

Trade and Brexit: Taking Stock

Regulating for Globalization

31/07/2018

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Please refer to this post as: Maria Kendrick, 'Trade and Brexit: Taking Stock', Regulating for Globalization, 31/07/2018, <http://regulatingforglobalization.com/2018/07/31/trade-brexit-taking-stock/>

The complexities of the Brexit process are highlighting many divisions in UK law and politics, not least in the UK Parliament itself, as it seeks to legislate in order to supply the necessary legal foundations that provide for Brexit. Having successfully enacted the European Union (Withdrawal) Act 2018,^[1] which received Royal Assent on 26 June 2018, the Conservative Government had to face the challenge of trying to find an agreed semantic formulation for the negotiations with the EU, especially in the areas of trade and customs. The prominence of these two areas in particular, is a result of many factors, including but not limited to, trying to resolve the issue of the border between the island of Ireland and Northern Ireland.^[2] The timing which has precipitated the prominence of these two areas is a consequence of the Parliamentary votes on the Trade Bill^[3] and the Customs Bill,^[4] as well as the impending EU summit in October. The intention of this blog post is to provide a brief update on the state of play reached before the summer UK Parliamentary recess, with a view to the EU summit in October 2018.

To try and dissolve divisions between pro-Leave and pro-Remain Ministers in the Cabinet, the Prime Minister organised a meeting at Chequers on 6 July 2018. The resulting statement proposed a 'common rulebook' on goods, but not services,^[5] and the phased introduction of a 'facilitated customs arrangement'^[6] whereby the UK would apply and collect a system of UK tariffs on goods intended for the UK, and apply and collect the system of external EU tariffs on goods intended for the EU. Semantics aside, the UK Government's trade proposals have only developed marginally with the Chequers statement,^[7] which has generally been based on perceptions of alignment with EU rules for trade in goods to ensure the maintenance of standards and to capitalise in negotiations on the fact that the UK has been trading on the basis of EU rules for so long. Divergence is therefore only likely to occur over time and in a piecemeal fashion, if at all. Despite the lengthy Parliamentary debate on the Chequers statement that followed soon after,^[8] more detailed proposals were awaited in the ensuing White Paper, particularly in relation to services.^[9]

The White Paper entitled *The Future Relationship Between the United Kingdom and the European Union*,^[10] does provide proposals on both goods and services. With regard to the former, there is more detail in the White Paper

than the Chequers statement, as was to be anticipated, but essentially the substance remains the same. With regard to the latter, there is a clear intention to diverge from EU rules with the UK Government seeking 'new arrangements on services and digital'[11] as well as 'new economic and regulatory arrangements for financial services'[12] so as to provide regulatory freedom.[13] The Prime Minister made clear in Parliamentary debates that the genesis of this split between what the UK is seeking on goods in comparison to the regulatory autonomy sought for services, is the opinion that there is no similar single market in services as there is in goods.[14] The Prime Minister therefore wants to ensure flexibility in relation to services,[15] in part because of the key role services play in the UK economy, and in part because she and (at least some members of) the Government do not recognise the same obligations to align under EU law on services as they do under EU law on goods.[16]

The importance of the contents of these statements and proposals resonate beyond the imposition of collective ministerial responsibility in the Cabinet, which helped to induce two high profile Ministerial resignations[17] that engendered so much political attention. They informed the Parliamentary debates on the legislation that is to provide for Brexit, and specifically crucial tabled amendments to the Trade and Customs Bills, which sought to legally restrict the Government's hand in negotiations, including an attempt to bind the Government to remaining within a customs union with the EU should a free trade area not be agreed in negotiations. There had been many such amendments to the European Union (Withdrawal) Bill before it was enacted,[18] including attempts to make adoption of the Norwegian model a negotiating objective,[19] which the Government managed to see off, at least in the House of Commons. The more significant challenges to the Government were also successfully defeated in the Commons on both the Trade and Customs Bills.

The Customs Bill was up first on 16 July 2018. New clause 36 was intended to prevent the UK collecting tariffs on behalf of the EU unless the EU agrees to collect them for the UK. This clause was agreed by 305 votes to 302. New clause 37 was to make it unlawful for the government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain. This amendment was agreed without a vote. Amendment 72, which was also agreed without a vote, was intended to ensure that any customs union between the UK and the EU must be approved by a separate Act of Parliament, which is an alteration to the existing legislation that only requires approval by an affirmative Resolution. The Trade Bill followed on 17 July 2018. This Bill is linked to the Customs Bill in the sense that they are to supply the legislative combination to implement trading and customs arrangements post-Brexit. The Trade Bill, specifically, is intended to form the legislative framework for implementing international trade agreements once the UK leaves the EU.[20] It was the Trade Bill which saw a cross-party amendment in the form of new clause 18, which was intended to make customs union membership an objective if a free trade area for goods cannot be agreed. This failed by 307 votes to 301. A narrow victory for the Government.

While both Bills made their way to the House of Lords before the summer

Parliamentary recess, there remain continuing divisions over Brexit, as the slim margins by which some amendments passed, or were blocked, demonstrate. This is as true in Parliament as it is in the country, and has prompted as many calls for a second referendum^[21] as pleas to avoid one.^[22] As the October EU summit approaches, what the shape and content of a final deal may be, and indeed whether there will be one at all, still remains uncertain. The 'off-the-peg' models such as the EEA, CETA, and the Swiss model have still not been dismissed entirely in some quarters of the debate.^[23] As the UK, and indeed the EU, looks for options, there is one of many Brexit induced paradoxes emerging. In seeking a soft Brexit and being offered a very soft Brexit, what may be possible to achieve looks insufficiently like Brexit to be accepted by a majority in both the UK Parliament and the country. The consequence is that this makes a hard Brexit look impossible to achieve and so a no-deal scenario looks ever more likely, the alternative being to remain in the EU, hence the calls for a second referendum. The October summit, which was thought in 2017 to be the moment to herald the framework of a future agreement as well as a detailed withdrawal agreement, looks more likely to produce continued uncertainty than detailed clarity. Any conclusion to the summit may produce a version of the Great British compromise, or alternatively a version of an EU compromise, which is something that the Intergovernmental Conferences of previous Treaty drafting endeavours also demonstrate the EU is capable of. Whilst one would continue to encourage optimism, the only certainty seems to be that there will be no shortage of Brexit legislating, with the European Union (Withdrawal Agreement) Bill on the horizon, giving MPs something to look forward to.

Maria Kendrick, co-editor of forthcoming volume A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications*, Kluwer Law International, which is a second volume following *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU*.^[24]

^[1] Although not without criticism, see P. J. Birkinshaw, 'Negotiating Brexit and Dissolving the Legal Union' in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

^[2] On which see C. Harvey and A. Kramer, 'Brexit and Ireland / Northern Ireland' in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

^[3] Trade Bill 2017-19.

^[4] Taxation (Cross-border Trade) Bill 2017-19.

^[5] Paragraph 4 (a) Statement From HM Government (Chequers, 6 July 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF accessed 28 July 2018.

[6] Paragraph 4 (d) Statement From HM Government (Chequers, 6 July 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF accessed 28 July 2018.

[7] See options as at May 2018: Maria Kendrick and Giorgia Sangiuolo, *The moment of truth. Or not?* Federalismi, Observatorio Brexit, Bulletin May 2018 <http://www.federalismi.it/ApplyOpenFilePDF.cfm?artid=36444&dpath=document&file=05062018231209.pdf&content=The+moment+of+truth.+Or+not?+-+stati+europei+-+documentazione+-+> accessed 25 July 2018.

[8] Hansard, 'Leaving the EU' statement and debate 9 July 2018, Vol 644, Col 707, <https://hansard.parliament.uk/Commons/2018-07-09/debates/DFF149CD-3762-4293-82A3-ED03A0BA48D5/LeavingTheEU> accessed 28 July 2018.

[9] HM Government, 'The Future Relationship Between the United Kingdom and the European Union' 12 July 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf accessed 28 July 2018.

[10] Ibid.

[11] Ibid page 8.

[12] Ibid page 8.

[13] See more widely on services and Brexit, the chapters on the commercial legal implications of Brexit in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

[14] Prime Minister, Theresa May, and Nigel Huddleston MP, Hansard, note 9, Col 740.

[15] Prime Minister, Theresa May, Hansard, note 9, Col 726.

[16] See S. Weatherill, 'The Several Internal Markets' Oxford Legal Studies Research Paper No 64/2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032513 accessed 28 July 2018.

[17] First, Secretary of State for Exiting the European Union, the Rt Hon David Davis MP, for the full text of the resignation letter see <https://news.sky.com/story/davis-davis-resignation-letter-in-full-11430720> accessed 28 July 2018. Second, Foreign Secretary the Rt Hon Boris Johnson MP, for the full text of the resignation letter see <https://www.bbc.co.uk/news/uk-politics-44772804> accessed 28 July 2018.

[18] See P. J. Birkinshaw, 'Negotiating Brexit and Dissolving the Legal Union' in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

[19] On the option of the EEA see D. sif Tynes, 'The Future Ain't What it Used to Be – Some Reflections on the UK and the EEA' in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

[20] These include an international trade agreement to which the UK is a signatory and to which the EU was a signatory before exit day, s2 of the Trade Bill as introduced in the House of Lords on 18 July 2018.

[21] Vernon Bogdanor, 'Brexit broke Parliament. Now, only the people can fix it', *The Guardian* (London, 23 July 2018)
<https://www.theguardian.com/commentisfree/2018/jul/23/brexit-broke-parliament-people-fix-election-dilemma> accessed 25 July 2018.

[22] Anand Menon, 'A second Brexit referendum would be a painful, toxic waste of time', *The Guardian* (London, 25 July 2018)
<https://www.theguardian.com/commentisfree/2018/jul/25/second-brexit-referendum-toxic-waste-time> accessed 25 July 2018.

[23] See M. Oesch, 'The Swiss Model of European Integration'; D. sif Tynes, 'The Future Ain't What it Used to Be – Some Reflections on the UK and the EEA'; and M. L. Marceddu, 'A Complicated Relationship: The UK in the WTO at the Time of Brexit' in A. Biondi, P. J. Birkinshaw and M. Kendrick, *Brexit: the Legal Implications* (Kluwer Law International 2018 forthcoming).

[24]
<https://lrus.wolterskluwer.com/store/product/britain-alone-the-implications-and-consequences-of-united-kingdom-exit-from-the-eu/>