policy.

A "Ukraine Plus" model, which goes further on free trade and on collaboration regarding security and defence policy, would however be in the interests of both the United Kingdom and the EU. This cep**Adhoc** sets out the objectives of the British Government and the options and scope for negotiation of both sides in the exit talks.

1 Theresa May's Brexit Plan

In a speech on 17 January 2017, the British Prime Minister, Theresa May, presented a 12-point plan for the United Kingdom's exit from the EU.¹ This Brexit Plan provides the first concrete indication of how the British Government sees the country's future relationship with the EU. It sets out the following twelve objectives for Brexit:

1. **Certainty:** The Brexit negotiations will be conducted as transparently as possible; EU law will initially continue to apply as national law after Brexit and the Brexit deal with the EU will be put before both Houses of Parliament for ratification.
2. **Control over legislation:** The laws applicable in the United Kingdom will be made in the UK and interpreted only by UK courts, no longer by the European Court of Justice.
3. **Union of the 4 nations of the UK:** The governments of England, Scotland, Northern Ireland and Wales will work closely together on implementing Brexit.
4. **Common Travel Area with Ireland:** The freedom to travel between Northern Ireland and the Republic will be maintained.
5. **Control of immigration:** The United Kingdom intends to control the number of immigrants from the EU.
6. **Protection of existing rights:** The rights of EU citizens who are living in Britain, and the rights of British nationals living in the EU, will be guaranteed.
7. **Protection of workers' rights:** The level of protection for workers under EU law will be maintained and extended.
8. **Free trade with the EU:** The United Kingdom is seeking the greatest possible access to the EU single market for goods and services. It is willing to make financial contributions to the EU.
9. **Free trade agreements:** The United Kingdom is aiming to conclude its own free trade agreements with third countries.
10. **Science and innovation:** The United Kingdom aims to continue its collaboration with the EU in the areas of science, research and development.
11. **Security and defence policy:** The United Kingdom is aiming to continue to collaborate with the EU on foreign and defence policy as well as on combating crime and terrorism.
12. **A smooth, orderly Brexit:** The United Kingdom is seeking a transition period which will give government and businesses time to adapt to the new arrangements.

This cepAdhoc looks primarily at objectives 2, 5, 8, 9 and 11 which are likely to be significant for the future relationship between the United Kingdom and the EU. The following analysis will demonstrate that these objectives can only be achieved by way of a new form of partnership which we are calling the "Ukraine Plus" model. Some of the objectives are likely to be met with significant opposition in the EU. The United Kingdom does, however, have something to offer.

¹ Theresa May's speech can be downloaded at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

2 The "Norwegian" and "Swiss" models can be ruled out

May argues in favour of "the greatest possible access" to the EU single market in order to allow for "the freest possible trade in goods and services" with the EU; British goods should be exported into the EU internal market "duty free" (Objective 8). At the same time, the United Kingdom wants to be able to conclude its own free trade agreements with third countries (Objective 9).

The background to these two British objectives is obvious: With a 50 percent share of British trade, the EU as a whole is the United Kingdom's most important trading partner, whilst the other 50 percent is divided up between various trading partners such as China, India, Japan, Canada and USA.² Britain's service exports to the EU have been rising by an average of seven percent per year since 2000. Financial services alone made up over 22 percent of all British service exports in 2015. The conclusion of its own free trade agreements with third countries is intended to make up for any fall in British exports arising from reduced access to the EU internal market following Brexit.

May declared that she wants to take back "full control" of legislation (Objective 2): Laws applicable in the United Kingdom will once again "be made in Westminster, Edinburgh, Cardiff and Belfast" and interpreted not by "judges in Luxembourg" but only by British courts. In addition, May wants to regain full control of "immigration" and thus rejects, in particular, the EU principle of the free movement of people. These two objectives rule out the "Norwegian" and "Swiss" models for the United Kingdom.

2.1 "Norwegian Model"

Since 1992, Norway, like Iceland and Liechtenstein, have been connected to the EU by way of the Treaty on the European Economic Area (EEA). This "Norwegian Model"³ provides extensive access to the EU internal market: Companies based in the EEA can export many types of goods to the EU, duty free or at reduced rates of duty, and offer services, including financial services, throughout the EU without having to set up an EU subsidiary ("EU passporting"). The "Norwegian Model" allows the country to conclude its own free trade agreements. To that extent the "Norwegian Model" certainly accommodates the British objectives.

On the other hand, May's demand for full control over legislation is not compatible with the "Norwegian Model" because the EEA countries are obliged to accept all EU rules relating to the internal market without - as non-EU Member States - any involvement in drafting them in Brussels and Strasbourg. In addition, they are subject to the jurisdiction of the EFTA Court which in turn has to base its decisions on the case law of the European Court of Justice (ECJ).⁴ As both courts are located in Luxembourg, May's declaration that British laws will no longer be interpreted by "judges in Luxembourg" can only mean that the United Kingdom does not want to be bound by the case law of the two courts in the future.

Equally incompatible with the "Norwegian Model" is having full control over immigration because all four freedoms of the EU, including freedom of movement, also apply in the EEA. These can only be restricted in exceptional cases and only by mutual agreement.⁵

2.2 "Swiss Model"

Switzerland is connected to the EU by way of various treaties. Although it has access to the EU internal market,⁶ access only applies to certain sectors. The very sector which is so important to the British, that of

² UK Office for National Statistics, UK Balance of Payments, The Pink Book 2016, p. 11 et seq.

³ For details on the "Norwegian Model" see [cepAdhoc, Brexit! What now?](#), p. 8 et seq.

⁴ Article 3 of the Treaty establishing an EEA Court

⁵ Art. 112 (1) EU/EEA Treaty

⁶ For details on the "Swiss Model" see [cepAdhoc, Brexit! What now?](#), p. 10 et seq.

financial services, has been almost completely excluded from mutual market opening.⁷ Swiss companies wanting to offer financial services in the internal market must therefore set up a subsidiary in the EU. Until now, they have mainly done so in London. Like Norway, Switzerland can conclude its own free trade agreements with third countries.

By contrast with Norway, Switzerland has no legal obligation to transpose EU law into national law, nor is it subject to the jurisdiction of the ECJ. Both of these points would correspond well with British objectives. In practice, however, Switzerland voluntarily adopts many EU regulations into national law ("voluntary alignment").

The main argument against the "Swiss Model" though is the fact that the United Kingdom wants to restrict free movement. Since 2002, an agreement on free movement has been in place between the EU and Switzerland. This states that free movement can only be restricted in exceptional cases by mutual agreement.⁸ If Switzerland were to terminate the agreement on free movement in order to implement the popular initiative "against mass immigration", this would result in the automatic termination of all bilateral agreements between Switzerland and the EU ("Guillotine Clause").

3 Free Trade and Cooperation on Security and Defence Policy: "Ukraine Plus Model"

If the United Kingdom were only interested in free trade with the EU, without free movement, the "Comprehensive Economic and Trade Agreement" (CETA), which the EU has concluded with Canada, would provide a suitable model for future relations.⁹

May stated, however, that she also wants to continue close cooperation with the EU on foreign and defence policy as well as on combating crime and terrorism (Objective 11). Thus, next to free trade, collaboration on security policy will constitute the second pillar of the future relationship with the EU.¹⁰ CETA does not provide for such collaboration.

A model for this special type of partnership could be provided by the Association and Free Trade Agreement which the EU has concluded with the Ukraine. This has been in effect since 1 January 2016, although some of it only provisionally because ratification by the Netherlands is still outstanding.¹¹

Firstly, the "Ukraine Model" corresponds to the British objectives in that it contains substantial market access but does not require the application of EU law or compliance with the case law of the ECJ, nor does it provide for free movement¹² but it does allow free trade agreements with third countries. Thus the United Kingdom's four key requirements are met. However, the agreement with the Ukraine is unlikely to satisfy the United Kingdom as regards the scope of trade liberalisation because it contains numerous restrictions on market access particularly for cross-border services.¹³ The United Kingdom will probably require better access to the EU internal market, primarily in the interests of the British finance industry, what one might call a "Plus" to the "Ukraine Model".

⁷ Only direct insurance, with the exception of life insurance, is included in the mutual market opening under a special agreement.

⁸ Art. 14 (2) Agreement on Free Movement EU/Switzerland.

⁹ In Art. 10, CETA only provides for concessions on temporary stays by natural persons.

¹⁰ See also the section of the speech entitled "A new partnership between Britain and Europe"

¹¹ A supplemental submission passed by the Member States to the effect that Ukraine does not have any definite prospect of joining the EU, will now allow for ratification by the Netherlands.

¹² The agreement with the Ukraine only provides for visa concessions and otherwise has no effect on the contracting partner's immigration policy (Art. 18, 19 of the Agreement).

¹³ Art. 92 of the Agreement EU-Ukraine in conjunction with Annex XVI-B; the Annex to CETA also provides for numerous restrictions to the principle of the freedom to provide cross-border services.

Secondly, the "Ukraine Model" corresponds to the British objectives because it also provides for collaboration on foreign and defence policy as well as on combating crime and terrorism.¹⁴ In order to illustrate the benefits to the EU of collaboration with the United Kingdom in these areas, May referred to British nuclear weapons, its permanent seat on the United Nations Security Council and British intelligence capabilities.¹⁵ In addition, she underlined the "crucial" importance of British armed forces in defending Europe's borders - possibly a reference to the British units currently stationed in the Baltics. Since the United Kingdom could contribute significantly more than the Ukraine to any collaboration on foreign and defence policy, as well as in combating crime and terrorism, and, according to May, is apparently prepared to do so, the ideas of a "Ukraine plus Model" would also be justified.

The following table provides an overview of the various models:

United Kingdom's Objectives	Norway	Switzerland	Canada	Ukraine
No application of EU law (Objective 2)	–	(✓)	✓	✓
No free movement (Objective 5)	–	–	✓	✓
Access to the internal market (Objective 8)	✓	(✓)	(✓)	(✓)
Own trade agreements with third countries (Objective 9)	✓	✓	✓	✓
Collaboration on security and defence policy (Objective 11)	–	–	–	(✓)

4 Will the EU consider a "Ukraine Plus Model"?

An agreement on the future relationship between the United Kingdom and the EU is in the interest of both sides. Whether the EU is prepared to consider the "Ukraine Plus Model" will probably depend on whether a reasonable balance of interests can be achieved with regard to the following four points. The EU cannot give the United Kingdom preferential treatment in this regard. Above all, from the EU's perspective, the agreement must be designed in such a way that it does not encourage other Member States to leave. Also, the agreement must not put the United Kingdom in a better position relative to Norway, Switzerland or other third countries that have concluded agreements with the EU, otherwise these countries will demand a renegotiation of their agreements. Any concessions by the EU must therefore be objectively justified.

4.1 Trade

May declared that the United Kingdom does not want "membership of the single market" in the future but "the greatest possible access" to it (Objective 8). With this qualifier, it seems that she already recognises that the country will not in future, even by way of an extensive free trade agreement, obtain the comprehensive access to the single market which the United Kingdom as member of the EU currently enjoys.

It is also very important for companies in the EU to retain the greatest possible access to the British market. In 2015, the EU's trade surplus with the United Kingdom amounted to almost 80 billion euros. It has almost doubled in the last ten years.¹⁶ In addition, European companies have invested extensively in

¹⁴ Art. 7 et seq. Agreement EU-Ukraine.

¹⁵ In the section of the speech entitled "A new partnership between Britain and Europe".

¹⁶ UK Office for National Statistics, UK Balance of Payments, The Pink Book 2016, p. 13 et seq.

the United Kingdom and also therefore have an interest in ensuring that products produced there can continue to be sold in the EU single market unhindered.

4.2 Free Movement

May wants to control the number of migrants from the EU and thereby de facto abolish free movement (Objective 5). This is subject to significant reservations in the EU. Although the agreements with Canada and the Ukraine indicate that the EU is in principle willing to open up its market without insisting on free movement, neither the EU nor Canada have any interest in the complete free movement of all European and Canadian citizens, and the EU at least has no interest in uncontrolled immigration from the Ukraine where the standard of living is significantly lower than that of the EU.

EU interests are somewhat different with regard to the United Kingdom. Firstly, all Member States, particularly the eastern European countries, have an interest in ensuring that the rights of their citizens, who are currently living in the United Kingdom, are not invalidated. May expressly stated that she will guarantee the rights of these citizens after Brexit but requires the same guarantee for the rights of British citizens living in the EU (Objective 6). The interests of the EU and the United Kingdom are probably the same in this regard. Nevertheless, the EU is likely to enter into an agreement to protect existing rights only as part of a reasonable overall package.

Apart from protecting existing rights, it is also a question of whether and to what extent free movement will be part of the relationship between the United Kingdom and the EU in the future. The EU Heads of State and Government have repeatedly emphasised that "access to the single market" after Brexit will be linked to the continuation of "free movement".¹⁷ On the other hand, the term "free movement" has very negative connotations in the United Kingdom so the British Government will be pushing for it not to be used in the agreement on future relations.

The United Kingdom obviously has an interest in continuing to acquire skilled workers from the EU in the future. The same applies in reverse to the EU. It is possible that the political link between single market access and free movement will be rendered irrelevant if the United Kingdom does not get full access to the single market after Brexit. Another subject of the negotiations will be the conditions under which employees and their families are able to move freely between the United Kingdom and the EU in the future.

4.3 Finance

May stated that, as part of the future collaboration, the United Kingdom will be willing to make a "reasonable financial contribution" (Objective 8). The EU's agreement with the Ukraine also provides for the country to contribute financially to EU programmes.¹⁸ Until now, the United Kingdom has been the third largest net payer into the EU, significantly behind Germany but almost equal to France.¹⁹ Between 2008 and 2015, the country contributed a net average annual amount of 6.5 billion euros to the EU budget. Brexit will therefore give rise to a gap in the EU-finances. This can only be filled by increasing national contributions to the EU or by reducing expenditures, as a result of which the scope and structure of the distribution between the Member States would change. It is therefore in the interests of all Member States to keep this gap as small as possible.

The UK's willingness to pay, referred to by May, could therefore increase the EU's willingness to accommodate the United Kingdom in an agreement on the arrangements for free movement. This applies in particular to Germany and France because these two countries are not only the biggest net

¹⁷ Statement of the Heads of State and Government of the EU-27 of 29 June 2016 (para. 4) and 15 December 2016 (para. 2).

¹⁸ Art. 2 Protocol III Agreement EU-Ukraine.

¹⁹ For details on British contributions to the EU budget see [cepStudy Redistribution between the Member States](#), p. 34 et seq.

payers into the EU but they both also have significant trade surpluses vis à vis the United Kingdom.²⁰ They therefore have an interest, both fiscal and trade related, in a comprehensive free trade agreement paid for with a substantial financial contribution from the United Kingdom.

4.4 Security and Defence Policy

May stated that the United Kingdom wants to cooperate closely with the EU on security and defence policy in the future (Objective 11). Considering the fact that, for decades, the United Kingdom has repeatedly blocked a common security and defence policy, this objective is less likely to be a genuine expression of Britain's own interests than an offer to the EU. The security and defence capabilities of the country are what set the United Kingdom apart from Norway and Switzerland, as well as from most of the other EU Member States - with the exception of France. May is aware of this and therefore makes express reference to British nuclear weapons, her country's seat on the UN Security Council and British intelligence capabilities.²¹ At a time when NATO's reliability is in doubt and the EU is facing increasing challenges to its security policy, this factor should not be disregarded.

If the United Kingdom were actually willing to work closely with the EU in the future, not only in the context of NATO but also in that of the common security and defence policy, this could justify concessions by the EU in other areas. In view of its previous unwillingness to support the EU's common security and defence policy, however, the credibility of this offer from the British Government must be questioned.

5 Conclusion

The United Kingdom and the EU are facing complex Brexit negotiations. Every agreement on future relations between the United Kingdom and the EU must reasonably balance the interests of all sides and at the same time prevent others from following suit.

One possibility with benefits for both sides is the "Ukraine Plus Model" resulting in a comprehensive free trade agreement with restricted free movement which the United Kingdom would pay for with a substantial financial contribution to the EU and cooperation on a common security and defence policy.

The fiscal and trade-related interests of the EU as a whole, and of Germany and France in particular, speak in favour of the EU agreeing to enter into this sort of cooperation. However, an absolute requirement must be Britain's credible commitment to cooperation regarding common security and defence policy. This must form a fundamental component of the agreement because only then will the EU be able to present the "Ukraine Plus Model" as a bespoke model for the United Kingdom and thus prevent any imitation by other EU Member States or third countries.

²⁰ UK Office for National Statistics, UK Balance of Payments, The Pink Book 2016, p. 14.

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