



## Customs Flash Belgium

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### Free-Trade Agreements in the context of WTO, EU and a changing global context

#### Introduction

The year ahead in global trade promises to be a challenging one. With recent developments, **such as the looming Brexit, rising populism and elections in European countries and announced renegotiation of trade deals by the new US President**, it has become clear that open markets will be increasingly under pressure. In light of these disruptive trends, businesses (big and small), consumers and Governments are looking for insights and clarity. Dealing with these global challenges, and overcoming them, demands for a **'trade rethink'** to make sense of facts and trends, assess possible implications and identify ways forward.

Globally, companies are faced with increasing and new types of trade restrictive measures in target markets, from tariffs to trade defence measures and local content requirements. Whereas Free Trade Agreements (FTA's) negotiations are still expected to open up new markets, and support conducive business environments in target markets, the political context in the West is complicating their full entry into force. Looking at existing customs and trade agreements, the question also arises how certain companies will be able to benefit from these bilateral and/or regional arrangements?

For those companies active in the global market place, be it through sourcing, local production or (in)direct selling, there is

growing need to keep track of the risks and opportunities as a result of changing market conditions. This Customs Flash addresses the concerns with regards to existing and future customs and trade agreements in the changing world order.

## Free Trade Agreements: an exception under WTO rules

Whereas WTO membership offers companies the security of a minimum level of market access through the so-called Most-Favoured Nation (MFN) tariffs, Governments have been keen to further lower tariffs on imports through bilateral and regional trade agreements. Going beyond what is covered under WTO membership, these preferential trade agreements increasingly also touch upon regulatory aspects, from standards, to intellectual property and investment.

With over 40 trade agreements already in place between the EU and trading partners, the EU continues to negotiate to further improve market access and regulatory cooperation for imports and exports of goods and services. Reflecting the increasing complexity of the global trading environment, new topics have been added to these trade negotiations as reflected in the EU [Trade for All](#) strategy, including on government procurement, investment, e-commerce and labour and environment.

### **EU trade agenda: changing substance and context**

The EU treaties confer an exclusive competence to the EU to negotiate and conclude Free-Trade Agreements, and most FTAs cover areas on which the EU also has exclusive competence. However, this exclusive competence is under scrutiny. Advocate-General Sharpston delivered on 21 December 2016 an opinion stating that FTAs are not an exclusive competence of the EU, and need to be considered mixed agreements. It is to be seen what the final judgement will be of the ECJ.

The EU has already several implemented agreements which economic operators can already benefit from (list of EU trade agreements can be found [here](#)).

In light of the broadened and deepened trade negotiations with Governments in key target markets, led by the European Commission, free trade agreements entered the European public light.

Recently, several EU FTAs have been considered as such:

- In July 2016, the European Commission proposed that the CETA shall be signed and concluded as "mixed agreement".
- The EU-Ukraine Association Agreement signed in March and June 2014, includes provisions that fall under the competences of both the EU and its member states, so was concluded to be a so-called "mixed agreement".

For the newly negotiated FTA's, awaiting ratification and full entry into force, the prospects have become increasingly insecure due to the competency issue (EU-only, or shared

competency with EU Member States). For the EU-Ukraine Association Agreement (DCFTA) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), provisional entry into force will likely require full ratification by 28 EU Member States. As a result of concerns from EU Member States, the provisional entry into force can be allowed with approval from the European Parliament, but the full entry into force of future EU trade agreements, including the pending Canada (CETA) agreement and Singapore (EUSFTA) agreement, will require approval from all 38 Parliaments.

The discussion around 'mixed agreements' reflects the ever expanding trade agenda, with topics that may touch upon public domain, but which are crucial to operating in global value chains and dealing with the complexity of the global trading environment. Those aspects include government procurement, investment, e-commerce and labour and environment.

Hence, for companies awaiting the full entry into force of newly negotiated FTA's with target markets, for example to the US, Canadian or Japanese markets (negotiations currently underway), the prospects for full entry into force have become more insecure, and will be subject to a longer duration.

### **Free trade agreements (FTA's): secured market access?**

Recent developments have spurred concerns about the security of market access offered under trade agreements other than the WTO, for example in the context of the Brexit negotiations as result of the United Kingdom decision to leave the European Union, including the customs union (Treaty on the Functioning of the European Union, Articles 28-33), or the announcement of the new US President to re-negotiate North-Atlantic Free Trade Agreement (NAFTA) with Canada and Mexico.

There are two main considerations to take into account with regard to conditions provided under FTA's.

First, for those trade agreements in place between WTO members, withdrawal of either of the parties will still leave guaranteed market access and domestic regulations under the countries' commitments made as part of their WTO Accession protocols. The commitments on goods and services market access, captured in WTO Members' schedules, provide for Most-Favoured Nation (MFN) tariffs, as well as National Treatment (NT) and MFN for selected services sectors. In the context of Brexit and the future trade agreement between the EU and UK, the [UK trade minister confirmed WTO talks will be initiated](#). This bid for regularised WTO status is not likely to be short and painless; the UK will need to agree with all WTO members on -inter alia- its schedules for goods and services.

Regularised WTO membership would provide a minimum guarantee for all WTO members (including EU) on market access. However, under WTO membership the UK would be considered a separate trading partner for the EU, requiring companies to file import declarations and prove origin for all imports.

Second, as bilateral and regional trade agreements are an exception to the multilateral WTO non-discrimination principle (MFN), it is to be understood that options and procedures for negotiating a withdrawal differ per trade agreement, be it a customs union or a bilateral or regional trade agreement. WTO does not cover the governance of bilateral and regional trade agreements on goods and services. Whereas the EU single trading area goes much beyond free circulation of goods and services, general free trade agreements (FTA's) are voluntary arrangements providing for withdrawal of parties. For example, NAFTA provides for the presidential powers to return to MFN tariffs on imports from Mexico and Canada, or to install additional duties, without requiring the approval from US Congress.

In the context of looming Brexit negotiations, article 50 of the Treaty on the Functioning of the European Union (TFEU) provides for the legal basis and procedure to be followed towards withdrawing. Whereas the EU and UK will likely agree upon a new trade agreement, the fall-back option would be the UK WTO Accession Protocol stipulating the MFN tariffs for goods and market access and domestic regulations commitments for services.

## What does it mean for you?

From an over-all perspective, the changing global trading environment, and the disruptive trends sketched in this article, will impact upon global supply chains. In increasingly unpredictable global markets and regulatory environments, companies need to assess what is at stake.

With regards to FTA's and security of market access, it is advisable to conduct a 'tour d'horizon' of risks and opportunities. For EU FTA's pending ratification by all 28 member states of the EU, companies should expect delays in the full entry into force. However, most of these FTA's will be provisionally applicable, meaning that agreements will be legally binding upon the contracting parties, opening their markets for goods and services based on predictable and enforceable trade rules. For those topics identified falling under 'full EU competence', including tariff preferences, the full entry into force will in principle require EP consent.

## What to do?

- Benefiting from FTA's requires a forward looking and strategic approach, for companies to identify and anticipate upon possible benefits as well as risks.  
**Companies can prepare by conducting a global supply-chain FTA review**, gaining insights on possible opportunities and risks (including annulment and/or changed market access conditions), based on analysis of trade flows, trends in target markets (sourcing, storage, selling of goods as well as services).
- Based on improved trade insights, a **strategic 'green room trade session'** can be organised, assessing global and target market risks and opportunities related to FTA's, market access as well as regulatory issues. Key internal stakeholders from different company units (compliance, supply chain, government affairs, management, etc.)

should be present to identify priority issues, risks and opportunities, for key target markets.

- These insights can provide the cornerstones of a company trade strategy, encompassing elements of a **corporate 'trade rethink'**, integrating different perspectives and objectives. A **corporate global trade strategy** can help to position and prepare, as well as act upon issues arising in the short-, medium- and longer term.

### **How can Deloitte Customs and Global Trade team support?**

A dedicated Deloitte Customs and Global Trade team offers targeted and customised trade related solutions and expertise to support in the above mentioned areas.

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### **Contacts**

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