

No Divorce—A New Cross-Channel Relationship? The Implications for Business of the UK’s White Paper on Its Future Relationship with the European Union

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Introduction

The UK’s announcement, on 19 March 2018, of plans for a transition period following the UK’s scheduled exit from the European Union on 29 March 2019 was welcomed by business. The transition deal provided some certainty in an increasingly uncertain period: that a so-called “cliff edge” Brexit scenario would likely be avoided, thereby unblocking important investment, recruiting and operational decisions in the short-to medium-term.

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Nonetheless, following agreement in principle on the transition, uncertainty returned in full force to the negotiations over the exit from the EU, culminating most recently in the resignation of three senior members of Prime Minister Theresa May’s Government, including the Brexit Secretary and the Foreign Secretary. This has undermined, to some extent, the Government’s proposed strategy and the “clear vision” that the Prime Minister sought to achieve in respect of Britain’s exit.

Despite these challenges, on 12 July 2018, the Government published its White Paper on the “The Future Relationship Between the United Kingdom and the European Union” (the “White Paper”). In it, the UK Government attempts to set out its negotiation position regarding the EU-UK relationship after 31 December 2020. We analyse below the key aspects of the White Paper, and their likely impact on business, noting that these are only preliminary proposals and the UK’s final negotiating position on each of these matters is subject to change. Indeed, the Government has recently acquiesced to four amendments proposed by Conservative Brexiteers to its Customs Bill which the Prime Minister maintains are consistent with the White Paper but which many believe will make the trade proposals much less likely to be accepted by Brussels.

In General

At its core, the White Paper makes it clear that the UK Government does not see Brexit as a ‘divorce’. Rather, it will be seeking a “new relationship” with the EU, and one that is intended to be “broader in scope than any other that exists between the EU and a third country”. There are two key elements to this new relationship.

Economic Partnership

First, the White Paper states that the UK wishes to continue its economic partnership with the EU. So while the proposal is for the UK to leave the Single Market and the Customs Union of the EU, the White Paper asserts that the UK will be seeking a free trade area for goods. This appears to be an attempt to recognise concerns repeatedly voiced across various industries that modern-day supply chains would be impossible to maintain with the addition of cumbersome customs checks and procedures, and the economic viability of those supply chains would be threatened by potential tariffs. Enabling free trade of goods within the EU, the White Paper says, requires a “common rulebook for goods”, crucial for the continued success of the UK’s largest manufacturing industries, including its automotive sector. A key component of this proposal was that the EU would not apply UK tariffs at its border for goods. On 16 July, only two working days after the publication of the White Paper, the Government agreed to an amendment to the Customs Bill that no customs deal would be struck unless Brussels agreed to collect tariffs on behalf of the UK. This is plainly inconsistent with the White Paper proposals and it therefore remains to be seen exactly how the UK Government will proceed in this regard.

The White Paper also says that the economic partnership would include completely new arrangements for services and digital industries, since the UK will no longer operate under the EU’s passporting regime. The White Paper suggests that this will ensure that Britain is best placed to capitalise on industries of the future, whilst at the same time seeking to preserve the mutual benefits of integrated markets and protecting financial stability. As discussed below, however, it remains unclear how these arrangements would be implemented.

Security Partnership

Second, the UK proposes a security partnership with the EU. The White Paper makes clear that the UK will make an unconditional commitment to Europe’s security on the basis that the UK’s security and Europe’s security are inextricably linked. Although the UK will no longer be part of the EU’s common policies on defence, security, and justice, the White Paper proposes very close cooperation in these areas to maintain existing operational capabilities (including sharing critical data and information), to allow the

UK to participate in key EU agencies, and ensure coordination on foreign policy, defence and development.

Association Agreement

It is further envisioned that these new partnerships and agreements would be structured “around an overarching institutional framework”: a set of separate agreements covering economic, security and cross-cutting cooperation. The most significant of these agreements is the “association agreement”. Similar in nature to agreements entered into by the EU with Ukraine and Georgia, the White Paper suggests that this agreement will lay the foundations of institutional arrangements to ensure some level of accountability regarding challenges that arise from an exit. The association agreement would provide the procedure by which the UK could maintain close regulatory alignment with the EU, while also ensuring parliamentary scrutiny. It is intended that a UK-EU governing body, including a Joint Committee, would be responsible for the effective and efficient administration of the agreements and would also assume responsibility for preventing disputes and/or resolving them through means including arbitration.

As part of this new association, Britain would retain its ability to enter into trade deals with “old friends and new allies” in line with a new trade policy that would allow it to represent itself before the WTO, to conclude trading agreements with third-country trading partners, and to implement its own trade and sanctions regime.

Below is a general overview of issues of specific relevance to businesses.

In Detail

Financial Services

In the White Paper, the Government states for the first time that once the UK has left the EU following the transition period, it “can no longer operate under the EU’s ‘passporting’ regime” on the basis that this is an “intrinsic” part of the Single Market. Crucially, however, it also dismisses the existing “third country equivalence” regime as a suitable alternative, on the basis that third country equivalence lacks the institutional dialogue, as well as the reciprocal supervisory and dispute resolution tools necessary for the UK financial services industry’s continued operations in Europe.

As a proposed solution, the White Paper, foresees some form of “equivalence-plus” or what it terms a “new economic and regulatory arrangement” based on bilateral treaty commitments to underpin the operation of a new regime. Such a bilateral framework would focus on the regulatory autonomy of both parties, with the UK proposing that at

the end of the implementation period, “there should be reciprocal recognition of equivalence under all existing third country regimes”. Such a solution, the UK proffers, would provide businesses with some initial confidence in the new framework.

It remains to be seen how this proposal will play out in negotiations and how the measures that are to be agreed will replicate or replace the current regime. Although the EU and UK start from a place of “identical rules and entwined supervisory frameworks”, there will be significant time pressure on the UK government to agree a position. Businesses are well aware that any move away from the current regulatory alignment will have a significant impact. Precisely how the EU and UK will come to agree on what amounts to “extensive supervisory cooperation and regulatory dialogue” will not become clear until later in the transition period, when it may well be too late for meaningful changes to key strategy decisions that businesses will have made.

Mobility and Movement of People

It has always been the UK Government’s position that leaving the EU would end the free movement of people. We know, too, that the UK and EU have agreed to maintain the status quo on this issue until December 2020, after which a new Immigration Bill will regulate access to the UK.

The White Paper proposes that post-exit day, reciprocal mobility arrangements will be sought with the EU, building on the UK’s WTO/GATS commitments. These will include reciprocal arrangements allowing businesses to transfer and move “talented” people, visa-free travel for tourism and temporary business purposes, and mobility arrangements for students and young people.

As part of its preparations, the Government’s Migration Advisory Committee will publish a report in September 2018, setting out patterns of EU migration and the wider role of migration for the UK economy. Details of the Government’s position are expected to be published following this report.

Interestingly, however, the White Paper does provide for a system which aims to continue mutual recognition of professional qualifications that would enable professionals to freely practice across borders. It sets out a system which covers the same range of professions as the Mutual Recognition of Qualifications Directive, whilst maintaining the right to request predictable and proportionate requirements that professionals should be able to meet. The White Paper also proposes supplementary provisions permitting joint legal practice between the UK and EU, as well as continued joint UK-EU ownership of accounting firms.

Jurisdiction of the European Court of Justice and Civil and Judicial Cooperation

Post 31 December 2020, the Court of Justice of the European Union will no longer have jurisdiction over UK courts, and the doctrine of direct effect and supremacy of EU law will no longer apply to UK courts. There is, however, a general expectation that the UK will nonetheless import significant aspects of EU law and jurisprudence into UK law after this date, and that UK judges would continue to consider EU judgments for guidance on matters of EU law. Most of the details of the arrangements have not yet been articulated.

The White Paper does, however, recognise the benefits of civil judicial cooperation for both the UK and the EU, including the legal certainty that this provides. The White Paper sets out the government's intention to participate in the Lugano Convention post-Brexit, whilst noting that some of the Convention's provisions have already been overridden. There is a proposal that the UK will also seek to explore a new bilateral agreement with the EU, which would cover a coherent package of rules dealing with jurisdiction, applicable law and recognition of judgments. If accepted, these proposals could protect London's role as a leading global centre for dispute resolution.

Data Sharing and Cyber Security

The White Paper states out that the protection of personal data remains of paramount importance. The UK Government's stated aim is to cooperate with the EU to ensure that the future relationship enables continued flow of data to support business activity and security collaboration. As part of this new framework, the UK Government proposes close regulatory cooperation between the ICO and the EU data protection authorities to avoid complexity and duplication. The UK intends for the greatest possible cooperation when it comes to exchanging classified information, scientific research, international development assistance and the development of defence capabilities. It is proposed that the UK and the EU enter into accords for these areas, including an agreement by both parties to make appropriate financial contributions.

It remains to be seen whether the General Data Protection Regulation, recently introduced in the UK by the Data Protection Act 2018, will suffice to ensure future alignment on the issue. Any divergence from the newly implemented data protection regimes, will add an additional layer of operational complexity for businesses.

The Future of the UK/EU Relationship

Overall, while the White Paper is helpful in some ways, it raises many more questions than it answers. Whilst it does set out a few bright-line proposals (notably, that the services industry should not count on passporting or the "mutual recognition"

arrangements favoured by many in the City and previously endorsed by the Government), in most other respects it does not provide a detailed route-map for achieving its vision. Indeed, many of the proposals appear to be aspirational: it is unclear, for example, how aspects of the Single Market for goods will be retained, but completely disparate arrangements will be made for services whilst the UK signs up to an accord on regulatory cooperation. There is a risk that in trying to take into account the views and proposals of multiple interests, the UK Government's proposals are now a 'halfway house Brexit' with which no one will be satisfied.

The White Paper proposals suggest that the UK is seeking a Brexit "à la carte", in view of the "UK's and the EU's deep history, close ties, and unique starting point". This is in spite of Donald Tusk's admonitions that a special deal for the UK will not be possible. It remains to be seen how many of these proposals will be accepted by the EU and how quickly talks can progress.

Given the number of new arrangements proposed, the general view is that it is more likely than not that the next nine months will be insufficient to conclude final agreements on many of these matters, and that a large portion of the 21-month transition period will be spent on further negotiations. There is also the real risk that the political fallout over the terms of the White Paper's proposals can undo the limited progress that has been made and may result in significant concessions and claw-backs, as the recent amendments to the Customs Bill demonstrate. In the circumstances, whilst the proposals envisage a softer Brexit than was initially envisaged, a 'no deal' Brexit remains on the table and businesses should plan accordingly.

For the full text of the White Paper click [here](#).

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Please do not hesitate to contact us with any questions.

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