UK Trade Policy Observatory
Response to the Trade White Paper and the Customs Bill
6 November 2017

The UK Trade Policy Observatory (UKTPO) at the University of Sussex is an independent expert group that focuses on the international trade aspects of Brexit and offers a programme of research and analysis of both current and post-Brexit options for UK trade policy. The University of Sussex has the largest concentration of academic expertise on the world trading system in the UK with specialists in economics, international relations and law. Created in June 2016, the UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world.

We welcome the publication of the White Paper 'Preparing for our future UK trade policy' and the "Customs Bill: legislating for the UK's future customs, VAT and excise regimes" and the opportunity to respond to it. Our Fellows bring long experience of trade policy analysis at global, regional and national level and the challenges of trade policy in developing and developed countries. This experience of global practice informs our consideration of the White Papers. To that extent the comments aim to put flesh on the bones of policy options as laid out in the White Papers. The intention is to be helpful to the government and also to parliaments, voters, civil society and business in a field which is relatively complex and unfamiliar.

We do not intend to cover every aspect of the White Papers. We will follow the structure and, for ease of reference, use the section numbering of the Trade White even where we may also discuss issues raised in the Customs Bill.

The Trade White Paper

3.1 Trade policy that is transparent and inclusive

The UK can undertake a number of approaches to achieve transparent trade policy, include UK society as a whole, and safeguard and promote core UK values alongside economic goals. These include:
(1) strategic enhancement of the role of Parliament and devolved governments in the negotiation process vis-à-vis the 2010 Constitutional Reform and Governance Act;
(2) include a wide range of stakeholders in the development of trade policy;
(3) publish negotiating texts/explanatory documents where possible;
(4) undertake impact assessment of new trade agreements; or set up an independent body to provide such assessments.
5) ensure that trade policy upholds our commitment to sustainable development and human rights; and
(6) provide adequate training and income support to workers displaced by trade

(1) Strategic enhancement of the role of Parliament and devolved governments in the negotiation process

In negotiating new trade agreements, the UK must strike a balance between efficiency and democratic accountability. While the 2010 Constitutional Reform and Governance Act provides that the Commons can block treaty ratification indefinitely, Parliament's role is still very limited: it does not have to debate, or vote on, ratification of treaties. Yet future UK trade agreements will likely impact upon many areas of the UK economy in which Parliament has legislative powers, e.g. energy, public services, agriculture and finance. The Trade Bill might enhance democratic accountability by:

- Providing that Parliament will be kept informed regarding UK positions on key negotiating issues. Mechanisms for information exchange, such as Select Committees, could allow Parliament soft influence during negotiations, facilitating its ability to raise issues of potential strong opposition.
- Granting Parliament the ability to approve or reject the final agreement.
- Incorporating a requirement to consult devolved executive and legislature on treaties (not present under the 2010 Act).

(2) Including a wide range of stakeholders in the development of trade policy publishing negotiating texts/explanatory documents

- Establishing Advisory Groups comprised of civil society and business representatives alongside mechanisms for these groups to engage in dialogue with negotiators and feed recommendations into the process.

(3) Publishing negotiating texts/explanatory documents

Analysis of controversy over TTIP revealed that civil society actors sought access both to proposed negotiating chapters and also explanatory documents. The UK government must address the legitimate need for public information and oversight whilst preserving the necessity for confidentiality at some stages of negotiation. It should:

- When possible, during negotiations, make public draft negotiating chapters and provide readable, accessible explanatory documents.

(4) Undertaking impact assessment of new trade agreements

In providing greater understanding of the potential benefits and drawbacks of new trade agreements and providing an avenue for public consultation, impact assessment facilitates an inclusive approach to trade policy. EU Sustainability Impact Assessment provides guidance but has limitations; e.g. while effective at identifying macro-level impacts, it is less able to determine impacts on local communities. Thus:

- The UK should undertake *ex ante* assessment and *ex post* monitoring of trade agreements, addressing economic, social welfare and environmental impacts of trade agreements.
- Assessment and monitoring of the impact of trade agreements on partner countries, to ensure coherence in UK development and other external policy goals.
- In particular, the UK should ensure that assessment takes into account impacts on local communities most likely to feel displaced by trade liberalisation.
- The government should consider the out-sourcing of impact assessment to an independent external body with a remit to publish such assessments. It might commission a study of experience with such institutions.

(5) Ensuring that trade policy upholds core UK values and commitments in the areas of environmental protection and human rights.

- The UK should commit that no trade agreement will lead to the lowering of consumer, environmental and social protection.
- UK trade agreements should incorporate provisions on the environment and human rights/labour standards.

(6) Providing adequate training and income support to workers displaced by trade.

- The UK should provide a safety net, through re-training and income support, for workers from industries hit by trade opening.

- The UK should also ensure that it facilitates the export opportunities of SMEs so that benefits of trade opening are distributed

3.2. Boosting our trade relationships

3.2.1 Trading with the EU (this covers the discussion in both the Trade White Paper and the Customs Bill)

Both the Trade and the Customs White Papers, call for a "deep and special partnership" with the EU, "the freest trade possible in goods and services", and "frictionless trade".

As a general comment' there is very little in either document which seems to recognize that the impact of leaving the EU may be very different depending on firm type. Two key distinctions here are size, and for example the impact on SME's versus the impact on larger firms; and secondly with regard to ownership status and levels of foreign investment in a firm. There are good reasons to suppose that different firm types may experience the changes quite differently and this issue needs more consideration.

Post Transition relationship with the EU:

For the longer term the customs White Paper suggests two approaches to the future customs relationship with the EU: (a) *"highly streamlined customs arrangements"* between the UK and the EU; (b) A new customs partnership. The former focusses on the efficiency of customs and border procedures; and the latter focusses on the nature of the agreement with the EU which then determines the degree of market access (tariffs, non-tariff measures etc) that the UK may have in the future.

In the White Paper these are presented as alternatives whereas they should be seen as complementary. Whatever the nature of the future legal trading relationship that the UK will have with the EU (be this some form of FTA, customs union, or trade under WTO-MFN terms) there will inevitably be an increase in the procedures and paperwork required for trade to take place with the EU. This will impact on firms' logistics particularly with regard to customs and border procedures, and so maximizing the efficiency of customs and border procedures is desirable.

(a) *"highly streamlined customs arrangements"*

As stated above this is desirable, and clearly simplifying procedures as much as possible, aligning procedures with those of the EU, automating and using information technology to facilitate such arrangements needs addressing. However, several further points need to be considered:

- The 'streamlined' customs arrangements need to be considered as part of a package of measures and policies that minimize the disruptions to firms' logistics chains. This refers to the physical, digital and procedural infrastructure that will need to be in place to minimize disruptions to trade. There will be little advantage from having streamlined paper work in place, if there are delays at the border because of increased inspections.
- Implementing new digital solutions is likely to take several years. It is extremely unlikely that any significant new systems could be introduced and in place within a two-year transition period. It may be easier / more feasible to expand the use of existing solutions such as CFSP (Customs Freight Simplified Procedures) which are currently applied to trade with non-EU partners.
- The government needs to put appropriate levels of support in place to ensure that firms can take advantage of any new streamlined arrangements that are put in place (which could be based on current procedures such as Authorised Economic Operators, Approved Exporters, REX). For example, currently the number of Authorised Economic Operators is low (c. 500), and there are 180,000 firms that export only to the EU, and therefore have not had to deal with the paper work required to

export to a third party. Given that for many businesses the required paperwork will straddle different government departments (HMRC, DEFRA, BEIS, DWP etc..) depending on the fiscal and regulatory requirements for their products it will be important to have a coordinated / central advisory (helpdesk) facility for firms.

- The preceding is likely to be most important for SMEs who will have the greatest difficulties in adjusting.
- Much of the preceding requires building capacity physical and also in terms of personnel. This too takes considerable time where once again a transition period of two years is unlikely to be sufficient
- The preceding points focus on what the UK government could do to facilitate trade via customs arrangements. It is important to note, however, that considerable effort will also be necessary on the side of the EU counterparts – with regard to policy, infrastructure and procedures. This is more likely to be achieved more quickly the earlier the agreement on equivalent processes, IT systems etc. can be agreed. In turn, some of this cannot be achieved without knowing the precise legal relationship between the UK and the EU. This suggests we need a transition period during which the negotiations over the future relationship take place, followed by an implementation period – the length of which should be determined by what has been previously agreed.

(b) Longer term relationship with EU: 'A new customs partnership'

The key innovation here is the idea that with respect to exports to the EU, the UK could retain 'existing' levels of market access on the basis of the UK applying the same tariffs as the EU, and providing the same treatment for rules of origin, for the goods that are exported to the EU. Conversely, for goods that are not exported to the EU the UK could levy different import tariffs, and have different rules of origin.

There is a general issue here which is worth emphasizing – rules of origin are needed where the tariffs levied by the importing countries diverge. Hence, where the external tariffs levied are the same – in principle no rules of origin are required. Therefore, the UK could try and negotiate with the EU the application of this general principle: where the UK tariffs are the same as the EU's, then firms that buy those goods as inputs should be able to have duty free access to the EU market.

The new customs partnership proposal (NCP) focuses on the specific case of where UK tariffs and EU tariffs are no longer the same. The extent to which this may be the case in the future is unclear. The proposal is then that a differential tariff is levied according to the final destination of the good.

This new customs partnership proposal (NCP) is interesting. Its desirability or not depends on two factors. First, how feasible would be its implementation, or rather how costly. Secondly, if it could be implemented what would be its advantages.

How could this be feasible?

- Firms would need to be able to track and prove originating status for each of the imported inputs that are used in goods which are then exported to the EU.
- Firms would need to be able to track and prove that all the imported inputs that are used in the goods exported to the EU, meet the EU's standards and regulatory requirements. Outside of the EEA this is a big challenge unless there was a clear agreement on mutual recognition of testing and certification. It is typically difficult to agree MR with the EU except for where substantive regulations have been approximated.
- There needs to be clear separation in all the production processes used by firms between goods destined for the EU market and goods destined elsewhere. Otherwise, firms may have the possibility of using (cheaper) imported inputs to cross-subsidize the costs of production of goods intended for the EU market and also through economies of scale and scope. This would imply that firms would need to have separate plants and product lines for exports to the EU and separate plants for production destined elsewhere.

- HMRC would need to have processes in place for dealing with different tariffs being levied on the same good being imported by the same firm depending on its use. This might apply to a single shipment, but where the firm is using some of that shipment to produce a good for export to the EU, and some of the shipment to produce a good for export elsewhere.
- Note that the above is not necessary for those cases where the UK and the EU tariffs are the same, as per the discussion of the general principle above.

The preceding suggests that while conceptually feasible the specific NCP proposal is likely to involve additional expense and complexity for firms, and additional systems in place by the government. In turn, this suggests that at best it is likely to be only feasible either for large firms that can reorganize their production facilities as above; or for firms that only export to the EU. Its general application may therefore be small.

Advantage and disadvantages:

Currently the high levels of market access for UK firms into the EU derive from four main factors:

i. No tariffs on UK exports to the EU
ii. No restrictions on the amount of foreign value added that can be included in the good exported to the EU a(no rules of origin requirements).
iii. Access to the single market for goods, and in consequence low bureaucratic / customs paperwork requirements, such as no requirement to prove originating status, or that goods have been produced to the required standards (eg. CE or mutual recognition).
iv. Access to the single market for services and labour

In the first instance the NCP proposal could provide levels of access to the EU commensurate with (i) and (ii), but would not assure (iii) and (iv).

Rules of origin are required in an FTA wherever countries' external tariffs diverge. If UK firms can provide evidence that they have applied the EU external tariff on their imports, this circumvents the need for rules of origin. In turn, this means that there would be no restrictions on the amount of that foreign input that is used in the exports (ii); and no tariffs on UK exports to the EU (i).

This in turn raises a curious anomaly which could result in third country imports having superior access to those under an FTA: Suppose a UK firm imports an intermediate from a third country (Country C) on which it applies the EU tariff. That intermediate is then used in the exports of a final good to the EU, and the share of that intermediate in the total value added of the good is high, say 70%. Under the NCP proposal the good could enter the EU duty free. Now compare this to the case of a firm which exports the same final good to the EU, but imports the intermediate from a different third country (Country D) with whom both the UK and the EU have a free trade agreement, and suppose the rules of origin in both these FTA specify a minimum 40% domestic value added. Even if the UK, the EU and Country D had agreed to diagonal cumulation of rules of origin, in this case the final good would face tariffs on export to the EU.

Essentially an FTA constrains the amount of foreign input that can be used in exports to a partner country while a customs union does not. This also applies to the NCP proposal to the extent that it replicates the principles of a customs union at the firm-product level. In turn, this suggests that in highly integrated supply chains and where the share of foreign intermediates is high even though there may be a free trade area in place, firms might choose to trade under MFN terms to retain their supply chains.

With regard to (iii) above, clearly the NCP proposal will require detailed documentation to make it feasible – hence increasing firms' procedural / administrative costs. So, while it might provide some replication of customs union arrangements it does not provide the same bureaucratic savings. And with regard to (iv) the NCP proposal does not cover regulatory issues required for market access into the EU and therefore these

additional costs will still need to be incurred by firms. Additionally, exiting the Single Market will lead to restrictions with regard to services trade and labour mobility. As for some firms / industries these are an important element in the supply of goods, the NCP proposal does not resolve any increases in costs arising from this aspect.

In summary, therefore the NCP proposal might well alleviate some of the increased costs of EU market access for some firms / industries in the UK. Hence, whether it is worth pursuing or not will be highly industry specific and much more work should be done to consider which industries this might have the greatest impact for. But, it is likely to be difficult to implement at the firm level, will require increased HMRC processes and regulations, and should not be seen as a general solution to the problem of achieving frictionless trade with the EU.

The logical consequence of this is that leaving the Customs Union, and the Single Market will result in numerous consequences for firms and their ability to export to the EU. At the firm level those consequence relate to the procedural, financial, digital, and physical logistics that are required, as well as the use of intermediate inputs (both goods and services), and having access to the appropriate labour. From the government's point of view minimising the impact on firms should be about much more than sorting out the customs procedures.

In turn that suggests that rather than focusing on maintaining tariff free access via the NCP proposal, the government should explore ways in which it might maintain the equivalent of single market level access for given industries (ie with regard to all the regulatory issues).

Finally, there is a wide range of cross-cutting issues which will also impact on firms. See our submission to the House of Lords inquiry which highlight some of the key areas which will need addressing and which are not addressed in the current White Papers. [1]

Transition / implementation:

The Customs Bill raises the possibility of "*a new and time-limited customs union between the UK and the EU Customs Union… based on a shared external tariff and without customs processes and duties between the UK and the EU*".

Our comments on this are that:

- A CU would obviate the need for some customs process, and if it covered all sectors the need for rules of origin. However, an CU like EU-Turkey does not cover agriculture. However, this does not address the issue of 'business as usual' equivalent single market access, mutual recognition, conformity assessment, services trade (modes 1 to 5) etc, UK's involvement/participation/membership of the various regulatory agencies. A customs union would not give this level of access, it would have to be accompanied by a full regulatory union as well.
- Hence even if there were a new and time-limited customs union there would still be the need for customs processes.
- Practically probably the only way of achieving continued access to the EU markets without customs processes (and duties) would be extension of Article 50. This is both because of the nature of the current bilateral arrangements between the EU and the UK, but also because of the role of the free trade agreements that the EU and therefore the UK are currently members of (see discussion below for more on this).

[1] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-deal-or-no-deal/written/72574.pdf)

- There is clearly the possibility of a no-deal scenario. However, this should be seen as covering two different outcomes: a managed / ordered no deal; and a situation where the UK crashes out of the EU.
- With regard to each of these this raises the question as to which element of a no deal / crashing out would have the biggest effects, and which industries / sectors / regions / households would be most affected. There are two aspects to this question: (a) the distributional one (who are the biggest losers); (b) which industries / sectors which might be affected matter most to the UK economy (economic impact considerations)
- These issues needs complex economic analysis, which presumably in part is what is being undertaken by the government in relation to the 58 sectoral studies. We would encourage greater transparency at a minimum with regard to information as to what issues are being addressed by these studies, if not the outcomes / conclusions.
- To address these issues, we suggest a number of factors needs to be considered (once again this is not a comprehensive list):
    - Levels and shares of trade with the EU by sector and in total
    - MFN tariffs in goods
    - NTMs in goods and services
    - In which products / sectors are standards harmonized, and in which is their mutual recognition, as the impact on trade is likely to be different.
    - In which sectors is the UK heavily engaged in non-EU supply chains and where RoO issues may prove to be important in maintaining trade with the EU
    - Regional distribution of economic activity by sector, and by supply chain engagement
    - The use of which service sectors in which industries which export to the EU and non-EU.
    - In which sectors are the regulatory agencies important
    - In which sectors is EU labour important; and in which sectors is the (temporary and permanent) mobility of skilled workers important. This is equally an issue to do with the UK's and the EU's commitments under mode 4 of GATS (the temporary movement of natural persons).
    - All of the preceding is largely focusing on the UK (use) dimension; but equally need to consider the UK (supply) dimension – ie what and to whom do we export especially where supply chains are involved, including services, investment, workers.
    - It is also important to consider much of the preceding from the perspective of EU importers and therefore on their ability to switch their sources of supply away from the UK.
- Also need to think about which sectors may be most affected the longer these negotiations go on e.g.
    - In which sectors is investment most time sensitive?
    - Distribution of foreign ownership by sector – presumption is that these may be more footloose.
    - Need to know already what is happening now to trade and investment by industry / sector / region. Impacts now are likely to be a good indicator of where the effects may be greater.

3.2.2 Trading with the rest of the World

Transitioning EU third country trade agreements:

The trade White Paper suggests that the UK will wish to "transition" EU third country free trade agreements, and in other contexts this is sometimes referred to as grandfathering the existing agreements. Our recent blog on this explains why the issue of grandfathering existing free trade (for example EU-Korea), is not simply a bilateral issue between the UK and Korea.[2] One key reason for this is that even if the UK and Korea could in principle agree to grandfathering the agreement, this would not give:

- the UK the same degree of access to the EU market for goods using Korean inputs;
- the UK the same degree of access to the Korean market using EU inputs;
- Korea the same degree of access to the EU (UK) market using UK (EU) inputs
- The EU the same degree of access to the Korean (UK) market using UK (Korean) inputs.

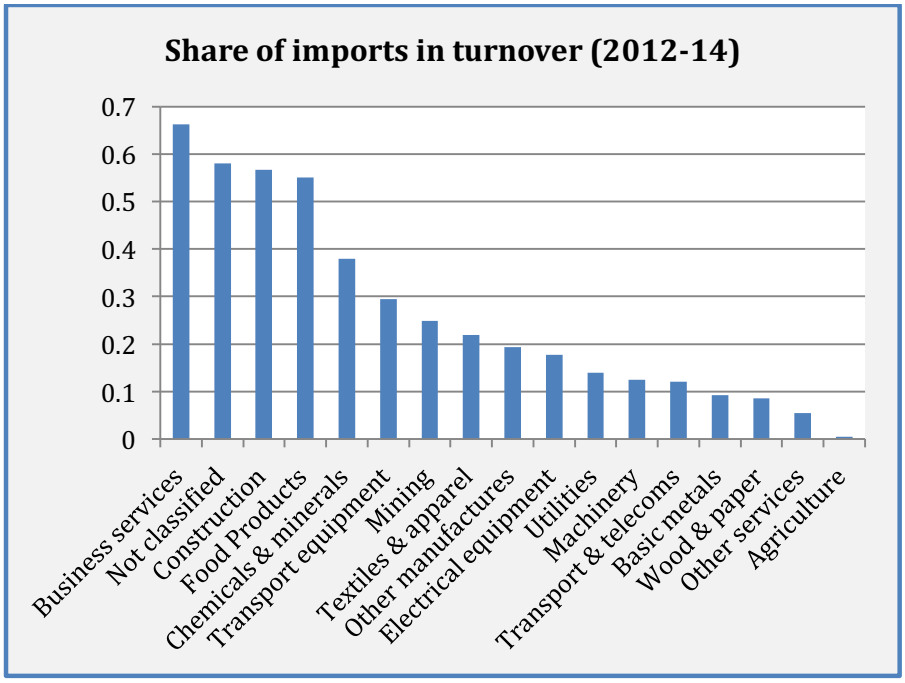
The reason for this revolves around the lack of diagonal cumulation of rules of origin in the existing agreement. To get closer to existing levels of market access in grandfathering the agreement ***all*** the countries involved would need to agree on an additional clause which allowed for diagonal cumulation of rules of origin. So, in the UK-Korea example above, this would require the agreement of the UK, Korea and the EU. So, what appears to be a bilateral relationship is in fact a trilateral one. Even if diagonal cumulation could be achieved there is the further issue raised earlier that currently there are no restrictions on the amount of foreign value added that can be included in the good exported to the EU (no rules of origin requirements), whereas this will no longer apply.

It is worth noting that agreeing diagonal cumulation with the EU is likely to be difficult unless it is on the EU's terms. Currently diagonal cumulation in the EU is almost entirely only offered as part of the Pan-European system and the EU is notoriously resistant to any other possibilities. Related to this, application of the Pan-EU system of diagonal cumulation is only possible where all the parties are applying the same (i.e. the EU's Pan-European) rules of origin. There would therefore appear to be no scope for the UK to have different rules of origin in place.

It is important for the government to assess for which sectors / firms this may be an important issue. Prima facie it is more likely to matter where the share of imported intermediates is high relative to the value of production. The chart below provides some very preliminary indication of this. The chart is based on taking firm level data and for each firm calculating the share of imports (which by definition therefore are treated as being intermediates) in the firm's total turnover. We then aggregate this information to obtain the average share of imports to turnover for different sectors. The higher is this share the higher is the reliance of that sector on imported intermediates and therefore the more likely it is that issues of rules of origin may matter. Of course, it will also depend on where the imports come from, and whether they are capital goods or not, but the chart provides at least some initial relevant information. From the chart, it can be seen that for certain manufacturing sectors (food products, chemicals, transport equipment) the imported share is high, whereas for other it is much lower (such as agriculture or wood & paper).

We strongly recommend that such analysis is done at a finer level of industrial disaggregation, distinguishing between different sources of supply, and different categories of imports.

[2] Grandfathering Free Trade Agreements and Rules of Origin: What might appear bilateral is in fact trilateral! (27 September 2017): https://blogs.sussex.ac.uk/uktpo/2017/09/27/grandfathering-ftas-and-roos/



Source: own calculations undertaken using ONS and HMRC data.

The current EU approach to diagonal cumulation is that each of the participating countries need to have signed at least one FTA with each other, and that all the FTAs have to contain the same rules of origin (e.g. the Pan European rules). However, diagonal cumulation should be possible even if countries do not have an FTA, and thus do not even have RoOs with each other and/or if there are agreements with different RoOs. This can be achieved by applying the 'preferential partner' principle (PPP).[3] The principle is that any preferential partner can use the intermediates of any other preferential partner, providing that for each imported intermediate the RoO applicable to the country supplying the intermediate is used. This would prevent trade deflection, which is the objective of RoOs.

Negotiating and implementing new trade agreements:

This section of the white paper was extremely brief and so there is little concrete to respond to. However, some initial comments are:

- There is a need for much greater clarity on objectives and priorities from such new trade agreements, other than a generalized hope that they will compensate for loss of access to EU market. It is important to note that to compensate for a small percentage decline in exports to the EU, this requires a substantially much larger change in the percentage of trade with future possible FTA partners. For example, taking the six countries the UK has expressed an interest in signing an FTA (United States, Japan, China, India, Australia and New Zealand), if trade with the EU were to decline by 1%, the UK would have to increase its trade with all of these countries by 3% just to keep trade levels constant.
- Negotiating and signing free trade agreements is lengthy and difficult. This is well known. We therefore recommend that the UK government draws up a standardized UK-FTA template based on UK industrial structure and priorities, which identifies the key issues / areas / proposals the UK would wish to negotiate.

[3] See Gasiorek, Augier and Lai-Tong, "Multilateralizing regionalism: lessons from the EU experience in relaxing rules of origin", in Baldwin, R & Low, P., ed. "Multilateralizing Regionalism: Challenges for the Global Trading System", CUP, 2009, for a discussion of this

- The preceding should be based, inter-alia on:
    - UK industrial structure and industrial policy objectives
    - Identification of UK (changing) patterns of trade (both imports and exports), of key developments, emerging and declining sectors
    - Use detailed (world) trade data to identify sectors / markets / regions where there may be unexploited import and export opportunities for UK firms.
    - A factual and detailed (ie as disaggregated as possible) understanding of the way UK firms engage in value-chains and the use and supply of both goods and services to and from both goods and services producers
    - The role of EU and global (produce and process) standards
    - An understanding of the distributional impact on the UK both by sector, nation, region, household type and worker-type.

4. Supporting developing countries to reduce poverty

The specific questions in the White Paper are:

1. *What elements should a UK unilateral trade preference scheme include to maximise the development impact?*
2. *What aspects are most important for businesses exporting and importing under a trade preference scheme?*
3. *What complementary measures can the UK offer to maximise the benefits of trade arrangements with developing countries?*

Questions (1 and 2) A good preferences scheme would focus strongly on the needs of the exporting country's businesses and so we answer these questions together. Such a scheme would have a number of characteristics:

Predictability and stability: if developing countries are to use preferences to develop viable commercial activity rather than merely take the short-term gain by absorbing the tariffs forgone into profits, they need assurance that preferences will actually apply to any consignment they send and that, for investment purposes, this will apply well into the future. Hence, if there have to competitiveness rules (which withdraw preferences from any exporting country that becomes too dominant in the market) they need to be generous and operated with reasonable notice. Changes to product coverage and/or country eligibility need to be infrequent and adequately flagged in advance.

Rules of Origin (RoOs): predictability is important here as well. So too is ease of administration. Experience shows that relaxed RoOs do foster trade and the recent(2013) move by the EU to permit upto 70% foreign content under the Everything But Arms scheme increased the take-up of preferences considerably.

Product coverage: needs to be as broad as possible. If large numbers of sectors/products are excluded this potentially reduces the value of trade that can benefit from preferences significantly. The exclusions are, for fairly obvious political economy reasons, typically in the very areas in which the beneficiaries are most likely to be able to export and so a constant source of frustration and friction in preference schemes. A further consideration is that if preferences apply only to specific sectors, developing countries will lean towards supplying these goods. Since, almost by definition these are not the sectors in which they have comparative advantage, the preferences distort the beneficiary's economy and may discourage growth.

Country coverage: preferences for everyone are preferences for no-one. However, in devising eligibility rules the UK should aim for clear and objective criteria both in the name of fairness and in order to avoid challenges in the WTO. It is possible to have several classes of beneficiaries but too complex a system would be difficult

to administer. Any differences in treatment between countries increase the burden on customs and potentially encourage trade diversion. The EU division between LDCs and a next tier of lower middle income countries is one reasonable way of approaching this problem, but there would be scope to vary it as long as the criteria are objective and applied even-handedly.

Levels of preference: the ideal is to reduce tariffs on preferred goods to zero, but there may be cases, for high tariffs, where partial preferences are useful. The degree of preference could be one way of distinguishing between different classes of recipient.

Consultation: It would be good practice to discuss preferences with beneficiary countries even though, as unilateral policies, they do not strictly need to be negotiated. It is important that, once agreed, the scheme is not open to political manipulation or modification because one does not want developing country administration devoting very scarce skilled administrative resources to rent-seeking via the preference scheme.

Conditionality (e.g. about human rights): The UK is a lot smaller than the combined EU; thus it has less muscle with which to impose conditions on the recipients of preferences. Given the divisiveness of such conditions and they resource they absorb in both the UK and the partner, it would be better to eschew conditionality in preferences in pursue the associated objectives via other means. If conditionality is unavoidable, it should be clear, quick and clean to avoid too much absorbing political effort. We would not advocate maintaining the EU's GSP + plans but rather ensuring that the general GSP regime meets GSP + recipients' needs (i.e. is more generous than the EU's scheme for that tier).

Preserving preferences for developing countries is not a reason for the UK to maintain tariffs that it would otherwise have. The government should be alive, however, the unpopularity that reductions in MFN tariffs or the signing of other trade agreements may engender among developing countries.

Question (3) Complementary policies. Developing countries' capacity to trade may be helped in a variety of ways – for example, by improving infrastructure, providing knowledge about markets, helping with the achievement of standards and their certification, improving policy stances. These are all subject covered by aid for trade and while one needs consultation with both governments and the private sector and also careful analytical work to see what would be helpful, almost every country could benefit from some inflows. Essential, however, is to recognize that any projects undertaken should not be oriented towards trade with the UK alone, but rather towards trade in general. Thus, linking Aid for Trade with UK preferences, or trade agreements, will greatly diminish its value. Aid for trade must also conform to general good practice in the provision of aid – e.g. avoiding tying it to UK suppliers and ensuring local ownership of projects.
We comment on two further elements of the White Paper. There seems to be almost universal agreement among development economists that the EPAs have failed. They have absorbed effort, resources and attention over two decades for almost no return. They offer the same access as EBA on the export side and so offer nothing to LDCs. For middle income countries, they offer better access to the UK market than GSP, but the latter could be extended significantly to become a more or less perfect substitute so far as African countries are concerned. The Caribbean and Pacific countries generally trade sufficiently little with the UK that curtailing their access would have little effect and could easily be compensated by aid or other flows. The remaining features of the EPAs have been universally disappointing. They have induced almost no trade liberalisation among the developing partners. They have forced countries to negotiate with each other as a precursor to negotiating with the EU, and so have wasted huge amounts of effort and often political good will. In most cases there has been very little institutional development stemming from the EPAs. Where they have tried to cover services (with CARICOM) the weaknesses of the visa system have prevented almost all benefit. If the UK had a different pattern of preferences in the developing country market than the EU, it is very likely to create trade diversion there, which is potentially costly. It would be better to design a unilateral scheme that delivers basically the same access benefits as the EPAs (including in very occasional cases, perhaps, a

bilateral FTA) and interact with the developing country partners on institution and trade reform through different mechanisms.

Finally, the White Paper makes no mention of services trade with developing countries. While it may require serious analysis to draw up appropriate details, there are services that developing countries can supply to developed countries. Facilitating this – possibly via the so-called 'services waiver' - would be helpful. It is premature to say precisely what form this could take, but we would urge on the government that it be considered in the development of future policy.

5 Ensuring a level playing field

5.1 Trade remedies

Traditionally one of the main trade policy tools to mitigate the impact of imports on producers (including workers) is the use of anti-dumping or countervailing (anti subsidy) duties, which can be deployed when foreign producers are deemed to be injuring domestic producers through "unfair" trade practices.[4] Consumer interests are rarely, if ever, taken into account in anti-dumping actions, where there is a clear and intentional tilt towards protecting producers against the impact of what are alleged to be "unfairly" low import prices. The WTO allows countries to raise tariffs when other countries' goods are sold "below normal value" and industries can be shown to be "injured.[5] This will inevitably put up prices to consumers (who may be industrial users). While there are sometimes cases of injurious dumping, anti-dumping duties are not a suitable way of managing a loss of competitiveness or change in comparative advantage. This is more efficiently achieved by other means such as macro policy, regional policy, industrial policy or active labour market policies that target the regions or workers affected.

The US has a scheme for Trade Adjustment Assistance and the EU has had a European Globalisation Adjustment Fund. This fund has been extremely under-utilised.[6] It is striking that the UK has never applied to drawn on this fund[7]. Cernat and Mustilli have suggested that in an EU context a decision not to use anti-dumping duties even though dumping and injury were found might be made a trigger for the use of the The European Globalisation Adjustment Fund (EGF). If the UK set up its own domestic equivalent of the EGF a similar idea could be used.

However, there will be cases when anti-dumping is used. Anti-dumping allows all firms in an industry to put prices up – and risks anti-competitive outcomes, at the expense of consumers. Whilst other policies have a fiscal cost, trade protection imposes a cost on consumers which does not show up fiscally. But if there is political pressure for trade policy interventions, it is extremely important that it should be done in the full knowledge of the consumer costs being inflicted so that a rational trade-off can be made. Even in jurisdictions such as the EU which have a public interest test, there is no systematic attempt to balance consumer vs producer interests![8] Early EU anti-dumping decisions typically examined the impact on down-stream businesses and would argue that if there were in a position to pass the costs of anti-dumping duties on their inputs on to users and consumers, this meant there was no negative community interest! Often the

[4] Closely related to these types of measure there are also safeguard duties where disruption is caused to a domestic industry without any "unfairness". These tariff surcharges must be compensated by tariff reductions somewhere else and hence are less popular than AD or CVD duties.

[5] Related instruments are anti-subsidy (Countervailing) duties and Safeguard duties which can be applied in the event of disruptive trade surges

[6] See Lucian Cernat and Federica Mustilli "TRADE AND LABOUR ADJUSTMENT IN EUROPE: WHAT ROLE FOR THE EUROPEAN GLOBALIZATION ADJUSTMENT FUND?"
http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155512.pdf

[7] In 2016 the a Parliamentary Question reply stated it was not needed.

[8] For an early piece on this see Peter Holmes and Jeremy Kempton "Study on the economic and industrial aspects of anti-dumping policy" Sussex European Institute https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-22.pdf&site=266

Commission would state that the consumer interest in sustaining a viable EU producer base would offset any costs generated by the duties[9].

The UK Trade White Paper has outlined a framework for the use of "trade remedies", i.e. anti-dumping, countervailing duties and safeguards. It speaks of the need to combat "unfair" trade practices, but promises to include an efficiency test that will take consumers into account.
Whereas within the EU, the Directorate-General for Trade judges both dumping and injury, the US has a system under which the Department of Commerce assesses whether there has been dumping and the independent International Trade Commission decides if there has been injury to US firms. This removes some of the bias towards politically powerful producers, but still leaves the decision to politicians. It is probably unrealistic to expect that all anti-dumping decisions in a post-Brexit UK could be left to an independent agency, since anti-dumping is inherently political. However, given the White Paper's promise of transparency it is reasonable to suggest that it is necessary to include an independent audit of the costs to consumers and downstream users of anti-dumping actions.

5.2 Conducting trade disputes

The role of the European Courts (and the role of the European Commission) in any future trade deal with the EU would be one of the most contentious areas.

On the EU side the CJEU is not prepared to accept new judicial *fora*. [10] When the EEA Agreement was negotiated the EEA court was proposed, which would have been functionally integrated with the CJEU. When sitting in plenary session the proposed court would have been composed of 5 CJEU Judges and 3 Judges nominated by the EFTA States. In an Opinion[11] on the compatibility with the then EEC Treaty of the new judicial mechanism creating the CJEU held that:

> 'It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the [draft] agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect. Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law. "[12]

After renegotiation, a Surveillance Authority and a Court of Justice (the EFTA Court) were seen as satisfactory and compliant with EU law by the CJEU in Opinion 1/92.[13]

The UK government has set out its views on how future disputes could be resolved in a position paper, *Enforcement and dispute resolution - a future partnership paper* (23 August 2017).[14] This Paper

[9] For a discussion of such cases in the 1980s see Wellhausen, Marc. "The Community Interest Test in Antidumping Proceedings of the European Union." American University International Law Review 16, no. 4 (2001): 1027-1082. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1245&context=auilr

[10] There are similar issues over the accession of the EU to the ECHR and how to balance the respective competence of the CJEU and the ECtHR.

[11] Opinion 1/91 ECR [1991] I-6079.

[12] Opinion 1/91 ECR [1991] I-6079, at I-6084.

[13] Opinion 1/92 [1992] ECR I-252.

[14] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf

recognises that 'there are a number of additional means [not involving the direct jurisdiction of the CJEU] by which the EU has entered into agreements which offer assurance of effective enforcement and dispute resolution and, where appropriate, avoidance of divergence, without necessitating the direct jurisdiction of the CJEU over a third party' (para 67). An example explicitly recognised in the Paper (at paragraph 20) is the Association Agreement with Ukraine which serves to outline where the EU has accepted binding international arbitration mechanisms.

However, in the EU-Ukraine Agreement the arbitration mechanism is geared towards ensuring CJEU supremacy in the interpretation of EU law. Art 322(2) sets out that:

> '[w]here a dispute raises a question of interpretation of a provision of EU law [relating to regulatory approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition), or which otherwise imposes upon a Party an obligation defined by reference to 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. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel'.

Therefore, this may not be the model that the UK would subscribe to in order to resolve disputes over the interpretation of a post-Brexit trade agreement. Reference to an arbitration panel recognising the UK and the EU as equal partners would presumably be the preferred approach of the UK, requiring the EU to adapt its position on the role of supremacy of EU law in external Treaties as well as the central role of the CJEU in upholding EU law, as set out in Article 19(1) of the Treaty of Lisbon:

> "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."

Thus, it may be necessary for the EU to re-think its position on the role of arbitration in order for a trade deal to be acceptable to the UK.

After Word

The white papers cover a very wide ambit – not surprisingly in circumstances where the whole of British trade policy will be set up to change radically. Our responses are of necessity selective and incomplete. They do not necessarily represent the last word of our Fellows on these documents or any future statements of British Government.

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