The Red Cell

Blue Touch Paper: Reviewing the Chequers Brexit Text

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Introduction

The Cabinet met at Chequers over 6 July to thrash out an agreed Brexit negotiating document. Initially, only a short summary has been released. This brief paper reviews the key elements that are in it and are potentially controversial.

The core problem underpinning policy difficulties is that the approach that has been taken has been to begin from mirroring EU rules and to try to work backwards, rather than to step back and then work upwards from the basis of a free trade model.

The significant risk is that the deal generates a 'fax democracy'.

This may yet be mitigated to some extent by what we call a **Careening Clause**, if well-crafted; and by refusing to yield over certain areas the Commission is likely to demand even more concessions over than have been traduced here.

Ultimately, a Strongly Mitigated No Deal provides the ultimate guarantee of avoiding a bad deal, but also of providing a good one - if both sides come to the conclusion the Chequers approach is unrealistic.

The core to the controversy

There have been two basic forms of potential trade agreement that could emerge from Brexit negotiations.

The first approach is one based on regulatory alignment, where sectors copy the rules uniformly set out for the Single Market. In the case of Norway, this has historically if slightly simplistically been criticised as the 'fax democracy' approach: mimicking the model without the safeguards contained in the EEA deal would generate here an *actual* 'fax democracy'.

The second model is of mutual recognition. This means that both sides operate different standards, but products (or to a much lesser extent, services) are trusted as being consumer-friendly. The authorities who check those standards are also recognised as being competent and trustworthy. So trade in agreed areas is allowed on the basis of equivalence.

The second model is preferable to the first where it can be achieved, as it allows for a much greater degree of direct democratic oversight and accountability, plus increased flexibility. The negative is that approvals tend to take much longer to be generated, since trust needs to be built up.

However, a key point rightly raised in the ministerial 'Road to Brexit' speeches is that the UK starts from full compliance with EU standards, and fully trusts its certifying agents and authorities. The latter model, based around an ambitious free trade deal (called by some Canada Plus), is a realistic objective, attainable by building out from existing EU-third country precedent and adding a large

number of other areas. Thus there would be an FTA expanded by an additional Association Agreement. This would include clauses to cover how to identify and manage divergence over time.

The problem arising from the Chequers text as it stands is that it endorses the first rather than the second model.

Let's turn thematically to the text itself and what it says on various elements.

(a) Leaving the EU

The document asserts that the UK "will leave the European Union on 29 March 2019, and begin to chart a new course in the world." In itself this is neither contentious (since it is a repetition of a known fact) or informative, since the nature of the future association agreement may be onerous and replicate many of the existing burdens – or it may not.

(b) Baseline model

Strikingly, the introduction to the Chequers paper indicated in passing that there has been a "substantial evolution in our proposals for the UK's future relationship with the EU." This might be interpreted as a shift away from previous ministerial and Prime Ministerial commitments, and confirm that the White Paper when it is released will be based on regulatory alignment. This would confirm wider reading, and be a retreat from previous aspirations.

(c) The 'Common Rulebook'

The Government is describing its regulatory alignment with the EU as a 'Common Rulebook' "for all goods including agri-food." It is hard to see how this could mean anything other than accepting the *acquis* – but not only the existing elements, but future ones also. The qualification that this should be "covering only those necessary to provide for frictionless trade at the border" ignores the track history of Luxembourg case law interlinks wider elements – the most infamous case was circumventing the UK's Social Chapter opt out through Health and Safety provisions.

Significantly, the document states, "The UK would of course continue to play a strong role in shaping the international standards that underpin them." If this point is pursued to its logical conclusion, the UK should be focusing its negotiating efforts at international standards bodies in the first place, while accommodating the needs of UK exporters into the EU market by mutual recognition agreements that don't burden the bulk of the internal market or exporters into other markets.[1]

[1] In passing, we also note the document includes fisheries products as an element to be covered by the trade deal. This area is excluded from EEA terms and so raises possible expectations over maintaining existing levels of CFP-level access by foreign trawlers. The fact that it carries tariffs should not blind us to the high demand for these stocks on the continent.

(d) Parliamentary veto

Under the model given it is stated that "Parliament would have oversight of the incorporation of these rules into the UK's legal order – with the ability to choose not to do so, recognising that this would have consequences."

We have already advocated in a detailed paper elsewhere of the need for Parliament to establish the machinery to do so.[2] Regulatory oversight mechanisms need to be radically reshaped. However, what is critical here is the corollary…

(e) Reciprocation

The success or otherwise of the model set out in this white paper depends heavily on one single element: the mechanism through which managed divergence is able to take place.

Only with a realistic prospect of moving away from the gravitational pull of the EU's regulatory and legislative systems will the UK have any prospect of shifting into an alignment that can no longer be called a 'fax democracy'.

There are two important parallels to note. The first is the Suspension Clause in the EEA Agreement. Article 102 sets out a procedure (which is quite lengthy, and involves prior consultation and review) where one party is failing to implement Single Market rules. It has a number of safeguards but the effect to the Single Market is that the "affected part thereof […] is regarded as provisionally suspended". This element of the EEA is likely to be considered a model for how the UK-EU arrangement is set out. But a key question arises over what might be meant in that environment over the "affected part". If it is wide ranging, it will be a deadly anchor to motoring away from EU regulatory dead weight. If narrow, corporate business lobbyists will more readily take the hit.

This becomes more important when we reflect upon WTO dispute rules. The WTO system allows for retaliatory sanctions, also known as countermeasures. Again there are complex principles and frameworks, but a key element is that the response will only likely be signed off by the reviewing panel if it is proportionate in its effect, which likely means in terms of the value of the goods affected.[3]

What these examples should remind us if that the wording in the White Paper over managed divergence will be of critical importance. If any divergence by the UK from exact mimicry of EU rules risks the Commission shutting down the UK's entire access to the a whole sector, or allow retaliatory action of a protectionist nature, then that will have not so much as a chilling but a deep freezing effect on the process of gradual regulatory divergence.

An ideal model in the White Paper would allow for a process of **careening**, allowing for a gradual transition of managed regulatory divergence, particularly in those areas where the red tape burden

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[2] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/brexits_red_tape_challenge.pdf

[3] See for example https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm

is heavy, by tackling small individual sectors but ambitiously over time. But there is a real concern that the White Paper would mean any changes would at a stroke dismantle entire sectors of the agreement. This would act as a huge deterrent to any attempt at the necessary reform, and would mire the UK permanently.

(f) Existing *acquis*

The summary paper pledges to "agree to maintain high regulatory standards for the environment, climate change, social and employment, and consumer protection – meaning we would not let standards fall below their current levels."

This is, frankly, an astonishing list for a Conservative Government to sign a blank cheque over. It should be noted that (i) each of these areas is associated with high levels of EU red tape, and (ii) none of these need be covered if the Government went for an FTA approach rather than a Shadow EEA settlement.

(g) Extrajudiciality

The Chequers document says that

> "The UK and the EU would establish a joint institutional framework to provide for the **consistent interpretation and application of UK-EU agreements** by both parties. This would be done in the UK by UK courts, and in the EU by EU courts – with due regard paid to EU case law in areas where the UK continued to apply a common rulebook."

The emphasis is in the original. This is subsequently expanded upon in these terms;

> "with no more preliminary references from UK courts, but committing that UK courts would pay due regard to the CJEU's jurisprudence where the UK had chosen to apply a common rulebook to ensure consistent interpretation"

The key is over the commitment to pay "due regard" to CJEU rulings. This contains a measure of dangerous ambiguity, and leaves the prospect open to British judges considering themselves fully constrained by EU precedent. At the very least, it is easy to predict a judge complaining in a ruling that they have an uncertain mandate to go against EU precedent and therefore feel constrained to follow it in the absence of a specific parliamentary mandate, which will be hard to get.

Noticeably, this duty of reference is not stated in the reverse, with respect to the Luxembourg courts towards any UK precedent.

(h) The budget

This document rules out the payment of "vast" annual payments to the EU budget. It does not rule out 'less than vast' payments.

This is a matter for subjective interpretation. But it is also very much in the line of (problematic) previous commitments and is at least not a policy change.

(i) CSDP

The commitment is to "maintain operational capabilities on internal security, and ensure that the UK has an independent foreign policy, with suitable arrangements to work with the EU as required."

However, this is a highly problematic pledge given the level of support Whitehall has been supplying to the development of EU Permanent Structured Cooperation (PESCO). Considerable work has been done exposing this hidden integration.[4] This Chequers commitment is consequently dangerously erroneous, simply through missing the ground reality. The word "suitable" carries a heavy burden here.

(j) Preparedness

The paper agrees to step up preparations "for a range of potential outcomes, including the possibility of 'no deal'."

This is a vital, and overdue, declaration.

[4] http://veteransforbritain.uk/pesco-avoided-but-risks-remain/

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