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Review of Kainer, F.; Repasi, R. (eds) | Frau, R. (2019 | 2020) Trade Relations after Brexit | Das Brexit-Abkommen und Europarecht

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Friedemann Kainer and René Repasi (Eds.), *Trade Relations after Brexit*. Baden-Baden / Oxford: Nomos / Hart, 2019. 415 pages. ISBN: 9783848751334. EUR 98.

Robert Frau, *Das Brexit-Abkommen und Europarecht*. Baden-Baden: Nomos, 2020. 142 pages. ISBN: 9783848762910. EUR 38.

For a political event whose supporters claimed that “people have had enough of experts”, Brexit has generated a large amount of work from those same experts. One example of this is the volume *Trade Relations after Brexit*, the product of a conference held in Mannheim in January 2018. In their introduction, the editors mention that the text was finalized before the original Brexit date of 29 March 2019; as a consequence, the three subsequent extensions could not be taken into account. It also means that the legal text on which most authors base their analysis is the original Withdrawal Agreement, agreed in November 2018 but then thrice rejected by the House of Commons.

Part 1, which discusses the current state of affairs, opens with a chapter by 40-year CDU MEP Elmar Brok and his former head of office Anne Liekenbrock. While its title suggests that the chapter discusses “the negotiation position of the EU27”, Brok and Liekenbrock discuss the circumstances that led to Brexit viewed from the position of the EU as well as the progress of the negotiations (or lack thereof). The chapter serves as a useful introduction to the rest of the book, providing the reader with an update on the Brexit process and a critique of several of the UK’s positions.

Following this somewhat EU-centric view of Brexit, Minford argues that Brexit will in fact boost the UK’s economy; he estimates that a “Canada+ Brexit” would increase the UK’s GDP by 4% and a “WTO Brexit” (that is, a no-deal Brexit) by 3%. He supports a “clean Brexit” – which is “clean” in the same way cutting off one’s arm with a rusty saw is “clean”: it gets the job done, but leaves a mess – in which the UK would retain access to the EU’s market but also deregulate and ditch burdensome EU regulation to open itself up for trade with other countries. This, of course, is a classic example of the UK wishing to “have its cake and eat it” – rejected by many of the other contributors. Following Minford’s pro-Brexit argument, Matthes provides a more “mainstream” view of the economic effects of Brexit, analysing many different possible effects in detail.

The second part of the book deals with the trade law aspects of Brexit. Herrmann points out that “the ‘WTO option’ is not an option but an inevitable consequence of Brexit” (p. 101) – all options for a future relationship, such as the “Canada(+) option”, build on the basic WTO framework. He examines several specific issues that could arise under WTO law after Brexit relating to the EU’s schedules of concession, market access for services, and the limits of a future agreement between the EU and the UK. Repasi discusses the options for the future relationship: by identifying several parameters for a trade relation (intensity, means to implement, enforcement, and the scope of cooperation) he creates an analytical grid which is then filled in for several scenarios. Taking into account issues of democratic legitimacy that plague international organizations and treaty bodies, Repasi argues that a simple free trade agreement cannot provide for mutual recognition, full harmonization or positive integration by common standards (pp. 141–145). He concludes that Brexit must necessarily lead to a deterioration of the integration of the UK’s market with that of the EU; keeping the current level of integration would require a more advanced and institutionalized form of cooperation, which is hard to reconcile with the claim that Brexit is about “taking back control” (p. 147).

Kainer deals with the thorny issue of product standards and market access. He points out that “taking back control” over legislation would almost inevitably require deviating from EU regulatory standards, while the establishment of common standards has long been at the heart of EU law (pp. 149–150). He explores several ways of creating common standards between the EU and the UK after Brexit, concluding that none of these options would satisfy the demands for a guaranteed “level playing field” or UK regulatory autonomy (pp. 169–170). The solution, he argues, is voluntary equivalence: a Regulatory Coordination Office should be set up to monitor changes in relevant regulations, after which the UK could decide to adjust their regulations accordingly.

The third and final part of the book concerns substantive issues to be dealt with in future trade agreements. Cuyvers offers a solid overview of the options for a free movement of goods regime in the future relationship – his extensive discussion of the Northern Irish situation, unfortunately, has become outdated now that the relevant Protocol has been rewritten – and criticizes the EU’s insistence on the indivisibility of the four freedoms: there has historically been a lot of flexibility in their development and their extension to third countries. He argues that the EU’s position on this issue “appears primarily driven by political considerations, not legal ones” (p. 211), and suggests that the EU should move towards more flexible integration. In a chapter on free movement of services – which have received comparatively little attention in the literature, despite service exports to the EU making up 4.8% of the UK’s GDP (p. 216) – Barrett is somewhat pessimistic about the possibilities of free trade in services after Brexit – understandably so, since even the most advanced FTAs (e.g. CETA) do not provide significant liberalization of trade in services, let alone something approaching that of the Single Market

(pp. 224–225). Ringe, dealing with financial regulation after Brexit, claims that “the impact of Brexit for financial services will be minuscule, if not irrelevant” (p. 250). He supports this claim by arguing that “the post-referendum government is not the ‘man in the street’ who is immune to economic outlook scenarios” and will be “much more susceptible to economic realities than a plebiscite which was tainted by emotions” (p. 261). This is a rather bold claim: the history of Brexit has shown that the UK government is driven more by the desire for independence from the EU than by economic incentives. This part also includes a chapter by Markakis, who provides a clear analysis of the impact of Brexit on EU citizens in the UK and which rights they will still enjoy (as the relevant provisions of the Withdrawal Agreement have not been changed, this chapter is up to date even after the 2019 revision). Wagner-von Papp explores to what extent EU competition and State aid law will still apply in the UK after Brexit; he is critical of the UK’s intention to simply copy much of current EU State aid law. As regards the future relationship, he argues that the UK will probably have to submit to some sort of supranational authority (the Commission, the EFTA Surveillance Authority or a new body) if an FTA is concluded at the end of the transition period (p. 350). It seems unlikely, however, that the UK, fearful of losing its newly gained “sovereignty”, will actually submit to such a supranational body. Sanchez-Graells discusses the impact of Brexit on public procurement law. As he points out, the UK and the EU are in the unusual position of already having their procurement rules fully harmonized at the start of negotiations, whereas negotiations for an FTA normally aim at regulatory convergence. He argues that the UK should stay as close as possible to current EU procurement rules, both in the case of substantive rules and for more technical aspects such as transparency.

The final chapter, by Müller-Graff, offers some concluding observations on the several themes discussed in the book as well as thoughts on dispute resolution after Brexit. He explores several models, going from an “absence model” in which each party retains full judicial autonomy to an “inclusion model” in which the courts of one party are entrusted with the binding interpretation of the agreement. He recommends the last option – which seems a rather utopian solution and unlikely to be included in the future relationship: the UK has insisted on excluding the ECJ’s jurisdiction throughout the negotiations.

Contrary to what one might have expected from an edited collection like this, there is little overlap between the several chapters: rather than every author repeating the same well-known episodes of Brexit, most authors quickly move towards their particular subject and its relevance for trade relations (which makes Brok and Liekenbrock’s quasi-introductory chapter all the more useful). Less fortunately, there is also very little overlap in the styles of the different chapters: some have an abstract, others do not; some chapters include a separate bibliography, others do not; at least four different ways of numbering (sub)sections are used, and every author has his preferred style of footnotes. While this does not make the contents any less relevant, the book would have looked better if there had been more consistency on this point.

This book, written before the original Brexit deadline of 29 March 2019, is already somewhat outdated: the authors often refer to the “old” Withdrawal Agreement, to Prime Minister Theresa May, or policy documents that have long been binned. Nonetheless, much of the material is surprisingly relevant, especially now negotiations on the future relationship are ongoing: the authors mostly look towards the future, discussing issues relating to an agreement on which frighteningly little progress has been made at the time of writing and which, if any lessons are to be drawn from the previous phase of negotiations, will probably be finished only moments before the deadline – if at all.

Whereas *Trade Relations after Brexit* mostly looks towards the future, Frau’s *Das Brexit-Abkommen und Europarecht* focuses on something that has already taken place, namely the conclusion of the Withdrawal Agreement (WA). In this slim volume Frau analyses the final text of the WA (including the new Protocol on Ireland/Northern Ireland), concluded in late 2019 and pursuant to which the United Kingdom has now indeed left the EU; the text was finished in January 2020.

After giving a brief overview of the content of the WA, Frau discusses several doctrinal questions regarding its nature, its temporal application, and the resolution of disputes over its

interpretation. He questions whether the WA should be regarded as EU primary law, a regular international agreement, or a *sui generis* legal document, concluding that it is essentially an agreement under public international law (pp. 32–35). He also deals with several specific issues of the WA: fundamental rights and the applicability of the Charter of Fundamental Rights during the transition period; free movement of persons between the UK, Ireland, and the other Member States; whether UK citizens may retain their EU citizenship after Brexit (he argues that the implication in Art. 127(6) WA that UK citizens retain their EU citizenship during the transition period violates Art. 20(2) and 216 TFEU; p. 76 et seq.); free movement of goods and customs law regarding the UK in general and Northern Ireland in particular (an issue on which the book makes good use of the new Protocol); and, briefly, free movement of workers and self-employed persons.

In his conclusion, Frau puts the WA in the context of the various forms of integration within and outside the EU, particularly the EEA and EFTA and the Neighbourhood Policy, each of which might serve as a model for a future relationship. He points out that the UK forms what might be called the “exit neighbourhood” (*Austrittsnachbarschaft*, p. 132) of the EU – because, as has been pointed out, even as it has left the EU, the UK has not left *Europe*, and the peculiar new relationship between the EU and the UK that Brexit has created will certainly give rise to many new legal questions in the years to come.

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