**BREXIT: THE UK GOVERNMENT’S NEGOTIATING PROPOSALS FOR GOODS**

**Introduction**

The UK Government’s long-awaited White Paper setting out a negotiating position on post-Brexit trade and other relations with the European Union was published on July 12 2018. Previous Government statements on these issues mostly expressed generalised aspirations for the UK’s future relations with the Union and with other trade partners world-wide. The White Paper contains detailed proposals for post-Brexit cooperation between the UK and the remaining 27 EU member states (EU27), but it also highlights the sheer range of issues, from approval of medicines to security and judicial cooperation, aviation safety and transport, which remain to be tackled.

Ministers have listened to the urgent concerns expressed by many sectors of the UK economy and society about legal, economic and procedural difficulties which Brexit may present for their operations, and in particular about the risks of the UK’s dropping out of the EU at the end of the 2-year Brexit negotiating period without an agreement.[[1]](#footnote-1) The bulk of the proposals concentrate on how the UK, from its new position outside the EU, can go on benefiting from trade and regulatory relationships as similar as possible to those which it currently has.

From the day of publication the White Paper has been mired in controversy. People who want a total break from the EU condemn it for effectively keeping the UK within the regulatory systems of the customs union though with no say in the formulation of relevant rules – the term “vassal state” has been bandied about. Those opposed to Brexit ask: in these circumstances, what is the point of leaving the EU at all? And faced with the strong possibility of losing a vote in the House of Commons on key provisions of the EU Withdrawal Bill (now passed into law), the Government accepted amendments from strong Conservative supporters of Brexit which it knew will render central provisions of the White Paper unworkable.

However controversial and widely disliked, the White Paper proposals nevertheless remain on the table as the only practical solutions currently on offer. EU negotiators have so far done no more than acknowledge them. The UK Government has undertaken a charm offensive among the EU27 to try to gather support from national governments.

**A deep and comprehensive economic partnership – a new FTA**

The brutal fact for the UK is that any enterprise in any sector which wants to trade into the EU27 after Brexit is going to have to comply for that trade with all EU standards and regulatory systems in force. The White Paper explicitly accepts that following Brexit, UK firms will not have the same access to EU markets from outside the customs union as they enjoy at present, and that the UK cannot have all the benefits of membership of the Single Market without its obligations. In order to preserve as much as possible of current access rights, the UK proposes that a bilateral free trade area (FTA) be negotiated for goods. This would respect the integrity of the EU’s Single Market as well as UK national sovereignty, and avoid friction at the border in the form of tariffs, quotas, and checks for health and safety. It would avoid creating a “hard border” and associated checks and procedures in transactions on the island of Ireland, and ensure that both sides meet their political, economic and social commitments to Northern Ireland and the Republic. It would protect the uniquely integrated supply chains and ‘just-in-time’ manufacturing practices that have developed across the UK and the EU over the last 40 years.

The FTA would not extend to services, for which a different approach is envisaged that is outside the scope of this article.

**Common rulebook**

Even under the proposed FTA, UK suppliers of goods into the EU27 would have to face a range of border checks in order to determine both that EU standards and regulations were met, and that goods were of UK origin, sufficient to qualify for FTA treatment. The same would apply in the reverse direction, namely for EU27 exports to the UK. Therefore it is proposed that the FTA include an agreed “common rulebook” of standards for goods, including agri-foods, which would enable the UK and EU to reduce or avoid border checks on the basis that common standards were observed. Other rules could be set by the two sides on the basis of equivalence of effect. This would ensure interoperability between UK and EU supply chains, and avoid the need for manufacturers to run separate production lines for the separate markets.

Nevertheless the rulebook would cover only those rules necessary to provide for frictionless trade at the border, so it would not equate to continued full UK participation in the customs union and the Single Market. As now, UK firms would be able to manufacture products for export that meet the regulatory requirements of third countries. Rulebook provisions would be legislated for in the UK by the UK Parliament and the devolved legislatures, and inevitably on the EU side the EU Court of Justice would be the ultimate arbiter.

The White Paper stipulates that all these commitments must be consistent with an independent UK international trade policy, permitting the UK to make bilateral trade agreements with non-EU countries and to implement its own regime of trade remedies and sanctions.

**A Facilitated Customs Arrangement (FCA)**

This is not a term familiar in international trade policy debates. It has been invented in the Brexit context to mean that the FTA for goods would be implemented between the UK and the EU “as if in a combined customs territory” (which is also not a normal concept in trade policy). The UK would apply its own trade policy and tariffs, at whatever levels they were set, to imports of goods intended for consumption in the UK. For goods destined for the EU that entered via the UK, the UK would apply the EU’s tariffs and trade policy, effectively as agent for EU customs authorities, and therefore would need to agree with the EU a mechanism for the onward remittance of relevant tariff revenues.

As proposed, the FCA would remove the need for customs procedures in trade from the UK to the EU, including customs declarations for tariff classification purposes, routine rules of origin requirements, and entry and exit declarations. The White Paper recognises that this approach would need to be consistent with the integrity of the EU’s Customs Union and to ensure that tariffs were properly applied to goods entering the EU via the UK. Subject to that, the FCA would preserve frictionless trade at the border for the majority of UK/EU goods transactions. The system would depend in large measure on customs declarations and returns made by firms given “trusted trader” status, and on maximum use of modern technology.

The tariff proposal on which the FCA rests would be a one-sided arrangement. The White Paper does not propose that the EU apply parallel treatment to goods which entered the Single Market for onward shipment to the UK, i.e. charge UK-rate tariffs on those goods and pay them on, because it is believed that the EU would not agree to do that. However an amendment to Brexit-related legislation – effectively a wrecking amendment – which the Government was forced to accept in Parliament on 16 July would now prohibit the UK from applying EU tariffs in the manner proposed unless the EU agreed to do the same in respect of goods destined for the UK, in a fully reciprocal system. Meanwhile the EU Chief Negotiator Michel Barnier has anyway rejected the UK proposal to collect tariffs on behalf of the EU, arguing that the Union could never agree to outsource any part of its customs administration to a non-member state. Both these developments appear to kill the FCA proposal, and with that to knock a big hole in the entire White Paper strategy.

**Reservations**

In any case two reservations must be made. First, the proposal for the UK to apply EU tariffs to appropriate import transactions could be relatively straightforward for Customs authorities to implement if (as suggested by UK Ministers in December 2016) the UK chose to apply tariff rates which as far as possible replicated those currently applied under the EU Common Customs Tariff (CCT).[[2]](#footnote-2) Should the UK choose however to apply tariff rates that diverged from those in the CCT, the job of Customs authorities – and the impact on traders – could become much more complex, especially in the case of consignments that were partly for UK and partly for EU destinations.

Second, the concept of a “combined customs territory” is unknown in the World Trade Organisation. WTO rules recognise customs unions and FTAs – subject to strict requirements as to their coverage – but not looser bilateral trade arrangements which could entail breaches of the basic WTO rules that ban discrimination against the goods of other members. The White Paper recognises that other WTO members have a direct interest in how these proposed new UK/EU arrangements would impact on them and would certainly scrutinise any such proposals exhaustively.

Ag **and Fish**

The UK and EU will need to negotiate new common rules for the handling of agricultural and fisheries products. Both sides will of course start from the current position of full UK integration in relevant EU regimes. Renegotiating these on a new legal basis will nonetheless be of particular complexity, involving three separate categories of regulations: Sanitary and Phytosanitary (SPS) rules, which safeguard human, animal and plant health and require border checks; food policy rules, such as marketing rules that determine how agri-food products can be described and labelled, which do not need to be checked at the border; and those relating to domestic production (in the EU, governed under the Common Agricultural Policy and the Common Fisheries Policy). In these areas the UK will seek with the EU a regime of equivalence, such as the EU has already negotiated with several non-members.

The UK’s proposal would cover all of the compliance activity necessary for products to be sold in the UK and EU markets including testing procedures, conformity assessment, Good Laboratory Practice and licensing procedures. In line with the UK’s objective of ensuring that products go through only one approval mechanism to access both UK and EU markets, the UK is seeking active participation in relevant EU agencies, albeit without voting rights, which would involve making an appropriate financial contribution.

**Independent trade policy**

The White Paper justifies the UK’s departure from the EU common commercial policy on the basis of the freedom which the UK would then have to set its own tariff levels independently and to make new bilateral trade agreements with foreign countries worldwide, opening up increased possibilities for UK exporters. As an individual member of the WTO (which in fact it already is)[[3]](#footnote-3) the UK aims to operate independently as a leading supporter of the rules-based global trading system. These freedoms would be exercised in parallel with the UK’s new economic partnership with the EU, and the White Paper claims that it would be possible for the UK to negotiate, sign and ratify new bilateral trade agreements with third countries within the withdrawal implementation period up to 31 December 2020. Streamlined procedures in the operation of UK customs under the Facilitated Customs Arrangement would minimise administrative burdens and maximise the value offered by UK preferential tariff reductions, enabling the UK to make a strong and compelling tariff offer in negotiations for FTAs with new partners.

To operate an independent trade policy, the UK will need to put in place an independent trade remedies framework to protect domestic industry against unfair and injurious trade practices. The UK will be able to investigate cases and enforce measures that offer proportionate protections for producers.[[4]](#footnote-4)

**Investment**

The White Paper notes that global trade rules and agreements are only as good as the use that people can make of them. The Government undertakes to ensure that the UK’s export and inward investment environments are world-class, supporting the domestic aspects of the UK’s modern Industrial Strategy. The frictionless access to the EU market provided by the FTA, FCA and common rulebook would also support the UK’s ongoing attractiveness as a destination for foreign direct investment.

**Provisional reactions**

The White Paper attempts to reproduce on a different political and legal basis as much as possible of the cooperation, freedoms, checks and balances that have grown up between the member states during sixty years of expansion and integration, first of the European Communities, and latterly of the Union. Trade in goods, though a central and vital element in UK/EU relations and in the Brexit debates, is only one area among EU rules and arrangements which cover dozens of areas of economy, law and technical cooperation. The UK Government recognises the unequivocal importance for the national economy of the broad range of these commitments, which are listed in the White Paper. But the White Paper proposals are only an initial negotiating position. They will be argued over point by point and detail by detail with the EU side, a process which cannot conceivably be completed by the formal Brexit day of March 29 2019, nor quite possibly within the provisionally agreed “implementation period” up to end-2020.

Not all these proposals, including those relating to goods trade and however intrinsically desirable, will prove to be negotiable. The EU27 will advance proposals from their own side that require negotiation. And it is already clear, and conceded by the Government, that in many of these respects Brexit will leave the UK in a less favourable position in dealings with the EU27 than it currently enjoys.

The White Paper is intensely controversial within the United Kingdom, and even within the Government itself, having given rise to several high-profile ministerial resignations on grounds of its alleged “caving-in” to EU demands. Its implied recognition of the benefits of EU membership, and attempt to recover on a different basis as much as possible of the advantages that will be lost on withdrawal, are hotly disputed. People on one side of the argument insist that it betrays the clean-break Brexit that was sold to the UK public in 2016, leaving the UK effectively half in and half out, marooned in a sort of legal limbo. People on the other side argue that it demonstrates the impossibility in the modern globalised world of a medium-sized country, even one with a large and sophisticated economy, going it alone; and that Brexit is a fundamental folly which it is not yet too late to abandon. Either way the White Paper shows up the hollowness of suggestions made before the 2016 referendum that the UK, once outside the EU, would be easily able to retain the advantages of membership while jettisoning the obligations: having its cake and simultaneously eating it.

1. See our separate article: *What if Brexit leads to “No deal”?* Since that article was written there are now reports that the Government is stockpiling supplies of certain key commodities against disruption caused by a No deal outcome in March 2019. [↑](#footnote-ref-1)
2. On July 24 2018 the United Kingdom submitted to the World Trade Organisation new schedules of the tariffs and other comparable charges related to imports of goods which it intends to apply on a national basis after Brexit. The WTO Secretariat will circulate the proposed schedules to all WTO members, who will have three months to offer comments on them. At the time of writing, those draft schedules remain confidential to WTO members. [↑](#footnote-ref-2)
3. It is by convention, based on EU internal law and accepted by the WTO countries, that the European Commission speaks in WTO debates on behalf of the member states as a whole. [↑](#footnote-ref-3)
4. See separate articles on *Trade remedies: why do we need them and how do they work?* and *Unscrambling trade measures in Brexit* [↑](#footnote-ref-4)