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The common rulebook in context - reflections on certain aspects of the UK Government's proposal for a post-Brexit UK-EU relationship

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On 12 July, the UK Government published a White Paper setting out its proposal for a future UK-EU relationship, following Brexit.

The type of UK-EU relationship which this envisages is unprecedented, reflecting from the UK's perspective, the UK's unique circumstances as a current EU Member State in full regulatory compliance with EU rules, and a common desire with the EU to avoid a hard border between Northern Ireland and Ireland.

A lot has already been said about a key aspect of the proposals, namely, the creation of a "free trade area for goods", which for all intents and purposes, would entail the UK continuing to participate in the EU's Single Market for goods. At the same time, the White Paper provides for the possibility of the UK continuing to participate in certain services sectors of the Single Market, including aviation and energy, as well as EU policies and programmes relating to, among others, data sharing, science and innovation, defence research, the EU's space programmes, and also involving continued UK participation in certain related EU bodies and agencies.

It is not the intention of this briefing to discuss how the proposal for the UK to continue, effectively, to participate in certain sectors of the Single Market, whilst also ending the freedom of movement of people, would be made to work, given previous statements by the EU27 about the indivisibility of the "four freedoms" (of movement of goods, services, capital and persons) that underpin the Single Market. Suffice it to say here, that the UK's proposal draws on different elements from a number of other international trade agreements, including the EU's Association Agreement with Ukraine. That Agreement covers goods but also certain services sectors in the Single Market, whilst incorporating limits on the freedom of movement of people. Crucially, perhaps, the proposed scope of arrangements in the UK Government's White Paper is comparatively deeper and wider, whilst the core premise underpinning such arrangements is also different, as explained below.

The proposals set out in the White Paper, seek to establish a new UK-EU relationship which is based on the principles of sovereignty and autonomy, not least in relation to each side's respective legal order. Accordingly, subject to certain exemptions where

the UK would continue to participate in specific EU agencies, the Court of Justice of the EU (CJEU) would no longer have direct jurisdiction over the UK, including in relation to the implementation of the “common rulebook”, that is, the body of EU legislation with which the UK would harmonise its domestic laws so as to ensure frictionless trade in relation to goods. Whilst the UK would commit upfront to maintaining such a common rulebook, the White Paper acknowledges that, ultimately, it would be for the UK Parliament to decide whether or not to harmonise domestic legislation with relevant EU laws. At the same time, the decision whether or not to do so, would be taken by Parliament in full knowledge that non-harmonisation would mean a breach of the UK’s international commitments and have consequences, including the possibility of financial penalties, border friction and reduction in market access.

It has been argued that such a system is balanced and fair, creating rights and obligations which are underpinned by appropriate incentives which seek to ensure full and consistent implementation of the common rulebook across the UK and the EU so that trade between the parties is not disrupted. However, there are also challenges with this approach.

The White Paper recognises that “certainty around a common rulebook would be necessary to reassure the UK and the EU that goods in circulation in their respective markets meet the necessary regulatory requirements, removing the need to undertake regulatory checks at the border”. There is no doubt that the EU27 would agree about the need for legal certainty in any UK-EU new arrangements. At the same time, they might be concerned that the proposal put forward in the White Paper does not go far enough to ensure such certainty or indeed, the homogeneity of the Single Market, which would extend, in certain respects, to the UK. This could be disrupted if the UK Parliament were to decide, as it legitimately could, not to harmonise domestic laws with EU legislation which relates to the common rulebook, a possibility which, as noted above, the White Paper fully acknowledges.

Similarly, the proposal for a new UK-EU relationship envisages that whilst the judicial authorities of each side cannot have jurisdiction over the other, in seeking to ensure the consistent interpretation of the common rulebook, there would be an obligation for the UK courts to pay “due regard” to CJEU case law in so far as this is relevant. In cases where there is “significant” divergence between the CJEU’s and the UK courts’ interpretations of legislation underpinning the common rulebook and other aspects of UK-EU agreements, the Joint Committee (the body which, under the proposals, would effectively have the role of supervising the implementation of the new UK-EU arrangements) “could be empowered” to act to preserve the consistent interpretation of the UK-EU agreements.

Separately, in the event of a dispute over the correct interpretation of the common rulebook, the White Paper proposes that there should be an option for a referral to the CJEU for the interpretation of EU law but without the CJEU’s ruling being directly binding on the UK, so as to respect the principle that “the court of one party cannot resolve disputes between the two”. Instead, the Joint Committee itself, or an arbitration panel, would have to resolve the dispute in a way that was consistent with the CJEU’s subsequent interpretation of that particular law.

By comparison, the EU's Association Agreement with Ukraine provides that in cases where that Agreement requires the "approximation" of Ukrainian legislation with EU laws, such legislation must in its "implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Union". Separately, in areas where there is regulatory approximation (essentially, a common rulebook), that Agreement provides that where a dispute raises a question of interpretation of EU law, the CJEU "must" be asked to give a ruling on the question, and such ruling shall be binding on the arbitration panel dealing with the dispute.

It is possible that the more flexible approach proposed in the White Paper to ensuring consistent interpretation of the common rulebook and dealing with divergences or disputes over the correct interpretation of relevant EU laws, underpinning the common rulebook, could be made to work. Equally, it would not be unreasonable for the EU27 to express some concerns about the possibility that in view of the depth and breadth of the new arrangements being proposed, this system might be at once unduly flexible and complex to apply, without raising issues once again about legal certainty, the EU's own legal order and the homogeneity of the Single Market.

Ultimately, it is to be hoped that differences over these and other aspects of the White Paper can be resolved. The recognition that it is in neither party's interest for the UK to leave the EU with no deal, or a meaningful deal, might just be enough to focus minds on the mutual benefits which would ensue from finding a mutually acceptable way forward which preserves as much as possible a close relationship post-Brexit. A difficult and delicate task but not an impossible task.

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