

THE CHEQUERS CONCLUSION

Briefing Memo

by Martin Howe QC
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1. This memo is based on the press statement issued by the government on 6 July 2018, which lacks details in a number of key areas. However, some important conclusions can be drawn very clearly.

Para 4(a): the "common rulebook for all goods including agri-food".

2. *A "common" rulebook?* Although the phraseology is expressed as being that the UK and EU would maintain a "common" rulebook for all goods including agri-food, this would only be "common" in the sense that the UK would have to obey and apply in complete detail the laws promulgated by the EU without having a vote on the content of those rules. Further, it is clear from 4(c) (dealt with below) that the UK would be obliged to interpret these rules in accordance with rulings of the ECJ under a system which would (whether directly or indirectly) bind UK courts to follow ECJ rulings. In areas where rules relating to goods are applied in a discretionary way under the control of EU regulatory bodies, it is inevitable that the application of the rules in the UK and UK regulatory bodies would continue to be bound by the decisions of EU bodies in the same way as if the UK were still a member state but without a vote or voice within those institutions. This would amount to a permanent vassal relationship in the area covered by the 'common' rulebook.

3. *Ability to change current laws?* There is no indication in the text of the statement that the UK would have any ability to change any of the existing body of EU laws, however damaging they may be or become in the future - for example where restrictive EU laws block the development or deployment of new technology, such as in the biotech area where the UK has a huge opportunity to develop its leading industry and to sell its expertise and products around the world. In order supposedly to benefit the 12% of our economy which consists of exports to the EU, we would accept a binding obligation to freeze the laws which cover 100% of our economy consisting of domestic production and also imports from third countries (see further below). In political and constitutional terms, it would mean that Parliament would not be free to alter laws in the field covered, however strong the wishes of voters. The present democratic deficit whereby Parliament is unable to alter laws in the field covered by EU competences would be worsened, since UK voters would lose their current (limited) ability to press for changes to EU laws via the UK government or via MEPs.

4. *Obligation to follow future changes to EU laws.* The statement tells us that the UK would “commit by treaty to ongoing harmonisation” in the area covered by the EU rulebook. First, it states that Parliament would have “oversight of the incorporation” of new EU rules into UK law, which suggests simply the continuation in substance of the current EU setup whereby most changes to UK law in order to implement EU directives are made by statutory instrument under s.2(2) of the European Communities Act 1972. In practice, most such SIs are made by negative resolution procedure and so Parliament exercises “oversight” only in the sense of

not exercising its theoretical right to vote down an SI.

5. Secondly, it is said that Parliament would have “*the ability to choose not to*” incorporate future changes into UK law “*recognising that this would have consequences*”. It would appear that the government will request a theoretical right not to implement future EU law changes but in return will accept a treaty which allows the EU to impose “*consequences*” if this theoretical right were to be exercised. It is worth noting that a similar theoretical right under the EEA Agreement not to follow future changes in EU internal market laws has never been successfully exercised, with Norway being forced to back down in 2013 from its refusal to implement the Postal Services Directive in the face of threatened countermeasures by the EU. Thus, it would appear that this reference to a theoretical right for Parliament to block new EU laws is included for reasons of political tokenism and is unlikely to be of real practical value.

6. *Impact on UK's international trade policy.* In addition to hobbling the UK's domestic economy, the so-called ‘common’ rule book would require the UK to apply EU laws against imports from third countries. Most trade agreements today are about far more than tariffs, but deal with the removal or reduction of non-tariff barriers which arise from differing regulatory laws or systems. Most developed countries have in place laws which deal satisfactorily with, for example, keeping dangerous food, medicines or other goods off the market, but the details of those laws may differ widely. Therefore “mutual recognition” involves accepting that goods from another trade partner and which satisfy their own laws on the subject of, say, food safety, are not going to poison people if imported, so should be allowed in. An obligation to follow the EU

rulebook on goods would prevent the UK from entering into mutual recognition agreements on goods.

7. This problem is particularly acute in the area of agriculture and food, where many aspects of current EU laws are not based on genuine safety issues or scientific principles, but rather are framed in order to protect EU producer interests and methods against imports from outside the EU. A particularly egregious example are the EU's current unscientific and technophobic rules against improvement of crops or livestock using DNA technology. The USA in particular has (under all colours of administrations) had a long standing objection to the EU's unscientific and protectionist rules in the agriculture field, and the idea that the USA would accept a trade agreement with the UK in which the UK maintains the EU's existing corpus of non-tariff barriers against US imports is for the birds. Similar objections would be likely to arise on the part of Australia given its large agricultural export interests, so this "common rulebook" policy is likely to destroy at one stroke the two most attractive and achievable post-Brexit free trade agreements for the UK.
8. *Scope of the "common rulebook"*. The area of EU laws which the UK would be obliged to apply is said to be "*only those necessary to provide for frictionless trade at the border.*" However at minimum this would cover all laws and rules which have to be complied with by goods placed on the single market, including those regulating methods by which they are produced, inspections and certificates, etc, and rules relating to how they are packaged and presented on the market. This is a very wide field indeed. An example is the detailed EU rules on the requirements for labelling vacuum cleaners with energy test results, which were framed by

the Commission to require tests to be performed in a way which gave an advantage to German manufacturers over Dyson's more efficient bagless designs. These particular rules were successfully challenged at one stage by Dyson in the ECJ (Case C-44/16 P *Dyson Ltd v. European Commission*, 11 May 2017), but more recently Dyson may suffer a reverse since an ECJ Advocate-General has expressed the view that EU law does not permit Dyson to display supplementary information about its own tests alongside the officially required EU flawed energy tests: Case C-632/16 *Dyson Ltd v. BSH Home Appliances NV*, AG Opinion 22 Feb 2018 - the ECJ's judgment is expected.

9. The Dyson case illustrates how the EU regulatory system for goods can already be skewed in favour of Continental interests and against British manufacturers. More significantly, the system is skewed in favour of existing technologies and against innovators. Once we leave the EU and no longer have a vote on the framing of these type of rules, the EU will have a positive incentive to frame its rules in order to disadvantage UK producers who will be obliged to follow those rules.

4(b) "reciprocal commitments related to open and fair trade"

10. While it is normal for Free Trade Agreements to contain some flanking provisions relating to open markets and state subsidies, the width and detail of what is proposed is far greater than would be accepted or acceptable in an agreement between any independent country and the EU. There is a commitment to apply a "common rulebook" on state aid. While the principle of restricting state aids is acceptable, this would imply the acceptance of the EU's detailed state aid rules, so not allowing the

UK to apply such rules flexibly and with the interests of its industries in mind.

11. Of even more concern is that the UK would 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 the current levels.*” (Emphasis added). The problem with this is not a general requirement to maintain high standards, which we would want to do anyway, but the commitment not to let standards in these areas “*fall below*” current levels. Any changes to our rules in these areas which improves the competitiveness of UK industry would almost certainly be interpreted by the EU as allowing our standards to “*fall below*” current standards. This commitment is therefore an extremely dangerous one to undertake, particularly if it were linked to a binding enforcement mechanism and even more so if that binding mechanism ultimately becomes the ECJ (see below).

Para 4(c): “consistent interpretation and application of UK-EU agreements” - putting the UK on a par with Moldova

12. This paragraph first states that the interpretation and application of UK-EU agreements would be done “*in the UK by UK courts, and in the EU by EU courts.*” This is what one would expect with any treaty arrangement. This subject has been covered in depth and the principles explained in “*Adjudicating Treaty Rights in post-Brexit Britain: Preserving Sovereignty and Observing Comity*”.¹ Put shortly, there is nothing wrong with the courts

1. Paper by Martin Howe QC, Francis Hoar and Dr Gunnar Beck, available from Lawyers for Britain at <http://lawyersforbritain.org/adjudicating-treaty-rights-in-post-brexit-britain>

of the parties to an international treaty looking at each others' judgments, reading them with mutual respect, and trying to be consistent with each others' interpretation if they can. This is indeed a general principle of international judicial comity in the interpretation of treaties.

13. However, it is important that this process should be mutually balanced (i.e that the ECJ and Member State courts should pay just as much attention to judgments of UK courts as vice versa), and absolutely essential that it be non-binding. Para 4(c) indicates that "due regard" will be paid to EU case law in "common rulebook" areas. This lacks mutuality - there is no suggestion that EU courts should pay "due regard" to UK courts, immediately unbalancing the relationship and placing UK courts in an inferior position. More importantly, the phrase "due regard" will be coloured by the ECJ reference procedure mentioned later in that paragraph.
14. The paragraph states that there shall be a dispute resolution procedure involving in many areas "*binding independent arbitration*". This is commendable. Indeed, as we argue in the Adjudicating Treaty Rights paper,² a neutral and balanced (ie. balanced between the UK and EU, with a neutral chairman) international arbitration mechanism is the normal and appropriate mechanism by which parties to international treaties agree to resolve their disagreements, and is the normal mechanism contained in the EU's own trade and association agreements with non-member states.
15. However, para 4(c) goes on to indicate that the binding "*independent*"

2. See previous footnote.

arbitration procedure will accommodate *“through a joint reference procedure the role of the Court of Justice of the European Union (CJEU) as the interpreter of EU rules, but founded on the principle that the court of one party cannot resolve disputes between the two.”* This Delphic and seemingly self-contradictory sentence is extremely important, and needs to be carefully unpacked to be understood.

16. The first point to appreciate is that the ECJ has held that if issues of EU law are referred to it, its answers must be binding. In its formal Opinion 1/91 on the proposed EEA Court, it said:

“61 ... it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding.”

17. Therefore it is impossible to implement the proposed “joint reference” procedure without the ECJ’s rulings being given binding effect, which will necessarily overrule any contrary judgments of the UK courts. This envisaged “joint reference” procedure would appear to be based on the procedure in the EU-Moldova Association Agreement. In preparation for its hoped for accession to the EU, Moldova has agreed to align wide areas of its domestic law with EU law, and also to align the interpretation of that law, in preparation for its hoped-for accession to the EU. The key mechanism by which this convergence in interpretation is to be achieved is, under Article 403(2) of the EU-Moldova Association Agreement, an obligation on the arbitral panel in an EU-Moldova dispute to refer issues of interpretation of provisions of the Agreement which reflect EU law to the ECJ, rather than deciding those issues for itself. Although formally

it is the function of the arbitral tribunal to rule on the dispute between the EU and Moldova, where the dispute is over the content of the EU based rules which Moldova is to apply, it is the ECJ which has the sole power to rule on the issue. Thus the closing words of para 4(c) of the Chequers statement - *“the principle that the court of one party cannot resolve disputes between the two”* are formally correct, but are in fact empty of substance if this mechanism is used.

18. One can see the logic of entering into that kind of relationship from the point of view of a country which is aligning its laws in preparation for membership, but it is wholly incompatible with the status of the UK as an independent state when it has departed from the EU. When we leave the EU on 29 March 2019, the ECJ will cease to be a multi-national court in which we participate alongside other members, and will become an entirely foreign court owing its loyalties solely to the EU itself and its Member States. It is virtually unheard of in international relations for any independent state to agree to be bound by the organs of the other treaty party if there is a dispute over the interpretation or application of treaty. As a practical matter, the UK's treaty obligations in the relevant areas will be like signing a blank cheque on which the detailed words can be written in by an organ of the EU. By participating in this mechanism, the UK will be placing itself lower than any other independent state which has a treaty with the EU, and on a par with Moldova.
19. The existence of this mechanism will in turn affect the approach of the UK courts to how they interpret and apply the concept of paying *“due regard”* to ECJ jurisprudence. While (it would appear at least) direct

references from UK courts to the ECJ will cease,³ it is likely that the UK courts will reason that there is no point in them departing from EU case law, even if they disagree with it, since it will just end up in an arbitration in which the issue will be sent to the ECJ whose ruling will then be binding on the UK. The courts adopted very similar reasoning in deciding that they were effectively bound to follow clear and consistent jurisprudence from the Strasbourg Court when applying the Human Rights Act 1998, even though the Act itself merely required the courts to “take into account” Strasbourg Court rulings.⁴

20. Para 4(c) does not make clear what areas will be covered by this “joint reference” procedure, but presumably at least the whole “common rulebook” area would need to be covered, or at least the EU would insist on that. In the areas covered by the “joint reference” procedure, even if formally instructed to pay “due regard” to it, the UK courts are likely to treat the case law of the ECJ as *effectively binding* and in any event if they do hold to a view contrary to that of the ECJ it is likely that that view will eventually be overruled via the arbitration and joint reference procedures. So while the direct route of preliminary references from UK courts to the ECJ will be ended, it will still remain the case that as a matter of substance UK courts will be bound by the future jurisprudence of the ECJ in the areas covered by the “joint reference” procedure.
21. The claim made in para 6(g) of the Chequers statement that this proposal

3. Except in citizens’ rights cases where the UK has already conceded that such references may continue to be made in cases which commence up to 8 years after 31 Dec 2020.

4. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

would “*restore the supremacy of UK courts*” is therefore simply not correct. While the mechanism by which our courts would be overruled by the ECJ would be changed to one that is more indirect, they would remain subject to the ECJ’s case law.

Para 4(d): "Facilitated Customs Arrangement"

22. This paragraph is very difficult to understand in the absence of any detail. However, the first and most obvious and indeed important point is that the attempted introduction of the “FCA” would cause significant delay before the UK can leave the EU customs union and choose to set its own tariffs, whether by unilaterally changing them or abolishing them against free trade partners. We are now already over two years after the referendum. It beggars belief that it should be contemplated that administrative issues about customs processes could be allowed to dictate the whole trading future of the UK by preventing us from implementing tariff changes even after the end of the implementation period (31 Dec 2020 - 4½ years after the referendum). Yet this seems to be the message of this paragraph. This would be severely damaging to the political prospects of the government and of the Conservative Party, since it would remove the chance of giving tangible benefits of Brexit before the next general election to low income families by removing or lowering tariffs on goods, particularly those where the UK has no or limited producer interests to protect.
23. The multiple problems of the so-called New Customs Partnership (NCP) were addressed in a 30-page briefing note which has become publicly

available.⁵ The FCA attempts to address (as far as one can see from this text) only one of those numerous problems, which is that under the NCP, EU-level tariffs would have to be collected on all imports to the UK from the EU, and then importers would have to claim a rebate in order to import tariff free. It does so by indicating that EU level tariffs would be collected on goods shown to be destined for the EU, and UK level tariffs on goods destined for the UK, leaving only a residual “uncertain destination” category (claimed to be a small percentage of imports) to which the “pay the higher rate and claim rebate” system would apply.

24. The problem with this solution however is that goods which are declared on importation as “UK destination” then need to be tracked down the supply chain in order to make sure that they really do end up at a UK consumer. This entails the need for a tracking mechanism in order to track individual goods down supply chains, imposing costs on businesses importing goods for UK consumption and upon their customers who sell on the imported goods in turn. It is most unlikely in any event that the EU would be satisfied that such a system would be sufficient to prevent leakage of goods into the EU. But more fundamentally, it would appear that this system is vulnerable to a successful challenge that it breaches the national treatment principle in GATT Art. III. This is one of the most fundamental principles of the WTO system. WTO Members are not allowed to impose burdens on imported goods (apart from permissible tariffs levied at the point of importation) which treat those goods less favourably than nationally produced goods. The obligation to subject goods imported from WTO Members to burdensome tracking obligations

5. <https://europeanfoundation.org/customs-partnership-briefing/>

to which nationally produced goods are not subject would appear to be such a prohibited measure under GATT Art. III.

25. The FCA introduces a new problem compared with the NCP, in that (at least as far as one can see from the paragraph) there is no means of preventing goods flowing into the UK via the EU which come from countries against which the UK is imposing higher tariffs than the EU. This would come about (1) when the UK imposes trade protection measures (e.g. anti-dumping duties) on goods from a country and the EU has not matched those UK measures itself; and (2) where the EU has entered into a free trade agreement with a country where the UK does not have a matching FTA. Imports from that country could then flow into the UK tariff free by travelling via EU ports, so undermining the UK's negotiating leverage in getting the country concerned to enter into an FTA with itself. But there seems no suggestion that the EU will be asked to undertake reciprocal obligations (ie. collecting UK level tariffs on goods bound for the EU when UK tariffs are higher, and imposing tracking obligations on third country goods imported into the EU in order to make sure that they do not migrate into the UK). Indeed even where the tariffs are the same, there seems nothing to prevent companies importing their goods into EU ports for reasons of pure convenience and paying the tariffs on UK consumed goods to the EU rather than the UK.
26. Further, there is no answer, at least in this short text, to a fundamental problem with the NCP to do with Rules of Origin Controls. That problem is that an FTA between the UK and the EU would not mean that UK manufactured goods would be entitled to enter the EU tariff free. That would only apply if the goods satisfy rules of origin controls as

“originating” in the UK. For example, cars assembled in the UK with a non-EU non-UK content above a certain threshold would not count as of UK origin for tariff purposes and the EU would be entitled, and indeed bound under WTO rules, to collect import tariffs on such cars. It is not sufficient just to collect EU level tariffs on the components: that would not satisfy WTO rules. This means (in the absence of some mysterious and magical solution within the details of the White Paper) that customs controls will still be required to operate between the UK and the EU under the FCA, so destroying its central point.

27. It is hard to take this latest evolution of this long running saga as a serious proposal capable of actual implementation. Rather, it seems to be a plan put forward in order to cause delays to the inevitably necessary processes of implementing post-Brexit customs controls between the UK and the EU.⁶

The negotiation process

28. These Chequers proposals are the starting point rather than the end point of the negotiating process, and therefore any final deal (if a deal is negotiated) is likely to contain further concessions above and beyond those proffered up by the UK at this stage. It will not be acceptable for the EU to permit the UK to (as it puts it) “cherry pick” the goods element of the single market, without also accepting the obligations of the rules on services, the rules on the free movement of persons, and the obligation to contribute to the EU budget for reasons of claimed

6. Which does **not** mean that they must be enforced by means of physical installations at the Irish land border.

“solidarity”.

29. However it is unlikely that the EU will reject these proposals outright. Rather, it will suggest that they go some of the way but not far enough, and keep the UK inside the “lobster pot” delaying the UK’s no-deal concessions until time runs out and the EU can demand further concessions in return for graciously “granting” the transition period. We are therefore firmly on course for a “Black Hole” Brexit in which the UK continues to subject to most of the obligations of EU membership, is firmly stuck in the EU’s regulatory tarpit and prevented from developing our economy away from trade with the EU towards trade with the rest of the world, we are unable to take advantage of the freedom of Brexit to improve the competitiveness of our economy or respond to the demand of our citizens for changes to the laws which govern us, and we will no longer have the voting rights and treaty veto rights which we enjoyed as an EU member state.

30. It is sometimes said that it is best to get any deal on leaving the EU, and then try to fix it later. This would be extremely difficult. To get out of the wide ranging and permanent obligations which are envisaged, it would be necessary to give notice to terminate the agreement or the EU would simply have no reason to negotiate. Giving such notice would generate Project Fear 3.0 and the same hysterical nonsense that the country would be “crashing out over the cliff edge into the abyss”. Further, the envisaged agreement might contain clauses which lock the UK in legally for a longer period, such as an agreement to keep tariffs aligned with the CET unless and until the EU is satisfied with procedures at the Irish border. At least as an EU member we have the right under Article 50 to

leave on 2 years notice; under the proposed agreement we could be left in the Black Hole without that right.

Conclusions

- (1) The Chequers proposals would involve the permanent continuation in the UK of all EU laws which relate to goods, their composition, their packaging, how they are tested etc etc in order to enable goods to cross the UK/EU border without controls. All goods on the UK manufactured in the UK for the UK domestic market, or imported from non-EU countries, would be permanently subject to these controls.
- (2) There would be a general obligation to alter these laws in future whenever the EU alters its own laws, with a mechanism for Parliament to block such changes which is probably theoretical rather than practical.
- (3) This would put the EU in a position to fashion its rules relating to goods so as to further the interests of continental producers against UK competitors, when we will have no right to vote on those rules.
- (4) The obligation to follow the EU rulebook for goods would gravely impair our ability to conduct an independent trade policy. In particular, it will prevent us from including Mutual Recognition Agreements for goods in trade treaties and this is likely to destroy the prospect of successfully achieving meaningful agreements with some of the prime candidates such as the USA and Australia.
- (5) The ECJ jurisdiction proposals would put us in the same position

as Moldova, an applicant/suppliant state which is willing to accept binding ECJ rulings on the conformity of its laws with EU law as part of the preparations for its accession. Quite why this is thought to be a suitable model for a country which has left the EU and is the 5th largest economy is unclear. The supremacy of the UK courts over laws in the UK would not be restored, contrary to the claim made in para 6(g) of the statement.

- (6) The new “Facilitated Customs Arrangement” seeks to solve one of the problems of the NCP (collection of EU level tariffs with rebate system on goods destined for the UK market) by imposing on UK-destined goods the administrative burdens of a tracking system. This would (1) increase the likelihood of this system being found in breach of the national treatment principle in GATT Art.III, and (2) apparently extend yet further the timescale for implementation of this Heath Robinson system, locking the UK in the mean time into the EU’s common external tariff, preventing the electorate from benefiting from Brexit in time for the next General Election.
- (7) However, there is no indication at least from what has been made public that the FCA has solved or alleviated any of the other problems of the NCP proposal. It is not clear how the problem of rules of origin controls on UK manufactured goods imported into the EU will be addressed in the absence of customs controls on the UK/EU border, or how this issue can be solved compatibly with WTO rules.
- (8) These proposals will not be accepted by the EU since in their

perception they amount to unacceptable “cherry picking” of the “benefits” of the single market. However the EU is unlikely to reject the UK’s position outright, but will instead keep the UK inside a “lobster pot” where it negotiates rather than prepares for no-deal while the negotiation time runs down and when the EU will demand huge last minute concessions in return for not taking away the transition period.

- (9) These proposals therefore lead directly to a worst-of-all-worlds “Black Hole” Brexit where the UK is stuck permanently as a vassal state in the EU’s legal and regulatory tar-pit, still has to obey EU laws and ECJ rulings across vast areas, cannot develop an effective international trade policy or adapt our economy to take advantage of the freedom of Brexit, and has lost its vote and treaty vetos rights as an EU Member State.