

FRICITIONLESS TRADE? UK-EU CUSTOMS RELATIONS POST- BREXIT

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Legal Briefings - By **Lode Van Den Hende, Morris Schonberg and Eric White**

On 15 and 16 August 2017 the UK Government published two papers setting out its proposals for UK-EU customs relations post-Brexit. While these papers contain the greatest amount of detail to date in relation to the Government's thinking, they do of course only represent the start of the conversation rather than the final word and the Government's proposals raise many questions in practice.

Businesses should carefully study the proposals in light of their own particular circumstances and consider how they may contribute to the debate.

1. [The Government Papers and the Ongoing UK-EU Brexit Negotiations](#)

[The Future Customs Arrangements Paper](#)

[The Northern Ireland-Ireland Border Arrangements Paper](#)

[Next Steps for Businesses](#)

1. THE GOVERNMENT PAPERS AND THE ONGOING UK-EU BREXIT NEGOTIATIONS

The first of the two papers is a "[future partnership paper](#)" on UK-EU future customs arrangements, which sets out the Government's proposals for UK-EU customs relations and calls for stakeholder input. The second paper is a "[position paper](#)" specifically in relation to Northern Ireland-Ireland border arrangements, which covers a number of aspects, including the movement of goods across the Northern Ireland-Ireland border, and which overlaps and builds upon the groundwork in the UK-EU future customs arrangements paper.

The different status of the two papers can be explained by reference to the ongoing UK-EU Brexit negotiations that remain currently at the first phase of discussing "exit issues", of which the Northern Ireland-Ireland border arrangements is one. The EU has required that sufficient progress is made in relation to these exit issues before the Brexit negotiations can move on to discussing the framework for a future relationship, including UK-EU customs arrangements. In publishing these two papers essentially together, the UK is attempting to move the debate forward by demonstrating that these issues are to an extent, interlinked – the Northern Ireland-Ireland border arrangements exit issue may depend on the future UK-EU trade relationship.

In addition and importantly, the focus for the discussion in both papers concerns those elements of customs controls that relate to customs duties and their administration. With the exception of sanitary and phytosanitary measures (SPS) for agri-food products, which are mentioned in the Northern Ireland-Ireland border arrangements paper, these papers do not address in any detail the compliance of products with technical standards. While this issue arises in relation to all sorts of different product sectors, it is particularly sensitive for agri-food products, where checks take place primarily at the border.

2. THE FUTURE CUSTOMS ARRANGEMENTS PAPER

The future customs arrangements paper proposes two "broad approaches" for future UK-EU customs relations post-Brexit, a "highly streamlined customs arrangement" and a "new customs partnership". The paper also proposes a "model of close association" with the EU customs union for a "time-limited interim period" in order to avoid a cliff-edge for operators in both the UK and EU.

Highly Streamlined Customs Arrangement

The highly streamlined customs arrangement approach envisages the re-imposition of customs controls between the UK and EU but with the use of trade facilitation measures, both unilateral and to be agreed with the EU, to reduce the associated administrative burdens. Examples of potential trade facilitation measures mentioned in the paper include:

UK membership of the Common Transit Convention (to which the EU is currently a party) – this facilitates smooth movement of goods across countries by allowing goods to move across transit countries without completing import and export declarations;

Mutual recognition of Authorised Economic Operator (AOE) status – AOE status allows for simpler and faster customs procedures for traders that have supply chain and customs controls and procedures that are recognised as efficient and compliant;

Bilateral implementation of a technology-based solution for roll-on / roll-off port traffic i.e. wheeled cargo, potentially removing the need for these vehicles to stop at the border; and

Unilateral measures, such as customs duties self-assessment for traders and customs declarations aggregation, speeding up certain authorisation processes; and making existing domestic simplified procedures easier to access.

Further possible trade facilitation measures may be added to those in the paper, including for example, the use of simplified / preferential rules of origin for UK-EU trade, under which lower thresholds would be set to determine what constitutes local content or indeed rules of origin requirements could be waived altogether for certain goods. However, there is clearly a limit as to what trade facilitation can achieve – the only way to remove entirely the administrative burdens associated with customs is to not have them altogether i.e. to enter into a customs union of the type that exists within the EU.

It should also be recognised that certain trade facilitation measures may not necessarily be accessible or helpful to all traders. For example, the requirements for AOE status and of some of the proposed technological solutions are such that it may be unlikely that SMEs would be able to fulfil them. Business will need to consider exactly how their specific import / export operations may be impacted by the re-imposition of customs controls between the UK and EU so that they can put forward potential solutions to the Government that address the additional particular administrative burdens that they would face.

New Customs Partnership

The new customs partnership approach seeks to remove the need for customs controls, while at the same time, avoiding the formation of a customs union with the EU. The specific proposal is for the UK to mirror the same customs tariffs / rules of origin as the EU for goods that enter the UK to be consumed in the EU market, while imposing the UK's own customs tariff / rules of origin for goods destined for the UK market (which the UK may change post-Brexit). As a consequence, there would be no need for customs controls between the UK and EU as the UK would have applied the EU's customs tariff / rules of origin to all goods entering the UK that are destined for the EU. The EU would therefore not need to be concerned that the UK was operating as a "backdoor" to the EU market.

A "robust enforcement mechanism" would be required to ensure that goods entering under the UK's customs tariffs / rules of origin are not onward shipped to the EU. The paper proposes a tracking mechanism, where imports to the UK are tracked until they reach an end user, or a repayment mechanism where the higher customs tariff out of the UK and EU is paid upon entry and traders are able to claim a repayment when the goods are sold to an end user in the customs territory charging lower tariffs (subject to those businesses being able to track the goods).

The paper admits that this is "an innovative and untested approach" and a number of questions may be raised as to how such an approach could effectively function in practice. While the system appears reasonably straight-forward in the case of finished goods, it seems that significant complications could arise in the case of components to be integrated in products that are ultimately exported to the EU. The creation and operation of a tracking system to cover the entirety of goods trade would furthermore constitute a significant undertaking that would impose material additional costs and burdens on economic operators. Any repayment system on the other hand could require significant additional administration, potentially to be handled alongside import VAT. Furthermore, the EU may be reluctant to rely on the administration by the UK alone of a customs arrangement that seems considerably more complex and vulnerable to fraud than the customs regime applicable within the EU (which is not without its challenges) over which the EU institutions have direct enforcement powers. Finally, the proposal may trigger opposition from within the EU because it would seemingly only benefit producers in the UK - these could remain virtually within the EU customs union whereas EU producers may not be able to benefit from a similar type of access to the UK market (unless the EU itself were to apply the same system and associated enforcement mechanism).

Close Association for a Time-Limited Interim Period

In order to avoid any potential "cliff-edge", the future customs arrangements paper proposes a "close association" with the EU customs union for a "time-limited period" post-Brexit. According to the paper, this could involve a "new and time-limited customs union" based on a shared external customs tariff and without customs tariffs and customs controls between the UK and the EU. The possible length of the time-limited period is expressed as being subject to further consideration but will be linked to the speed at which the implementation of the new arrangements for the permanent UK-EU customs relations could take place.

At first glance, what the Government appears to be proposing is effectively remaining a member of the EU customs union for a certain period, albeit not formally, so that the UK can pursue new trade negotiations with other countries. Yet arguably, the UK is already able to engage in trade negotiations whilst being a member of the EU customs union so long as it does not seek to implement any agreements reached until after it leaves. The continuation de facto of the UK's membership of the EU customs union is also challenged by the paper's assertion elsewhere that regardless of the outcome of the negotiations, the Government will need to legislate for a new customs regime to be in place by March 2019. If the UK is to remain in effect part of the EU customs union for an interim period, it is difficult to see why the UK would require a new customs regime to be in place by Brexit day.

Stakeholder Consultation

The future customs arrangements paper concludes by calling for further stakeholder input in relation to its proposed highly streamlined customs arrangement and new customs partnership approaches and the interim arrangements. As part of this dialogue, the Government further pledges to be as open and transparent as possible in an effort to provide as much certainty as it can to businesses, without comprising its negotiating position with the EU.

3. THE NORTHERN IRELAND-IRELAND BORDER ARRANGEMENTS PAPER

The Northern Ireland-Ireland border arrangements paper restates the Government's two proposals for UK-EU customs relations post-Brexit while adding that the Northern Ireland and Ireland border will, in particular, require a "flexible and imaginative approach". In this regard, the paper proposes a special "cross-border trade exemption" from customs controls that would recognise the "unique economic, social and cultural context of the land border and the fact that many of the movements of goods across it by smaller traders cannot be properly categorised and treated as economically significant international trade." According to the paper, such an exception could potentially cover over 80 per cent of border trade. The compatibility of this proposal with EU law may be questioned however (as is effectively implied in the paper itself), depending on the specific details.

As mentioned above, the Northern Ireland-Ireland border arrangements paper also discusses the potential to avoid technical checks at customs in relation to SPS measures for agri-food products, which are of particular significance for Northern Ireland-Ireland trade. In this regard, the paper proposes a system of regulatory equivalence for agri-food measures, based on regulatory cooperation and dispute resolutions mechanisms designed to achieve the same regulatory outcomes, while leaving scope for flexibility as to the method of achieving this.

This proposal is potentially the most interesting element of the two papers, as it relates to the potential regulatory non-tariff barriers posed by Brexit which arise across all sorts of different product sectors and which will need to be addressed to achieve the Government's goal of ensuring that trade is "as frictionless as possible". The proposal may be revealing as to the general approach that the UK may propose in addressing such regulatory non-tariff barriers in future.

4. NEXT STEPS FOR BUSINESSES

The two papers represent an important step forward as they set out the greatest detail to date as to the Government's thinking in relation to UK-EU customs relations post-Brexit. However they indicate the direction of travel but not the final destination - as explained above, the proposals are partial only and raise significant questions in practice. There remains ample opportunity for businesses to seek to influence the debate and it would be prudent for businesses to study carefully the proposals in light of their own particular circumstances.

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