



After the UK's Brexit White Paper – What's the next move towards a CFTA?

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Summary

The Brexit White Paper marks a significant advance towards setting out how the UK will seek to negotiate a Comprehensive Free Trade Area (CFTA) with the EU. In seeking to secure “free, frictionless and seamless” trade relations in at least several chapters of a comprehensive agreement, this leads straight into the next question of how this objective might be specified in legal and operational terms. The EU for its part has experience with two quite different CFTAs, namely CETA with Canada and the DCFTA with Ukraine and others. While the British debate at home talks more about the Canadian CETA, this seems to reflect the opinions of people who have not looked at the content of the two cases. Of course, for British public opinion, Canada is ‘more like us’. CETA, however, is clearly not in the “frictionless and seamless” category of free trade arrangements. On the other hand, the DCFTA model has some specific features that could help reconcile the British objective of getting “free, frictionless and seamless” market access with some degree of flexibility for negotiation over its commitments for continuing compliance with EU market law. The EU’s likely response to these hypotheses of course is unknown at this stage, except that anything like “free, frictionless and seamless” market access will be subject to rigorous conditions. Finally, there is recent news that immigration from the EU into the UK has fallen drastically in the second half of 2016 since the referendum, which, if confirmed and possibly amplified, greatly eases the context for this very difficult issue.

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978-94-6138-586-4

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1. What the White Paper says

The Brexit White Paper, published on 2 February 2017,¹ substantially elaborating on the Prime Minister's speech of January 17th, sets the stage for the beginning of negotiations once the Article 50 notification is completed. The language is explicit in wanting a Strategic Partnership (and not an Association Agreement), and within that, a "bold, ambitious and comprehensive Free Trade Agreement" for which the acronym could be CFTA, to distinguish it from the EU's two existing 'comprehensive' agreements: namely the Comprehensive Economic and Trade Agreement (CETA) made with Canada and the Deep and Comprehensive Free Trade Area (DCFTA) agreed with Ukraine and others. Comparisons may also be made with the consolidated content of Switzerland's many sectoral agreements with the EU. The EU, however, will certainly also, like the UK, want to make a one-time comprehensive agreement, and avoid the negotiation of different packages of agreements over many years, as happened in the Swiss case.

The White Paper goes into considerable detail over how the UK will seek agreements or arrangements over almost the entire landscape of EU policies, for the single market, crime and terrorism, and foreign, security and defence policies. The main headings are listed in Annex 1 below, with quotations of their key wording, and can be viewed as prefiguring chapters of the agreement to be negotiated. These may be summarised under the following headings (that we adopt here to facilitate analysis):

A. Areas for which 'free' (frictionless, seamless) market access is sought

- Tariff-free trade
- Customs arrangements
- Financial services
- Services (other)
- Telecommunications
- Broadcasting

From the wording of the White Paper, these are the areas where the objective of market access is defined most clearly and strongly. From an EU perspective, these ambitious objectives (free, frictionless, seamless) would require a very high degree of legal compliance with EU law.

B. Other market-related areas where options are under consideration, and the objectives are not yet clearly defined

- Technical standards
- Competition and consumer policy

¹ ["The United Kingdom's exit from and new partnership with the European Union"](#), UK White Paper, Cm. 9417, 2 February 2017.

- Energy
- Transport
- Data protection
- Environmental protection
- Fisheries
- Science and research
- European Union agencies
- Dispute settlement
- Movement of people

From an EU perspective most of these chapters are an integral part of the single market concept and legal structure. The White Paper has at least signalled that the UK regards these as relevant matters, but the drafting gives less indication over how ambitious they would like the future relationship to be for these sectors. Some topics are clearly at the heart of the market access question, notably technical standards, where one would expect the UK to seek a frictionless system. In other areas, transport and science, for example, the UK has very strong interests, and options are surely under consideration if not yet determined. It remains to be seen therefore how many of these sectors the UK might want to 'promote' into our notional category A as the process advances, and for how many the EU itself would demand rigorous commitments as conditions for agreeing free and frictionless market access.

As for dispute settlement and the movement of people, these merit special comment below.

C. Other areas

- Financial, EU budget
- Crime and terrorism
- Foreign and security policy

These chapters are quite different compared to categories A and B above, and should be handled by *sui generis* solutions.

2. Comparisons with CETA, DCFTA and the Swiss agreement

The White Paper is silent on how the trading and market relationships that would be "as free as possible", or "as frictionless and seamless as possible", should be translated into legally operational terms.

For this question, however, the EU has experience with two different models of 'comprehensive' FTAs, the CETA with Canada, and the DCFTA with Ukraine and others. British commentators talk more about Canada than Ukraine, understandably, for those who have not studied the complicated contents of the two cases, since Canada sounds 'more like us'. However the objective difference between the two is that the Canadian CETA makes no reference to EU law, and so has no place for the kind of free, frictionless and seamless trade conditions that the UK seeks.

The difference is vividly apparent from the texts of the Canadian CETA on technical standards, food safety (SPS) and subsidies – see Annex 2 of this paper. The provisions may be somewhat deeper than WTO principles, but they are a long way from being free or frictionless. They are soft cooperation provisions, with no binding force except on matters of procedure.

On the other hand, for technical standards, the UK could easily, as mentioned, remain wholly compliant with European standards, which would be a major instrument for free and frictionless market access for goods. The EU is likely for its part to seek much tougher commitments on subsidies than it did in the CETA negotiations.

Overall this means that a CETA model would not achieve the quality of market access that the UK seeks, whereas a derivative of the DCFTA model could do so.

Also the consolidated set of Swiss agreements comes close to assuring free and frictionless conditions for trade in goods, although not for services.

3. The core mechanism

Free, frictionless and seamless access to the EU market might in principle be possible if the UK were to continue to comply with relevant EU law. But which laws and how would this work? One possible EU response, drawing on its experience with the DCFTAs, would be for the main text of the CFTA treaty to set the objectives for degrees of market access in broad terms, chapter by chapter, linked to annexes listing the relevant EU directives and regulations that would have to be complied with.

These seemingly banal legal-bureaucratic features cover a systemic aspect that could be of considerable practical importance for the UK's case. The key legal point is that the main body of a treaty cannot be changed without the hugely arduous process of renewed ratification by all member states and the European Parliament, making it virtually impossible to accommodate ordinary policy developments. But the annexes can be amended much more simply by joint agreement between the EU and the partner state in their Joint Council or Committees of ministers or senior officials.

The UK's Great Repeal Bill will transfer into UK law relevant EU market law; hence, on Day 1 of withdrawal, the UK would still be in full compliance with the lists of directives and regulations that the EU might want to put into the annexes. But this leads into the next key question: What would happen when the EU adopts new laws, or amends existing ones that are relevant for this or that annex, or when the UK wants to delete or amend some such laws? The EU can further be expected to say that in principle new EU legislation should be taken into account in revisions of the annexes, but this could still allow room for negotiated agreement over which legislative changes are deemed necessary or not. This system is therefore different from the EEA model as followed for Norway, where the updating of the list of EU laws has to be done automatically.

A CFTA of this kind could thus allow some greater flexibility, within limits, for accommodating different preferences, and so could be viewed by the UK as scoring more favourably than the EEA in terms of political sovereignty. The flexibility point may be further illustrated by the differences between the DCFTAs signed by the EU, for example, with Georgia compared to Ukraine. Georgia actually wanted a relatively lighter DCFTA to go with its own track record of a very lightly regulated economy. Thus, Georgia entered into no commitments to replicate EU agricultural policy directives or regulations, an example that the UK would predictably want to follow.² The general point here is that the list of EU laws that are 'necessary' for access to the EU market could at its outer limits be a matter for negotiation. EU lawyers will argue that this detracts from the legal homogeneity of the single market, but the UK is not seeking to be 100% in the single market. Alternatively, one can view the consolidated set of Swiss agreements as having also a degree of flexibility in covering much but not all of the single market.

4. Dispute settlement

The White Paper reviews a list of precedents in various international agreements over how mediation and arbitration mechanisms may be designed without reliance on the Court of Justice of the European Union (CJEU) whose jurisdiction the UK wishes to avoid. In the scenario for the CFTA in which the annexes would be listing much EU law, the EU side will predictably say that the CJEU cannot be ignored. Is there a way around this roadblock? One possible model is to rely mainly on WTO-type dispute settlement mechanisms, but to compromise by reserving only a limited and exceptional role for the CJEU, for which there is a precedent, again in the DCFTA cases.³

5. Movement of people

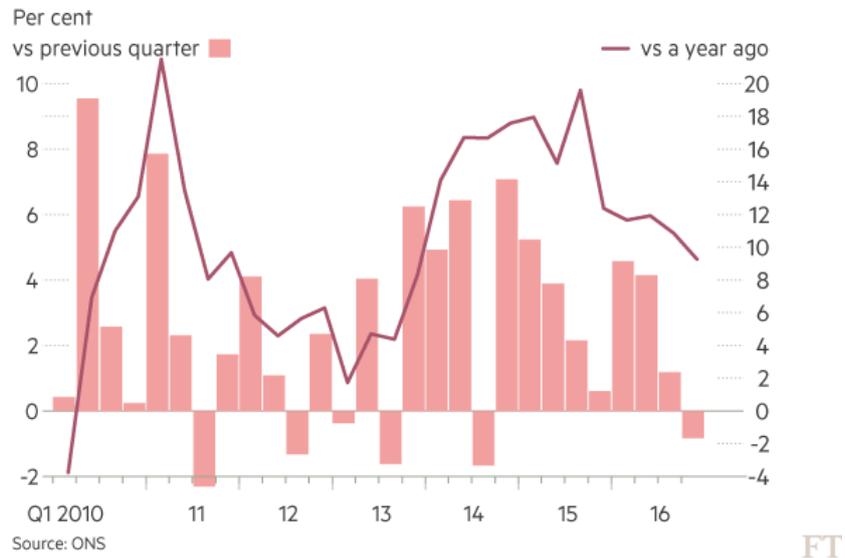
The White Paper gives no indication of how immigration might be controlled. However, important news recently emerged since the referendum indicating that there has been a drastic reduction in net immigration from the EU. For the third quarter of 2016 (i.e. the first quarter after the June referendum), net immigration from the EU fell to 30,000, which is half the quarterly number observed in the preceding three quarters, and for the fourth quarter the number even turned negative (i.e. net migration out of the UK back to the EU).⁴ Compared to one year earlier, there is now a sharply declining trend, which in principle corrects for seasonal variations (see Figure 1).

² EU agricultural policy here, however, is not to be confused with its food safety (SPS) regulations, which have to be complied with for free trade.

³ Article 372.2 of the EU-Ukraine Association Agreement states: "Where a dispute raises a question of interpretation of a provision of EU law..., the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question,. ... The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel".

⁴ Financial Times, "Number of EU nationals working in the UK starts to fall - Figures for the end of 2016 reinforce anecdotal evidence on the impact of Brexit", 16 February 2017. The figures above also come from this source.

Figure 1. Change in number of EU nationals employed in the UK



Given the unpleasant atmosphere towards EU immigrants created during the referendum campaign, and now the uncertainty surrounding their future status in the UK, it is not surprising that these numbers have declined. Caution is still needed, however, in interpreting these figures since the time series of data is quite erratic. But if this new trend is sustained and possibly amplified, the context for the UK's immigration policy is totally changed, calling into question the need for bureaucratically heavy regulations and procedures. The case for a safeguard mechanism, like that adopted by Switzerland in 1999 with EU approval, becomes all the more relevant. The safeguard mechanism would call for the introduction of controls in the event of a new surge of immigration, but would otherwise allow free movement to continue.

Politically this could be extremely important for the UK's search for a smooth Brexit, going a long way towards removing the objection from the EU side that the UK was seeking to benefit for just three of the four freedoms.

Annex 1. Possible chapters for the UK's desired Strategic Partnership and CFTA with the EU

1. Elements of the single market

"That agreement may take in elements of current single market arrangements in certain areas."

2. Tariff free trade

"Our new partnership should allow for tariff free trade in goods that is as frictionless as possible..."

3. Customs arrangement

"... the UK will seek a new customs arrangement"... "for trade to be as frictionless and seamless as possible..."

4. Technical standards

"The European Standards Organisations are not EU bodies, though they have special status with the EU. ... We are working... to ensure that our future relationship with the European Standards Organisations continues..."

5. Competition and consumer policy

"...a common competition and consumer protection framework deals with mergers, monopolies and anti-competition activity and unfair trading within the EU on a consistent basis...", but the text does not say what the UK will want to do with this.

6. Financial services

"In our new strategic partnership we will be aiming at the freest possible trade in financial services..."

7. Services (other than financial services)

"In our new strategic partnership we will be aiming for the freest possible trade in services..."

8. Energy

"We are considering all options for the UK's future relationship with the EU on energy..."

9. Transport

"In the transport sector there is a substantial body of EU law covering four transport modes (aviation, roads, rail, maritime) ... and which will need to be taken into consideration as we negotiate our future relationship."

10. Telecommunications

"... we will want to ensure that UK telecoms companies can operate as freely and competitively as possible..."

11. Broadcasting

“... we will focus on ensuring the ability [of the UK’s broadcasting sector] to trade as freely as possible...”

12. Data protection

“... we will seek to maintain the stability of data protection transfer between the EU ... and UK.”

13. Environmental protection

“... we will use the Great Repeal Bill to bring the current framework of environmental regulation into the UK and devolved law.”

14. Fisheries

“... it is both our interests to reach a mutually beneficial deal that works for the UK and EU’s fishing communities.”

15. Science and research

“We are an active participant in Horizon 2020..... As we exit the EU, we would welcome agreement to continue to collaborate on major science, research and technology initiatives.”

16. European Union agencies

“We will discuss with the EU and member states our future status and arrangements with regard to these agencies.”

17. Movement of people

“... the Free Movement Directive will no longer apply and the migration of EU nationals will be subject UK law.”

18. Dispute settlement

“... the UK will seek a new approach to interpretation and dispute resolution with the EU.”

19. Budget

“As we will no longer be members of the Single Market we will not be required to make vast contributions to the budget.”

20. Crime and terrorism

“As we exit, we will therefore look to negotiate the best deal we can with the EU to cooperate in the fight against crime and terrorism.”

21. Foreign policy, security and defence

“We want to use our tools and privileged position in international affairs to continue to work with the EU on foreign policy, security and defence.”

Source: Quoted text from UK White Paper, Cm 9417, op. cit.

Annex 2. Excerpted CETA provisions on technical standards, SPS and subsidies

Article 4.4 - Technical regulations

1. The Parties undertake to cooperate to the extent possible, to ensure that their technical regulations are compatible with one another. To this end, if a Party expresses an interest in developing a technical regulation equivalent or similar in scope to one that exists in or is being prepared by the other Party, that other Party shall, on request, provide to the Party, to the extent practicable, the relevant information, studies and data upon which it has relied in the preparation of its technical regulation, whether adopted or being developed. The Parties recognise that it may be necessary to clarify and agree on the scope of a specific request, and that confidential information may be withheld.

2. A Party that has prepared a technical regulation that it considers to be equivalent to a technical regulation of the other Party having compatible objective and product scope may request that the other Party recognise the technical regulation as equivalent. The Party shall make the request in writing and set out detailed reasons why the technical regulation should be considered equivalent, including reasons with respect to product scope. The Party that does not agree that the technical regulation is equivalent shall provide to the other Party, upon request, the reasons for its decision.

Article 5.7 - SPS Trade conditions

1. The importing Party shall make available its general SPS import requirements for all commodities. If the Parties jointly identify a commodity as a priority, the importing Party shall establish specific SPS import requirements for that commodity, unless the Parties decide otherwise. In identifying which commodities are priorities, the Parties shall cooperate to ensure the efficient management of their available resources. The specific import requirements should be applicable to the total territory of the exporting Party.

2. Pursuant to paragraph 1, the importing Party shall undertake, without undue delay, the necessary process to establish specific SPS import requirements for the commodity that is identified as a priority. Once these specific import requirements are established, the importing Party shall take the necessary steps, without undue delay, to allow trade on the basis of these import requirements.

Article 7.3 - Consultations on subsidies

1. If a Party considers that a subsidy, or a particular instance of government support related to trade in services, granted by the other Party is adversely affecting, or may adversely affect its interests, it may express its concerns to the other Party and request consultations on the matter. The responding Party shall accord full and sympathetic consideration to that request.

2. During consultations, a Party may seek additional information on a subsidy or particular instance of government support related to trade in services provided by the other Party, including its policy objective, its amount, and any measures taken to limit the potential distortive effect on trade.

3. On the basis of the consultations, the responding Party shall endeavour to eliminate or minimise any adverse effects of the subsidy, or the particular instance of government support related to trade in services, on the requesting Party's interests.

Source: [EU-Canada Comprehensive Free Trade Agreement](#).



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