

COMMENTS ON UK PROPOSAL FOR THE FUTURE RELATIONSHIP WITH THE EU

09 July 2018 | Europe
Legal Briefings - By **Eric White, Consultant**

Last Friday, 6 July, it was understood that the UK Cabinet had finally united around a [UK position](#) on the desired future relationship with the EU. However, it now remains to be seen if the proposal survives the protests of “betrayal” heard from some quarters and the resignations of the Secretary of State for Exiting the EU (David Davis) and the Secretary of State for Foreign and Commonwealth Affairs (Boris Johnson) and whether it will allow the negotiations with the EU to progress constructively. The details are also expected to be elaborated in a White Paper this Thursday. Assuming the proposal survives, what can we already say about the future relationship that it describes?

In this note, we examine and comment on the main features of the proposal. Once the reactions come in we anticipate a further note on how the negotiations may evolve.

We will also be responding to key aspects of the White Paper as additions to our recently updated [Brexit legal guide](#) for business.

THE MAIN FEATURES OF THE UK PROPOSAL

The self-proclaimed core of the UK proposal is the establishment by the UK and the EU of a free trade area for goods – so as to avoid friction at the border, preserve economic prosperity and allow commitments with respect to the border between Northern Ireland and the rest of the island of Ireland to be respected.

This free trade area will comprise:

- A **new Facilitated Customs Arrangement**, which, as we explain below, is likely to constitute a customs union
- A **common rulebook for all goods** including agri-food (but not services)
- **Open and fair trade**, that is maintaining a **level playing field**
- **Consistent interpretation and application of the rules**

We comment on each of these components in turn.

THE NEW FACILITATED CUSTOMS ARRANGEMENT

The paper envisages “the phased introduction of a new Facilitated Customs Arrangement that would remove the need for customs checks and controls between the UK and the EU as if a combined customs territory”. It goes on to say that the UK should be able to set its own tariffs for the rest of the world but this would involve the UK collecting the EU tariff on imports from the rest of the world and repaying excess duties if the goods remain in the UK. In this way, the UK hopes to be able to combine customs free trade with the EU similar to what exists now with the freedom to negotiate free trade agreements with other countries.

This seems to us to constitute a customs union. The definition of a customs union in Article XXIV:8(a) of the GATT comprises “the substitution of a single customs territory for two or more customs territories” and the elimination of substantially all “duties and other restrictive regulations of commerce” between the constituent territories. Maintaining or losing the freedom to negotiate trade agreements with other countries does not feature in the definition or in the other conditions contained in the GATT. It is simply received wisdom that eliminating customs controls between constituent territories requires the application of common rules towards third countries.

Accordingly, we consider that the “new Facilitated Customs Arrangement” is likely to be considered a customs union for WTO purposes. The paper probably avoids the term “customs union” because of the political connotations that this term has acquired.

THE COMMON RULEBOOK FOR ALL GOODS

The elimination of border controls requires not only the elimination of customs duties and regulations but also of the need for checks of conformity with other rules (often termed technical barriers to trade). The UK paper proposes “frictionless trade” in goods and therefore the maintenance by the UK of all EU rules that could give rise to checks at the border and an ongoing obligation to follow future harmonisation of relevant EU rules on goods. The UK would therefore remain for most purposes in the single market for goods.

The UK paper does not use the term “single market” (or even the term “regulatory union” used in the EU proposal for a Protocol on Northern Ireland) but the concepts are very close. The Treaty on the Functioning of the European Union defines the internal market (the term “single market” simply being a more political rendering of the same concept) as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. The objectives of frictionless trade and no internal borders appear equivalent for most purposes.

The paper correctly observes that the **existing** rules applicable at the border are relatively stable and supported by business. The difficulty for the UK will lie in the obligation to adopt future EU rules. Here the paper puts forward two mitigating factors.

First, that the incorporation of these future rules into UK law will be subject to the consent of a UK parliament (the so-called “parliamentary lock”) although there will be a price to pay for not complying with the treaty obligation of ongoing harmonisation. This is very similar to the situation prevailing under the EEA Agreement.

Second, the paper expresses the expectation that the UK would continue to play a strong role in shaping the international standards that underpin EU rules. It is true that most EU harmonising legislation merely sets out the objectives to be achieved and allows the detailed rules to be set by EU standardising bodies (such as [CEN](#) and [CENELEC](#)) and that historically UK industry has played an important role here. However, participation of UK standards bodies in EU standardisation will require a change of the rules that does not at present seem to be contemplated.

The paper expressly provides that the common rulebook (and therefore the free trade area) would not extend to services. This is a major departure from previous positions where free trade in services was considered vital for the UK given the importance of trade in services for the UK.

The calculation seems to have been made that free trade in services with the EU will be too difficult to achieve and that “regulatory flexibility” and maximum freedom in negotiations on services with third countries is preferable. Also the exclusion of services trade from the future relationship with the EU may be considered to facilitate a refusal to continue free movement of persons with the EU.

OPEN AND FAIR TRADE

Para 12 of the European Council [Guidelines](#) on the future relationship stated that

"Given the UK's geographic proximity and economic interdependence with the EU27, the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field. The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices."

Similarly, the [Commission](#) has always insisted on the need to maintain a level playing field during the discussions on the future relationship although its thinking is not yet far advanced.

The UK paper responds to these concerns by proposing to commit to apply a common rulebook on state aid and establish cooperative arrangements between regulators on competition and also to maintain high regulatory standards for the environment, climate change, social and employment, and consumer protection – meaning that it would not let standards fall below their current levels. This responds to the Commission call in its paper for a “non-regression” or “no backsliding” commitment in these areas. The UK proposal naturally proposes that these should be reciprocal commitments and so apply equally to the EU. A notable omission from the UK proposal is any reference to a level playing field in taxation.

CONSISTENT INTERPRETATION AND APPLICATION OF RULES (GOVERNANCE)

The final component of the new free trade area is governance. The proposal covers all agreements between the UK and the EU and so would also seem to be proposed for the Withdrawal Agreement (where most of the text is still in white, so not agreed).

On this matter the paper proposes a traditional joint committee and also a role for the courts of both parties (so it seems to be proposing direct effect in both jurisdictions). It provides that “due regard” should be paid to EU case law in areas where the UK continued to apply a common rulebook but is particularly vague when it comes to resolving disputes between the parties (in particular those persisting after the courts have taken position). It recognises that dispute resolution must be “robust and appropriate” but does not clearly specify how this should be achieved, stating that methods **include** “a Joint Committee and in many areas through binding independent arbitration”. This latter method is said to be able to include a joint reference procedure with the role of the Court of Justice as the interpreter of EU rules. However, it is added that this should respect the principle that the court of one party cannot resolve disputes between the two.

The UK is already shifting its red lines on the role of the EU Court of Justice but the EU still has to shift on its insistence, reflected in the draft Withdrawal Agreement, that the Court of Justice should also be the final arbiter of disputes about the interpretation and application of the law created by these agreements (rather than EU law in the narrow sense).

[Brexit hub](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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