

Hearings: Inquiry into the UK's Africa Free Trade initiative

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BREXIT: IMPACT ON CURRENT TRADE AGREEMENTS WITH AFRICAN COUNTRIES

AFRICA FREE TRADE AGREEMENT: LEGAL FRAMEWORK

- The EU Common Commercial Policy (“**CCP**”) is a EU exclusive competence under art. 207 of the Treaty of the Functioning of the European Union (“**TFEU**”). The scope of the exclusive competence is very clear in relation to trade of goods, public procurement, competition and other internal policies of exclusive EU competence. However, it is surrounded by grey areas in relation to other areas such as IP, FDI, trade in services, areas in which the scope of EU exclusive competence is limited or shared with Member States (“**MS**”) in line with the extent of the EU competence in this area.
- Concerning how EU law is articulated in domestic MS’ law, the bottom line for CCP is clear: CCP legal instruments (Regulation, third-country agreement, etc..) are **directly applicable in Member States**:
 - a) by virtue of the relevant Regulations; e.g. GSP, EBA, which are directly applicable and have direct effect in Member States not requiring (as it is the case for a Directive) transposition in national law)
 - b) by virtue of Council Decisions that implement Agreements with third countries and, therefore directly applicable to the MS who are their addressees.
- The EU trade relations with Africa are underpinned by two type of instruments:
 1. **CONTRACTUAL**: This is the case of the **Economic Partnership Agreements (EPAs)**, which are trade of goods and development agreements negotiated between the EU and African partners engaged in regional economic integration processes, although

there are a few bilateral ones. The main objective of these agreements is boosting sustainable development and poverty reduction although they are fairly controversial - among recipient countries and development practitioners - in regard to their capacity to meet those objectives. The majority of ACP countries are either implementing an EPA or have concluded EPA negotiations with the EU

EPA agreements are WTO-compatible and asymmetric in relation to the liberalization of tariffs. They create joint institutions that monitor the implementation of the agreements and address trade issues in a cooperative way. They are designed to be drivers of change that will help kick-start reform and contribute to good economic governance.

2. **AUTONOMOUS MEASURES**: This is the case of the EU **Generalized Scheme of Preferences (GSP)**, which allows developing countries to pay less or no duties on their exports to the EU. This gives them vital access to EU markets. The GSP was reformed in 2014 to focus support on developing countries most in need.

There are three main variants arrangements of the EU GSP Scheme:

- the standard/general GSP arrangement, which offers tariff reductions to developing countries. Practically, this means partial or entire removal of tariffs on two thirds of all product categories.
- the "GSP+" enhanced preferences mean full removal of tariffs on essentially the same product categories as those covered by the general arrangement. These are granted to countries which ratify and implement core international conventions relating to human and labour rights, environment and good governance; (Africa beneficiaries are NIGERIA + CONGO)
- "Everything but Arms" (EBA) arrangement for least developed countries (LDCs), which grants duty-free quota-free access to all products, except for arms and ammunitions.

BREXIT- WHAT NEXT?

- Given that EU trade law is directly applicable in the UK the above legal instruments will cease to apply in the UK on (date of activation of art 50 + 2yr +n) the date of withdrawal (not during the period of negotiations under art. 50).
- In order to guarantee the continuity of the benefits for African partner countries in the UK market as well as providing the necessary stability of the trading regime, the biggest challenge for the UK will be to fill those legal gaps ASAP. Therefore, it needs to find a plausible trade-off between keeping the status quo and developing an enhanced regime more suitable to new UK trading priorities.
- Despite the obvious temptation to develop a complete new trade regime more suitable for the UK outside the EU, it should be underlined here that the UK has been a very active and committed MS in the area of trade and development. By pushing within the EU an agenda of open trade linked to the support of development objectives, promotion of good governance and poverty reduction, the UK has been instrumental to the reform and modernisation of EU trade instruments with Africa. Therefore, unless the UK policy objectives change dramatically, a solution that prioritizes the status quo in the short and medium term, should not be totally at odds with the UK's thinking in relation to links between trade and development.
- Furthermore, any immediate post-Brexit decision in regards to the path to follow regarding these agreements, needs to take into consideration three key issues:
 - The UK's administrative capacity to negotiate multiple agreements in different areas in a simultaneous way. Preparing and formalising trade negotiations is a complex and often slow process, not to mention final signature and ratification.
 - The fact that the UK will have to define and agree its priorities in relation to the new trade policy towards third countries. This will take time and will face also the need to balance domestic and external pressures.

- The need for the UK to clarify its new status as a single member in WTO, which will require to reconfirm the UKs schedule separated from the current EU schedule. This will require agreement by all members and disentangling the UKs from current EU schedule (e.g. quotas). This could be a very complex and lengthy process. Having clarity on this issue is important to apply autonomous measures such as GSP that require WTO waiver.
- Last but not least, issues such as rules of origin, re-exports to EU countries, etc.... included in third country agreements will need some clarity in regards the new EU-UK relationship, which could also be a long process.
- **What are, then, the options for the UK?** In my view, the UK should attempt at least in the short term to maintain the status quo to avoid a legal vacuum on its relations with African countries that may take too long to fill (it is unclear also what will be the level of demands from African partners)
- The ideas below need to be explored technically but let us not forget that art. 50 has never been applied, and therefore most outcomes will be the result of a political negotiation. Furthermore, they may not be the perfect solution in light of new post Brexit trade policy (whatever it will be) but they could provide a relative smooth transition to something new.

Regarding **EPAs and other contractual** relations:

1. Negotiate under article 50 the possibility of a transitional period to stay party of those EPAs of particular interest for the UK (the EU may request that the UK remains party of all) until the UK has in place its own contractual arrangements. This would require obviously approval by partner countries (let us not forget the difficulties to negotiate EPAs). This should not be a totally new idea, since there is a reverse precedent in reverse when acceding MS in 2004, were allowed to become party of some EU trade agreements with third countries before accession (eg MRAs) through a specific Protocol.
2. The UK could negotiate with its African partners the possibility of replicating the relevant EPAs into a bilateral UK agreement. It was

difficult for the EU to negotiate those due to reluctance of third parties. The UK will need the proper incentive combination for third parties to ensure this option.

Regarding **autonomous measures**:

1. The UK could simply introduce a similar arrangement to the EU GSP into its national law. EU GSPs have been largely inspired by the UK and its own development objectives. Should not be too problematic to keep the thrust of those instruments. This could be accompanied by a long-term plan to offer an enhanced GSP plan meeting the UKs new trade and development policy objectives.