



BRITAIN'S BREXIT BLUEPRINT: THE UK GOVERNMENT PUBLISHES ITS FUTURE RELATIONSHIP WHITE PAPER

The UK Government has published its long-awaited White Paper, "*The Future Relationship between the United Kingdom and the European Union*". This follows the agreement reached by the UK Cabinet which precipitated the resignations of the Brexit Secretary David Davis and Foreign Secretary Boris Johnson, and led a number of Prime Minister Theresa May's own MPs to call for her resignation. The White Paper is the most detailed outline yet of the UK's aspirations for its future relationship with the EU since Article 50 was triggered in March 2017. The EU has welcomed the White Paper, but still may reject some key elements of the UK's proposals.

Background

After months of public division, the UK Cabinet met at Chequers on 6 July 2018 to finalise the UK's proposal for its future relationship with the EU. The three-page Chequers statement set out the collective position of the UK Government agreed at that meeting, and formed the basis of the White Paper published six days later.

The EU has repeatedly called for clarity from the UK on the nature of the UK's desired future relationship with the EU. The different visions within the Government, the Conservative Party and the country at large as to what this relationship should be have delayed finalisation of the withdrawal agreement. Not only does the EU want to understand the UK's aspirations for the future, but the European Union (Withdrawal) Act 2018 also requires the Government to lay before Parliament the "framework for the future relationship" between the EU and the UK when the Government asks for Parliament's consent to ratify the withdrawal agreement. This framework must include a statement that agreement in principle has been reached on the substance of the future relationship, including identifying the documents in which that framework is set out.

The UK's policy set out in the White Paper therefore seeks both to conjure up domestic political unity and to present its detailed negotiating position to the EU. On the first of these aspirations, the White Paper has already been met with hostility from some members of the UK Conservative Party. Arch-eurosceptic MP Jacob Rees-Mogg stated that "it is not something I would vote for nor is it what the British people voted for". On the second, the EU has responded so far in more muted terms, with negotiator Michel Barnier merely stating that "we will assess proposals to see if they are workable and realistic in view of the EU guidelines."

Key issues

- The UK Government has published a White Paper setting out its proposed post-Brexit relationship with the EU.
- The UK seeks a "common rulebook", to facilitate trade in goods, and commitments on equivalence for services.
- Continued cooperation in a number of areas including through regulatory agencies is sought.
- The proposals have been met with hostility from eurosceptics, remainers, and the President of the United States.

A common rulebook for goods

Among the most politically contentious proposals made in the White Paper is for the UK to commit by treaty to continued compliance with EU regulation on goods. The UK proposes that the “UK and the EU would maintain a common rulebook for goods including agri-food, with the UK making an upfront choice to commit by treaty to ongoing harmonisation with EU rules on goods, covering only those necessary to provide for frictionless trade at the border”. In practice, the “common rulebook” is likely to be the EU’s rulebook.

The UK would legislate for these rules through Parliament, which would retain the ability to diverge from the “common rulebook”. However, to do so “would be in the knowledge that it would breach the UK’s international obligations, and the EU could raise a dispute and ultimately impose non-compliance measures”. These could include “localised rebalancing measures” such as financial compensation, or, ultimately, suspending the relevant part of the relationship.

In essence, the UK is seeking to remain aligned with the EU single market with respect to goods, to the extent necessary to avoid border friction. This is aimed at avoiding the need for regulatory checks on the Irish border and any disruption to complex international supply chains.

This proposal has led to a hostile reaction by some Conservative MPs, who argue this does not deliver on previous promises on Parliamentary control of law post-Brexit. The EU is also likely to object to the proposal on the basis that it would only work if there is a commitment by the UK to implement all future goods regulation. This is not guaranteed by the UK’s proposals on governance of the “common rulebook”, nor is the proposal immune to the accusation that it amounts to cherry-picking, and that it fails to respect the indivisibility of the four freedoms of the EU internal market.

New arrangements for services

The Chequers agreement reached by the UK Cabinet attracted criticism for an apparent lack of concern about service industries, which account for nearly 80% of the UK economy. Both the Chequers agreement and the White Paper concede at the outset that new arrangements to be established post-Brexit will mean that “the UK and the EU will not have current levels of access to each other’s markets”.

However, a series of measures which go above and beyond the WTO General Agreement on Trade in Services are proposed. This includes provision for the additional “deep” market access and national treatment commitments, such that UK service providers are treated as equivalent to local providers when operating in the EU, and vice versa. Continued mutual recognition of qualifications is also proposed, by establishing both mechanisms for assessing equivalence and by agreeing to continue mutual recognition of a raft of qualifications covered by the current EU framework. This would go beyond the provisions in the CETA agreement with Canada, which is the EU’s most comprehensive third country trade agreement to date.

On financial services, the White Paper acknowledges that financial passporting rights will be lost, that the “decision on whether and on what terms the UK should have access to the EU’s markets will be a matter for the EU, and vice versa” and that “both

“The overriding issue for financial and related professional services firms is the ability to continue serving customers and clients. Mutual recognition would have been the best way to achieve this. It’s therefore regrettable and frustrating that this approach has been dropped before even making it to the negotiating table. In hundreds of discussions across the EU, the industry has never come across an unanswerable technical or commercial barrier to this approach. The EU’s objections have always been political.”

– TheCityUK

“By surrendering control over our rulebook for goods and agri-foods... we will make it much more difficult to do free trade deals. And then there is the further impediment of having to argue for an impractical and undeliverable customs arrangement unlike any other in existence.”

– Rt. Hon. Boris Johnson MP,
former UK Foreign Secretary

the UK and the EU will wish to retain regulatory autonomy of decision-making and the ability to legislate for their own interests". A series of measures is proposed to maintain the economic benefits of cross-border provision of the most important international financial services traded between the UK and EU, while preserving regulatory and supervisory cooperation and maintaining financial stability, market integrity, and consumer protection. The UK proposes a bilateral framework of treaty-based commitments to underpin the operation of the relationship, ensure transparency and stability, and promote cooperation between regulators and avoid regulatory arbitrage.

This approach falls short of the mutual recognition approach proposed in the paper in relation to other areas (eg, in relation to vehicle type approvals and professional qualifications). Instead, it suggests that there should be an agreement between the UK and EU that would build on, and improve, the EU's existing equivalence regime. This would have the aim of trying to solve some of the key questions which have been raised in relation to equivalence (eg, the ability of the EU to withdraw equivalence assessments on short notice) by implementing procedural safeguards which would protect any equivalence rights granted.

From the EU's perspective, the proposed measures on equivalence may appear contradictory. The proposals aim to protect the autonomy of each party while seeking to restrict the way in which EU regulators exercise that autonomy. The EU is unlikely to surrender its unilateral authority to grant equivalence lightly. Whether the EU would agree to renounce its autonomy in this decision making without further guarantees from the UK, is far from clear.

A 'facilitated customs arrangement'

Maintaining the commitments to a frictionless border between the Republic of Ireland and the United Kingdom has been the source of divisions within the UK Government over how best to manage the customs frontier between the two jurisdictions post-Brexit. The UK has rejected a customs union with the EU, and the UK's initial proposal for a "new customs partnership" has been rejected as "magical thinking" by EU negotiators. The White Paper rebrands the Prime Minister's preferred "New Customs Partnership" model as a "Facilitated Customs Arrangement", under which the UK would continue to apply the EU Union Customs Code, and collect EU external tariffs on imports destined for the EU, whilst applying UK tariffs to goods destined for the UK market. A system of rebates would be put in place by the UK whereby a product which is subjected to a higher tariff than in the event is applicable (due, for example, to a change in consignment destination), would attract a right to compensation to the value of the difference between the respective EU and UK tariffs. The Government estimates that 96% of UK goods traded would be able to pay the correct or no tariff upfront.

On first review, the proposed model appears to be extraordinarily complicated, and it is perhaps telling that the White Paper concludes that a phased approach, involving the introduction of artificial intelligence mechanisms, is necessary. Privately, EU officials continue to believe that a customs union for goods is the most workable proposal, albeit politically unpalatable in the UK. However, this would prohibit the UK from maintaining an independent trade policy, with different tariffs or quotas with third countries. This difficulty has been noted with characteristic diplomatic deftness by President Trump on his July 2018 visit to the UK, stating that such an arrangement could "kill" a potential US-UK free trade agreement post-Brexit.

"The White Paper details our proposals in all of these areas, setting out a comprehensive vision for the future relationship. It is a vision that respects the result of the referendum, and delivers a principled and practical Brexit."

**– Rt. Hon. Dominic Raab MP,
Secretary of State for Exiting
the European Union**

"The government accepts that their approach will mean that UK-based tech firms will not have the current levels of access to EU markets in the future. Increased friction in trade has a direct impact on jobs and investment... We are pleased that the White Paper goes further than a simple 'Canada-style' Free Trade Agreement and presents a comprehensive institutional framework. This is the right approach to facilitate the best possible market access particularly for goods and address issues critical to business such as competition law, state aid rules and VAT."

– Julian David, CEO, TechUKUK

"If they do a deal like that, we would be dealing with the European Union instead of dealing with the UK, so it will probably kill the [US-UK] deal"

**– President Donald J Trump,
The Sun, 13 July 2018**

Access to talent

The UK has committed to ending free movement of people as it currently exists under the UK's EU membership. However, the White Paper includes a proposal to allow "Mode 4" mobility commitments within the future relationship agreement (i.e. a service provider, such as a lawyer, crossing a border to provide the service to the client). The UK proposes to seek "reciprocal arrangements that would allow UK nationals to visit the EU without a visa for short term business reasons", allow for intra-corporate transfers between offices, and facilitate "temporary mobility of scientists and researchers, self-employed professionals, employees providing services, as well as investors". The White Paper also states that "the UK will make a sovereign choice in a defined number of areas to seek reciprocal mobility arrangements with the EU, building on current WTO GATS commitments".

Any proposal which goes beyond UK immigration policy as applied to non-EU countries or provisions common in free trade agreements, is likely to be met with alarm from certain corners in the Conservative and Labour parties, which consider that concern over immigration was the prime motivation for the "leave" vote in the 2016 referendum. The EU will conversely push for continued mobility commitments commensurate with the UK's desired market access. This is likely to be a major sticking point in negotiations.

Ongoing cooperation

The White Paper seeks to establish continued cooperation with the EU across a range of other policy areas. Most notably, the UK proposal features wide-ranging security cooperation measures which are likely to be welcomed in the EU. The UK also seeks to reassure the EU that it will not detrimentally diverge from common standards outside of the common rulebook proposed. For instance, on data protection, the UK seeks to establish cooperation mechanisms, underpinned by a commitment from the EU of recognising data protection regulatory equivalence. On State Aid regulation, the UK undertakes to maintain current regulations under a common rulebook with the EU, and the White Paper features a cooperation commitment on competition and antitrust enforcement.

The White Paper reiterates the UK's desire, as first set out in Prime Minister Theresa May's Florence and Mansion House speeches, to continue participating in certain EU agencies responsible for standard setting and supervision. These include those responsible for chemicals, aviation and pharmaceutical regulation, as well as a close association with the Euratom nuclear regulator. This would be a highly exceptional position for the UK as compared to other third countries.

On civil justice cooperation, the White Paper commits to exploring the UK's accession to the Lugano Convention which provides for the recognition of judgements across member jurisdictions. This would require the agreement of all participants, i.e. the EU, Denmark, Iceland, Norway and Switzerland, which is unlikely to be a quick process and is unprecedented for a non-EFTA state. It may prove more attractive for the UK to agree a separate treaty with the EU which would replicate the terms of the current EU framework under the Brussels I Regulation (recast), as long as the awkward issues of CJEU interpretative supremacy and institutional governance arrangements could be

"[The future EU-UK relationship will need to respect] the principles of the non-divisibility of the four freedoms, the integrity of the single market, avoiding a sector-by-sector approach and safeguarding financial stability, the preservation of the autonomy of EU decision-making, the safeguarding of the EU legal order and the balance of rights and obligations.... In this framework there will be, for example, no space for outsourcing EU's customs competences."

– European Parliament Brexit Steering Group, chaired by Guy Verhofstadt MEP

solved. A number of EU member states also appear to see Brexit as an opportunity to draw legal work away from London, which could present a negotiating difficulty as the European Commission attempts to maintain negotiating harmony within the EU27.

Further non-regression commitments are also made, including on social and environmental protection regulations. These serve a dual purpose of meeting the opposition Labour Party's test that the agreement defends rights and protections and prevents a "race to the bottom", as well as reassuring the EU that the UK will not pursue aggressive deregulation post-Brexit.

Dispute resolution and governance

The most politically contentious proposal made in the White Paper relates to the UK's proposed institutional and governance arrangements. Under a common rulebook, the UK Parliament would have the freedom to reject EU rules, but subject to the EU being able to demand compensation or to impose potentially restrictive measures to trade in response. This has been roundly rejected by the eurosceptic wing of the Conservative party. It will also be a hard-sell to the EU, who will not be easily satisfied with a discussion in a Joint Committee to resolve differences and prevent regulatory arbitrage.

The UK proposes an arbitration mechanism for the resolution of disputes which are not resolved at political or official level through a Joint Committee. This may prove difficult for the EU to agree to, as it could infringe upon the autonomy of the EU's legal order. Whilst the EU routinely agrees to arbitration mechanisms in its association and free trade agreements with third countries, no other such agreements go as far in obliging the EU to remove regulatory checks on its borders. The UK proposals seek unprecedented free access to EU markets whilst subjecting the EU to binding dispute resolution in areas core to EU market regulation. To meet this, the UK has proposed that the arbitration panel should be required to follow CJEU decisions on the interpretation of EU rules in the common rulebook (see the box on the right). Even if the EU were to regard this as acceptable, it sounds in practice like the UK remaining subject to the jurisdiction of the CJEU, the prospect of which will outrage eurosceptics.

"Where the UK and the EU have agreed to retain a common rulebook, it is possible that a dispute could relate to whether these rules had been interpreted correctly. The UK recognises that only the CJEU can bind the EU on the interpretation of EU law, and therefore in these instances, there should be the option for referral to the CJEU for an interpretation, either by mutual consent from the Joint Committee, or from the arbitration panel. The CJEU would only have a role in relation to the interpretation of those EU rules to which the UK had agreed to adhere as a matter of international law. The Joint Committee or arbitration panel would have to resolve the dispute in a way that was consistent with this interpretation. This would respect the principle that the court of one party cannot resolve disputes between the two."

**– The Future Relationship
between the United Kingdom
and the European Union
page 93, paragraph 42.**

What next?

Negotiations between the UK and the EU will now resume, and will continue throughout August. There remains a matter of weeks to conclude the withdrawal agreement and to produce a political declaration on the future relationship. Both are required to allow ratification of the terms of the UK's withdrawal to proceed in the UK Parliament. If the withdrawal agreement is ratified in both the UK Parliament and the European Parliament (neither of which is guaranteed), a transition period will run to 2020, allowing the UK and EU to continue on substantially the same regulatory terms, whilst the detail of the future relationship agreement is negotiated. The substantial number of sticking points, as well as the mounting domestic political difficulty which Prime Minister Theresa May faces, is likely to make the path through the weeks and months ahead anything but smooth.

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