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BRIEFING PAPER

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The Brexit White Paper on future relations and alternative proposals

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Summary

The White Paper

The Government published a White Paper on The Future Relationship between the United Kingdom and the European Union (Cm 9593) on 12 July 2018. On 23 July the Government published a summary of the White Paper in the form of slides on The Future UK-EU Relationship.

The White Paper is divided into four chapters, setting out:

- An **Economic partnership** based on 'bilateral autonomy'; includes an independent trade policy, trade in goods, services and investment, the digital sector, future mobility, competition, the environment, transport and energy; new arrangements for services, financial services and the digital sector; a Facilitated Customs Arrangement; no hard Irish border;
- A **Security partnership**: operational capabilities on internal security are maintained, but the UK has an independent foreign policy, sometimes working with the EU; cooperation or participation in law enforcement and criminal justice, data exchange, cyber security, extradition, counter-terrorism, sanctions, space, asylum and illegal immigration;
- **Cross-cutting and other cooperation**: UK participation in several EU agencies, continued participation or cooperation in science and innovation, data protection, culture and education, and fishing opportunities;
- **Institutional arrangements**: an EU-UK Association Agreement and other separate agreements; a new governing body of UK and EU officials and a Joint Committee; UK participation in EU agencies, making a financial contribution to the EU budget; UK respect for remit of the CJEU and a role for the UK Parliament in scrutinising rules made under the agreements.

The 'common rulebook'

Underpinning the economic partnership is the idea of the '**common rulebook'**, which is the standards and regulations followed by all EU Member States and non-EU EEA States and facilitates the functioning of the Single Market in goods and services. These harmonised standards cover a vast range of areas, including, for example, chemicals, emissions, pharmaceuticals, aerospace, automotive, health, safety, food safety, and environmental protection. In the White Paper the common rule book also includes state aid and competition but not rules on the environment, employment and taxation.

The common rule book for goods would cover only those rules required for "frictionless trade at the border". The UK Parliament would be free not to maintain harmonisation in the future, but this would be in the knowledge that there would be consequences (e.g. for market access).

EU reaction

The EU's Brexit negotiator Michel Barnier welcomed the long-awaited UK Government position paper setting out what it wanted for its future relationship with the EU and said "several elements" of it were "very useful". But he was not sure whether the plans for a "common rulebook" for goods and agri-foods were practical and he thought they might undermine the integrity of the EU Single Market.

The devolved governments

Reactions from the governments of Scotland and Wales were mixed. While the Scottish Government commented that the proposals offered "little reassurance" for those worried about the Scottish economy, the Welsh Government gave the White Paper a cautious welcome.

The alternative white paper

An 'alternative white paper' drawn up by the Department for Exiting the EU was published in 24 separate extracts on the Conservative Home website in July. The DExEU white paper calls for "a balanced, ambitious and wide-ranging economic partnership with the EU" which recognises the strength of the existing UK-EU trading relationship and the existing high level of integration between the UK and EU economies. This would involve largely frictionless trade, avoiding tariffs, and the establishment of new customs arrangements to minimise frictions at the border. The partnership would include services and investment and an "ambitious agreement on financial services that provides for market access in the most important areas of cross-border financial services trade."

This briefing paper looks at some of the proposals in the White Paper, their reception in the UK and EU, and any corresponding provisions in the DExEU 'alternative white paper'.

1. Introduction

1.1 The Prime Minister's Chequers statement

After the Chequers Cabinet 'away day' on 6 July, Theresa May made a statement on the agreement she said had been reached on what the future relationship between the UK and the EU should look like.

The Chequers statement set out the Government's commitment to maintaining a "common rulebook" with the EU, in which it would harmonise with EU rules on trade in goods and agri-food in order to provide "frictionless trade". Parliament, she said, would legislate on incorporating EU rules into the UK legal order, but choosing not to do so would have consequences for market access, security cooperation and frictionless trade.

The Prime Minister said there would be "different arrangements for services" and the UK would be able to diverge, but with consequences for access.

She introduced the new Facilitated Customs Arrangement that would remove the need for customs checks and controls between the UK and the EU, as if they were a "combined customs territory".

The statement insisted the UK would maintain high regulatory standards for the environment, climate change, social and employment policy and consumer protection.

There would be a joint institutional framework to provide for the consistent interpretation and application of UK-EU agreements by both parties. "Due regard" would be paid to EU case law where the UK applied a common rulebook and there would be "robust and appropriate means" for dispute resolution with a Joint Committee or through binding independent arbitration.

Theresa May said the proposals envisaged that the UK and the EU would meet their commitments to Northern Ireland and Ireland through the overall future relationship, and it was likely that the 'backstop' solution' (see section 3 of this paper) would not need to come into effect.

The UK would leave the Common Agricultural Policy and Common Fisheries Policy and the free movement of people would no longer apply. But a mobility framework would enable UK and EU citizens to continue to travel to each other's territories and apply to study and work.

Within a few days of the Chequers meeting, the Secretaries of State for Exiting the EU (David Davis) and for Foreign and Commonwealth Affairs (Boris Johnson) and other junior ministers had resigned from the Government.

1.2 The White Paper on future relations is published - and so is a DExEU alternative

The Government published its long-awaited White Paper on The Future Relationship between the United Kingdom and the European Union (Cm 9593) on 12 July 2018.

The White Paper is divided into four chapters, setting out:

- An **Economic partnership:** a "deep and comprehensive economic partnership" based on 'bilateral autonomy', including free trade in goods and agri-goods; new arrangements for services, financial services and the digital sector; future mobility, competition, cooperation in transport and energy; a Facilitated Customs Arrangement; no hard border between Northern Ireland and Ireland; an independent trade policy.
- A **Security partnership**: in which operational capabilities on internal security are maintained, but the UK has an independent foreign policy, sometimes working with the EU; cooperation or participation in law enforcement and criminal justice, data exchange, cyber security, extradition, counter-terrorism, sanctions, space, asylum and illegal immigration.
- **Cross-cutting and other cooperation**: UK participation in a number of EU agencies, continued participation or cooperation in science and innovation, data protection, culture and education, and fishing opportunities.
- **Institutional arrangements**: an EU-UK Association Agreement and other separate agreements; a new governing body of UK and EU officials and a Joint Committee; UK participation in EU agencies, making a financial contribution; UK respect for remit of the Court of Justice of the EU and a role for the UK Parliament in scrutinising rules made under the agreements.

The Government put translations of the document into Welsh, Gaelic and 22 other EU languages on the DExEU website.[1] Exiting the EU Secretary Dominic Raab introduced it in the House of Commons on 12 July.[2]

The White Paper sets out the UK Government's negotiating position but the future EU-UK relationship remains subject to negotiation. The political declaration on the future relationship with the UK after Brexit that the EU will draft for the negotiations is expected to be a much shorter document (5 - 30 pages long, according to a report in the Guardian, 31 July).

The White Paper has had a mixed reception in the UK and Europe, although it remains to be seen what the EU will accept of the White Paper proposals. David Allen Green, writing in the Financial Times (16

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1 Some of the translations were criticised for being inaccurate, misleading or antiquated. See EurActiv, and Financial Times, 20 July 2018

2 Its introduction was somewhat disorderly (cc 1156-57) and Mr Raab was heckled for not making the document available to Parliament earlier.

July), thought it was "a selection of cherries being offered with the aspiration for cake", and he was doubtful that the EU would accept it, because it proposed the free movement of goods and capital, but not of services and people. Michel Barnier's initial response is considered in section 1.3 below.

The Scottish and Welsh First Ministers had earlier called on the Government to "commit to staying inside the Single Market and Customs Union" and aim for a "Norway Plus" model for future relations.[3] Carwyn Jones gave the White Paper a "cautious welcome",[4] but it had a less positive reception from the Scottish External Affairs Secretary, Fiona Hyslop, who said the plans fell short and would harm the Scottish economy.[5]

Sections of an 'alternative white paper' drawn up by the Department for Exiting the EU (DExEU) while David Davis was in office were published on the Conservative Home website on 12-13 July. The DExEU paper calls for a future trading relationship based on a comprehensive system of 'mutual recognition' covering a broad range of sectors and regulatory activity. The alternative paper proposed a 'New Customs Partnership', which is fundamentally not that different from the Government's proposed Facilitated Customs Arrangement.

Conservative Home said of the two papers:

> […] it will be said that the DexEU approach is impracticable; that the EU would not have accepted it; indeed, that elements of it are incompatible with the EU's own rules. We don't for a moment claim to be able to second-guess what might or might not ultimately be acceptable to the Commission nor the EU27. Nor for what it is worth do we agree with everything that is set out in the DexEU plan, though we think that "Canada Plus Plus Plus" is broadly the right negotiating aim.
>
> What we do say is that those same criticisms can be made of the Government's new plan. It is far from clear, for example, that the EU will accept the restrictions on freedom of movement it claims to offer, or will accept that the rulings of the ECJ be given a lesser status than the conclusions of a joint institutional framework, or will sign up to the proposed Facilitated Customs Arrangement. At any rate, it is one thing to argue that DexEU's plan wouldn't work. It is another to claim that it simply doesn't exist – as we prove today.[6]

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3 Joint statement, Carwyn Jones and Nicola Sturgeon, 22 June 2018

4 BBC News, 12 July, Brexit: Carwyn Jones gives white paper 'cautious welcome'. Mark Drakeford, the Welsh Cabinet Secretary for Finance, had set out the Welsh Government's contribution to the White Paper in a letter to David Davis on 26 June. See also his Written Statement, 5 July 2018

5 Holyrood.com, UK Government Brexit white paper 'falls short', Scottish Government says, 12 July 2018

6 Conservative Home, Paul Goodman, May's new Brexit plan. There is an alternative – from within the Government itself, 12 July 2018

1.3 EU reaction

European Commission

On 20 July Michel Barnier made a statement on the White Paper, saying that although "some elements" provided a base to work on in the negotiations, there might be contradiction with the European Council's negotiating guidelines. He referred specifically to the integrity of the Single Market and indivisibility of the 'four freedoms' (the movement of people, goods, services and capital).

His reaction was interpreted as suggesting the EU would demand significant changes to the UK's negotiating position in order to reach a deal.[7] Mr Barnier said the EU would "constructively" engage with the proposals in the White Paper, but that it raised many questions the UK had not yet answered.[8]

After a meeting with the new Exiting the EU Secretary Dominic Raab on 26 July, Mr Barnier spoke about "close cooperation" in the exchange of DNA, finger prints and vehicle registration information, exchange of Passenger Name Records and extradition. He was "particularly pleased" with progress on foreign policy and external security, but noted continuing difficulties in reaching agreement on the future economic relationship. There was convergence, he said, on the need for "ambitious customs arrangements", but there were "major issues to be discussed and questions to be answered". They had agreed on preserving regulatory autonomy on both sides, but with regard to the proposed customs policy set out in the White Paper, he said: "The EU cannot – and will not – delegate the application of its customs policy and rules, VAT and excise duty collection to a non-member, who would not be subject to the EU's governance structures". These sentiments were broadly reiterated at the meeting between Michel Barnier and Dominic Raab on 21 August (e.g. see press conference after meeting).

On the Irish border Mr Barnier said: "Continued uncertainty on this issue after the UK's withdrawal would be unacceptable for Ireland, for Northern Ireland, for the UK as a whole, and obviously for the EU27".

European Parliament

The European Parliament's Brexit Steering Group (BSG), which is chaired by Guy Verhofstadt, issued a statement on the Chequers Statement and the White Paper. It welcomed them both, particularly the UK proposal that the future relationship should take the form of an Association Agreement. The EP had suggested this in a resolution on 14 March 2018 because it would protect and promote common interests, including a new trade relationship, provide a "flexible framework allowing for varying degrees of cooperation across a wide variety of policy areas" and "require both parties to maintain high standards and their international commitments in a number of policy areas".

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7 See MLex, 20 July 2018

8 See also Financial Times, Brussels rejects UK's financial services Brexit plan, 22 July 2018

The BSG reiterated its position that it would not consent to a Withdrawal Agreement or transition period without credible 'backstop' provisions for the Irish border to prevent a hard border and safeguard the integrity of the Single Market. It called on the UK Government to clarify its position on the 'backstop' and expected a positive response to its letter to the Home Secretary, Sajid David, on 3 July, concerning the independent authority and the registration of EU citizens in the UK.

The BSG reiterated its adherence to the indivisibility of the four freedoms, the integrity of the Single Market, the safeguarding of the EU's financial stability and the preservation of the autonomy of the EU's decision-making and legal order. It said it would further assess the White Paper over the coming days and weeks.

2. Economic partnership

2.1 The "common rulebook"

"a common rulebook for goods including agri-food, covering only those rules necessary to provide for frictionless trade at the border – meaning that the UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules, with all those rules legislated for by Parliament or the devolved legislatures" (Executive Summary)

The White Paper moves on from the Government's earlier proposals for 'mutual recognition' - which allows Member States to recognise each other's regulations - by proposing a "common rulebook" for trade in goods and agri-foods as well as a new "Facilitated Customs Arrangement" (FCA).[9]

There is no specific definition of a 'common rulebook', but it is used in the White Paper to describe an agreed area of regulation in which the UK would choose to follow EU rules. One possible definition would be "the body of EU legislation with which the UK would harmonise its domestic laws so as to ensure frictionless trade in relation to goods".[10]

By agreeing to follow a common rulebook with the EU the Government aims to protect trade in goods between the UK and the EU and to ensure frictionless borders. At the same time, this would also protect integrated supply chains, consumers and biosecurity.

Adopting a common rulebook means that "the UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules on goods" (Chapter 1, para 11). The UK Parliament and the Devolved Legislatures would legislate for all those rules. The Government believes this is sensible because the rulebook is stable; it has been developed over the last 60 years, with the UK participating in making those rules. The Government also believes that the UK would have a sufficient level of technical influence over the common rulebook, and businesses would likely follow these rules regardless.[11]

Within the EU's Single Market, Member States have to follow the same standards and regulations where the EU has legislated on these. This is part of the Single Market 'rulebook' on goods and services. Harmonised

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9 Michel Barnier had in any case already indicated that the EU would reject a partnership based on mutual recognition outside the Single Market and its enforcement mechanisms. In March 2018 Mr Barnier's adviser Stefaan de Rynck said the EU had moved away from mutual recognition of national standards "to a centralised approach with a single EU rule book and common enforcement structures and single supervisory structures". These structures also meant that the CJEU could intervene at any point to declare that mutual recognition of standards was undermining the integrity of the Single Market.

10 The common rulebook in context – reflections on certain aspects of the UK Government's proposal for a post-Brexit UK-EU relationship, *Kluwer Competition Law Blog*, 20 July 2018

11 HM Government, The Future EU-UK relationship, slides summarising White Paper, July 2018, p10

standards exist in all sorts of areas, such as health, safety, food safety, environmental protection, chemicals, emissions and pharmaceuticals. The Government proposes maintaining parts of this rulebook to allow "frictionless trade at the border" after Brexit.

A common rulebook would come closest to the system of harmonisation in the Single Market (where the EU institutions adopt laws which align Member States' regulations by making them identical) as opposed to the system of 'mutual recognition', which allows Member States to recognise each other's regulations. The free movement of goods in the non-harmonised sectors follows the principle of mutual recognition. This is commonly used in free trade agreements around the world.

According to the White Paper, the common rulebook would apply to goods, covering "only those rules necessary to provide for frictionless trade at the border" (Chapter 1, para 25). For manufactured goods, this encompasses all rules that *could* be checked at the border. For agricultural, food and fisheries products, this encompasses those rules that *must* be checked at the border.[12]

Areas of application

Although it has been argued that the common rulebook "would be defined more by its scope than its substance",[13] at the moment there are no sources other than the Government White Paper which discuss the possible scope of the rulebook in more detail.

Two specific areas are proposed:

- manufactured goods, alongside UK participation in EU agencies that facilitate goods being placed on the EU market (Chapter 1, paras 24-31);
- agriculture, food and fisheries products encompassing rules that must be checked at the border, alongside equivalence for certain other rules, such as wider food policy (Chapter 1, paras 32-46);

Manufactured goods

In the case of manufactured goods, this encompasses all rules that *could* be checked at the border. The common rulebook would cover sectors like automotives, aerospace, chemicals, electronics, machinery and pharmaceuticals, where manufacturing often involves complex cross-border supply chains (Chapter 1, para 24).

Adherence to a common rulebook would reassure the EU and the UK that the status quo is maintained in standards regulation for manufactured products, that manufacturers undergo only "one series of tests in either market", so the supply chains remain interoperable and there is no need to run separate production lines for each market (Chapter 1, para 28).

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12 HM Government, The Future EU-UK relationship, slides summarising White Paper, July 2018

13 The UK in a Changing Europe, What is the common rulebook?

A specific set of rules mentioned in the White Paper (Chapter 1, para 25) refers to environmental requirements for products (e.g. requirements regarding energy consumption).

A common rulebook would ensure that the British Standards Institution (BSI) would be able to ensure consistency between UK and EU standards. It would also enable the UK to continue playing a leading role in the European Standards Organisations and with the EU on a global stage, for example in the International Organization on Standardization (ISO).

Industry organisations envisage that the common rulebook should include chemicals regulation and a common rulebook for medicines.

The common rulebook must be read in conjunction with the UK effort to continue participation in various EU agencies for highly regulated sectors such as medicines, chemicals and aerospace.

Agriculture, food and fisheries products

The White Paper sets out the principles for conducting trade with the EU in agricultural goods (Chapter 1, paras 32-64), including the adoption of EU rules which relate to cross-border trade that affect agricultural production. The Government foresees that the relevant rules that must be checked at the border will include Sanitary and Phytosanitary (SPS) rules, which safeguard human, animal and plant health (Chapter 1, para 34a).

George Eustice, Minister of State at the Department for Environment, Food and Rural Affairs, has said that "the proposal does not extend to wider single market legislation nor animal welfare and would not fetter the UKs abilities to for example, restrict or ban live animal exports".[14]

Also, the wider food policy rules that set marketing and labelling requirements are not checked at the border as they determine how the products are presented to consumers. The UK is not seeking to incorporate these rules into the common rulebook (Chapter 1, para 36).

The UK also proposes leaving rules relating to domestic production, such as the Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP). This would enable it to introduce its own subsidy arrangements.

Michel Barnier commented on the UK's proposal for UK access to the Single Market for goods without having to apply all of the EU's product standards as such: "The United Kingdom … would not align itself to our agri-food standards, for example, on GMOs or pesticides, because these are not checked at the border.[…] But how, then, can we protect European consumers? On what basis could we accept free movement of goods?"[15]

In an op-ed on 2 August Mr Barnier said some of the White Paper proposals would undermine the Single Market:

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14 HC162599, 10 July 2018

15 Press statement following July 2018 General Affairs Council (Article 50), 20 July 2018

> The UK wants to keep free movement of goods between us, but not of people and services. And it proposes to apply EU customs rules without being part of the EU's legal order. Thus, the UK wants to take back sovereignty and control of its own laws, which we respect, but it cannot ask the EU to lose control of its borders and laws.

Customs

Customs (the Union Customs Code/ EU customs procedures) would also fall under the common rulebook (Chapter 1, para 17d):

> The UK would maintain a common rulebook with the EU, including the Union Customs Code and rules related to safety and security, and would apply and interpret those rules consistently with the EU. The UK already applies the Union Customs Code, and the new Customs Declarations Service (CDS), due for implementation by 2019, is fully compatible with it.

This does not cover the entirety of the EU's Common Commercial Policy - the Government aims to apply these common rules but still conclude its own trade deals (see section 2.8 below).

DExEU alternative white paper

The DExEU 'alternative' white paper calls for "a balanced, ambitious and wide-ranging economic partnership with the EU" which recognises the strength of the existing UK-EU trading relationship and "the level of integration between our economies". It calls for a "deep and comprehensive" economic partnership recognising "the unprecedented closeness of our trading and economic relationship". This would involve trade being "as free and frictionless as possible" with tariffs avoided and the establishment of "new customs arrangements to minimise frictions at the border". The partnership would also include services and investment and would "establish an ambitious agreement on financial services that provides for market access in the most important areas of cross-border financial services trade".

The paper refers to the unique starting position in the new UK-EU relationship of "highly integrated markets, equivalent laws and rules" and "a shared commitment to high standards and mutual trust". It calls for new bespoke arrangements that go beyond existing precedents with third countries (including arrangements with the EEA countries and Switzerland in some sectors), taking into consideration this unique starting point.

It proposes a trading relationship based on a comprehensive system of "mutual recognition" covering a broad range of sectors and regulatory activity, as proposed in Theresa May's Mansion House speech in March 2018. The DExEU paper makes multiple references to the Mansion House speech, echoing its call for a bespoke partnership that goes beyond existing precedents and which builds from the unique starting point of the current deep level of co-operation.

The paper refers to the deeply integrated UK-EU relationship in the manufacturing sector and the need for a solution to allow this to continue. It states that the future partnership should be based on three principles:

1. Preservation of deeply integrated supply chains;
2. Trade at the UK-EU border should be as frictionless as possible and there should be no hard border between Northern Ireland and Ireland; and
3. Goods should only need to undergo one series of approvals in one country to demonstrate that they meet the regulatory standards of both the UK and EU.

This should go beyond the precedents of existing EU relationships with third countries while respecting the integrity of the Single Market and recognising the UK's "unique position of having the same rules and regulations".

The alternative paper states that the UK would seek an agreement to achieve the free flow of agri-food products across borders with the flexibility to achieve outcomes in ways best tailored to both parties' circumstances. This would involve mutual recognition of certificates and documents for agricultural products; for example, organics, licences and export certification.

It emphasises the UK's commitment to "ensuring that its regulatory standards remain as high as the EU's" and provides for a "robust regulatory cooperation mechanism" to uphold these commitments and ensure trust on both sides. UK and EU regulatory standards would remain closely aligned, using one of three approaches depending on the particular area covered. This would mean:

i) in some cases both the EU and UK agreeing that their rules remain identical in substance;

ii) in other areas UK law would not be identical to EU law but the UK would have rules that are "technically equivalent";

iii) UK law would deliver "equivalent outcomes" to EU rules.

This would be overseen by a joint committee or relevant sub-committee governing the future relationship, which would make decisions on whether equivalence had been achieved. There would be reference to an arbitration panel in case of disputes, and due regard would be given to the relevant decisions of the CJEU.

If in future the UK were to adopt legislation that was not identical/or in substance equivalent to an EU rule, this would be in the knowledge that there may be consequences for the UK's ability to collaborate closely with the EU (for example by reducing mutual market access, the UK's participation in EU bodies or elements of security cooperation).

EU position on mutual recognition

The European Commission had already indicated that the EU would reject a partnership based on mutual recognition outside the Single Market and its enforcement mechanisms. Following the Prime Minister's Mansion House speech Mr Barnier's adviser Stefaan de Rynck said in March 2018 that the EU had moved away from mutual recognition of national standards "to a centralised approach with a single EU rule book

and common enforcement structures and single supervisory structures". These structures also meant that the CJEU could intervene at any point to declare that mutual recognition of standards was undermining the integrity of the Single Market.

In April, Barnier said in relation to the Prime Minister's call for continued trade in financial services between Britain and the EU "based on the UK and EU maintaining the same regulatory outcomes over time" that:

Geographical Indications

The Government White Paper states that the UK will establish its own geographical indications (GI) scheme after exit, "consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property" (Chapter 1, para 39). This refers to the WTO's intellectual property rules in the global trading system. "The scheme will be open to new applications, from both UK and non-UK applicants, from the day it enters into force" (para 39).

Politico Pro (12 July) raised questions about whether UK can simply transfer GIs under EU law into an equivalent regime in the UK and still benefit from the same protections granted by countries with which the EU has free trade deals.

Alternative white paper

The alternative paper states that the UK Government will seek the freest possible future economic relationship with regard to GIs; that existing UK GIs protected under relevant sectoral EU legislation should remain unaffected by Brexit, as they have already been recognised as qualifying for GI status. It states that this legislation imposes specific grounds for the cancellation of GIs from the EU scheme, none of which relate to a change in status from a Member State to a third country.

It states that the UK's objectives for GIs are to maintain effective protection for UK producers of GI products in the UK and the EU, and to ensure that consumers are not confused or misled as to the geographical origin of goods.

The UK would be committed to upholding the principles of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The UK would establish a UK GI scheme through legislation under the EU (Withdrawal) Act to continue to protect GIs and fulfil the UK's WTO obligations under TRIPS.

This would protect, by inclusion on the UK's new register, all UK GIs registered under the EU schemes at the time of exit. To protect the rights of producers and consumers, the UK will need to be satisfied that for any existing EU GI to be registered under the UK's new scheme they meet the requirements of UK law. The determination of which existing EU GIs will be included on the UK register will be the subject of negotiations on the future economic relationship.

The paper states: "Both consumers and producers would benefit from an approach that does not cause confusion and therefore the new UK

scheme will not protect any GIs that are identical with a term customary in common language as permitted under TRIPS".

Competition

"It will be important to ensure that competition decisions are compatible. The UK will seek to work with the EU to build on established cooperative arrangements, such as those found in existing FTAs, to manage parallel merger and antitrust investigations. This should include provisions on sharing confidential information and working together on live cases, and ensuring that the UK and the EU continue to take a robust approach in enforcing competition rules" (Chapter 1, para 116)

The Government is committed to robust domestic market surveillance and cooperation which should ensure a level playing field in both markets. The White Paper proposes applying a common rulebook for state aid, alongside establishing cooperative arrangements between regulators on competition (Executive Summary).

The UK's proposals include:

- committing to a common rulebook for state aid, to be enforced and supervised in the UK by the Competition and Markets Authority (CMA) (Chapter 1, paras 110-111);
- maintaining current antitrust prohibitions and the merger control system with rigorous UK enforcement of competition law alongside strong cooperation with EU authorities (Chapter 1, paras 113-116);

However, the UK would maintain and develop its own provisions for payments to farmers and land managers regarding environmental benefits (Chapter 1, para 111). It is also seeking to retain sovereign discretion on direct or indirect taxes and own minimum tax rates. Currently, certain tax measures are covered by EU state aid law (Chapter 1, para 112).

The White Paper also calls for provisions on sharing confidential information and working together on live cases in agreements that go beyond existing free trade provisions. These should ensure "that the UK and the EU continue to take a robust approach in enforcing competition rules" (Chapter 1, para 116).

Does the common rulebook breach a 'red line'?

Has the Government breached one of its own red lines in its proposals for a common rulebook? Would the common rulebook mean the UK becoming a rule-taker rather than a rule-maker, something the Trade Secretary Liam Fox said should not happen?[16]

David Davis criticised the common rule book in *The Times* (15 July), saying it would in practice "lead inevitably to the interference of the European Court, because the question would simply be: was the UK

[16] CITYAM, Liam Fox: UK must be a rule-maker, not a rule-taker, after Brexit, 25 February 2018

properly obeying EU law?".[17] Would this not bring the UK closer to the "vassal state" status claimed by Brexit supporters such as Jacob Rees-Mogg, former Foreign Secretary Boris Johnson and UKIP MEP Margot Parker?

What if the UK 'derogates' from the common rulebook?

There is no way of telling from the White Paper alone how deviation from the common rulebook would work.

The UK appears to be proposing that it would work akin to how suspensions of concessions in world trade works generally, which is that equivalent concessions to the concessions the UK was suspending by changing its laws would be suspended – usually in the same sector, but sometimes cross-sectoral. This might mean that changed rules on, e.g., cars, are met with access consequences on UK cars for the EU market, but it could also mean cars plus a further product, so as to equalise market value.

However, this is not how the EU deals with EEA-level trade – there are no retaliation clauses in the EEA, where the expectation is signing up to the rules and compliance. The CJEU's oversight similarly implies that derogations from the common rule book will simply be declared a violation of the common rulebook – the CJEU does not have any powers to oversee violations of EU law and declare them to be 'acceptable, with x as a response'. It is likely, therefore, that the EU will respond to derogations from the common rulebook by declaring the UK to be 'out' of the 'common rulebook' or EEA area.

Reaction to the 'common rulebook'

Competition

On 20 July Michel Barnier made two observations on the 'common rulebook' in relation to competition:

> By definition, the "common rulebook" for goods would not concern services, where the U.K. would be free to diverge. When we know that 20%-40% of the value of products that we use every day is linked to services, how would we avoid unfair competition which European businesses could be faced with?
>
> How could we avoid that an autonomous British commercial policy, while keeping all the advantages of our customs union, offers British companies major competitive advantages, to the detriment of EU companies?[18]

Business

The Confederation of British Industry (CBI) welcomed the common rulebook:

> These proposals match exactly what CBI members have been asking for. The diversity of products on the market is only set to expand, and the complexity of and need for cross-border supply

[17] The Times, May has left our fingers in the EU mangle but there is a way to get free, 15 July 2018

[18] Press statement, Michel Barnier following the July 2018 General Affairs Council (Article 50), 20 July 2018

> chains only set to increase. Though the UK has a large economy, for many businesses it is not a large enough market to make specific products for, particularly when compared to the rest of the EU. So convergence such as that proposed by the UK Government is essential for frictionless trade in goods in almost every sector.
>
> The CBI will be actively backing these proposals, and helping UK politicians understand the importance of achieving them for businesses. This is a serious and realistic proposition and – most importantly – the CBI will be engaging with EU negotiators to encourage them to engage with this policy, which would deliver for businesses on both sides of the border.[19]

Complications

Commenting on the common rulebook proposal, Dr Monica Horten pointed out that the total EU *acquis* forms a framework of inter-related laws and that it can be very difficult to unpick just the rules which refer solely to cross-border trade:

> Take the example of Airbus. In its Brexit Risk Assessment, Airbus highlighted how its product manufacturing must comply with safety legislation under the European Aviation Safety Agency (EASA). EASA oversees certification of airworthiness, and it oversees aspects of air operations and air traffic control. It oversees the certification of organisations that are allowed to design aircraft and aircraft parts, for all different kinds of aircraft, and who may do major or minor repairs to aircraft. The rules that govern aircraft components include a range of safety issues including the competence of a firm to undertake manufacturing or maintenance. Airbus has stated that "every single supplier" will need to be certified.
>
> If Britain wants to separate out rules for goods only, and moreover, it seems to want only those goods that are relevant for British manufacturers, then it going to have to pick out those rules sit within the individual directives and other legal instruments that comprise the Acquis. And those rules would have to be kept in a special file and updated every time the EU updates its own legislation.[20]

Scope

Dr Emily Lydgate thought the scope of the common rule book was too narrow:

> the scope of regulation the UK proposes should fall within this 'common rulebook' is narrower than what would be covered in a Single Market for goods – as the EEA Agreement demonstrates. It's narrower even than that covered by the EU-Ukraine DCFTA Agreement.[21]

'Cherry-picking'?

And would the UK proposals not amount to 'cherry-picking', which Michel Barnier and the European Parliament have categorically ruled out? The White Paper wants a common rulebook for agri-food but not

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19 CBI, Overview: The business view of the Government's Brexit White Paper, July 2018

20 Monica Horten, Brexit White Paper - a common rulebook for 21st century business? IPtegrity, 12 July 2018

21 UK Trade Policy Observatory, Tilting the playing field? The asymmetry in the UK and EU's regulatory 'ask', Dr Emily Lydgate, 27 July 2018

for agri-food standards (GMOs or pesticides, for example) because these are not checked at the border.

MLex reported (12 July) that the UK proposals were "to remain a de facto participant in the EU's single market for goods, including autos, chemicals, drugs and aerospace engineering". It predicted that the EU would regard this as 'cherry-picking', and:

> The EU has warned that such an approach ignores how the market works as a complex ecosystem of rules, and that financing and intellectual-property rules cannot be meaningfully separated from manufacturing standards.

Abandoning mutual recognition

TheCityUK Chief Executive Miles Celic, who had been reassured after the Chequers statement that the Government had recognised the importance of services,[22] said it was "regrettable and frustrating" that the Government had abandoned the principle of mutual recognition.[23]

2.2 Facilitated Customs Arrangement

"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 they were a combined customs territory, which would enable the UK to control its own tariffs for trade with the rest of the world and ensure businesses paid the right or no tariff, becoming operational in stages as both sides complete the necessary preparations" (Executive Summary)

Chapter 1, paragraphs 13-21 are about a new Facilitated Customs Arrangement (FCA), which would be introduced in phases (how long this would take is not clear) and would remove the need for customs checks and controls between the UK and the EU "as if they were a combined customs territory" (Chapter 1, para 12). The UK would apply the EU's tariffs and trade policy for goods destined for the EU and its own trade policy for those destined for the UK market.

There would be no tariffs on goods trade between the UK and EU: "Where a good reaches the UK border, and the destination can be robustly demonstrated by a trusted trader,[24] it will pay the UK tariff if it is destined for the UK and the EU tariff if it is destined for the EU". If a product is destined for the EU market, the UK would levy the higher or lower EU tariff on behalf of the EU at the UK's external border (para 16).

The 'common rulebook' for areas that affect cross-border trade with the EU would apply to sanitary and phytosanitary standards (SPS). But for other areas such as food labelling or marketing, the UK Government would legislate.

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22 Independent, Business leaders back cabinet's Brexit deal, 7 July 2018
23 Bloomberg, EU Offers Muted Reaction to May's White Paper: Brexit Update, 12 July 2018.
24 'Trusted traders' are Authorised Economic Operators - AEOs.

There would be free trade in food and agricultural products between the UK and EU, keeping as close to the status quo as possible, with "no routine requirements for rules of origin between the UK and EU" (para 12b), zero tariffs and no quotas.[25]

The UK wants to avoid customs checks at EU and UK borders, but at the same time wants the freedom to apply different tariffs from the EU. Could this give rise to enforcement problems? The White Paper assumes the EU will trust the UK to apply tariffs honestly and correctly - which the EU might not accept (given that Commission is taking action against the UK for allowing importers of Chinese textiles and footwear to evade paying the appropriate level of customs duties).[26]

The FCA proposal thus raises a number of issues, such as:

- Is it overly complex?
- Would the EU allow another country to collect tariffs on its behalf?
- How susceptible would it be to fraud?[27]

Reaction to the FCA

EU

Michel Barnier raised these and other issues in his press statement on 20 July. Could the White Paper proposals on the regulatory alignment of goods and the FCA be "applied without additional complexity and bureaucracy"? He continued:

> This proposal would consist of applying two tariffs - the UK one or the EU one - to goods entering the UK, depending on whether the goods are destined for the British or European markets.
>
> This poses a number of practical questions. For example:
>
> - How can customs authorities verify the final destination of goods, and therefore assure that the correct customs tariff is applied? Is there not a major risk of fraud?
>
> - What would the additional financial and administrative costs be for businesses and customs authorities in order to conform to this new system? I would like to simply say that Brexit cannot, and will not, be a justification for creating additional bureaucracy.
>
> - What would the impact be of a UK tariff that is lower than the EU tariff, with regards to revenues for both the Union budget and Member States?
>
> This complex customs system also poses a more fundamental question:
>
> - How can the Union delegate the application of its customs rules to a non-member of the EU, who would not be subject to

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25 For further information, see Commons Briefing Paper 8309, Brexit: customs and regulatory arrangements, updated 13 July 2018.

26 See European Commission press release, March infringements package: key decisions, 8 March 2018

27 Jill Rutter, Does the Brexit White Paper pass our six tests? Institute for Government, 12 July 2018

> governance structures? Would that be acceptable or, simply, legally possible?

Michel Barnier said at a press conference on 26 July "The EU cannot — and the EU will not — delegate the application of its customs policy and rules, VAT and excise duty collection, to a non-member who would not be subject to the EU's governance structures".

Taking back control?

David Davis thought the FCA would not mean 'taking back control':

> […] with the future customs arrangements, we would offer to collect the EU's tariffs for it in a complex scheme that would almost certainly lead to the European Court seeking oversight of customs arrangements. None of this really amounts to taking back control. What is more, it is likely that the EU, having achieved a break in the UK's position, will simply pocket the concessions and ask for more. For that reason alone this is a very bad decision.[28]

He criticised the customs proposals, calling instead for "a streamlined modern customs system that simply uses all the best techniques from around the world to make customs simple, quick and convenient".

Time consuming

The Drinks Business commented (13 July) on the length of time involved in the Authorised Economic Operator (trusted trader) mechanism:

> The AEO application process theoretically takes up to 120 days. However, experience in practice suggests that the process often takes much longer – in some cases extending from 18 months to two years. AEO status cannot be regarded as an easy route, or as a quick fix.

The author also pointed out that diverging tariffs would require 'rules of origin' checks for products made in the UK with lower tariff goods, which would not help the Irish border issue.

VAT

And what about VAT? The White Paper states that the UK aims to leave the EU Single VAT area and will maintain sovereign discretion to set its own VAT rates. It proposes the application of "common cross-border processes and procedures for VAT and excise" (Chapter 1, para 18) to facilitate frictionless trade in goods, but there is no further detail.

CBI Director General Carolyn Fairbairn found "many of the intentions … reassuring" but said "there are gaps in these proposals and more detail is needed on EU VAT, some services sectors and the new customs system" (BBC News, 13 July). Jill Rutter of the Institute for Government wrote (12 July): "although it deals with customs and regulatory checks at the border, the white paper fails to make clear whether the UK wants to stay part of the VAT area (indeed, by rejecting any EU interference in tax rates, it suggests not)".

Adam Marshall, director general of British Chambers of Commerce, thought it was a "welcome starting point for businesses", but was

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[28] The Times, 15 July 2018

critical of the time it had taken to reach this point: "This vision should not have taken two years and three weeks to emerge" (EurActiv, 13 July).

Bureaucratic, complex and costly

In a UKTPO blog on 23 July, Professor Alan Winters and Julia Magntorn argued that "[t]he solution offered is ingenious at a theoretical level, but at the expense of massive complication and bureaucracy".[29] The authors do not believe the White Paper claim that only four per cent of imports would require tracking to check whether they should pay the UK or EU tariff is credible. They also take issue with the Government's proposal that the EU and the UK will be treated "as if in a combined customs territory": "Each will have its own [Anti-Dumping Duties] procedures and will have to determine ADDs on the basis of its own trade and production conditions".

The UKTPO authors consider possible repercussions:

> Where the EU ADD exceeds that of the UK, the situation is as above, but just with a large incentive to cheat. Where the UK has the higher ADD, however, the situation is more complicated. The UK has conceded (para. 17a) that the EU will not levy UK tariffs at its border, so it will be open to UK firms to circumvent UK ADDs by importing via the EU. The White Paper declares (para. 162) that 'the UK would make it illegal to pay the wrong tariff, and use risk and intelligence based checks across the country, rather than at the border to check that the right tariffs are being paid.' This will be very intrusive and very costly administratively.[4] It also raises questions of WTO-consistency that we will consider on another occasion, and of consistency with Article 43 of the Withdrawal Agreement which commits the UK to 'the avoidance of a hard border, including any physical infrastructure *or related checks and controls'* in Ireland.

They conclude that the FCA "could work, but only at substantial – arguably prohibitive – cost".

Alternative white paper

The DExEU paper proposes "a highly streamlined customs arrangement, which, while introducing customs formalities to UK-EU trade, would seek to minimise these additional requirements as far as possible". It also states that there would be a "new customs partnership" under which the UK would mirror the EU's requirements for imports from the rest of the world, while also moving to an independent trade policy. It states: "This would remove the need for a customs border between the UK and the EU. This option hasn't been tried before but would mean no customs barriers to trade with the EU, including Ireland".

The paper states that the UK would seek to agree zero tariffs across all goods with no quantitative restrictions and a preferential Rules of Origin (RoO) arrangement that would enable most goods traded bilaterally to qualify for preferential tariff treatment based on existing supply chains.

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29 L. Alan Winters CB and Julia Magntorn, Decoding the Facilitated Customs Arrangement, 23 July 2018

This would involve "minimal administrative burdens on UK and EU business through the use of both importer and exporter-based certification systems, including access to the Registered Exporter system (REX), and with a *de minimis* provision which exempts goods from RoO requirements where the risk of tariff circumvention is negligible".

RoO negotiations would track discussions on the future UK-EU customs relationship particularly closely. The detail of the RoO agreement would vary depending on which customs model is implemented.

The UK and the EU would agree a RoO protocol and any business wishing to claim a UK or EU preferential tariff would need to satisfy the UK-EU RoO requirements. The paper states that this arrangement "would allow exemptions for small traders on the island of Ireland as well as trade where the risk of tariff circumvention is negligible".

In this new Customs Partnership, businesses would not need to prove the origin of their goods in UK-EU trade, and the UK and EU would agree how to handle RoO issues if businesses chose to claim a tariff differential repayment on goods that are imported.

2.3 Services

"The UK proposes arrangements with broad coverage, ensuring that service suppliers and investors are allowed to operate in a broad number of sectors without encountering unjustified barriers or discrimination unless otherwise agreed" (Chapter 1, para 52).

Services account for approximately 80% of the UK economy. The UK exported £277 billion of services in 2017, accounting for 45% of all exports. The UK had a surplus on trade in services of £112 billion in 2017.[30] Looking at trade with the EU only, UK services exports were £110 billion in 2017 (40% of all UK exports to the EU). The UK had a surplus with the EU in trade in services of £28 billion.[31] The share of services in exports to the EU has increased from 23% in 1999 to 40% in 2017.

The White Paper proposes regulatory freedom for services, recognising that this will lead to reduced access for the UK and EU to each other's markets (Executive Summary).

There would be a new framework allowing UK and EU citizens to continue to travel to each other's countries, and businesses and professionals to provide services – in line with those the UK might wish to offer other close trading partners in the future (Chapter 1, para 48)).

In professional services, the White Paper proposes continuing with the mutual recognition of qualifications for all professions currently covered by the Mutual Recognition of Qualifications Directive. This would cover

30 ONS, UK Trade, 10 July 2018, Table 1
31 ONS, Balance of payments, UK: January to March 2018, 29 June 2018, Table C

workers "operating either on a permanent or temporary basis across borders" (Chapter 1, para 55b).

The Government wants provisions to permit "joint practice" between UK and EU lawyers, and for joint UK-EU ownership of accountancy firms (Chapter 1, para 57).

The EU was reported to regard the White Paper proposal on services as a "non-starter", the main challenge being the continuation of free movement of goods but not services. *Politico Pro* commented (13 July) that the White Paper proposal meant the UK would have a competitive advantage:

> Services inputs are crucial for goods production, for example energy, transport, professional services. So it is undesirable that the UK will be able to compete on the EU market with goods, without being bound on the EU services acquis.

Also:

> Many of the U.K.'s digital positions were already well-known, and the paper doesn't open the door much to compromises, solutions or creative thinking on a Brexit deal that respects data flows and the digital economy.

Some have questioned the UK's "goods only" approach.[32] The Institute for Government commented:

> The discussion of the future of the UK services sector – much bigger than goods – is cursory outside financial services. Nothing is done to explain the benefits the UK sees from future regulatory flexibility and why they outweigh the benefits of staying within the Single Market.[33]

Alternative white paper

The paper calls for a services agreement which goes beyond the arrangements in the EU-Canada (CETA) Treaty, which has the most advanced coverage of services in any EU free trade deal.

It states that the agreement should aim to break new ground in three areas: scope, the rules governing the introduction of trade barriers, and professional qualifications.

The agreement would prohibit discrimination between UK and EU investors for sectors that fall within scope, and there would need to be a degree of regulatory harmonisation to prevent the emergence of non-discriminatory barriers that restrict market access.

The agreement would maintain the free movement of capital and no restrictions on payments. It would recognise the unique starting point of UK-EU regulatory harmonisation and the minimal level of existing barriers to services trade. It would cover a broad range of sectors, including those that are currently regulated at EU level.

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32 Chris Giles, A goods-only Brexit deal puts UK services sector jobs at risk, Financial Times, 5 July 2018

33 Jill Rutter, Does the Brexit White Paper pass our six tests? Institute for Government, 12 July 2018

On digital services the paper proposes "an ambitious, bespoke agreement" that reflects the dynamic nature of the digital economy. This would involve an agreement that encompassed the varied dimensions of digital trade, including digital trade and e-commerce, consumer benefits, telecoms, audiovisual services and digital technology.

However, respecting the EU's and the UK's red lines, the paper acknowledges that the future relationship will differ from membership of the Single Market. This means the UK would not automatically benefit from further liberalisation of the digital Single Market and the UK would not be bound by future regulatory initiatives.

The paper also proposes a UK-EU Mutual Recognition Agreement on audiovisual services.

2.4 Financial services

"63. … the UK proposes a new economic and regulatory arrangement with the EU in financial services. This would maintain the economic benefits of cross-border provision of the most important international financial services traded between the UK and the EU – those that generate the greatest economies of scale and scope – while preserving regulatory and supervisory cooperation, and maintaining financial stability, market integrity and consumer protection;

64. This new economic and regulatory arrangement would be based on the principle of autonomy for each party over decisions regarding access to its market, with a bilateral framework of treaty-based commitments to underpin the operation of the relationship, ensure transparency and stability, and promote cooperation. Such an arrangement would respect the regulatory autonomy of both parties, while ensuring decisions made by either party are implemented in line with agreed processes, and that provision is made for necessary consultation and collaboration between the parties" (Chapter 1)

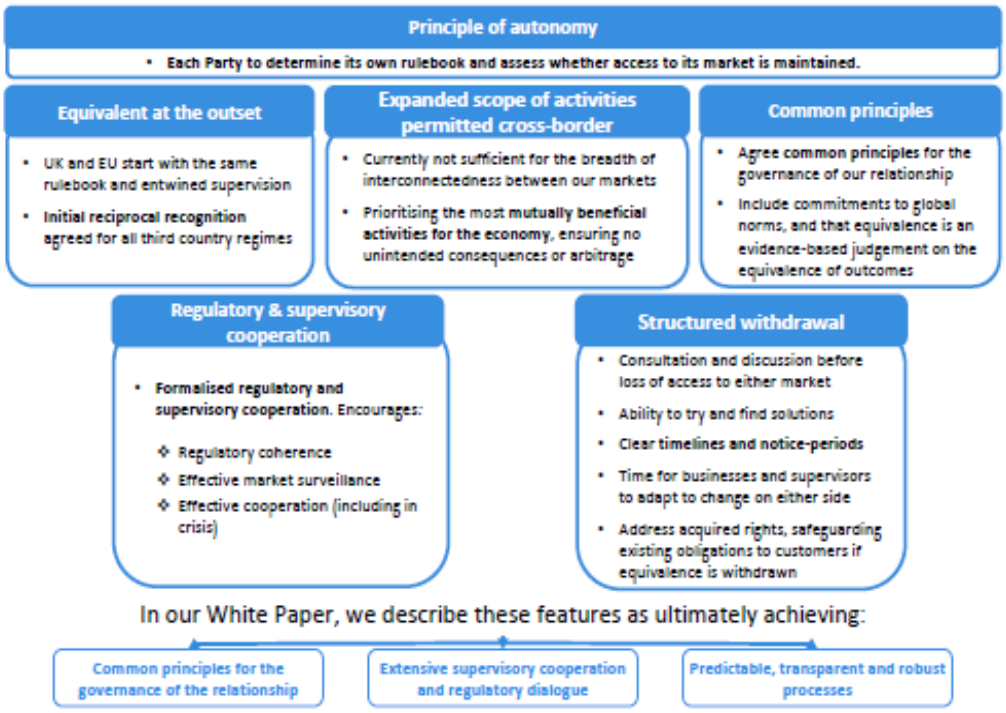
The White Paper accepts that continuing with 'passporting'[34] would not be compatible with the UK leaving the Single Market (Chapter 1, para 60) and sets out a new regulatory framework for financial services (Chapter 1, paras 58-71) which builds on international trade principles, including WTO rules and precedents of existing EU trade arrangements. The compromise model is 'bilateral autonomy' (control); it builds on the existing EU 'equivalence' regime but makes clear that the EU will make the decisions: "This new economic and regulatory arrangement would be based on the principle of autonomy for each party over decisions regarding access to its market" (Chapter 1, para 64).

In a document dated 25 July, Framework for the UK-EU partnership - Financial Services, the Government reiterated the White Paper proposals on "autonomous decision-making", with robust supervisory cooperation and a transparent process in withdrawing market access.

[34] "Firms that are authorised in a European Economic Area (EEA) state can carry out activities in any other EEA state in a process known as 'passporting'", Bank of England.

Details would be enshrined in "bilateral treaty-based commitments … not provided for under existing EU equivalence regimes". The Government notes that the EU has already entered into similar agreements with other countries, such as Japan.

The July document outlined the features of the proposed arrangement as follows:



The White Paper says the equivalence system should be "expanded", as it is "not sufficient to deal with a third country whose financial markets are as deeply interconnected with the EU's as those of the UK are" (Chapter 1, para 62).[35] It also envisages a unique system of joint governance and a "safeguard for acquired rights" (Chapter 1, para 70b), to prevent the UK's access to the EU financial services market from being easily withdrawn.

The White Paper says the UK will uphold and help shape the international standards on which many EU laws are based. In financial services, rules will change in the future and the UK aims to bridge gaps with a "coordinated approach leading to compatible regulation" (Chapter 1, para 61), plus more codified arrangements for how each side assesses each other's regulatory equivalence. "Although future determinations of equivalence would be an autonomous matter for each party" (Chapter 1, para 67), the EU and UK can set out principles for how to conduct reviews: a transparent methodology for assessing equivalence, possibly including expert panels. There could be "supervisory colleges" (Chapter 1, para 69b) for firms doing business across borders, and other mechanisms for cooperation among

[35] Equivalence regimes allow market access for businesses based in third countries whose regulatory regimes the EU deems provide equivalent standards to those of the EU.

regulators, so they can comment on proposals for rules and plan responses to crises.

Chancellor Philip Hammond said the White Paper proposal "works for the UK, works for the EU, and works for business"; that it would be "less than mutual recognition, but […] more than the EU's equivalence regime […] a model that preserves the stability, transparency and certainty of the former, while respecting the sovereignty of the latter" (*Financial Times*, 12 July).

The White Paper provisions received comments ranging from it being too soft and not a true leaving of the EU to it being a "sensible compromise".[36] Criticisms included:

- The EU's decisions in this area are unilateral and can be withdrawn at any time;
- Timing is hard to predict;
- The criteria differ in different sectors currently contained in 16 EU laws;
- Not all financial laws have an equivalence mechanism.

Catherine McGuinness, Chair of the Policy and Resources Committee of the City of London Corporation, said the White Paper was "a real blow for the UK's financial and related professional services sector". David Henig, UK Trade Policy Project at the European Centre for International Political Economy (ECIPE), called it "ultimate cakeism" (blog, 12 July).

The chief executive of the Investment Association, Chris Cummings, said the trade body welcomed the "much-needed clarity" offered by the White Paper, but also that "it is clearly disappointing that the government has ruled out mutual recognition as their preferred option" (*Investment Week*, 12 July).

The European law firm Fieldfisher thought the financial services proposal did not:

> provide a way of allowing UK firms relying on passporting to maintain European branches (under "freedom of establishment") to continue to do so except by obtaining authorisation for a branch or subsidiary within that country. The White Paper offers therefore not so much a "regulatory passport" as a "regulatory visa waiver scheme".[37]

Michel Barnier told European Affairs ministers from the EU27 on 20 July that the White Paper's enhanced equivalence proposals on financial services (rather than mutual recognition) would rob the EU of its "decision making autonomy" to grant equivalence rights, and would amount to a "system of generalised equivalence that would in reality be

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[36] In a Survation poll conducted on 7 July immediately after the Chequers meeting, 34% described the proposed agreement as a "sensible compromise". 38% thought it was "not faithful to the result of the EU referendum". For other polls on the Chequers agreement see 'What UK Thinks' post by John Curtice, What Might Voters Make of the Chequers Agreement? 12 July 2018.

[37] Fieldfisher, The Brexit White Paper: What it means for Financial Services, Nicholas Thompsell and John Worthy, 18 Jul 2018

jointly run by the EU and UK". But the Financial Times (30 July) thought Michel Barnier was softening his approach to the UK proposals after receiving assurances that the EU "would have ultimate control over the City's access to European markets", preserving the EU's "decision-making autonomy".[38]

Alternative white paper

The paper refers to the principles set out in the PM's Mansion House speech. It states that the goal of the UK in financial services will be to establish the ability to access each other's markets, based on the UK and EU maintaining the same regulatory outcomes over time, with a mechanism for determining proportionate consequences when they are not maintained.

It states that the equivalence model the EU uses with other third countries would be inadequate for the deep bespoke relationship the UK is seeking.

It referred to the Prime Minister also making clear "that the UK cannot simply become a 'rule taker' and sign up to automatically accept as-yet-unknown future rule change". A system would be required that respected both sides' autonomy in rule-making, allowing each party to take appropriate measures to maintain financial stability but without compromising the integrity of the EU's single market in financial services.

The UK would not seek passporting access to EU markets (respecting EU27 red lines).

2.5 Free movement of people

"In future it will be for the UK Government and Parliament to determine the domestic immigration rules that will apply. Free movement of people will end as the UK leaves the EU. The Immigration Bill will bring EU migration under UK law, enabling the UK to set out its future immigration system in domestic legislation.

Any future mobility arrangements will be consistent with the ending of free movement, respecting the UK's control of its borders and the Government's objective to control and reduce net migration. Trade agreements which cover trade in services include provisions on the mobility of people for the provision of services (known as 'Mode 4' commitments)" (Chapter 1, paras 73 and 76).

Chapter 1, Paragraphs 73-91 are about the ending of free movement and future mobility arrangements between the UK and the EU27.

The White Paper says (Chapter 1, para 76) the UK's future economic partnership should "provide reciprocal arrangements, consistent with the ending of free movement", that:

[38] For further information, see Commons Briefing Paper 7628, Brexit & financial services, 19 July 2018.

> a. support businesses to provide services and to move their talented people;
>
> b. allow citizens to travel freely, without a visa, for tourism and temporary business activity;
>
> c. facilitate mobility for students and young people, enabling them to continue to benefit from world leading universities and the cultural experiences the UK and the EU have to offer;
>
> d. are as streamlined as possible to ensure smooth passage for legitimate travel while strengthening the security of the UK's borders; and
>
> e. provide for other defined mobility provisions, including arrangements to ensure that UK citizens living in the EU, in future, continue to benefit from their pension entitlements and associated healthcare.

EU citizens in the UK "will continue to be able to move, live and work on the same basis as now up until the end of December 2020". This is in line with the citizens' rights provisions in the draft withdrawal agreement (Chapter 1, para 72).[39]

The Government wants reciprocal immigration rules with the EU in a "defined number of areas" (para 76). There could be "reciprocal" arrangements with the EU for the payment of certain benefits or social security. Arrangements should be "as streamlined as possible" (para 76d) and should allow businesses to move talent, allow citizens to travel visa-free for tourism and temporary business activity, and ensure that UK citizens living in the EU benefit from their pension entitlement and healthcare. The White Paper proposes a guarantee of "onward movement opportunities" (para 90) for UK nationals covered by the citizens' rights agreement.

UK and EU-based companies should be able to train staff, move them between offices and deploy expertise where it is needed, based on existing arrangements with non-EU countries (para 81).

The White Paper proposes a "UK-EU youth mobility" scheme modelled on current initiatives with Australia and Canada (para 86). It also calls for "ambitious provisions on the recognition of professional qualifications. This is particularly relevant for the healthcare, education and veterinary/agri-food sectors in the context of North-South cooperation between Northern Ireland and Ireland" (para 54).

Some believe this would mean free movement under another name and are suspicious that this is just the Government's opening bid (BBC News, 12 July). But officials are reported to have said this would not mean widespread access to UK benefits systems for EU nationals after Brexit (BBC News, 13 July).

The Recruitment & Employment Confederation commented (12 July):

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39 See also GOV.UK: the rights of EU citizens in the UK will not change until 1 January 2021. EU citizens living in the UK will be able to apply for settled status from 30 March 2019. EU citizens who have lived continuously in the UK for five years are eligible for settled status. Those who have lived in the UK for less than 5 years would generally be eligible for 'pre-settled status'. EU citizens granted settled status can remain in the UK on a permanent basis.

> Recruiters have been clear that Britain needs a comprehensive mobility deal with the EU to support national prosperity. The White Paper suggests this may be possible, but it leaves too many questions unanswered.
>
> Access to the UK for EU workers after the transition period should be based on coming to make a contribution, not a numerical target. Those with a job should be able to work here, plugging labour shortages as record numbers of people are in employment.

Alternative white paper

The UK's future immigration rules would incorporate any mobility provisions agreed with the EU in the same way they currently do in respect of the UK's international agreements with other trading partners. Discussions on this matter would take place in tandem with wider discussions on trade and market access.

The UK would discuss reciprocal arrangements in the following areas:

1) arrangements that allow EU citizens to visit the UK without a visa for short-term business reasons;
2) reciprocal provisions across all sectors for UK and EU-based companies to move staff between offices and plants in the EU and the UK;
3) arrangements to facilitate mobility of self-employed professionals, employees providing services in the UK and the EU as well as investors setting up new businesses and branches;
4) visa-free travel arrangements for tourists;
5) opportunities for EU and UK students to continue to benefit from each other's universities, including cultural exchanges like Erasmus+.
6) mobility provisions for scientists and researchers to underpin the science and innovation pact (detailed in separate chapter);
7) arrangements to ensure that EU citizens and UK nationals who do not have a right to enter or reside in their host country, for example foreign national offenders, can be returned to their home country;
8) onward movement opportunities for UK nationals in the EU who are covered by the citizens' rights agreement;
9) wider mobility areas such as future rules around social security coordination, where UK would seek a reciprocal system for UK and EU nationals;
10) mutual recognition of professional qualifications.

The proposals would be without prejudice to the Common Travel Area (CTA) arrangements between the UK and Ireland.

2.6 Consumer protection

"The UK believes strongly in the importance of consumer protection, and is committed to maintaining high standards.

… the UK proposes to commit to maintain reciprocal high levels of consumer protection. There should be cooperation on enforcement, including provisions to allow mutual exchange of information and evidence, and a framework to work collectively on areas of wider consumer detriment" (Chapter 1, paras 124 and 126)

The White Paper maintains that the UK "has gone beyond EU minimum requirements in a number of areas" (e.g. the 30-day short-term right to reject faulty goods) and that the UK wants to maintain "reciprocal high levels" of consumer protection (Chapter 1, para 125). Although this would not be possible currently in areas where the EU has taken a maximum harmonisation approach, the Chequers statement indicated that as long as UK law does not go below EU standards, this might be acceptable. But it is not clear how this would fit with the White Paper commitment to a common rulebook for goods, where rules are necessary for frictionless trade, and the UK "making an upfront choice to commit by treaty to ongoing harmonisation with EU rules" on goods (Executive Summary).

The UK is also seeking access to EU communications systems such as the Rapid Alert System for Food and Feed (RASFF), Rapid Alert System for Serious Risk (Rapex), and the Information and Communication System for Market Surveillance (ICSMS).

Alternative white paper

The chapter of the paper on goods states that although the UK is leaving the Single Market, it would "remain committed to high standards on consumer and patient Safety".

For Sanitary and Phytosanitary (SPS) measures - rules on food safety and animal and plant health, the preferred approach of "outcome equivalence" is set out (whereby the two parties agree to achieve the same outcome with flexibility as to the method by which that outcome is achieved).

Health and medicines

The UK wants to remain in the European Medicines Agency (EMA). The White Paper acknowledges that the UK would not have voting rights but wants its national regulators to continue doing technical work, even as a "leading authority" for medicine assessments (Chapter 1, para 30c). It also wants to participate in ongoing safety monitoring and new clinical trials frameworks.

The White Paper proposes continued cooperation on the Health Security Committee, membership of the European Centre for Disease Prevention and Control (ECDC) and continued collaboration with the European laboratory surveillance networks. It stipulates that "all current routes to market" for human and animal drugs should "remain available" (Chapter 1, para 30c), including the ability for UK regulators to assess medicines for sale.

Alternative white paper

The alternative white paper proposes UK participation in or associate membership of the European Medicines Agency. It also proposes continued close collaboration with the Health Security Committee and bodies such as the European Centre for Disease Prevention and Control (ECDC), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and the European laboratory surveillance networks.

Where the UK participates in EU bodies, agencies or programmes, the UK will respect the remit of the CJEU, and abide by the rules that govern them and their decisions, also recognising that in some cases this will involve making a financial contribution.

2.7 Euratom

The UK seeks a "close association" with Euratom, which would be "more comprehensive and broad than any existing agreement" (Chapter 1, para 143) with non-EU states and based on a new nuclear cooperation agreement between the UK and the EU which should "ensure continuity of contractual arrangements for the supply of nuclear material", either by keeping existing supply contracts or "by providing for their seamless re-approval prior to the UK's exit" (Chapter 1, para 144).

Alternative white paper

The UK would like to discuss participation in the Euratom Research and Training Programmes.

2.8 Independent trade policy

"The UK's proposal for its future economic partnership with the EU would provide a strong foundation for the UK to establish a broad and ambitious independent trade policy with the rest of the world" (Chapter 1, para 155).

"The UK's proposals for its new economic partnership with the EU would allow the UK to negotiate new international trade agreements in line with its priorities and interests covering goods, services, investment, data, government procurement, and intellectual property, consistent with the commitments in the economic partnership" (Chapter 1, para 158).

The White Paper confirms what the EU and UK negotiators agreed in the draft Withdrawal Agreement (Article 124) in March 2018 – that the UK would be free to sign and ratify free trade agreements with third states during the transition/implementation period and to bring them into force from 1 January 2021.

The UK would diverge from the EU to allow different and potentially more ambitious trade deals to give it "the freedom to chart its own path in the areas that matter most for its economy" (Executive Summary).

The White Paper states that the UK "would also have the freedom to reach new agreements with third country trading partners on the underpinning compliance activity, for instance through the mutual recognition of conformity assessments" (Chapter 1, para 163).

TechUK wondered how these two statements were compatible: did this mean that goods on the UK market would require an EU mark and a UK mark?[40]

The UK would seek to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), will "pursue an ambitious bilateral trade agenda" (Chapter 1, para 159) and strike deals with the US, Australia and New Zealand. On 18 July Liam Fox announced a consultation on the UK's future free trade agreements, including the possibility of joining the CPTPP. The Government is already engaging with CPTPP members about this possibility.[41] George Hollingberry replied to a Parliamentary Question about the prospect of the UK joining:

> As set out in the Government's White Paper on the future relationship with the EU, the UK will potentially seek accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CTPP). This will take place pending the outcome of a 14-week public consultation and the process of accession for new members being established. Potential accession would be sought on terms consistent with the future relationship with the EU, and domestic priorities. CPTPP includes some of the world's fastest growing economies that together represent 13-14% of global GDP, and a total population of around 500m people. If the UK were to join, it would be the second largest economy in the group, and CPTPP's coverage of global GDP would increase to around 17%. We are undertaking assessments of all the opportunities presented by CPTPP, including analysis on opportunities the agreement presents to UK consumers and businesses.[42]

A post on the Institute of Export website thought the EU would probably regard the UK proposals as 'cherry-picking':

> it is difficult to avoid the suggestion that the UK is trying to secure many of the benefits of the Single Market and Customs Union, while enjoying the freedom to conduct an independent trade policy. We should expect more comments about 'cherry-picking' and 'having your cake and eating it'.[43]

In the Lords debate on the White Paper on 12 July Baroness Ludford (LD) thought an independent trade policy might be incompatible with the common rulebook:

> How can there be an independent trade policy, which is alleged in the White Paper, if the UK has committed itself to a common rulebook, including on agri-food products? How will that work

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40 TechUK, White Paper a step forward but many questions remain, 12 July 2018

41 Launch of consultations on potential future free trade agreements, WS 873, 18 July 2018. Details of DIT's consultation on CPTPP are here. DIT has also published an information pack on CPTPP.

42 PQ 166107 24 July 2018

43 IOE, Government launches White Paper on Future Relationship between UK and EU, 13 July 2018

> when the US invites us to accept the famous bleached chickens and GM food?

The National Farmers Union, which generally welcomed the White Paper proposals on farming, agriculture and trade, was concerned that an independent trade policy might not uphold high UK standards: "It is imperative that the UK's independent trade policy does not seek to undermine those standards".[44]

2.9 Transport

"The UK's proposals include:

a. an Air Transport Agreement which seeks to maintain reciprocal liberalised aviation access between and within the territory of the UK and the EU, alongside UK participation in EASA;

b. exploring options for road transport, including reciprocal access for UK and EU road hauliers and passenger transport operators;

c. close cooperation on maritime, including with the European Maritime Safety Agency (EMSA);

d. bilateral rail agreements with relevant Member States to support the continued operation of services through the Channel Tunnel and on the Belfast-Dublin Enterprise line" (Chapter 1, para 128)

The Government would like an "Air Transport Agreement" which would "permit UK and EU carriers to operate air services to, from and within the territory of both the UK and the EU on an equal basis" (Chapter 1, para 130).

The Government wants the UK to stay in the European Aviation Safety Agency (EASA) and to cooperation closely on air traffic management and aviation security. The EU-Canada Air Services Agreement would be a possible template for an open-skies deal between the UK and EU to keep air traffic flowing.

The CBI agreed with most of these proposals:

> Businesses will welcome the intention to maintain current levels of market access between UK and EU markets and continued influence within EASA. This will maintain a level playing on aviation safety standards and preserve the right to fly intra-European routes and domestically within EU member states. However, the White Paper does not provide information regarding the UK's aviation links with other countries currently secured through the EU. Further detail will be required on how this will be maintained.[45]

It also noted some omissions with regard to haulage licensing:

> While the White Paper recognises the importance of road transport connections between the UK and EU for consumers and businesses it doesn't differentiate on the requirement for haulage.

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44 NFU, UK farming unions respond to Government Brexit white paper, 12 July 2018

45 http://www.cbi.org.uk/index.cfm/_api/render/file/?method=inline&fileID=49198108-D630-4E11-8570BE95C36642C1

> This requires mutual recognition of haulage licensing as well as vehicle standards. There is also no mention more broadly of UK and EU rules on basic vehicle requirements such as on emissions and road worthiness testing.

On 8 August the Council of the EU published a proposal for UK membership of the Common Transit Convention (CTC), which streamlines customs procedures and reduces bureaucracy for hauliers, and the Convention on the simplification of formalities in trade in goods.[46]

Alternative white paper

The paper refers to the PM's Mansion House speech which sets out the Government's ambition to maintain continuity of transport services as part of a deep and comprehensive future economic relationship.

It states that the UK is seeking to ensure the continuity of air, maritime and rail services, and to protect the rights of UK road hauliers to access the EU market and vice versa.

On aviation, the UK would seek "fully liberalised access for UK carriers to the common aviation area (replicating current levels of market access)- seeking to do so on the basis of committing to domestic legislation equivalent to the aviation acquis and committing to maintain that equivalence in the future".

The paper said that the UK "will explore the grounds for continued UK participation in the European Aviation Safety Agency (EASA)", referring to the Prime Minister words in her Mansion House speech that "we accept this would mean abiding by the rules of the agency and making an appropriate financial contribution". The paper notes that legislation underpinning the EASA creates a framework for third country participation (which has enabled Swiss participation in the Agency).

The UK would aim to continue close cooperation with the EU on air traffic management through its continued membership of EUROCONTROL (a non-EU body) and through ensuring equivalent legislative commitments to the Single European Sky (SES) acquis.

The UK would seek mutual recognition of standards in aviation security, continued information sharing and collaboration initiatives such as the ACC3 regime for cargo security, and the sharing of accident investigation data and information from the safety assessment of foreign aircraft programme.

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46 Proposal for a Council Decision on the position to be taken on behalf of the European Union in the EU-CTC Joint Committee established by the Convention of 20 May 1987 on the simplification of formalities in trade in goods and in the EU-CTC Joint Committee established by the Convention of 20 May 1987 on a common transit procedure as regards an invitation to the United Kingdom to accede to those Convention

In addition, it said that the future partnership on aviation should avoid the introduction of restrictions on ownership and control, and ensure continued mutual recognition of relevant professional qualifications and licences.

The Government would also seek new arrangements with third countries with which the UK is currently party to EU-level agreements on air services (for example the US and Canada).

On road transport, the UK would seek market access for road haulage and passenger transport operators, mutual recognition of driving licences and other motoring documentation for both businesses and citizens, close collaboration on road safety and enforcement, including access to the relevant enforcement databases such as RESPER, ERRU and TACHOnet, and continuation of links on the island of Ireland.

2.10 Environmental standards and climate change

"The UK's world leading climate ambitions are set out in domestic law and are more stretching than those that arise from its current obligations under EU law. The UK will maintain these high standards after withdrawal" (Chapter 1, para 120).

The Government reiterates its commitment to meeting international obligations in environmental protection and climate change. The White Paper notes that the UK would adhere to environmental rules on manufactured goods where necessary "to provide frictionless trade at the border". This would include "environmental requirements for products, such as their energy consumption" (Chapter 1, para 25).

Non-regression principle

On environmental standards there are several references to non-regression provisions (e.g. Chapter 1, para 118):

> In the context of a deep economic partnership, the UK proposes reflecting its domestic choice to maintain high regulatory standards for the environment. To that effect, the UK and the EU should commit to the non-regression of environmental standards. There should also be a reciprocal commitment to ongoing environmental cooperation, including in international for a, to solve shared global environmental challenges.

The Government's non-regression guarantees follow Michel Barnier's calls earlier in 2018 for a non-regression clause on the environment in any future EU-UK deal. In oral evidence to the Environmental Audit Committee on 11 July[47] Michael Gove said he did not believe a common rulebook on environmental standards was necessary, pointing instead to non-regression clauses as an "appropriate way of both countries satisfying themselves that suitably high environmental standards would be met" (Q101). He later explained his view of non-regression clauses in

[47] Oral evidence: Environmental principles and governance consultation, HC 1062

response to a question about providing reassurance that environmental standards will not go down (Q109):

> I think it is implicit in what we are talking about something similar to a non-regression clause may well be the best means of providing appropriate reassurance. I should say broadly, with most trade agreements, there is an acceptance that country A and country B or group of countries A and country B agree that in order to avoid what each might consider to be unfair competition that they agree certain common principles and certain common standards. If there is any suggestion that one side or the other is reneging on that commitment, then an arbitral body will decide whether or not it is appropriate for action to be taken and for one side or the other to have an appropriate trade remedy. In that sense, across the globe there are a network of agreements which countries have entered into as sovereign parties in which they commit, in order to advance free trade, to maintain certain principles and standards and a non-regression clause might very well be one means of doing that.

There are precedents for non-regression clauses in EU agreements with third states: for example, Article 16.2 of the proposed EU-Japan Economic Partnership Agreement. There are similar clauses in the EU-Canada Comprehensive Economic and Trade Agreement (CETA – see e.g. Article 23.4 of Chapter twenty-three: Trade and labour and Article 24.5 of Chapter twenty-four: Trade and environment).

The network of academic experts, 'Brexit and Environment', welcomed the non-regression principle but regretted that it was "limited" to non-regression. "The ideal would be an environmental progression principle that commits the EU and the UK to the pursuit of higher environmental standards".[48] It also noted that the White Paper does not mention the European Environment Agency.

David Henig pointed out on Twitter (12 July) that a non-regression clause on environmental protection "sounds virtuous, but is standard in trade agreements".

Alternative white paper

The excerpts of the alternative white paper released did not include a chapter on the environment. However, the chapter on agriculture and fisheries referred to the importance of maintaining environmental standards at least as high as the EU.

Internal Energy Market (IEM)

The Government would like "broad energy cooperation with the EU, including arrangements for trade in electricity and gas" (Chapter 1, para 139). It is also considering a common rulebook for trading rules on electricity and carbon emissions, but it is not clear whether it wants to continue to participate in the Internal Energy Market (Chapter 1, para 140):

> The UK wants to explore with the EU the options for the future energy relationship. One option would be for the UK to leave the Internal Energy Market (IEM). In this case, the UK would need a

[48] Brexit and Environment, The Brexit White Paper: What does it mean for the environment? 17 July 2018

> common rulebook with the EU on the technical rules for electricity trading, such as the market coupling mechanism – as well as a consistent approach to carbon pricing necessary for the market to function, which, for example, could be delivered by remaining in the EU's Emissions Trading System.

The White Paper rules out the possibility of a common rulebook on wider environmental and climate change rules.

It confirms the Government's commitment to the continuation of the Single Electricity Market (SEM) between Northern Ireland and Ireland "in any scenario".

Bloomberg commented (12 July) that leaving the IEM "would complicate trading and potentially push up power and gas prices for households and factories".

Emissions trading

Whether or not the UK will continue to participate in the EU emissions trading system (EU ETS) is not yet known. The White Paper does not contain proposals on emissions trading beyond noting that remaining in the EU's emissions trading system could be one way of ensuring a consistent approach to carbon pricing, which would be necessary if the UK stayed in the IEM and the ETS (Chapter 1, para 140).

Alternative white paper

The excerpts of the alternative white paper published did not cover the internal energy market, although it referred to the economic partnership between the UK and the EU also covering energy.

3. The Irish border

"Taken together, such a partnership would see the UK and the EU meet their commitments to Northern Ireland and Ireland through the overall future relationship: preserving the constitutional and economic integrity of the UK; honouring the letter and the spirit of the Belfast ('Good Friday') Agreement; and ensuring that the operational legal text the UK will agree with the EU on the 'backstop' solution as part of the Withdrawal Agreement will not have to be used" (Executive Summary)

The December 2017 Joint Report between the UK and the EU 'fudged' the issue of how the Northern Irish border might operate in the future, as the parties could not agree on a common proposal. So instead of proposing one solution, the Joint Report set out three scenarios.

The first, and the UK Government's favoured option, is for the Irish border issue to be settled as part of the overall UK - EU future relationship. The second is that the UK will propose specific solutions to solve the Irish border issue. The third is where there is no agreed solution; in these circumstances the Joint Report committed the UK to:

> Maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.

This third scenario has often been described as the 'backstop' proposal.

This White Paper proposes a future relationship that the Government believes fully settles the Irish border issue.

The backstop

In March 2018 the EU produced a draft withdrawal agreement. It contained a 'Protocol on Ireland and Northern Ireland' which put in legal text how this third or 'backstop' scenario would operate. It envisaged the creation of a common regulatory area "comprising the Union and the United Kingdom in respect of Northern Ireland". The draft text also said the territory of Northern Ireland "shall be considered to be part of the customs territory of the Union".

The Prime Minister rejected this text, saying "no Prime Minister [of the UK] could ever agree" to what the Commission proposed in the Protocol.[49] Arlene Foster, the DUP leader, thanked the PM for her intervention and agreed that the Commission's draft Protocol was "constitutionally unacceptable", as it would create a hard border in the Irish Sea.[50]

In August 2017 the UK published a position paper on Northern Ireland and Ireland. It proposed two solutions to solve the border problem: firstly a 'Customs Partnership', secondly, a "highly streamlined customs

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49 'Theresa May: No UK PM could ever agree with EU draft', BBC News, 28 February 2018.

50 'EU withdrawal text constitutionally unacceptable - DUP leader', Reuters, 28 February 2018.

arrangement". Both solutions were rejected by the EU as insufficient to prevent a hard border. Neither solution comprehensively addressed border checks not related to customs, such as checks on animal and plant health.

The White Paper - customs and regulatory checks

The White Paper proposes a solution to the regulatory checks issue in the common rulebook for goods including agri-food covering "only those rules necessary to provide for frictionless trade at the border".

The White Paper also recognises that Northern Ireland and Ireland currently form a single epidemiological unit for animal health and welfare, i.e. checks and controls on animals are done island-wide (Chapter 1, para 42). The paper proposes a similar all-island approach to this issue:

> The UK is fully committed to ensuring that the Northern Ireland Executive and North South Ministerial Council can, through agreement, continue to pursue specific initiatives, such as the All Ireland Animal Health and Welfare Strategy.

The proposed Facilitated Customs Arrangement would avoid customs checks at the border with Ireland (see also section 2.2).

The White Paper sets out that these solutions meet its aims of solving the border issue through the future relationship, but also meets the EU's concerns about the integrity of its institutions (Executive Summary):

> The free trade area for goods would see the UK and the EU meet their commitments to Northern Ireland through the overall future relationship.
>
> It would avoid the need for a hard border between Northern Ireland and Ireland, without harming the internal market of the UK – doing so in a way that fully respects the integrity of the EU's Single Market, Customs Union, and its rules-based framework.

On the issue of the 'backstop', the White Paper reproduces the wording of the Chequers statement about the proposals "ensuring that the operational legal text the UK will agree with the EU on the 'backstop' solution ...will not have to be used" (Executive Summary).

Other Irish border issues

The Paper also addresses other issues on the island of Ireland:

- On **road haulage:** "the UK will ensure that there is no requirement in any scenario for new permits for transport services between Northern Ireland and Ireland" (Chapter 1, para 134).
- On **energy**: "the Government is committed to facilitating the continuation of the Single Electricity Market (SEM) between Northern Ireland and Ireland" and "the UK will work with the EU to ensure that the SEM is maintained in any future scenario" (Chapter 1, para 138).
- On **police & criminal justice**: "the UK is committed to a security partnership with the EU, including Ireland, that will allow the Police Service of Northern Ireland to continue to tackle security threats, including the severe threat from dissident republicans, and serious and organised crime" (Chapter 2, para 106).

- On **EU development funding** "the UK remains committed to delivering a future PEACE programme to sustain vital work on reconciliation and a shared future in Northern Ireland" (Chapter 3, para 24). PEACE, is a cross-border programme between Ireland and the UK to support the peace process.

  The White Paper does not mention the other major EU programme in operation in the region-INTERREG. This programme's purpose is "overcome the issues that arise from the existence of a border".[51] Communities on the West Coast of Scotland are also eligible for INTERREG funding.

Developments since publication

The Irish prime minister Leo Varadkar welcomed the White Paper, saying:

> I think it's fair to say that the white paper is an evolution of the United Kingdom's position and evolved some of the red lines they had until now.
>
> I don't think it provides a solution to Brexit but I think it is something that can provide an input into the negotiations.[52]

On 16 July the Government accepted an amendment to the Taxation (Cross-Border Trade) Bill. The amendment (Clause 37) makes it unlawful for Northern Ireland "to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain". The amendment was passed.

Unless this legislation is amended, the backstop as envisaged in the Joint Report and Draft Withdrawal Agreement would not be able to operate unless the UK as a whole stayed in the Customs Union.

The Prime Minister travelled to Northern Ireland the week after the White Paper was released and delivered a speech on Brexit and Northern Ireland in which she reiterated her position that the backstop as envisaged by the EU is not acceptable to her Government. She called for the EU to "evolve" their position saying:

> The economic and constitutional dislocation of a formal 'third country' customs border within our own country is something I will never accept and believe no British prime minister could ever accept.[53]

She also said both sides in the negotiation "share a determination never to see a hard border in Northern Ireland", and:

> No technology solution to address these issues has been designed yet, or implemented anywhere in the world, let alone in such a unique and highly sensitive context as the Northern Ireland border.[54]

On 26 July in the press conference following the latest round of negotiations, Michel Barnier cast doubts on the UK's approach to the backstop and made clear there was still no agreement on the issue:

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51 Special EU Programmes Body, accessed 21 August 2018.
52 ITV News, 'Irish PM welcomes Brexit white paper as 'evolution of UK's position'', 13 July 2018.
53 BBC News, 'Theresa May says EU must 'evolve' its Brexit position', 20 July 2018.
54 Ibid.

> We have a clear agreement between the EU and the UK that the Withdrawal Agreement must contain an all-weather insurance policy. We share the goal of avoiding a hard border on the island of Ireland.
>
> […] We also had agreed in March on the scope of the issues to be solved in the backstop.
>
> This week, we focused on the customs element of the backstop.
>
> The UK wants this to be UK-wide.
>
> As I said last week, we have no objection in principle to this.
>
> But we have doubts that this can be done without putting at risk the integrity of our Customs Union, our Common Commercial Policy, our regulatory policy, and our fiscal revenue.
>
> We have had an open and frank – and therefore useful – discussion with Dominic and his team on these issues.
>
> I think that the UK has understood our concerns and respects our principles.
>
> And the UK has promised to come back to us with concrete proposals on how to address our concerns.[55]

Alternative white paper

The paper states:

> The agreement should also take account of the need for specific solutions to the unique circumstances of Northern Ireland and Ireland. As part of this, the UK and the EU have committed to protecting the Belfast Agreement and both stated explicitly that we will not accept any physical infrastructure at the border.

It states that its model of mutual recognition "if delivered in full, provides sufficient depth to remove any regulatory implications for the Northern Ireland – Ireland land border". It would mean "that requirements for checks on third country products prior to entering the Single Market should not need to apply" because "movement of goods between the UK and the EU presents no higher risk than it does at present".

It states that the new "Highly Streamlined Customs Arrangement" would involve a Rules of Origin protocol and any business wishing to claim a UK or EU preferential tariff would need to satisfy the UK-EU RoO requirements. This arrangement "would allow exemptions for small traders on the island of Ireland as well as trade where the risk of tariff circumvention is negligible".

David Davis wrote in The Times (15 July) that the customs issues were easily solved: "the answers to the customs and the NI issue are detailed and technical but rely on existing technology and sensible management, not on sweeping political solutions that imperil long-standing and sometimes delicate political arrangements.[56]

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55 European Commission, 'Statement by Michel Barnier at the press conference following his meeting with Dominic Raab, UK Secretary of State for Exiting the EU', 26 July 2018

56 The Times, 'May has left our fingers in the EU mangle but there is a way to get free', 15 July 2018.

4. The security partnership

"The UK will no longer be part of the EU's common policies on foreign, defence, security, justice and home affairs. Instead, the Government is proposing a new security partnership that maintains close cooperation – because as the world continues to change, so too do the threats the UK and the EU both face" (Executive Summary)

The Commission published a set of slides in January 2018 showing existing precedents for cooperation with third countries on policing, criminal justice and law enforcement. But the Government thought that "none captures the full depth and breadth of our envisaged relationship". A Government presentation on 9 May 2018 set out a vision for the UK's future security partnership with the EU in which the Government envisaged a future security partnership based on "three distinct pillars" covering internal security, external security and wider security cooperation.

Chapter 2 of the White Paper on the Security Partnership contains proposals on shared security, law enforcement and criminal justice cooperation; foreign policy, defence, development and wider security issues. It also notes that after Brexit the UK will remain a party to the European Convention on Human Rights (Chapter 2 para 5), which Michel Barnier welcomed.

4.1 Law enforcement and criminal justice

"The UK … proposes an ambitious partnership with the EU that goes beyond existing precedents in this area, covering:

a. mechanisms for rapid and secure data exchange;

b. practical measures to support cross-border operational cooperation; and

c. continued UK cooperation with EU law enforcement and criminal justice agencies (Chapter 2, para 13)

Presenting the White Paper to Parliament on 12 July, Dominic Raab said:

> The Government's proposal is for a new security partnership with the EU to tackle the shared, complex and evolving threats, enabling the UK and the EU to act together on some of the most pressing global challenges. It is important that the UK and the EU can continue operational co-operation on law enforcement and criminal justice to keep people safe right across Europe.

Europol and Eurojust

The White Paper argues that there is "mutual interest" in avoiding the creation of unnecessary gaps in operational capabilities, so participating as a non-Member State in Europol and Eurojust would provide "an effective and efficient way to share expertise and information, with law enforcement officers and legal experts working in close proximity so

they can coordinate operations and judicial proceedings quickly" (Executive Summary).

The White Paper also notes that any new arrangements "must respect Scotland's and Northern Ireland's separate and distinct legal systems" and the independent role of the Lord Advocate as head of the criminal prosecutions system in Scotland.

Mr Raab defended the UK ambition of participating in law enforcement mechanisms with the EU:

> As I have argued all along and as the White Paper makes clear, the UK can want to maintain, and even strengthen, operational law enforcement co-operation with the EU—through, for instance, bodies such as Europol and Eurojust—without being subject to the supranational jurisdiction of the European Court of Justice and all the decision-making fetters. Indeed, Europol and Eurojust have a large number of association agreements with non-EU countries. I believe that the US has more liaison officers posted at Europol than the average EU country.

The EU27 position was set out in slides on Police and judicial cooperation in criminal matters on 18 June 2018 which supported UK participation rights in the Europol analyses projects if Member States participating in the project agreed, but without participation in the Europol Management Board. Regarding Eurojust, there was support for judicial cooperation and a UK liaison prosecutor, but again no participation in the Management Board.

In his op-ed on 2 August Michel Barnier appeared to agree with the UK's proposals for close cooperation in a range of justice and home affairs matters:

> On security, the EU wants very close cooperation to protect our citizens and democratic societies. We should organise effective exchanges of intelligence and information and make sure our law enforcement bodies work together. We should cooperate to fight crime, money laundering and terrorist financing. We can cooperate on the exchange of DNA, fingerprints, or Passenger Name Records in aviation to better track and identify terrorists and criminals. We are also ready to discuss mechanisms for swift and effective extradition, guaranteeing procedural rights for suspects.

Data exchange

The White Paper draws on the Government's Technical Note on Security, Law Enforcement and Criminal Justice of May 2018. The UK "currently participates in around 40 EU tools that support and enhance police and judicial cooperation in criminal matters" (Chapter 2, para 12), and the White Paper proposes "an ambitious partnership with the EU that goes beyond existing precedents in this area", covering:

a) mechanisms for rapid and secure data exchange;

> b. practical measures to support cross-border operational cooperation; and
>
> c. continued UK cooperation with EU law enforcement and criminal justice agencies.

The White Paper assumes, because the UK's existing data-sharing systems are compatible with the EU's, that it will be "possible for operational cooperation to continue, but on the basis of a different legal relationship" (Chapter 2, para15). It proposes:

> a coherent and legally binding agreement on internal security that sets out respective commitments and reflects the integrated operational capabilities that the UK and the EU share. The UK's ambition is to cooperate on the basis of existing tools and measures that support these capabilities, amending legislation and operational practices as required and as agreed to ensure operational consistency between the UK and the EU.

While acknowledging that there is no precedent for a non-EU country having access to EU data exchange tools, the UK proposes combating crime through the exchange of sensitive information and data, including information about airline passengers, alerts to police and border forces (with access to systems that allow for efficient responses), exchanges of criminal records information and DNA, fingerprint and vehicle registration.

The EU has so far agreed to "streamlined information exchange between law enforcement authorities" and "effective exchanges of data with Europol" [57] but not to access to the Europol Information System. The EU also proposes "[e]ffective exchanges with Eurojust", "limited connection to Eurojust Case Management",[58] a system for a UK liaison prosecutor as for other third countries, and Passenger Name Record cooperation.

Galileo

The Government would like Galileo, the EU's Global Navigation Satellite System (GNSS), to be a "core component" of its future security partnership with the EU (Chapter 2, para 93). When fully operational (expected in 2026), Galileo "will provide accurate position, navigation and timing information. It will benefit governments, citizens and industry alike" (Chapter 2, para 92). The UK wants to participate in Galileo "in a new balance of rights and obligations, after it has left the EU", but it must be cost effective:

> The programme must also offer value for money to justify an ongoing UK contribution. As a logical consequence of the exclusion and uncertainty surrounding future UK participation, the

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[57] European Commission, Police and judicial cooperation in criminal matters (slides), 18 June 2018

[58] Ibid

> UK is exploring alternatives to fulfil its needs for secure and resilient position, navigation and timing information.

It has been estimated that the cost of building a new 'home-grown' Galileo would be around £3.7bn, assuming no cost or time overrun.[59] Other sources put it higher, at £5 billion.[60] A Technical Note published by DExEU in May 2018 estimated the cost to the EU of non-UK participation: "Excluding industrial participation by UK industry in security related areas risks delays of up to three years and additional costs of up to €1 billion to the programme".

The Commission had said the UK would have to apply to use the Public Regulated Service (PRS), which is part of the Galileo system, like any other non-EU country after Brexit.

Alternative White Paper

The paper proposes a new security partnership reflecting the breadth of the existing relationship, covering law enforcement and criminal justice cooperation, as well as collaboration on foreign policy, security and defence and development. This would go beyond existing precedents for the EU's third country relationships.

Civil Judicial Cooperation

"The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States" (Chapter 1, para 148)

Along with socio-economic cooperation in areas such as energy and transport, the White Paper says the UK will seek to join (or remain in) the Lugano Convention. Under this Convention EU Member States and third countries apply the same rules on civil and commercial judicial cooperation, and "commit to pay due regard to how each other's courts interpret those rules. This architecture provides a clear precedent for close cooperation between the EU and a third country" (Chapter 1, para 146).

But the White Paper states that some of the Lugano provisions "have been overtaken, and it is limited in scope. In addition, the European Council's Guidelines have suggested the possibility of going beyond existing precedent" (Chapter 1, para 147). So the UK would like to "explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction,

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59 Governmentcomputing.com, EU white paper shows extent that UK requires continued access to EU systems, David Bicknell, 12 July 2018

60 BBC News, Brexit: UK wants £1bn back from EU if it is excluded from Galileo, 24 May 2018

applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters". (Chapter 1, para 148).

The UK ambition for closer cooperation with the EU on civil judicial cooperation through an enhanced Lugano Convention and a new bilateral agreement raises questions about respect for UK sovereignty. Would the CJEU and its case law have a greater role in such agreements, or would there be other governance arrangements for both international agreements?

Alternative white paper

Referring to the objectives set out in the Prime Minister's Munich speech on 17 February 2018, the paper calls for "a new and comprehensive Internal Security Treaty, that enables continued cooperation on the basis of the most operationally beneficial EU tools" which would "preserve our shared capabilities and address cross-cutting issues through a single set of horizontal provisions".

It refers to UK participation in more than 40 EU tools that support and enhance police and judicial cooperation in criminal matters and says that "the UK believes it is vital to find a coherent way to maintain these capabilities in the future".

Replicating the existing precedents for law enforcement and criminal justice cooperation between the EU and third countries "would result in a limited patchwork of cooperation that would create operational gaps and not deliver our shared objectives of protecting our continent", and law enforcement cooperation "would be narrower, slower and less effective". It says that this depth of cooperation is particularly important on the island of Ireland.

The document gives a number of examples of EU cross-border law enforcement and judicial co-operation, and states that continued UK participation would be in "our mutual interest." These include Joint Investigative Teams, Mutual legal assistance and the European Investigation Order, the European Arrest Warrant, Europol and Eurojust ("when participating in EU agencies, the UK will respect the remit of the European Court of Justice"), and Data exchange (including Passenger Name Record data, European Criminal Records Information System and Prüm.)

4.2 Foreign Policy, Security and defence

"The UK will continue to collaborate with European allies and partners on military and civilian operations around the world. UK armed forces are engaged in active duties across the globe, including degrading and defeating Daesh in Iraq, providing humanitarian aid and combating the international drugs trade" (Chapter 2, para 75).

The White Paper envisages a continuation of defence cooperation, with NATO remaining the "cornerstone of European defence and security,

supported by strong multilateral and bilateral alliances and partnerships" (Chapter 2, para 76). It proposes (Chapter 2, para 77):

> a. arrangements to enable cooperation on crisis management operations, including using civilian and military assets and capabilities to promote global peace and stability, where it is mutually beneficial; and
>
> b. intensifying cooperation when needed, including during times of crisis.

Enhanced 'Framework Participation Agreement'

The White Paper welcomed recent EU proposals for a Framework Participation Agreement (Chapter 2, para 78) setting out a differentiated approach to the Common Security and Defence Policy (CSDP), stating that the UK's involvement "would be decided on a case-by-case basis so as not to prejudice the sovereignty of the UK or the decision making autonomy of the EU" (Chapter 2, para 78).

An "enhanced" Framework Participation Agreement would enable:

- Cooperation and the commitment of military assets to EU crisis management operations, on a case-by-case basis, where it is mutually beneficial. The UK has, however, also made clear its expectation that any decision to deploy UK military capabilities in support of EU operations "must be taken on the basis of adequate information and consultation" (Chapter 2, para 80), including access to planning documents. The White Paper also states that the UK "could bring its significant expertise to support EU operational planning" (para 80).

  By adopting an approach which suggests consultation and access to EU planning and an offer of support, the Government appears to have softened its tone slightly,[61] acknowledging that "this [approach] does not undermine the important principle that only EU Member States have a formal role in the decision-making process and a vote over the launch of EU operations" (para 80). However, the fact remains that the UK is requesting a level of access in operational planning, which goes far beyond current third-party arrangements.[62]

- A collaborative and inclusive approach to military capability development and planning, underpinned by a new 'Cooperative Accord' that would take a more strategic approach and would allow UK participation in EU programmes on a case by case basis, including specific projects under the remit of the European

[61] In its September 2017 Position Paper the Government stated that the UK envisaged working with the EU "during mandate development and detailed operational planning" and suggested that "the level of UK involvement in the planning process should be reflective of the UK's contribution".

[62] Existing third-party agreements on CSDP allow for the contribution of personnel and assets, once a Council Decision has been made, but decision making with respect to the operation remains within the remit of the EU Member States.

Defence Agency,[63] PESCO[64] and through the European Defence Fund[65] (para 82b)

- A partnership that is "flexible and scalable" (para 64) and one that respects the sovereignty of the UK and the autonomy of the EU and its Member States.

Given the divergence of opinion between the EU and UK on certain issues, but particularly third-party rights and obligations across CSDP and EU defence industrial initiatives, there is much still to be discussed and negotiated.

The White Paper proposes on-going collaboration between UK and EU defence companies which the CBI said addressed many of the defence industries' concerns, "reflecting the complexity of this industry's pan-European supply chains", but the CBI also thought there was "a gap on information regarding future procurement processes".[66] The Chief Executive of ADS, the Trade Organisation for companies in the UK Aerospace, Defence, Security and Space sectors, Paul Everitt, was optimistic, saying the White Paper "makes good progress in addressing concerns expressed by our industries and others".[67]

Hugh Bennett commented on Brexit Central that "[t]he UK's unqualified commitments in the security section risk the country sleepwalking into a Common Defence Union".[68]

Alternative white paper

The paper states that the "future partnership on foreign policy, security and defence must facilitate cooperation across all aspects of external relations". It refers to a range of existing third country models the EU uses for foreign policy, security and defence coordination, participation and alignment, but states that "none of these reflect the UK's unique position as a European country that shares the principles and values of the EU, as well as the significant assets, expertise, intelligence and capabilities that the UK, as a leading NATO Ally and permanent member of the UN Security Council, has to contribute to European security".

It suggests that future UK-EU foreign policy, security and defence cooperation will take various forms and will require a combination of political and legal agreements. Cooperation may in places involve legal agreements, for example where the UK proposes to participate in EU programmes and agencies. In other areas, such as foreign policy, "the

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63 Norway (2006), Switzerland (2012), Serbia (2013) and Ukraine (2015) have all concluded Administrative Arrangements that enable them to participate in EDA projects and programmes.

64 More detail on the capability projects that come under the remit of Permanent Structured Cooperation (PESCO) is available in Library Briefing Paper CBP 8149, EU Defence: the Realisation of Permanent Structured Cooperation

65 Proposals for third party involvement in PESCO and the EDF are currently being discussed, which the UK Government feels are too restrictive. Further detail is available in Library Briefing CBP 8216, European defence: where is it heading?

66 CBI, Overview: The business view of the Government's Brexit White Paper, July 2018

67 Brexit White Paper is a step forward for industry, Alex Hamilton, 12 July 2018

68 The Brexit White Paper: An exercise in giving away control, 13 July 2018

UK and EU will cooperate on a voluntary, case by case basis that reflects the sovereignty of the UK and the strategic autonomy of the EU".

With regard to consultation and coordination, the future security partnership should make provision for discussion between the EU27 leaders and the UK Prime Minister on the most important foreign policy challenges as they arise "underpinned by regular discussions between officials the UK, Member States and the European Commission, in particular the European External Action Service." Consultation should also facilitate coordination in international organisations to promote and defend shared values and discussion of objectives in specific theatres. It states that:

> UK-EU dialogue should enable the coordinated use of foreign policy levers, including an option to agree shared positions and statements, joint demarches and jointly organised events, such as the Human Rights Council or in response to international developments impacting on our shared security interests.

The relationship should be underpinned by the sharing of intelligence, such as through the EU Intelligence and Situation Centre (INTCEN), European Union Satellite Centre (SATCEN) and EU Military Staff Intelligence, and the sharing of expertise.

There should also be consultation and cooperation on sanctions, which should include:

1. agreement to share information and technical support;
2. consultation on future designations and regimes; and
3. comprehensive collaboration when both the UK and EU are seeking to adopt mutually supportive sanctions, including in crisis situations.

There will also be continued collaboration with the EU and Member States on Defence and Security operations. NATO will remain the cornerstone of European defence and security, supported by strong multilateral (e.g. the Organization for Security and Co-operation in Europe) and bilateral alliances. However, the UK recognises that the EU has an important role to play, including helping to prevent crises in Europe's neighbourhood, countering hybrid threats, enhancing resilience and stabilising post-conflict situations.

The alternative white paper states that the UK will remain committed to using its assets and capabilities alongside European partners where this is in the UK's mutual interest. As the UK will no longer be a member of the fora where operations are planned and discussed, a new framework for consultation will be needed with the Political and Security Committee (PSC) and EU Military Committee (EUMC) in informal sessions; and joint and shared horizon scanning and analysis through EU Military staff and INTCEN liaison. The paper also states:

> We believe that future UK participation in European Defence Agency (EDA) programmes will be beneficial for both the UK and EU, to maintain our strong defence industrial base and enhance

European security. There are precedents for third party collaboration with the EDA that the UK would look to build on, for example via a third country Administrative Arrangement (AA).

Defence research

On defence research, the paper proposes an accord between the UK and the EU to allow for collaboration on future projects, for example through the European Defence Research programme (EDRP) and the Defence Industrial Development Programme (EDIDP).

The paper refers to UK support for the launch of Permanent Structured Cooperation (PESCO) in December 2017, providing new opportunities to strengthen Europe's defence capabilities, and states that the UK has "been consistent that it wants to see it develop in a way that is coherent with NATO and that is open to third country participation where there is a clear value in doing so, including for the UK and its defence industry".

Depending on the specific programme and level of access, "the accord should include a third-party indexed financial contribution in return for full access; or looser arrangements that enable collaboration but require agreement and funding on a case by case basis".

Galileo

The paper states that continued UK-EU collaboration on Galileo would be mutually beneficial, guaranteeing access to the UK's investment and expertise, and calls for a partnership in this area involving:

1. ongoing access to Public Regulated Service (PRS) information;
2. a right for UK entities to compete fairly for PRS-related contracts;
3. a Galileo cooperation agreement, permitting a partnership with the programme and collaboration in its 'open' elements;
4. an information-sharing agreement facilitating the exchange of sensitive security-related information; and
5. a PRS access agreement that provides for UK participation in the development of the secure, encrypted signal.

Without such an agreement, the paper states Galileo would no longer meet the UK's basic security requirements and the UK "would be forced to pull out of the programme and consider alternative options".

Wider security issues

The paper discussed co-operation on issues including asylum and illegal migration, cyber security, counter-terrorism and countering violent extremism, civil protection and health security.

On asylum and illegal migration, this would involve:

1. Ongoing operational cooperation, for example working with the European Border and Coast Guard Agency (Frontex) to strengthen Europe's external border, and with Europol to combat organised immigration crime;

2. An agreement with the EU to ensure that illegal migrants who have a relationship with, or who have travelled through, the UK or an EU Member State can be returned to that country – and where relevant, have their protection claim considered there. This would require a clear legal structure "facilitated by access to Eurodac or an equivalent system".
3. New UK-EU arrangements to enable unaccompanied asylum-seeking children in the EU to join close family members in the UK, and vice versa;
4. Continuing the UK's strategic partnership with the EU to support work to address drivers of illegal migration by investing in source and transit countries and providing economic and social opportunities in home regions.

On cyber security, the paper states that at the point of exit the UK will be fully aligned with the EU's Network and Information Systems Directive. It states that close collaboration should continue between the UK and the Network and Information Security (NIS) Cooperation Group, Computer Security Incident Response Team (CSIRT) Network, and the European Union Agency for Network and Information Security (ENISA).

The paper calls for a new partnership with the EU on Counter Terrorism and Countering Violent Extremism to support and complement the strong bilateral partnerships the UK has with EU Member States. This would involve "a framework for dialogue on emerging threats, new capabilities and new opportunities, to identify where we can work together in our mutual interests" and "a sharing of best practice and expertise on key issues and themes relevant to counter terrorism and countering violent extremism, and assessment sharing and cooperation through the appropriate intelligence analysis bodies".

On civil protection, it calls for UK participation as a third country in the Civil Protection Mechanism, based on the principles established in EU legislation in 2013.

5. Cross-cutting and other cooperation

Chapter 3 of the White Paper contains proposals for cooperation in cross-cutting policy areas such as data protection, information exchange, science and innovation, development and fishing opportunities.

5.1 Data protection

"data protection arrangements that provide for the continued exchange and protection of personal data between the UK and the EU, and allow for ongoing cooperation between authorities" (Chapter 3, summary)

The White Paper states that the UK "is ready to begin preliminary discussions on an adequacy assessment so that a data-protection agreement is in place by the end of the implementation period at the latest" (Chapter 3, para 9).

The Government wants to make the Information Commissioner's Office (ICO) a full member of European Data Protection Board (Chapter 3, para 10) and believes "its proposals on regulatory cooperation between data protection authorities are in line with the EU's developing thinking on cooperation with third countries" (Chapter 3, para 12).

The White Paper says the EU's adequacy framework[69] provides the right starting point for UK - EU agreement on data protection, but it wants to go beyond that framework (Chapter 3, paras 8a and b):

- on stability and transparency: it would benefit the UK and EU, businesses and individuals, to have a clear, transparent framework to facilitate dialogue, minimise the risk of disruption to data flows and support a stable relationship between the UK and EU to protect the personal data of UK and EU citizens across Europe; and
- on regulatory cooperation: it would be in the UK's and EU's mutual interest to have close cooperation and joined up enforcement action between the UK's Information Commissioner's Office (ICO) and EU Data Protection Authorities.

Direct Marketing Association CEO Chris Combemale said the DMA supported the Government's position on the free flow of data and that this should include continued close cooperation between the ICO and EU data authorities, in addition to regulatory alignment.

In the UK's position paper (technical slides Benefits of a new data protection agreement, 7 June 2018) the Government aspired to an

[69] The Commission can formally recognise that a third country provides an 'adequate' level of data protection under EU law. Any third country can ask the Commission to consider it for an adequacy decision.

international data sharing agreement with the EU rather than an adequacy decision, to allow for participation of the UK regulator in data protection bodies and mechanisms and to make the arrangements more legally robust.

Does the White Paper depart from this aspiration and would it settle for an adequacy decision as a preliminary step towards an international agreement later on? Would an EU-UK data agreement be achievable without UK courts following future CJEU case law on data protection and without the UK having incorporated the Charter of Fundamental Rights into UK law (particularly Article 8) pursuant to the EU Withdrawal Act 2018?

Alternative white paper

The paper states that the UK would seek a new agreement with the EU, which builds on the EU's existing adequacy model for enabling EU personal data flows to third countries. This agreement would provide certainty on the rules governing future data flows to citizens, public authorities, law enforcement agencies and business in the UK and the EU. The UK would also seek an appropriate ongoing role for the ICO to provide valuable cross-border cooperation between data protection authorities.

5.2 Higher education, culture, research and innovation

"a series of cooperative accords that enable the UK and the EU to work together in areas ranging from science and innovation to development and international action" (Chapter 3, Summary)

Higher education

In the Framework for Mobility section, the White Paper proposes facilitating mobility for students and young people, so that they can continue to benefit from EU programmes such as Erasmus+ (Chapter 3, para 36). It points out that the UK "already operates a number of youth mobility schemes with other global partners, for example with Australia and Canada, on which this could be modelled" (Chapter 1, para 86).

It is not clear from the White Paper what the future visa status of EU students will be if they are to be international students. If the UK ends free movement altogether some believe it is unlikely that the EU will allow it to participate in Erasmus+ and parts of Horizon Europe (Swiss Higher Education Institutions could not participate between 2014 and 2016 when Switzerland curtailed free movement).

Vivienne Stern, Director of Universities UK International, said:

> It is encouraging to see that the importance of attracting world class researchers and international students has been acknowledged. We also welcome the UK's proposed participation in Horizon Europe and the next Erasmus programme, which will benefit EU member states as well as the UK.

> We urge the government and the EU to engage and reach agreement on these matters as quickly as possible to provide the certainty that university students and staff need on opportunities to study abroad and collaborate in research.[70]

The Times Higher Education commented that the White Paper "offers nothing on the issue of the fees to be charged to EU students after Brexit".[71]

Research

The White Paper proposes UK participation in scientific research networks such as the European Reference Networks and the European Research Infrastructure Consortia, the European Social Survey and INSTRUCT (Chapter 3, para 30).

The White Paper also envisages the continuation of the PEACE Programme between Ireland and Northern Ireland (Chapter 3, para 24).

In a commentary on the White Paper, Ludovic Highman found both positive and negative elements:

> Encouragingly, the White Paper calls for an accord that will provide for UK participation in EU research funding programme; enable continued cooperation through joint participation in networks, infrastructure, policies and agencies; and establish channels for regular dialogue between regulators, researchers, and experts. However, beyond this statement of intent and the reference to a new cooperative accord there is no detail on how this will be achieved. With regard to EU research and innovation programmes, the UK simply wishes to explore association, based on a range of precedents, with the 16 countries currently associated with Horizon 2020. The government's language is non-committal, at a time when UK universities and their EU partners are looking for certainty.[72]

The author thought much still needed to be fleshed out and that the EU would be looking closely at the UK's financial contributions to research projects before agreeing to the proposed accords:

> New cooperative accords are an ambitious type of arrangement and would gain from being further fleshed out. With increasingly hardline rhetoric from both sides, it is unlikely that either side will be keen to grant concessions, unless a significant gesture on the UK side is made regarding its proposed financial contribution to the EU's research and innovation budget.

Culture and tourism

A new UK-EU culture and education accord (Chapter 3, para 35) would:

- provide for UK participation in EU programmes and allow UK institutions to be partners, associates or advisers to EU projects and vice versa;
- facilitate continued UK membership of EU cultural groups and networks;

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70 Universities UK, Brexit white paper, 12 July 2018

71 UK's Brexit White Paper plans for 'temporary' researcher mobility, John Morgan, 12 July 2018

72 Centre for Global Higher Education and UK in a Changing Europe, The Brexit White Paper: what does it mean for higher education and research? 9 August 2018

- support the restitution of cultural objects where these have been unlawfully removed; and
- allow for the temporary movement of goods for major events.

As part of the proposed accord, the UK would like to "build on existing precedents such as the EU's Cultural Cooperation Protocols with third countries" (Chapter 3, para 40).

Tourism representatives were reported to be cautiously optimistic about the White Paper provisions.[73] The Creative Industries Federation was concerned about how the proposed "mobility framework" would work in practice ("The new system and scope of 'temporary business activities' is unclear, and there are no details on the UK's future immigration system").

The White Paper states that the UK wants to reach an agreement allowing musicians and museums to tour "major events" with their equipment and goods. But "what is considered a 'major event' is not clarified and there are few details on what an agreement would look like". More clarity was called for on broadcasting beyond the Government seeking "the best possible arrangements for the sector" and the statement that the UK would be "open to exploring … continued involvement in Creative Europe" lacked conviction. On the positive side, the authors thought the White Paper provisions on an independent trade policy "could open new opportunities for the creative industries".[74]

Alternative white paper

The alternative paper proposes co-operative accords in science and innovation, culture and education, development and international action, and defence research and development.

On science and innovation it says the UK is seeking an ambitious agreement providing mechanisms to facilitate UK-EU co-operation and encourage bilateral and multilateral collaboration. The UK would want to discuss participation in EU science and innovation programmes, including the Framework Programmes for Research and Innovation, the Euratom Research and Training Programmes, the Health Programmes, Copernicus (the EU's Earth Observation Programme) and Space Surveillance and Tracking (SST).

It refers to a range of precedents for non-EU participation in Union programmes, and says that building upon the unique UK-EU relationship in science and innovation "both parties may agree to go beyond existing precedent when agreeing the terms for UK participation

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73 E.g. see Travel Weekly, Industry welcomes Brexit White Paper, 13 July 2018, and Leisure Opportunities, Tourism bodies welcome Brexit paper "with caution", 16 July 2018

74 Brexit White Paper – impact on creative industries. Need to know summary, 13 July 2018

in Union programmes". The UK would make a fair financial contribution to any programme in which it continued to participate, based on the nature of cooperation between both parties.

On culture and education, it proposes an ambitious cultural accord involving key elements, including supporting the restitution of cultural objects, as well as EU programme participation and temporary movement of goods and people in the cultural, creative and sports sectors.

This would involve continued UK membership of some EU cultural groups and networks, involvement in funded projects, participation in EU education networks and agreement on educational exchanges, including on immigration/visa procedures. It would also involve discussion of UK participation in the Erasmus+ mobility programme for young people.

On development and international action, it proposed that future EU financial frameworks are designed so as to be open to external partners that share the same values and commitments.

5.3 Fisheries

"On leaving the EU, the UK will become an independent coastal state under the UN Convention on the Law of the Sea (UNCLOS). As a result, the UK will control access to fish in its waters, both in territorial seas and the Exclusive Economic Zone (EEZ)" (Chapter 3, para 54)

Leaving the EU will mean leaving the Common Fisheries Policy (CFP). The Government's White Paper on Sustainable Fisheries, published on 4 July, said access to UK waters will be "on our terms, under our control and for the benefit of UK fishermen".[75] The White Paper reiterates this aim, stating that the UK will take back control of its waters and will only concede access through annual negotiations (Chapter 3, paras 60-61):

> As an independent coastal state, the UK will have control over access to its waters from the end of the implementation period. Any decisions about giving access to UK waters for vessels from the EU, or any other coastal states will be a matter for negotiation (para 60).

The White Paper envisages the UK applying the right to control and manage access to fish in UK waters out to the 200 nautical mile limit or the median line. The Financial Times reported that officials expected the UK's aim of restricting the EU's share of fish catches to be "traded away" in the negotiations.[76]

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75 Foreword to Government White Paper, Sustainable fisheries for future generations: consultation document, 4 July 2018. In early July the Government launched a consultation, which closes on 12 September 2018.

76 Financial Times, Brexit white paper's 98 pages and even more questions, 12 July 2018

The former Labour Prime Minister, Tony Blair, commented that in the section on Fishing Opportunities "we agree to negotiate a new fishing framework with the EU, which looks a lot like the old one".[77] But the EU has suggested it is seeking access to UK fishing waters in exchange for a deep future trade deal: the March 2018 guidelines on the framework for future relations state that "In the overall context of the FTA, existing reciprocal access to fishing waters and resources should be maintained".

The UK in a Changing Europe has commented on what the UK will have to do to develop international cooperation when it leaves the CFP:

> In practical terms, the UK's withdrawal from the CFP requires UK authorities to consider what capacities and technical areas they need to develop for the areas that were once managed by the CFP. This is particularly the case for international policy coordination, as the UK will have responsibilities under the UN Convention on the Law of the Sea to co-operate on the management of shared stocks.
>
> Relationships with non-EU countries and international bodies, such as the International Council for the Exploration of the Sea and the North-East Atlantic Fisheries Commission, are currently handled by the EU, so the UK will need to develop these links in addition to managing its relationship with the EU.[78]

The Scottish Fishermen's Federation welcomed the Sustainable Fisheries White Paper as a signal of the Government's intention to take back control of UK waters.[79] The Scottish Government's contribution to the Brexit White Paper supported negotiated access for EU vessels and a sustainability policy based on scientific evidence:

> The baseline position in UK-EU negotiations must, therefore be no fixed levels of access for EU vessels to the Scottish zone, with access forming part of annual coastal state quota negotiations. Preventing permanent, unpaid for access for EU fleets to the Scottish zone is crucial to Scottish fisheries interests. […].
>
> **Current relative stability shares of quota of jointly managed stocks should be maintained at the point of exit. Shares thereafter should be open to variation between coastal states through negotiations.**
>
> As with access arrangements, the Scottish Government firmly believes that all negotiations on quota should take place in the well-established Coastal States fora under the auspices of UNCLOS. We are clear that, regardless of the outcome of Brexit negotiations, the guiding principles of fisheries policy should be sustainability and the setting of quotas in line with scientific advice as required by UNCLOS.[80]

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77 Tony Blair Institute for Global Change, The In-Betweener Solution Is the Worst of All Worlds: Parliament Should Reject It, 15 July 2018

78 The UK in a Changing Europe, The Brexit white paper: what it must address – fisheries, Craig McAngus, Christopher Huggins, John Connolly and Arno van der Zwet, 24 July 2018

79 SFF press release, SFF welcomes UK Government White Paper on fisheries, 4 July 2018

80 Scottish Government, Contribution to the UK Government's White Paper on the Future Relationship with the European Union, June 2018

Alternative white paper

The alternative paper states that once outside the CFP, the UK would seek to establish a mechanism to agree with the EU access to each other's fishing waters and improving the UK's share of fishing opportunities. This would be achieved by ensuring the parties develop a fair and scientific methodology for their allocation.

The paper states that it is in the EU's interest to secure such an agreement with the UK (given the large and diverse fish stocks in UK waters). The paper proposes agreeing the total share of stocks and access through annual bilateral negotiations with the EU and annual trilateral negotiations with Norway and the EU, and the Faroe Islands and the EU for the relevant stocks. Negotiations would be in collaboration with the Scottish Government, Welsh Government and Northern Ireland Executive, recognising that some stocks are concentrated in areas managed by the devolved administrations.

The paper states that the UK is committed to championing and ensuring sustainable fisheries, including by preventing wasteful discarding. An ecosystem approach to fisheries would deliver better sustainable management. This would involve restoring and maintaining the healthy fish stocks and marine environment necessary for a prosperous fishing industry.

6. Institutional arrangements

"The new institutional arrangements should respect the UK's sovereignty and the EU's autonomy, and be sufficiently rigorous such that people across the UK and its wider family, and across the EU and its Member States can depend on them" (Chapter 4, para 3)

6.1 Governance

The UK proposes, in line with the European Parliament, that the future relationship should be based on an Association Agreement (AA) between the EU and the UK, accompanied by other separate agreements covering different elements of economic, security and cross-cutting cooperation. The structure "draws on precedents from other international agreements, which all have some form of institutional architecture" (Chapter 4, para 8), such as the EU's Comprehensive Economic and Trade Agreement with Canada (CETA) and the EU-Ukraine Association Agreement.

The White paper also points to the North American Free Trade Agreement (NAFTA) which establishes a Free Trade Commission and provides for a system of international arbitration for disputes, and the Association of Southeast Asian Nations (ASEAN) trade in goods agreement, which is managed by an ASEAN Free Trade Area Council.

Institutional structure

The White Paper proposes two main institutions:

- A Governing Body which would set the general direction for the future relationship, and
- A Joint Committee which would be directed by the Governing Body and would manage the implementation of the relationship.

The partnership would be subject to a "robust governance arrangements and a dispute resolution mechanism […] supported by comprehensive data protection arrangements" It would include a "mutual commitment to individuals' rights" (Chapter 2, para 19).

The UK proposals raise questions as to whether the AA itself or any agreement coming under its umbrella, or any other agreement not coming under its umbrella, would be a 'mixed agreement' (meaning that it contains elements of EU and elements of UK responsibility). Their legal basis is defined in Article 217 of the Treaty of the Functioning of the EU (TFEU), which provides for "an association involving reciprocal rights and obligations, common action and special procedures".

AAs are mostly mixed agreements and they can be provisionally applied (this is written into the agreements themselves). They can take a long time to ratify as they must be ratified by the European Parliament, the Council of the EU and all the other 27 Member States according to their

own constitutional requirements - which can involve sub-national parliamentary approval and referendums.

Given the length of time it might take to ratify, would the Government seek to have the AA provisionally applied so that it could enter into force from exit day, or at the end of the transition period? Also, if (as the White Paper suggests) not all agreements will fit under the AA 'umbrella', what will the governance structures for those agreements outside the AA look like?

Management of regulatory and legislative changes

The White Paper envisages that there would be UK experts with non-voting seats on the EU committees which draw up standards. The Joint Committee would be notified of a piece of draft legislation, which the UK would scrutinise and decide whether it fell within the scope of the 'common rulebook' and required implementation. The UK would then either implement it or look for alternative existing UK legislation that would be equivalent. If the UK refused to implement a piece of legislation, the parties could consider "proportionate and … localised rebalancing measures" (Chapter 4, para 30ii), including financial compensation, or the UK's market access could be partially suspended.

"If an agreement had been updated to reflect a rule change, this would become a binding obligation on both parties in international law […] The agreed rule changes would also need to be given effect in UK law through domestic legislation" (Chapter 4, para 31). UK failure to implement the change could mean the UK was in breach of its international obligations and the EU could instigate a dispute resolution procedure "and ultimately impose non-compliance measures" (Chapter 4, para 31). The UK would have to keep in step with the EU to prevent a hard border with Ireland.

A question arises as to what "financial compensation" is and whether it is different from a lump sum or penalty payment which the Commission's draft withdrawal agreement posits to ensure compliance. The White Paper cites as a precedent for financial compensation US agreements, including one with Australia. The Australian Guide to this Agreement indicates (on page 123):

> An innovation introduced through this Agreement is the capacity of a government to choose to pay a monetary assessment in lieu of providing trade compensation (Article 21.11.5). This may prove a preferable policy option where: · a breach cannot be rectified – where, for example, a state government measure is at fault and the Commonwealth has no constitutional capacity to intervene, and · the Government does not consider it appropriate that traders in the broader economy should bear the burden of such a breach. Such a monetary assessment will be set at fifty percent of the value of suspended benefits determined by the panel unless agreed otherwise by the governments (Article 21.11.5). The Joint Committee can agree that this monetary assessment be paid into a joint fund and expended on initiatives to facilitate trade between the United States and Australia (Article 21.11.6). Where a Party is found to be in breach of its core commitment (not to fail to enforce effectively the Party's own laws) under the Environment or Labour Chapters (see Chapters 18 and 19), a

> dispute panel can impose an annual monetary fine, not exceeding US$15 million, to be paid into a fund established under the Agreement for expenditure on appropriate labour and environment initiatives in the territory of the country that violated the Agreement, in a manner consistent with its law. The Agreement makes specific provision for a review of the effectiveness of these compensation arrangements within the first five years, or following compensation being provided with regard to five separate complaints, whichever comes first (Article 21.14).

Consistent interpretation

In order to achieve consistent interpretation the White Paper provides that "when courts in the UK or the EU interpret provisions of national legislation intended to give effect to the agreements, they could take into account the relevant case law of the courts of the other party" (Chapter 4, para 33). To what extent will individuals and business be able to claim rights under the agreement itself in the face of inconsistent national law (direct effect)?[81]

The White Paper suggests that private enforcement like this will not be possible in a system like the UK's, where international agreements themselves do not grant right without implementing legislation. Where that legislation is inaccurate or absent, there would be no law for a private party to rely on—unless direct effect would continue to apply. The White Paper does not suggest it will, however. It proposes that the Joint Committee should "keep under review the case law of both the senior courts of the UK and the CJEU where this was relevant to the interpretation of the agreements" (Chapter 4, para 34) and that the Joint Committee "could be empowered to act to preserve the consistent interpretation of the agreements". Where the UK had agreed to adhere to a common rulebook, "the UK would commit by treaty that its courts would pay due regard to CJEU case law, insofar as this was relevant to the matter before them" (Chapter 4, para 35). But UK courts would not be able to make preliminary references to the CJEU and there would be no optional reference procedure like Protocol 34 to the EEA Agreement.

Dispute resolution

The White Paper states that if "efforts to resolve a dispute by negotiation fail after a defined period of time, it would make sense in some cases for either party to have the option of referring the issue to an independent arbitration panel, which would include members from both parties….with the decision of the panel binding on the parties" (Chapter 4, para 41). This section continues:

> 42 Where the UK and the EU had 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 a referral to the CJEU for an interpretation, either by mutual consent from the Joint Committee, or from the arbitration panel.

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[81] The UK Government Paper on Enforcement and Dispute Resolution of 23 August 2017 can be read as not ruling out that the UK Agreement with the EU might have direct effect See an analysis by Carl Gardner.

> 43: This process would be separate to other routes the parties might have for resolving disputes in other international agreements. For instance, the parties could choose whether to raise a dispute through the WTO, where relevant, or through the process set out above.

These provisions go further than Article 111 EEA, which relies on a resolution by the Joint Committee alone where the dispute concerns interpretation of the Agreement other than provisions "identical in substance EU rules".

It is not clear whether the arbitration panel would act by majority as it does under Protocol 33 of the EEA Agreement[82] or whether there would be an exclusive jurisdiction clause equivalent to Article 153 of the Withdrawal Agreement, and if not, why not. Most details of the proposed dispute resolution process will still need to be negotiated between the UK and the EU.

Parliamentary scrutiny

The White Paper sets out a role for the UK Parliament in the proposed system, as follows (Chapter 4, para 54):

> a. Notification: if the EU proposed a change to the rules related to the agreements, the UK would be notified through the Joint Committee and the UK Government would inform the UK Parliament.
>
> b. Scope: in determining whether the rule change was in scope of the agreements in the Joint Committee, the UK Parliament would have the opportunity to provide the Government with its opinion.
>
> c. Consultation and adaptation: there would be a decision in the Joint Committee about whether to add a rule change to the relevant agreement, and whether technical adaptations were required for the UK context. There would be a process for the UK Parliament to be consulted.
>
> d. Legislation: following consultation and adaptation, if the Joint Committee had agreed to adopt a rule change into the relevant annex of the agreement, the UK Parliament would be notified with an explanatory memorandum ahead of any domestic legislative proposals coming forward. The UK Parliament would then scrutinise any legislation to bring the proposals into UK law. As would be its right, the UK Parliament could ultimately decide not to pass the legislation, but it would be in the knowledge that there would be consequences from breaking the UK's international obligations, as there would be for any international treaty, potentially for market access, border frictions or security cooperation

This raises a number of scrutiny issues. Why is the Explanatory Memorandum only provided at the stage of domestic implementing legislation when the international law obligation is already established, rather than at the initial stage? Why could an Explanatory Memorandum not be provided at the notification stage? And at the scope stage, why could Parliament not give its view on the merits? Should there be an equivalent to the current scrutiny reserve resolution

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82 Arbitration under the EEA only applies to the scope, duration, proportionality or rebalancing measures – not interpretation of the Agreement.

at the consultation stage? Does this require a standing committee whose (sole) responsibility is the scrutinising the UK-EU relationship? And if domestic implementation is by subordinate legislation, will it be scrutinised as to merits and the appropriate procedure?

Alternative white paper

The alternative paper proposes governance arrangements that include political oversight and a joint committee, provisions for ensuring consistent interpretation and application of the agreements, mechanisms for resolving disputes, imposing non-compliance and rebalancing measures, and implementing safeguards, and provisions for UK participation in EU bodies, agencies and programmes.

Political oversight would take the form of regular (e.g. biannual) leader-level summits, and formal and informal ministerial dialogue where needed.

The Joint Committee would be made up of officials from both parties responsible for the functioning of the partnership, following the direction set by the Political oversight forum.

Where a dispute between the EU and the UK arose, either party would refer it for consideration by the Joint Committee in the first instance.

Additionally, parts of the agreement would provide for recourse to an independent arbitration panel, for example in relation to the future economic partnership. The paper states:

> Where a dispute arises which concerns the interpretation of provisions of the agreement which are identical in substance to EU law, it may be appropriate for the Joint Committee, or the arbitration panel, to seek an interpretation from the CJEU. This will only occur when both parties agree that this would be beneficial and enable resolution of the dispute in question. This interpretation will be binding on the Joint Committee or arbitration panel. But significantly, it will then be for the Joint Committee or arbitration panel to determine the ultimate decision on the dispute in question – it will not be for the CJEU to decide on the outcome of the dispute.

Where breaches of the agreements are found by the dispute settlement process and compliance is not forthcoming within a reasonable period of time, non-compliance measures may be required. The specific nature of the non-compliance measures would be subject to negotiation, but could take different forms with different non-compliance measures needed for different parts of the agreement. In some instances, suspension of obligations or parts of the agreement "may make sense", whereas in others "financial penalties may be more appropriate".

6.2 UK relations with EU bodies and agencies

"The nature and structure of the UK's participation will vary depending on the EU body or agency in question. In some cases, there may be an appropriate precedent for third country involvement, as in the case of Switzerland's participation in the European Aviation Safety Agency (EASA). In other cases, such as the European

Medicines Agency (EMA) and Europol, the future relationship should go beyond existing third country provisions, in line with the depth and breadth of the proposed relationship" (Chapter 4, para 37)

The White Paper proposes:

- UK participation in EU agencies which provide authorisation for goods in heavily regulated sectors, such as the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA) and the European Medicines Agency (EMA);

- Participation in Europol and Eurojust:

  > providing an effective and efficient way to share expertise and information, with law enforcement officers and legal experts working in close proximity so they can coordinate operations and judicial proceedings quickly – accepting the rules of these agencies and contributing to their costs under new arrangements that recognise the UK will not be a Member State;

- Close cooperation with the European Maritime Safety Agency (Chapter 1, para 135):

  > In the interests of tackling shared safety, security and environmental issues, the UK proposes to continue cooperating closely with both the EU and the EMSA, including sharing information on safety and to counter pollution.

- "collaboration on specific projects, programmes and initiatives, including through the European Defence Agency". The future relationship includes a defence research and capability development accord. The arrangement would include cooperation on the research elements of EU defence programmes and capability development aspects of EU defence programmes (Chapter 3, para 49).

  > This cooperative accord would complement UK and EU capability collaboration through the European Defence Agency (EDA) including: coordination on capability priorities and planning processes; cooperation in specific EDA projects and initiatives; and potential UK involvement in specific European Development Fund (EDF) and Permanent Structured Cooperation (PESCO) projects.

- On cybercrime (Chapter 2, para 103a):

  > close collaboration between the UK and the Network and Information Security (NIS) Cooperation Group, Computer Security Incident Response Team (CSIRT) Network and the European Union Agency for Network and Information Security (ENISA).

UK participation in or collaboration with EU agencies will be decided on a case-by-case basis. Many provide for third-party participation by

means of an EU-third party agreement, but without voting or decision-making rights.[83]

But how realistic is it for the Government to expect continued participation in its agencies of choice? The EU guidelines on the framework for future EU-UK relations state that the EU "will preserve its autonomy in decision-making", so the UK will be excluded from participation in EU Institutions and decision-making of EU bodies, offices and agencies.[84]

Case study: chemicals regulation

The EU's regulatory regime for the use of chemicals is known as REACH. It is managed by the European Chemicals Agency (ECHA). The ECHA website provides several pages of information on the consequences of the UK's exit from the EU with barely a mention of any future relationship. The ECHA has stated that, in the absence of an agreement to the contrary, "British participation [in ECHA] will come to an end" after the UK leaves the EU.

The Lords EU Energy and Environment Sub-Committee held a roundtable on REACH and Brexit with a number of experts in June 2018, followed by an evidence session in July. The Minister, Dr Thérèse Coffey, could not say when the Government would confirm whether the UK will remain part of REACH after Brexit.

So far, the EU has taken a hard line on UK membership of the ECHA. Although the two sides have agreed on a 'standstill' transition period in which the UK continues to apply EU law, the chemicals industry body Cefic and EU regulators appear to assume that the UK will leave without an agreement or transition period and are advising UK-based companies to relocate to the EU27 if they want to retain access to the European market. If this happens, UK industries may lose access to the ECHA database and information on 21,000 chemicals registered for use on the EU market. Associate membership of ECHA is the preferred solution and would mean the least divergence from REACH.

Recognition of jurisdiction of CJEU

The White Paper states that where it participates in an EU agency, it "will respect the remit of the Court of Justice of the European Union. It also acknowledges that UK participation in EU agencies would involve several commitments, including a financial contribution, respect for the rules of those bodies or agencies and for the remit of the CJEU, noting that this would not involve giving the CJEU jurisdiction over the UK (Chapter 4, para 38).

'Not giving the CJEU jurisdiction' would nonetheless mean that if there was a challenge to a decision made by an agency that affected the UK, this could be resolved by the CJEU. But does this give the CJEU a greater role than the UK has conceded before in interpreting EU rules the UK has agreed to abide by?

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83 For further information on possible UK participation in EU agencies, see Commons Briefing Paper 7957, EU Agencies and post-Brexit options, 28 April 2017.

84 For further information on the Guidelines, see Commons Briefing Paper 8289, Brexit: new guidelines on the framework for future EU-UK relations, 19 April 2018. Section 7.1 deals with UK participation in EU agencies and bodies.

It is not clear whether the UK would be a "privileged litigant" in order to bring a challenge to an act of an agency in which it was participating, in the same way that Member States, the EP, the Council and Commission are under Article 263 TFEU.

Alternative white paper

The alternative paper advocates continued UK participation in certain EU bodies, agencies and programmes, including UK participation in or associate membership of the European Aviation Safety Agency, the European Medicines Agency and the European Chemicals Agency.

It would also seek continued cooperation with a number of key EU agencies, including the European Defence Agency, Europol, Eurojust and EU-LISA.

The UK would also want to be able to participate in certain EU programmes across all parts of the relationship.

The paper acknowledges that UK membership of EU agencies would mean the UK applying rules that are identical in substance to those EU rules that are specifically relevant to the agency and making an appropriate financial contribution.

Where the UK participates in EU bodies, agencies or programmes, the UK would respect the remit of the CJEU and abide by the rules that govern them and their decisions. It would also recognise that participation or associate membership of EU bodies, agencies or programmes would involve making a financial contribution. The nature and structure of the UK's participation would vary depending on the EU body, agency or programme.

7. Further reading

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