



## HIGHLIGHT

# BETWEEN RHETORIC AND REALITY: CONSENSUS ON THE UK'S ROLE IN UNION EXTERNAL ACTION POST-BREXIT?

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The EU Commission's Draft Withdrawal Agreement ("the Agreement")<sup>1</sup> prompted a strong response from Theresa May: "No UK prime minister could ever agree to it".<sup>2</sup> In her rebuke, she cited the constitutional integrity and common market of UK as threatened. On its face, this suggests that there is more than just the North Sea between the EU and UK on post-Brexit transitional arrangements. That may be the case in many areas. However, going beyond the rhetoric this short insight reveals that there is (perhaps surprisingly) a significant degree of consensus on the role of the UK in Union external action during this period.

This is demonstrated through comparison of the Withdrawal Agreement and the UK's Draft Text for Discussion ("the Draft").<sup>3</sup> Each contain provisions, identically titled *Specific arrangements relating to the Union's external action*, that limit the UK's participation in EU external action.<sup>4</sup> The six separate subsections of each provision mirror one another. There is agreement that during any transition period that the UK will:

a) Continue to be bound by international agreement concluded by the Union and its Member States.

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<sup>1</sup> European Commission, Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33 – Commission to EU 27, 28 February 2018, ec.europa.eu.

<sup>2</sup> House of Commons, Prime Minister's Questions, 28 February 2018, Volume 636, Column 823.

<sup>3</sup> UK Government, Department for Exiting the European Union, *Policy paper, Draft Text for Discussion: Implementation Period*, 21 February 2018.

<sup>4</sup> Respectively, Art. 124 of the Agreement and X+3 of the Draft.

b) Observe the principle of sincere cooperation in its external relations. The two subsections differ slightly to the extent that the Agreement goes further in stipulating that as a result of the stated principle “the UK shall abstain...from any action or initiative which is likely to be prejudicial to the Union's interests.” In contrast, the Draft simply accepts the principle applies in the external sphere.

c) May not conclude international agreements in its own capacity in an area of exclusive competence unless authorised to do so. Whilst a blow to a free trading *Global Britain*, it is notable that neither provision fleshes out exactly what sort of negotiations or action the UK in advance of the conclusion of an international agreement.<sup>5</sup>

d) Shall not provide commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations conducted under Arts 42 to 44 TEU or operational headquarters for such missions.

There is also recognition amongst there would be a need for further coordination between the EU and the UK. Whilst the language of the Agreement is somewhat conservative on the extent of this coordination (“the [UK] *may* be consulted, on a *case-by-case* basis”), the Draft is more forthright by articulating the need for coordination on sanctions policy and representation in relevant international organisations. Moreover, it emphasises (in British fashion) the need for the UK to be consulted in *good time*.

The one area lacking in consensus is whether representatives of UK may participate in bodies set up as part of bilateral international agreements. The position of the Agreement is clear that this is not permitted unless the UK is a member in its own right. In contrast, the Draft provides that the UK would continue to participate where: (i) the decision in question related to the legal status of persons residing in the UK or (ii) where its participation would ensure effective operation and application of Union law. The conditioned position of the UK appears reasoned. In both of the stated scenarios, but particularly the first, it would seem reasonable to accept UK participation in the decision-making process.

This brief insight has revealed that there is broad consensus as to role the UK would be able to play in Union external action post-Brexit and during the transitional period. It is clear that both the EU and UK envisage a limited role for the latter. This will likely prove unpopular in the British Department of International Trade as they find their hands tied when trying to advance their free trade agenda. That said, the advancement of such an agenda assumes British capacity in the first place. In reality, the approach taken removes a potentially contentious issue from an already tense negotiating table and safeguards the EU's role in coordinating the external action of its member states.

<sup>5</sup> An issue discussed in detail by R.A. WESSEL, *Consequence of Brexit for International Agreements Concluded by the EU and its Member State*, in *Common Market Law Review*, 2018, forthcoming.