

The Brexit White Paper Raises More Questions than Answers

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749 days after the referendum, and 470 days after Article 50 was triggered, the UK government has produced the White Paper “The Future Relationship between the United Kingdom and the European Union” with its negotiation position in the Brexit negotiations. This is the first formal statement of the UK’s negotiation stance in the Brexit process.

The White paper, which has prompted the resignation of two senior cabinet members, takes a “softer” form of Brexit than many in the Leave camp had hoped, but has been welcomed by advocates of a closer relationship with the EU. In an interview with The Sun, however, President Trump said that the closer relationship with the EU would likely make a trade deal with the USA more difficult. It also appears that both the EU negotiators and the WTO have reservations regarding the proposed settlement.

The White Paper covers four areas: the economic partnership, the security partnership, cross-cutting and other cooperation and institutional arrangements. The proposed arrangement is a free trade area for goods (including agricultural products), with the UK collecting tariffs for goods ultimately headed to the EU when they enter the UK, in order to allow free trade in goods between the UK and the EU under what is termed the Facilitated Customs Arrangement. However, the UK still wants to leave the Common Fisheries Policy, returning to the status quo prior to the 1888 North Sea Fisheries Convention.

As part of the free trade area for goods, the UK would follow the EU rulebook for goods, including membership (albeit without voting rights) of some EU standards agencies, as well as in areas such as fair competition, environmental standards, labour practices and other areas.

This could allow the UK to set its own tariff levels and make free trade agreements with other countries, although it would be restricted in

some ways by following EU regulations in goods. However, there will be more regulatory freedom for services under this proposal, but with less market access for the UK to the EU – something which has received criticism from some areas, notably the City of London.

The White Paper does advocate the general provisions to lower tariffs on services, in line with the World Trade Organisation General Agreement on Trade in Services obligations, with provisions for the mutual recognition of qualifications. Professional and business services and the financial sector are mentioned specifically, with suggestions to allow the joint practice of UK-EU lawyers and joint UK-EU ownership of accounting firms for the former, and a regulatory equivalence scheme for the latter.

The White Paper also covers other areas where the UK and the EU could work together in the future, including cooperation on security matters such as counter-terrorism, organised crime, defence, cyber security and data protection. The UK also wishes to maintain relationships with the EU in areas of science and culture, seeking to retain participation in programmes such as the Horizon programme and Erasmus, as well as continuing as a member of the Galileo project, something which has become a point of some contention between the UK and the EU in recent months.

Some of the institutional arrangements needed to make the proposed relationship work are set out in the White Paper. Although the UK maintains that it will no longer be under the jurisdiction of the ECJ after Brexit, instead suggesting that an alternative institutional structure is formed, such as in the Canada CETA deal or that forms part of NAFTA, it does suggest that the UK joins the Lugano convention, which covers jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The institutional structure would also involve looking at case law from the ECJ in the UK, and British courts in the EU, in order that the rules are applied consistently across both the UK and the EU.

The EU is likely to have objections to the proposed arrangement, for example whether it does indeed resolve the issue of the Northern Ireland border, as the government contends it does. The apparent aspiration of the EU to provide a “no hard border” solution to the land border between the United Kingdom and the Republic of Ireland

raises a number of fundamental questions that remain unresolved. Most noticeably, the EU proposal seems to violate the basic principle, as explained to the Catalans, of the inviolability of the territorial integrity of its member states. This would not seem to be the case with regard of the Northern Ireland province proposal, and could stimulate currently quiescent separatist movements across the EU. Moreover, if Northern Ireland is to receive differential treatment, why not Wales, Scotland, London and the Midlands? Furthermore, for a supra-national entity such as the EU to effectively challenge the Treaty of Westphalia conventions (1648) and the provisions of UN membership, indicates the complexity of the issues ignored by the Good Friday Agreement – largely because they were not apparent when that settlement was reached.

The EU is also likely to object to the UK effectively staying in the Single Market for goods without accepting the other forms of freedom for capital and labour. They also seem to be uncertain about how the Facilitated Customs Arrangement will work in practice – particularly with regard to the technology required to make the border work. In practice, the arrangement could make it difficult for the UK to strike FTAs with other countries after Brexit, especially in goods. There is more scope for negotiation with services, but FTAs covering services are less common.