The post-Brexit negotiations and the level playing field criterion

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Abstract: I negoziati post-Brexit ed il criterio del level playing field – On 31 January 2020, the United Kingdom left the European Union and phase two of Brexit, which will be dedicated to the definition of the future relations between the Parties, officially started. This contribution presents the main features of the future trade relations between the UK and the EU, as they emerge from phase one of Brexit. Then, it analyzes two paradigms (market integration and trade liberalization) and four relevant models, which currently link the EU to some of its most important commercial partners, namely Norway, Switzerland, Turkey and Canada. Finally, it focuses on the "level playing field" criterion, which relates to the standards to be applied by the Parties in their future relations with regard to competition policy and State aids, environmental protection, social and labor standards, fiscal policies.

Keywords: Brexit; European Union; Withdrawal Agreement; Political Declaration; Level playing field.

1. Introduction

The Brexit saga, which began with the referendum of 23 June 2016, reached its first conclusion on 31 January 2020, more than three and a half years later, when the United Kingdom finally left the European Union. On that date, phase one of Brexit, characterized by the negotiations foreseen by article 50 TEU on setting out the arrangements for the withdrawal of a Member State from the Union, was over. At the same time, phase two of Brexit, regarding the negotiations between the Parties for the definition of their future relations, started. This new negotiation phase should last until the end of the transition period provided for in the Withdrawal Agreement, currently set for 31 December 2020[1].

[1] On the Brexit see among others: P. Mariani, G. Sacerdoti, *Brexit and Trade Issues*, in *EJLS Special Issue*, October 2019, 187-218; M. Montini, *Le future relazioni commerciali tra Regno Unito e Unione europea dopo la Brexit: paradigmi e modelli a confronto*, in *Federalismi.it*, 20, 2019, 29-49; F. Savastano, *Uscire dall'Unione europea. Brexit e il diritto di recedere dai Trattati*, Torino, 2019; A. Tanca, *Brexit: l'esito di una relazione problematica*, in *Quaderni costituzionali*, 2018, 341-360; M. Dougan, *An Airbag for the Crash Test Dummies? EU-UK Negotiations For A Post-Withdrawal "Status Quo" Transitional Regime under Article 50 TEU*, in *Common Market Law Review*, 55(3), 2018, 57-100; T. Tridimas, *Article 50: An Endgame without an End?*, in *King's Law Journal*, 27(3), 2016, 297-313; D. Dixon, *Article 50 and Member State Sovereignty*, in *German Law Journal*, 19(4), 2018, 901-940; M. Puglia, *Art. 50 TUE*, in A. Tizzano (a cura di), *Trattati dell'Unione europea*, Milano, 2014, 338 ff.; P. Nicolaides, *Withdrawal from the European Union: A Tipology of Effects*, in *Maastricht Journal of European and Comparative Law*, 20(2), 2013, 209-219; A. Di Rienzo, *Art. 50 TUE*, in C. Curti Gialdino (a cura di), *Codice*

The negotiations for phase two look quite hard and complex. However, they do not start from the scratch. They will be rather based on what the Parties have already agreed in the Withdrawal Agreement and in the Political Declaration. Both documents are the result of the negotiations between the Parties that began in the aftermath of the withdrawal notification sent by the United Kingdom to the European Union, pursuant to article 50 TEU, on 29 March 2017. The two Parties agreed on the Withdrawal Agreement, and the related Political Declaration, on 13 November 2018. However, the British Parliament refused to ratify the two aforementioned acts despite being pledged by the Government chaired by Theresa May. As a consequence, following the appointment of a new Government chaired by Boris Johnson, in summer 2019, the negotiations between the Parties were re-opened and the two documents were revised. The new updated versions of the Withdrawal Agreement and the Political Declaration were finally adopted by the Parties on 17 October 2019.

This contribution will focus on the main features of the future trade relations between the United Kingdom and the European Union, as they emerge from the most relevant documents that marked the negotiations between the Parties in the period between the withdrawal notification sent by the United Kingdom to the European Union in March 2017 and the conclusion of the revised version of the Withdrawal Agreement and the Political Declaration which occurred in October 2019.

Subsequently, the analysis will be devoted to the description of the two paradigms that constitute the reference points in the negotiations for the definition of future commercial relations between the Parties. These paradigms represent two different, and somehow opposed, visions. They correspond on the one hand to the imperative of market integration and on the other to the one of trade liberalization. The two paradigms constitute the reference points normally used by the European Union to define its commercial relations with third countries. Therefore, the analysis of the paradigms will be followed by an examination of some of the most relevant models, which have been drawn up in implementation of the two aforementioned paradigms. These models currently link the Union to some of its most important commercial partners, located both inside and outside the European continent.

Finally, the last part of this contribution will concentrate on the question of the "level playing field" criterion, with a specific focus on the issue of the definition of the standards which may be applied by the Parties in their future relations with regard to competition policy and State aids, environmental protection, social and labor standards, fiscal policies.

dell'Unione europea operativo, Napoli, 2012, 404 ff.; G. Busia, *Revisione del Trattato, ammissione di nuovi Stati e recesso dall'Unione*, in F. Bassanini, G. Tiberi (a cura di), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Bologna, 2010, 401 ff.; H. Hofmeister, *Should I stay or Should I go? – A Critical Analysis of the Right to withdraw from the EU*, in *European Law Journal*, 16(5), 2010, 589-603.

2. The main features of the future trade relations between the United Kingdom and the European Union

In this paragraph the main features of the future trade relations between the United Kingdom and the European Union will be presented. The analysis will focus firstly on the most relevant documents that shaped the negotiations between the Parties during phase one of Brexit, up to the conclusion of the revised version of the Withdrawal Agreement and the Political Declaration in October 2019. Then, the attention will shift to the documents containing the negotiating positions of the two Parties, published in February 2020, which marked the beginning of phase two of Brexit.

The analysis ought to start from the withdrawal notification sent from the United Kingdom to the European Union on 29 March 2017, which officially gave the start to the withdrawal procedure regulated by article 50 TEU, following the outcome of the British referendum on Leave vs. Remain of 23 June 2016[2].

In the letter of notification, the United Kingdom declares its intention not to remain connected to the European single market, while recognizing the indivisibility of the four freedoms of movement (goods, people, services and capital). The United Kingdom proposes a series of principles which should guide the negotiations with the European Union, making a reference to the necessity to negotiate in a constructive and respectful way and "in a spirit of sincere cooperation". The main objective of the United Kingdom is to establish a "deep and special relationship" between the two Parties, which should include cooperation in economic and security matters[3].

From the European Union's point of view, the first relevant document to be analyzed consists of the "Guidelines" of the European Council of 29 April 2017, which contain the negotiating directives adopted by the Heads of State and Government of the Member States of the Union to steer the positions of the European Commission during the subsequent negotiation phase[4].

In the "Guidelines", the European Council notes the positive attitude of the United Kingdom aimed at establishing a "close relationship" with the European Union after Brexit, but at the same time clearly affirms that no kind of future agreement between the Parties should create a situation equivalent to a (total or partial) participation by the United Kingdom in the European single market, as this could hinder its integrity and proper functioning[5].

Furthermore, it clarifies that the future agreement between the Parties should include provisions aimed at protecting European companies from any competitive advantages that British companies may enjoy in the future, if the United Kingdom was to decide to lower its tax, social, environmental and regulatory measures and practices as compared to those applicable in the

[2] United Kingdom Notification under Article 50 TEU, data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf
[3] Ibidem, 2.
[4] Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines, EUCO XT 20004/17.
[5] Ibidem, para. 18-20.

European Union. The Parties, in defining their future commercial relations, should mutually commit to ensuring the application of similar or comparable standards to the economic and commercial entities operating in competition in each other's territory[6].

On the basis of the positions expressed by the Parties in the documents examined above and during the initial phase of the negotiations, the so-called "red lines" for the negotiations emerged, that correspond to the apparently "non-negotiable" points and thresholds adopted by each of the Parties. The relevance of such "red lines" with regard to the definition of the main features of their future commercial relations was well summarized by Michel Barnier, the chief negotiator of the European Union, in a speech held at the meeting of the European Council of 15 December 2017[7].

According to Barnier's reconstruction, the analysis of the negotiating positions of the United Kingdom and the European Union, paired with the experience gained by the Union in the definition of various bilateral agreements with some of its most important commercial partners globally, leads to the conclusion that the only models that may realistically work as useful references for the definition of the future trade relations between the United Kingdom and the European Union are the free trade agreements concluded by the Union in recent years with Canada and South Korea[8].

Despite the differences between the Parties and the narrow negotiation margins represented by the "red lines" mentioned above, following an intense year of negotiations, the Parties agreed on 13 November 2018 on the first version of the Withdrawal Agreement and the related Political Declaration. While the first document deals mainly with regulating relations between the Parties during the transition period, foreseen between the effective date of exit of the United Kingdom from the European Union and the deadline of 31 December 2020[9], the second document is more relevant for the purposes of this analysis, as it contains some relevant elements on the indicative main features of the future relations between the United Kingdom and the European Union[10].

In particular, the Political Declaration on the one hand takes up some of the issues corresponding to the negotiating red lines of the Parties mentioned above and on the other hand contains some indicative hints on how to shape the future trade relations between the Parties[11].

[6] Ibidem, para. 20.
[7] M. Barnier, European Commission Chief Negotiator to the Heads of State and Government at the European Council (Article 50), 15 December 2017, ec.europa.eu/commission/sites/beta political/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf
[8] Ibidem.
[9] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 144 I/01), Official Journal of the European Union C 144 I/1, 25 April 2019, 1–184.
[10] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 66 I/02), Official Journal of the European Union C 66I, 19 February 2019, 185–198.
[11] Ibidem, paras. 4 and 17.

More precisely, in paragraph 4 of the Political Declaration, the Parties state that their future relationships should be based "on a balance between rights and obligations that takes into account the principles of each party". These principles seem to coincide with some of the already mentioned red lines for negotiation adopted by each of the two Parties. For the European Union, the principles of the integrity of the single market and the customs union, as well as the indivisibility of the four freedoms, are specifically mentioned. For the United Kingdom, the main principles refer to the respect for its sovereignty and the protection of its internal market, as well as to its right to develop an independent commercial policy and to end the regime of free movement of persons between the United Kingdom and the European Union, in accordance with the results of the 2016 referendum.

Subsequently, in paragraph 17 of the Political Declaration, the Parties indicate the proposed main characteristics of their future commercial relations. These consist in particular of an "ambitious, wide-ranging and balanced economic partnership", which should firstly include a "free trade area", in which goods can circulate freely, without quotas and without tariffs, and a facilitated investments regime. Secondly, it is stated that the partnership should give rise to "wider sectoral cooperation, where it is in the mutual interest of both Parties." This reference indicates a common fundamental interest of the Parties not to limit their future cooperation only to the exchange of goods. However, the future sectoral cooperation between the Parties, rather than being automatic or general, should be subject to specific negotiations. The Parties also agree that the provisions of their future agreement should guarantee a "level playing field" for open and fair competition, with the aim to guarantee equal or comparable conditions to their respective economic and commercial entities.

Beyond the specific indications contained in paragraph 17, from the systemic reading of the Political Declaration it emerges that the "ambitious economic partnership" between the Parties should be based primarily on the free movement of goods and on the facilitation of investments. Only to a more limited extent, the Parties have shown their interest in the free movement of services. Furthermore, the Parties have declared their willingness to allow some limited forms of temporary entry and stay of natural persons for professional reasons only, in sectors that will have to be defined specifically. In addition to this, the Parties have declared their interest in ensuring the free movement of capital and payments associated with the movement of goods and services that will be subject to liberalization as part of their future economic partnership. Finally, with specific reference to the free movement of persons, the Parties, in view of the clear position of the United Kingdom aimed at ending the free movement of persons applicable in the European single market, stated their interest in pursuing negotiations to establish some "mobility arrangements" for persons. These should be based on the principle of non-discrimination and on the full reciprocity of rights and obligations between the Parties. Within the framework of the proposed "mobility arrangements", the adoption of specific provisions

aimed at guaranteeing the exemption of visas for short-term visits, as well as facilitated conditions of entry and stay for specific purposes, such as research, study, training and youth exchanges, should be considered[12].

In sum, it may be noted that the Political Declaration, in its original version of November 2018, already included some hints on the main features of the future commercial relations between the Parties. However, after the resignation of Theresa May and the appointment of the new Government of Boris Johnson, the negotiations between the Parties were "reopened" in the summer of 2019. The outcome of the resumed negotiations was the conclusion of a revised version of both the Withdrawal Agreement[13] and the Political Declaration[14], which were adopted by the Parties on 17 October 2019. For the purpose of the present analysis, however, it should be underlined that the revised version of the Withdrawal Agreement, similarly to the original one, did not contain any specific element on the shaping of the future trade relations between the Parties, whereas the relevant features originally included in the Political Declaration remained substantially unchanged in its revised version. For these reasons, it is not necessary to examine in detail the new version of the Political Declaration.

The matter of the proposed main features of the future trade relations between the Parties was revived in February 2020, when the official documents on the negotiating positions of the European Union and the United Kingdom for phase two of Brexit were published.

The negotiating directives of the European Union are contained in the Council Decision of 25 February 2020[15]. As to their relevant content, paragraph 7 should be mentioned in the first place. It states that the main goal of the post-Brexit negotiations is to establish a new broad partnership with the United Kingdom, covering the areas of interest indicated in the Political Declaration, including trade and economic cooperation as well as some other sectors, such as cooperation in criminal matters, foreign policy, security and defense. The partnership between the Parties should form a coherent structure and should be embedded in an overall governance framework[16].

With reference to the content of the planned partnership, the Union's negotiating directives contain a series of principles on which cooperation between the Parties should be based. From the Union's point of view, the envisaged partnership should guarantee a "balance of rights and obligations" and ensure the autonomy of the Union's decision-making and legal order. Moreover,

[12] Ibidem, paras. 48-57.
[13] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), Official Journal of the European Union, C 384I, 12 November 2019, 1-177.
[14] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 66 I/02), Official Journal of the European Union, C 384I, 12 November 2019, 178–193.
[15] Council Decision authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 25 February 2020, 5870/20 ADD 1 REV 3.
[16] Ibidem, para. 7.

it should comply with the relevant guidelines expressed by the European Council, with a particular reference to the integrity of the single market and the customs union and the indivisibility of the four freedoms[17].

The economic partnership between the Parties should be wide-ranging and should include a free trade agreement accompanied by sectoral cooperation where this will be in the interest of the Union, provided that compliance with a high "level playing field" is guaranteed in the current and future standards adopted by the Parties[18]. The free trade area should provide for the total absence of tariff and non-tariff obstacles and should be connected to a customs and regulatory cooperation system between the Parties. Furthermore, it should be accompanied by strong reciprocal commitments of the Parties for the enforcement of high standards in the respective competition policy[19].

The negotiating positions of the United Kingdom for the post-Brexit negotiations are outlined in a document on the future relationship with the European Union issued by the British Government at the end of February 2020[20]. From this document, it emerges that the vision of the UK with respect to the future relations with the EU aims at the establishment of a friendly cooperation between sovereign states, in which both Parties should respect one's another legal autonomy[21].

The United Kingdom reiterates that the reference parameters for defining the future relations between the Parties are those contained in the Political Declaration of 17 October 2019. These contemplate the conclusion of a comprehensive free trade agreement, drawn up along the lines of the recent free trade agreements concluded by the European Union with Canada and some other non-European countries. Such a free trade agreement should be accompanied by a series of other international agreements relating to specific sectors, such as fisheries, law enforcement and judicial cooperation in criminal matters, transport and energy[22].

As for the specific features that the free trade agreement should have, according to the United Kingdom this should provide for liberalized access to the respective internal markets for goods originating in the territories of the two Contracting Parties and should be largely based on the relevant WTO provisions, such as those on technical barriers to trade (TBT agreement) and sanitary and phytosanitary measures (SPS agreement)[23]. The agreement should also include provisions aimed at facilitating trade in services, including the entry and temporary stay of people in connection with the provision of services, as well as at promoting investments[24]. In addition, the agreement should provide for a

[17] Ibidem, para. 10.
[18] Ibidem, para. 17.
[19] Ibidem, para. 19-20.
[20] HM Government, The Future Relationship with the EU. The UK's Approach to Negotiations, CP211, February 2020.
[21] Ibidem, para. 5.
[22] Ibidem, Part 2, Chapter 1.
[23] Ibidem, Part 1, Chapters 1-7.
[24] Ibidem, Part 1, Chapters 8-10.

pathway for mutual recognition of professional qualifications[25]. Finally, the Parties should commit to some sort of free movement of capital and payments, as facilitative elements for promoting trade and investment[26]. Notably, in the United Kingdom's negotiating positions there is no reference at all to the mobility of persons.

In its negotiating positions for phase two of Brexit, the United Kingdom has officially declared that it will not extend the transition period beyond 31 December 2020[27]. According to the UK, if an agreement with the European Union will not be concluded by that date, the commercial relations between the two Parties will be governed by the provisions of the Withdrawal Agreement and will be similar to Australia's[28]. In this regard, it should be emphasized that in the aftermath of Brexit, the United Kingdom and Australia have announced their intention to conclude a free trade agreement shortly. The precise terms of such a foreseen agreement are not known yet. In any case, what is certain is that, in the event that the United Kingdom and the European Union fail to reach a trade agreement by the end of the transition period, their trade relations will be governed by WTO rules.

With the aim to better understand the foreseeable main features of the future relations between the Parties, in the next paragraph the attention will shift to the analysis of the two most important paradigms and of some relevant models of free trade agreements concluded by the European Union in the recent past that could influence the negotiations between the United Kingdom and the European Union in phase two of Brexit.

3. Paradigms and models for the future trade relations between the United Kingdom and the European Union

In this paragraph, the two main paradigms that normally inspire the Union's relations with its trade counterparts will be examined. These paradigms correspond on the one hand to the imperative of market integration and on the other to the one of trade liberalization[29]. Subsequently, the analysis will focus on the main features of some relevant models experimented by the European Union with its most important commercial partners, located both inside and outside the European territory. In this context, four different models will be highlighted. They have been selected on the basis of their particular relevance as possible sources of inspiration for the definition of the future commercial relations between the United Kingdom and the European Union. The relevant models are

[25] Ibidem, Part 1, Chapter 12.
[26] Ibidem, Part 1, Chapter 18.
[27] Ibidem, Introduction, para. 9.
[28] Ibidem, Introduction, para. 7.
[29] P. Eeckhout, *Future trade relations between the EU and the UK: options after Brexit*, European Parliament, Directorate General for External Policies of the Union, Policy Department for External Relations, PE 603.866, March 2018, 6-16, www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU(2018)603866_EN.pdf

the following ones: the Norwegian model; the Swiss model; the Turkish model and the Canadian model[30].

The market integration paradigm has as its main objective the approximation of the technical regulation of the Parties. This objective can be achieved both through a centralized approach (which promotes harmonization "from above" of regulatory and technical standards) and through a decentralized approach (which promotes regulatory and technical convergence "from below" through the use of the principle of mutual recognition). In the context of the European internal market, the two approaches coexist. In some cases, the EU prefers to use the centralized approach (for example in the field of public health and safety of products and production processes), while in other cases European legislation allows Member States to adopt and maintain different national regulatory systems (for example with reference to some traditional products or production processes). In the latter circumstance, on the basis of the mutual recognition principle, each Member State must recognize, as equivalent to its own, the standards of the other countries and must guarantee the free circulation within its national territory of products legitimately manufactured and placed on the market in other Member States, which are based on different (but equivalent) national laws and regulations. In such cases, the possibility for a Member State to impose some limited restrictions on the free movement of goods in cases where there is the need to protect some of its fundamental national interests (the so-called "imperative requirements") is always ensured. The relevant national interests may refer, for instance, to public health, environmental protection or consumer protection, to the extent that the requirements invoked are based on overriding public interests reasons and do not relate to fields for which European legislation has dictated a common harmonized discipline.

In the context of the European Union, the market integration paradigm experienced in the context of the European single market is also strengthened by the application of the principles of direct effect and primacy. These principles, coming into play in the event of a conflict between European and national legislation, are meant to guarantee the supremacy of European Union law. In addition, the correct functioning of the European single market is ensured by the constant monitoring of the behavior of the Member States by the European Commission and by a dispute resolution system which guarantees the uniform and correct application of European Union law.

The paradigm of market integration not only characterizes the European single market, but also strongly permeates the economic and commercial relations of the European Union with some of its neighboring European countries, which despite not being Member States, enjoy strong commercial and institutional links with the Union. In this sense, one should consider, for example, the cases of Norway, Switzerland and Turkey.

[30] M. Montini, Le future relazioni commerciali tra Regno Unito e Unione europea dopo la Brexit: paradigmi e modelli a confronto, cit., spec. 37 ff.

Some details on the main features of the market integration models that characterize the commercial relations of the European Union with the aforementioned countries will be provided below, in order to verify how the paradigm of market integration is articulated and operates in these three contexts, which share significant similarities, but also have important differences.

The Norwegian model refers to the commercial cooperation regime established under the 1993 Agreement on the European Economic Area (usually referred to as the EEA Agreement, from the English acronym European Economic Area).[31] This is due to the fact that Norway represents the most economically relevant country among the three countries of the EFTA (European Free Trade Area), namely Norway, Iceland, Liechtenstein, which are linked by the EEA agreement to those of the European Union.

The EEA establishes a free trade area between the European internal market and the national markets of the three countries in question. In this context, customs duties are abolished for products originating in the Contracting Parties. This integration of the respective markets is accompanied by a high degree of regulatory integration between the countries involved. In fact, the three aforementioned countries have an obligation to implement the technical standards that are part of the so-called *acquis communautaire* into their national legislation. However, despite having to comply with the technical regulations and standards imposed by the European Union, they do not have the opportunity to participate in their adoption or revision, which remains a matter of exclusive EU competence. This represents an important shortcoming of the EEA Agreement, which shows a serious deficit of democratic participation in its decision-making process.[32]

The integration model envisaged by the EEA Agreement is very similar to the one in place in the European internal market, In fact, it may be said that the EEA Agreement extends to the European Economic Area, in a more or less similar way, the four freedoms of movement (goods, people, services, capital) already present in the European internal market.[33]

The Swiss model refers not to a specific agreement, but to a complex system of economic and commercial agreements that connect the European Union and Switzerland.[34] There is no general cooperation agreement between the EU and Switzerland, at least so far. In fact, a framework agreement between the Parties – called the Institutional Agreement – is currently under negotiation, and the Parties may eventually agree on its terms. There are, however, a series of sectoral agreements covering various fields, which have the main objective of

[31] Agreement on the European Economic Area (EEA Agreement), in GUUE L 1, 3 January 1994, 3 ff.
[32] H. Haukeland Fredriksen, C.N.K. Franklin, *Of pragmatism and principles: The EEA Agreement 20 years on*, in *Common Market Law Review*, 52(3), 2015, 629 ff.
[33] C. Hillion, *Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA*, in *Common Market Law Review*, 55(1), 2018, 135 ff.
[34] C. Sanna, *Gli accordi tra Svizzera e Unione europea: un modello per le future relazioni con il Regno Unito?*, in *Federalismi.it*, 18, 2017, 1-23; M. Condinanzi (a cura di), *Unione europea e Svizzera tra cooperazione e integrazione*, Milano, 2012.

guaranteeing access (on a reciprocal basis) to the internal markets of the Contracting Parties. These agreements were negotiated at different times, starting with the 1972 Free Trade Agreement.[35] To date, the system of agreements between the European Union and Switzerland includes the 1972 Free Trade Agreement and five subsequent agreements, which deal with the following issues: free movement of persons, land transport, air transport, mutual recognition in the field of conformity assessment / technical barriers to trade, agriculture.

The original 1972 Free Trade Agreement between the European Union and Switzerland establishes a free trade area between the customs territories of the two contracting parties. It primarily focuses on the free movement of goods, based on the model of the European internal market. Within this area, industrial products and agricultural products originating in the territory of each of the Contracting Parties may circulate without the application of customs duties. The application of quantitative restrictions and measures of equivalent effect in the commercial relations between the two Parties is also prohibited. The free trade agreement between the EU and Switzerland also provides for the free movement of services and, to a more limited extent, for the free movement of persons.

The Turkish model, similarly to the Swiss one, does not consist of a single trade agreement between the Parties, but in a series of agreements and decisions that have given rise to a complex system of preferential bilateral trade relations between the European Union and Turkey (EU –Turkey Bilateral Preferential Trade Framework – BPTF).[36] Trade relations between the Parties have developed since the 1960s and have been marked by several stages. The first agreement concluded between the Parties was the 1963 Association Agreement between the European Union and Turkey, commonly referred to as the Ankara Agreement, which initiated the process for the establishment of a customs union between the Parties.[37] This agreement represents the reference basis for the economic and commercial cooperation relations between the Parties. The Ankara Agreement was then supplemented by the 1970 Additional Protocol, which set up the roadmap for the progressive elimination of tariff and non-tariff barriers to trade.[38] Finally, the customs union between the Parties was established a few

[35] *1972 Free Trade Agreement between the European Union and Switzerland*, (Accordo tra la Confederazione Svizzera e la Comunità economica europea - Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Wirtschaftsgemeinschaft - Accord entre la Confédération suisse et la Communauté économique européenne), RS.632.401, 22 July 1972, www.admin.ch/opc/it/classified-compilation/19720195/index.html

[36] F. Hakura, *EU–Turkey Customs Union. Prospects for Modernization and Lessons for Brexit*, in *Chatam House Briefing*, December 2018, www.chathamhouse.org; K. Binder, *Reinvigorating EU-Turkey bilateral trade: Upgrading the customs union*, European Parliament Briefing PE 599.319, 2017.

[37] *1963 Ankara Agreement*, Agreement creating an association between the European Economic Community and Turkey (Ankara Agreement), 12 September 1963, Official Journal of the European Union, L217, 29 December 1964, 2687.

[38] 1970 *Additional Protocol*, Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry

years later, through Decision 1/95 of the EU / Turkey Association Council and entered into force from 1996.[39]

The key feature of the trade relations between the European Union and Turkey is represented by the customs union, which provides for the elimination of customs duties and measures having an effect equivalent to the exchange of goods between the Parties, as well as for the application by Turkey in its relations trade with third countries of the European Union common customs tariff. The customs union between the EU and Turkey initially referred to industrial products only. It was extended to the coal and steel sector in 1996,[40] and to agricultural and fisheries products in 1998.[41]

However, the application of the customs union in question is not immune from difficulties, especially due to the asymmetrical nature of the relations between Turkey and other EU trade partners.[42] Moreover, such a trade relation has very peculiar features, since the commercial relations between the Parties are rather advanced in the field of free movement of goods, while they are severely limited, if not completely absent, in the area of free movement of services and persons. For these reasons, it may be very difficult to replicate the provisions which shape the trade relations between the EU and Turkey in a different context.

As to the second reference paradigm mentioned above, namely the trade liberalization paradigm, its main objective is to promote the liberalization of trade between countries. This largely differs with respect to the first paradigm seen above. In fact, the trade liberalization objective is pursued by the Parties by keeping their national markets separate, rather placing them in a perspective of mutual integration.

The trade liberalization approach usually focuses on trade related to goods and extends to the progressive reduction or elimination of barriers to trade, both tariff and non-tariff ones, according to WTO rules and criteria. As regards tariff obstacles, the trend in the most advanced trade agreements is towards the total elimination of tariffs against products originating in the countries with which a Party decides to conclude a preferential trade agreement (PTA). Usually this kind of agreement creates a free trade area, established in accordance with the provisions of article XXIV of the GATT.

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into force - Final Act – Declarations, Official Journal of the European Union, L 293, 29 December 1972, 3–56.

[39] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, Official Journal of the European Union, OJ L 35, 13 February 1996, 1–46

[40] Agreement between the European Coal and Steel Community and the Republic of Turkey on trade in products covered by the Treaty establishing the European Coal and Steel Community, Official Journal of the European Union, L 227, 07 September 1996, 3-34.

[41] Decision No 1/98 of the Association Council of 25 February 1998 (EC-Turkey trade agreement for agricultural products), Official Journal of the European Union, L 86, 20 March 1998, 1-38.

[42] F. Hakura, *EU–Turkey Customs Union. Prospects for Modernization and Lessons for Brexit*, cit.; K. Binder, *Reinvigorating EU-Turkey bilateral trade: Upgrading the customs union*, cit.

The elimination of non-tariff barriers is more difficult, insofar these are closely linked to the regulatory power of the various countries. Normally, according to WTO rules, not all forms of differentiated national regulation that may have a direct or indirect impact on trade are prohibited, but only the national provisions that have a clear discriminatory intent or effect against products manufactured in a different country are banned. In this sense, the legal system set up in the European single market is an exception, in which the Court of Justice generally considers inadmissible all the national provisions of the Member States which can "directly or indirectly, actually or potentially hinder" trade between the various Member States, without it being necessary to provide evidence of their effective and relevant impact on intra-European trade.

In the current global context, characterized by a general trend towards the progressive reduction and elimination of tariff obstacles in the international trade in goods, the most significant problem to be faced is the control and elimination of non-tariff barriers. In this case, it should be underlined that the system established with the European internal market constitutes an unmatched reference model at a global level, since in addition to guaranteeing the full integration of the national markets of the contracting countries, it provides for a high level of regulatory integration for the Parties. This level of regulatory integration is far more advanced than the one that can be found in any kind of bilateral free trade agreements existing worldwide, including some of the most recent ones concluded by the European Union, such as for instance those with Canada, South Korea, Japan. These agreements, in fact, provide for a very significant level of market integration, which, however, does not go as far as to establish an advanced model of regulatory integration between the Parties comparable with the European internal market.

Within the preferential trade agreements, sometimes the liberalization of trade is also extended to the services sector, with a varying intensity, depending on the specific type of agreement. In some cases, the liberalization of trade in services may be accompanied by a limited freedom of movement for persons, usually understood as a limited free movement of service providers.

In the context of the liberalization of trade in services, the question of the liberalization of tariff measures does not arise, as measures of this type are normally absent. For this reason, with reference to services, the main problem concerns the control of non-tariff measures. Free trade agreements extending to services may contain measures designed to promote the approximation of the national provisions of the Contracting Parties on services, but generally do not go as far as to undermine the general principle according to which the regulation of services constitutes a topic reserved to the national regulatory competence of each sovereign country. In fact, this matter is normally excluded from the harmonization efforts promoted at international level, both in bilateral and in multilateral contexts. The exception in this sense is represented by the European internal market, in which the regulatory integration on the free movement of

goods is also accompanied by a broad, albeit less evolved, regulatory integration on the free movement of services.

The most advanced bilateral trade agreement model that is an expression of the trade liberalization paradigm is represented by the free trade agreement concluded in 2016 between the European Union and Canada, called the Comprehensive Economic and Trade Agreement (CETA).[43] This agreement is the most advanced example of a free trade agreement (FTA) concluded to date by the Union.

The CETA agreement provides for the establishment of a free trade area which includes both the free movement of goods, pursuant to art. XXIV of the GATT, and the free movement of services, pursuant to art. V of the GATS. In fact, the peculiarity of this agreement lies in the coexistence, within the same legal instrument, of a "complex" free trade area, where the free movement of goods, which represents the traditional content of free trade agreements, is accompanied by the free movement of services. However, this agreement does not contain provisions relating to the free movement of persons, with the exception of temporary movements of persons who provide services in the territory of the other Contracting Party.

Chapter II of the CETA agreement regulates the free movement of goods. It provides for a gradual reduction and progressive elimination of customs duties on the import of goods originating in the other Contracting Party and the prohibition on introducing or maintaining prohibitions or restrictions on the import of goods from the customs territory of the other Party or on the export towards that territory, in line with the provisions of art. XI of the GATT. In general, all the provisions of this chapter of the agreement are largely based on the corresponding GATT rules and incorporate its fundamental principles.

As for the free movement of services, this is governed by Chapter IX of the CETA agreement, which provides for a broad regime of free movement of services between the Parties, with particular reference to some specifically identified sectors. For example, it includes legal or accounting consultancy services, as well as those provided in the transport, telecommunications and tourism sectors. Conversely, the air transport sector, as well as those of audiovisual services (for the European Union) and culture (for Canada) are excluded. Overall, it can be said that the CETA agreement is the expression of a broad agenda of liberalization of the provision of services between the Parties.

As for the movement of persons, Chapter X of the CETA agreement contains specific rules on the right of temporary entry and stay of natural persons of one Party in the territory of the other Party, provided that this occurs in connection with the provision of services. In addition, Chapter XI establishes a legal framework for the negotiation of future agreements between the Parties aimed at the mutual recognition of their professional qualifications.

[43] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, (Accordo CETA), 2016, in GUUE L 11, 14 January 2017, 23-1079.

In conclusion, it can be argued that the CETA agreement, as an example of an advanced FTA agreement, which also provides for the free movement of services alongside the free movement of goods, is probably the most interesting source of inspiration for defining the future relations between the United Kingdom and the European Union.

4. The "level playing field" (LPF) criterion

In this paragraph, the question of the "level playing field" (LPF)[44] criterion will be analyzed, with a particular regard to the provisions of the Political Declaration and to negotiating positions of the Parties for the phase two of Brexit [45].

According to the Political Declaration, the LPF should be a fundamental criterion for the definition of the future commercial relations between the United Kingdom and the European Union, in order to avoid the possible negative consequences that could result from regulatory discrepancies between the Parties in the definition of competition, environmental, social and tax standards. The LPF criterion refers to a situation in which the conditions of competition for all economic operators operating in a given market are fair. This term is usually used in the context of the application of the respective national regulatory standards of the Parties to a free trade agreement to some horizontal sectors, such as those relating to business taxation, labor standards, environmental protection standards and climate change policies.

The LPF criterion may consist in the application of two different approaches: the first "softer" one corresponding to the principle of non-regression and the second "stricter" one relating to the principle of dynamic regulatory alignment of the various Contracting Parties to an international trade agreement[46]. The first criterion (non-regression)[47] is a common feature in some recent free trade agreements, such as those concluded by the European Union with Canada, South Korea and Japan. The second criterion (dynamic regulatory alignment)[48] is often applied in the commercial relations of the European Union with some neighboring countries, in the context of its neighborhood policy. The main example of the application of the regulatory alignment is represented by

[44] F. Zuleeg (et al.), *Ensuring a post-Brexit level playing field*, European Policy Centre (EPC), May 2019, www.epc.eu/en/publications/Ensuring-a-post-Brexit-level-playing-field~26c1e0
[45] M. Morris, *Level playing field*, IPPR briefing, The Progressive Policy Think Tank, 18 February 2020, www.ippr.org/blog/level-playing-field-ippr-briefing
[46] D. Loud, *Defining Withdrawal: Brexit and the "Level Playing Field" for Environmental Regulations*, in *Columbia Journal of Transnational Law*, blogs2.law.columbia.edu/jtl/tag/daniel-loud/
[47] M. Prieur, *Non-regression in environmental law*, S.A.P.I.EN.S (Online), 5(2), 2012, journals.openedition.org/sapiens/1405
[48] K. Armstrong, *Regulatory alignment and divergence after Brexit*, in *Journal of European Public Policy (JEPP)*, 25(8), 2018, 1099-1117.

the provisions of the EEA Agreement, but similar examples can also be found in other recent EU agreements, such as the one with Ukraine.

The LPF issue was already present in the first period of the Brexit negotiations, which culminated with the first version of Withdrawal Agreement and the related Political Declaration concluded in November 2018. In this context, the only explicit reference to the LPF criterion was contained in the Protocol relating to Ireland / Northern Ireland annexed to the Withdrawal Agreement. In fact, in article 6 of this Protocol, it is written that in order to facilitate the exchange of goods within the common customs area during the transition phase, between the Brexit date and the deadline of 31 December 2020, the level playing field criterion will be applied between the Parties, with reference to their competition laws, their fiscal system, as well as their environmental, social and labor standards. In addition, Annex 4 to the said Protocol provides that for environmental, social and labor standards, the principle of non-regression applies, with reference to the common criteria and rules in force for the Parties at the end of the transition period provided by the Withdrawal Agreement. As for the progressive update of the relevant common standards, article 6 of the Protocol states that the Joint Committee in charge with the implementation of the future agreement between the Parties will enjoy the competence to modify the conditions of the level playing field and to adopt higher and more stringent standards.

After the resumption of negotiations between the Parties following the appointment of the Government of Boris Johnson, the reference to the level playing field criterion has been widely changed, both in its location and in its content. As for the location, the reference has been moved from the above mentioned Protocol relating to Ireland / Northern Ireland to the Political Declaration, in its revised version of October 2019. As for the content, the criterion has assumed the role of a general guideline for the regulation of the future commercial relations between the Parties after Brexit, as better explained below.

The LPF criterion is explicitly referred to in paragraph 77 of the Political Declaration, in its revised version of October 2019[49]. This provision contains a commitment of the Parties to guarantee in their future relations the application of a common level playing field. This should aim at ensuring an open and fair competition system, which can guarantee to economic and commercial operators of both Parties to compete on the same terms in the future integrated market between the United Kingdom and the European Union.

The commitment to maintaining a common (high) level playing field refers to the internal regulations of the Parties regarding competition policy and state aids, social and labor standards, environmental protection and climate change, and fiscal policy. However, there is a reference in paragraph 77, according to which the precise nature of the respective commitments of the Parties on their

[49] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 66 I/02), cit, para. 77.

common level of regulation will depend on the scope and depth of their future relationship and on the level of their economic connectedness. Furthermore, in paragraph 77 there is no reference to the possibility of a verification of the implementation of the LPF criterion by the governing entity that will take care of the management of the future agreement between the Parties and may resolve the related disputes.

The latter two elements could represent a very relevant weakness of paragraph 77. In fact, it seems that there are no effective guarantees that the United Kingdom will in any case respect the generic commitment contained in the Political Declaration to maintain a level playing field with the European Union. It is in fact absolutely possible that, during the phase two negotiations, the United Kingdom will try to use the provision in question in order to push towards the conclusion of a commercial agreement with the European Union more favorable to it, otherwise threatening to become a paradise of deregulation in tax, social and environmental matters, located at the gates of the European Union. Moreover, it is equally possible that, even in case a free trade agreement governing the future commercial relations between the Parties is concluded, the United Kingdom, when confronted with its implementation, may nevertheless decide to adopt a policy which tends to be less restrictive than the European one, thus putting at risk the concrete application of the level playing field criterion.

The European Union, in its negotiating position for phase two of Brexit[50], has introduced a section specifically dedicated to the issue of the level playing field[51]. In this section, the Union refers to the provisions of the Political Declaration, according to which "the envisaged partnership must ensure open and fair competition, encompassing robust commitments to ensure a level playing field"[52]. According to the European Union, the agreement with the United Kingdom on the future relations between the Parties should confirm the current high common standards "in the areas of State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, relevant tax matters and other regulatory measures and practices in these areas"[53].

Similarly, the standards of the Parties in the sectors indicated above should remain high and should have European Union standards as a reference point, taking into account how these will evolve in the future. Furthermore, according to the EU, the governing body of the future agreement between the Parties should have the competence to modify the joint commitments regarding the level playing field, with the power to subject new sectors to the criterion in question or to introduce stricter standards over time[54].

[50] Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, cit.
[51] Ibidem, para. 93 ff.
[52] Ibidem, para. 94.
[53] Ibidem, para. 94.
[54] Ibidem, para. 94-95.

As for the United Kingdom, there is no specific reference to the level playing field criterion in its post-Brexit negotiating positions[55]. However, there are relevant provisions in this sense in the sections dedicated to competition policy and to the relationship between trade and other relevant interests related to sustainable development, social and employment protection, environmental protection and fiscal policy[56].

In particular, with reference to competition policy, according to the United Kingdom, the Parties should undertake to maintain their own effective system of competition laws, without this requiring their legislative or regulatory alignment[57].

With reference to the standards for social, labor and environmental protection, the United Kingdom proposes the insertion in the agreement between the Parties of a clause aimed at establishing a mutual commitment not to lower or reduce the protection standards, in order to encourage trade and investment[58]. Such a proposal is based on the principle of non-regression, as contained in many recent European Union free trade agreements (FTAs) with non-European countries, such as those concluded with South Korea and Japan. However, the limit inherent to such an approach is that the application of the non-regression principle is not conceived as an absolute obligation, but it only imposes to the Parties a reciprocal commitment conditional to the promotion of trade and investment.

On the basis of what has just been examined regarding the possible role of the LPF criterion in the context of the future economic and commercial relations between the United Kingdom and the European Union, it can be concluded that, at present, in view of the provisions of the 2019 Political Declaration and given the respective negotiating positions for phase two of Brexit, as expressed by the Parties in February 2020, it is difficult to argue that the criterion under consideration will constitute a guarantee against the possibility that one of the two Parties, more likely the United Kingdom, decides to promote a race to the bottom in the definition of the standards in the areas covered by the application of the said criterion.

5. Conclusion

In this article, the main features of the future trade relations between the United Kingdom and the European Union were firstly examined, based on the most relevant documents that marked the negotiations between the Parties between 2017 and 2019. From the analysis carried out, and in particular from the Political Declaration of 2018-2019, very precise hints on the future commercial relations between the Parties seem to emerge. The Parties, in fact, seem to be moving

[55] HM Government, The Future Relationship with the EU. The UK's Approach to Negotiations, cit.
[56] Ibidem, Part 1, chapters 21 and 25-28.
[57] Ibidem, Part 1, chapter 21, para. 66.
[58] Ibidem, Part 1, chapters 26-27, paras. 75-78.

towards the conclusion of a free trade agreement, in which a wide free movement of goods will be ensured, where there will be room for some free movement of services and a more limited chance for free movement of capital and payments, whilst the movement of persons will be greatly limited.

Subsequently, the two paradigms that normally inspire the Union's relations with its trade counterparts and which are likely to influence the definition of future trade relations between the United Kingdom and the European Union have been examined. These paradigms correspond on the one hand to the imperative of market integration and on the other hand to the one of trade liberalization. In addition, some relevant models, drawn up in implementation of the aforementioned two paradigms, which currently connect the European Union to some of its most important commercial partners have been presented and analyzed. They are the Norwegian model, the Swiss model, the Turkish model and the Canadian model.

The analysis conducted above has shown that, at the beginning of phase two of the Brexit negotiations, the Parties look inspired by the trade liberalization paradigm rather than by the market integration one. This preference emerges from the Political Declaration and it is clearly restated by the United Kingdom in its negotiating positions, whereas the European Union has a less clear-cut position. In fact, on the one side, it seems to acknowledge that the trade liberalization paradigm looks like the most appropriate one for shaping the future trade relations with the UK, while on the other side appears to be looking for a solution which takes into account the specificity of the United Kingdom as a peculiar trade partner, which is quite different from other countries with which the EU has recently concluded trade agreements shaped by the trade liberalization paradigm, such as for instance Canada, South Korea and Japan. This peculiarity of the UK vis-à-vis the EU is due to two main reasons: its geographical proximity and its nature of a former Member State. However, despite these specific circumstances, which make the UK different from any other trade partner, it emerges that the most relevant model for shaping the future EU-UK trade relations is represented by the recent CETA Agreement that connects the European Union with Canada, which is to date the most advanced example of PTA ever concluded by the Union.

Finally, the analysis conducted above has focused on the "level playing field" criterion, which may come into play in the definition of the regulatory standards of the Parties, in the field of competition policy and state aids, environmental protection, social and labor regulations and fiscal matters. It has emerged that the future application of the respective standards of the Parties in these fields could reserve some difficulties and surprises, in particular for the European Union. This is due to the fact that, despite the generic commitment of the Parties, contained in paragraph 77 of the 2019 revised Political Declaration, to promote the application of a common level playing field in their future relations, there are no real guarantees that the United Kingdom, after Brexit, will be able to resist to the temptation to become a champion of deregulation. In

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other words, it is not possible to exclude that the UK will not tend to deregulate in the fiscal, social and environmental sectors, with the intent, or in any case with the effect, to create a competitive advantage for its economic and commercial operators.

In order to minimize such risk, the European Union should carefully conduct the negotiations during phase two of Brexit, focusing on two main objectives. In the first place, the EU should try to steer the application of the level playing field criterion towards a dynamic regulatory alignment approach rather than simply towards a non-regression commitment. In the second place, the European Union should aim to guarantee a proper application of the level playing field criterion by trying to make the UK agree on the insertion in the trade agreement between the Parties of a clause empowering the Joint Committee or a similar body in charge with monitoring the application of the agreement with some specific competence for the periodical review and update of the pertinent standards as well as the resolution of the relevant disputes between the Parties. If this will occur, the application of the level playing field criterion may become a meaningful instrument to create a truly "ambitious, wide-ranging and balanced economic partnership" between the EU and the UK, as stated in the Political Declaration. Otherwise, the planned trade agreement between the Parties runs the risk of being not very dissimilar to the other PTAs which already connect the EU with some of its relevant non-European trading partners.

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