

THE UK AGRI-FOOD SECTOR, BREXIT AND INTERNATIONAL TRADE: OPPORTUNITIES AND CHALLENGES

Michael Cardwell, Professor of Agricultural Law, University of Leeds and

Fiona Smith, Professor of International Economic Law, University of Warwick

The Context

International trade continues to be of great importance to the UK agri-food sector. Thus, in 2015, the value of food, feed and drink exports from the UK was £18 billion, with the principal destinations being the Irish Republic (17%), France (11%) and the USA (10%).¹ On the other hand, imports into the UK amounted to £38.5 billion, with the principal countries of despatch being the Netherlands (12%), the Irish Republic (10%) and France (10%), leaving an agri-food trade gap of £20.5 billion.² Accordingly, the shape of trade policy post-BREXIT is of intense interest to the sector: decisions taken during the process of withdrawal may have direct impact not only on producers, but also, for example, on food prices for the consumer and on food quality and food safety as products are traded across international boundaries.

Post-BREXIT Agri-food Trade Policy

The overall approach to post-BREXIT agri-food trade policy is beginning to be sketched out in Government circles. In particular, it has been affirmed by the Secretary of State for Environment, Food and Rural Affairs, Andrea Leadsom, that “[w]e definitely want to continue maximising trade possibilities with our European neighbours....But there are also enormous opportunities around the

¹ DEFRA *et al*, *Agriculture in the United Kingdom* (2016) 84.

² *Ibid*. See also DEFRA, Statistical Data Set: Overseas Trade in Food, Feed and Drink (2014) (available at: <https://www.gov.uk/government/statistical-data-sets/overseas-trade-in-food-feed-and-drink>).

world”.³ And this is consistent with the stance on trade policy more generally as set out by the Prime Minister, Theresa May, at the 2016 Conservative Party Conference, when she laid emphasis on a “Global Britain” post-BREXIT where British companies also had “the maximum freedom to trade with and operate in the Single Market”.⁴ Indeed, the International Trade Secretary, Liam Fox has declared that “[a]s we establish our independent position post-Brexit, we will carry the standard of free and open trade as a badge of honour”.⁵

While the more precise contours of post-BREXIT agri-food trade policy remain very much a work in progress, discussion hitherto has frequently been couched in terms of a range of existing “models”, chief among them being the “Norwegian Model” and the “Swiss Model”, which will be considered later. For the present, it may be highlighted that, in the absence of any preferential trade agreement with the EU, the likely default position would be to trade on the terms of the WTO legislative framework. While the aim of the WTO remains further liberalization, the current legislative framework still allows an array of tariffs and other barriers to trade: definitely, it cannot as yet be equated with “free trade”.

The possibility of failing to secure a preferential arrangement and “defaulting” to WTO rules is a real one: Donald Tusk, President of the EU Council of Ministers, has stated that, “[i]n my opinion, the only real alternative to a hard Brexit is no Brexit”.⁶ By contrast, the position adopted by Theresa May has been more ambivalent, in that she has called for a “red, white and blue Brexit”, which would be “the right deal for the United Kingdom” and “the right relationship for the UK with the European Union once we’ve left”.⁷ In her view, the distinction between a “hard BREXIT” and a “soft BREXIT” is a false dichotomy and, again in her Conservative Party Conference Speech, she expressly rejected the Norwegian and Swiss “Models” in favour

³ Rt Hon Angela Leadsom MP, *Farmers’ Weekly*, 17 October 2016.

⁴ “Britain After Brexit: a Vision of a Global Britain” (2 October 2016) (available at <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of>).

⁵ Rt Hon Liam Fox MP, Manchester Town Hall, 29 September 2016 (available at <https://www.gov.uk/government/speeches/liam-foxs-free-trade-speech>).

⁶ *Financial Times*, 13 October 2016.

⁷ *Guardian*, 6 December 2016.

of a bespoke deal between an independent and sovereign UK and the EU.⁸

The “Models”

1. UK Withdraws from the EU but Stays in the Customs Union

The EU applies a common external tariff to the import of agricultural products from all non-EU countries. Once the tariff is paid on import into the first EU Member State, then the product can freely circulate among all the EU Member States because there are no tariffs between them. The EU is also a regulatory union. This means that once a product satisfies the internal inspection criteria at its first point of entry, it can then freely circulate without the need to pass additional customs checks when it passes into subsequent EU Member States.⁹ The EU’s current external tariffs on some agri-food products are low, but in the case of several contentious products they are high: as much as 40% for cheese, 59% on beef and 40% on lamb.¹⁰ The EU also negotiates all free trade deals with non-EU countries and EU Member States must accept free movement of people. As key objectives underpinning UK government’s post-BREXIT policy are regaining control over UK borders and its external trading relationships, then remaining within the existing customs union is not likely to be a desirable outcome.¹¹

It is more likely that those supporting this option envisage a new customs union being formed between the EU and the UK, something akin to the customs union between the EU and Turkey. That said, the EU-Turkey customs union is incomplete;¹² and, importantly, it is designed rather to provide a stepping stone to full EU membership for Turkey.

⁸ “Britain After Brexit: a Vision of a Global Britain” (2 October 2016) (available at <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexite-a-vision-of>).

⁹ UK Government: ‘Alternatives to Membership: Possible Models for the UK Outside the European Union’ (March 2016) 10.

¹⁰ See, eg, Nick Clegg: *Food, Drink and Brexit* (17 October 2016) (available at: <http://www.libdems.org.uk/brexit-challenge-fooddrink-paper#> and also at: <http://foodresearch.org.uk/brexit-and-food/>).

¹¹ Boris Johnson has suggested leaving the customs union while remaining within the Single Market, but this possibility has gained little traction: *Guardian*, 16 November 2016.

¹² For discussion of this aspect, see House of Lords European Union Select Committee, *Brexit: the Options for Trade* (5th Report of Session 2016-17) HL Paper 72, para 90 (and, more generally, the evidence of Dr Holmes).

2. The Norwegian “Model”

Norway is not a member of the EU, but instead is a member of both the European Economic Area (EEA) and the European Free Trade Association (EFTA) (whose other three members are Iceland, Liechtenstein and Switzerland).¹³ The EEA is established by an agreement between the Member States of the EU and all members of EFTA with the exception of Switzerland; and its objective is to promote a “continuous balanced and strengthening of trade and economic relations” where conditions of equal competition prevail,¹⁴ thus constituting an enhanced preferential trade agreement between the specific contracting parties.

The EEA covers the free movement of goods, capital, services and people and, notwithstanding that the Court of Justice of the European Union does not have jurisdiction over EEA provisions *per se*, the parties do agree that the rules of the EEA must be interpreted and applied in accordance with the relevant rulings of that Court in so far as the rules of the EEA are “identical in substance” to the EU rules.¹⁵

Despite the common assumption that the EEA Agreement does not include any rules pertaining to agriculture,¹⁶ there are in fact some limited provisions which do apply: for example, there are specific provisions and arrangements relating to veterinary and phytosanitary matters.¹⁷ In addition, there are general commitments that the parties are to examine any difficulties that might arise in their trade in agricultural products and endeavour to seek appropriate solutions; and to undertake to continue their efforts with a view to achieving progressive liberalization of agricultural trade.¹⁸

As well as acceptance of the principle of free movement, Norway, Iceland and Liechtenstein have no real right to influence EU policy and often complain the EU does not take their views into account. All non-EU EEA members also “speak with one voice” when it comes to

¹³ On the EEA and EFTA, generally, see *ibid*, paras 54-86.

¹⁴ Article 1.1 of the Agreement on the European Economic Area (EEA Agreement).

¹⁵ Article 6 of the EEA Agreement.

¹⁶ Article 8(3)(a) of the EEA Agreement provides that its provisions do not apply to agricultural products.

¹⁷ Article 17 of and Annex 1 to the EEA Agreement.

¹⁸ Article 19 of the EEA Agreement.

discussions with the EU,¹⁹ which, given the UK government's commitment to retaining control over its borders and its external policy, may not sit well as a "model" for agri-food trade regulation post-BREXIT.

3. The Swiss "Model"

As indicated, Switzerland has not joined the EEA, but is a member of the EFTA. Further, the Swiss government has negotiated a series of bilateral agreements with the EU. Notably, as part of these agreements, Switzerland accepted free movement of people; and, although it is not technically subject to the jurisdiction of the Court of Justice of the European Union, the Court's interpretation of a number of EU Directives is relevant to the interpretation of some of Switzerland's obligations in the bilateral agreements.

As Switzerland is not a member of the EEA, its agri-food products only have access to EU markets in so far as the bilateral agreements allow: it does not have access as of right to the Single Market. Nevertheless, under "Bilaterals I" of 2002 a reduction in customs duties was negotiated for cheese, fruit and vegetables, meat, wine and horticulture, together with a reduction in non-tariff barriers on wine and spirits, organic agriculture, pest control, crop protection, fodder and seeds.²⁰ Subsequently, under "Bilaterals II" of 2004 further trade commitments were agreed to include some processed agricultural products, for example, chocolates, biscuits and pasta, with duty-free access of these products being allowed into the EU.²¹

4. Trading on WTO Rules

The WTO rules govern trade in conformity with the fundamental principle of non-discrimination: members' trade policies must not discriminate between agri-food products on the basis of their origin or whether those products have been imported or domestically produced. As 164 countries are members of the WTO, "trading on WTO rules" is the default position for most countries. It should nonetheless be noted that the WTO legislative framework does permit members to

¹⁹ House of Lords European Union Select Committee (above n 12) para 56.

²⁰ FDFA/DEA, *The Major Bilateral Agreements-Switzerland and the EU* (December 2016) 11.

²¹ *Ibid*, 22.

enter into preferential agri-food customs unions and trade agreements, but these too must comply with WTO rules.²²

Importantly, WTO rules allow members freedom to devise their own agri-food policies and instead impact on the mechanisms which member use to implement those policies. Accordingly, under the WTO Agreement on Agriculture, members were required to set maximum limits for their (i) agri-food tariffs (subject to a range of minimum access commitments), (ii) domestic support and (iii) export subsidies. And the exercise was effected using a complex methodology set out in both the Agreement on Agriculture itself and the “Modalities”²³ as constructed during the Uruguay Round.

These agreed limits on tariffs, domestic support and export subsidies are contained in each member’s Schedule of Commitments which are themselves legally binding.²⁴ The EU has a single Schedule for all its member states, although it should be noted that the EU’s current Schedule submitted to the WTO is accurate to 2012/13 and so does not take into the subsequent enlargement to include all 28 EU Member States.²⁵ It is important to note too that a member’s Schedule contains maximum limits and that the actual rates can be less.

In addition to these rules under the Agreement on Agriculture and the “Modalities”, the WTO legislative framework also sets out a number of “non-tariff” measures which may likewise have the capacity to restrict both imports and exports, in particular the Agreement on Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and the Agreement on Technical Barriers to Trade (the TBT Agreement). The SPS Agreement is directed to matters of human, animal and plant life and health; and it has been the basis of disputes on, for example, the EU’s regime for the approval and

²² Article XXIV GATT.

²³ The Modalities Agreement, MTN.GNG/MA/W/24, 20 December 1993.

²⁴ In subsequent multilateral negotiations, developed countries (including the EU) agreed to the immediate phasing out of export subsidies from December 2015 (subject to limited exceptions): WTO, *Ministerial Decision on Export Competition*, WT/MIN(15)/45, 21 December 2015, para 6..

²⁵ WTO, *Committee on Agriculture, Notification by EU*, G/AG/N/EU/26, 2 November 2015.

marking of GMOs.²⁶ A key characteristic of its provisions is a “turn to science” in order to determine the legitimacy of measures conditioning imports.²⁷ The TBT Agreement, by contrast, is directed to such matters as labelling and standards. Accordingly, it has been the basis of disputes on, for example, the extent to which “dolphin-safe” labelling is WTO compliant.²⁸

Policy Opportunities and Challenges

There can be no doubt that leaving the EU will grant the UK greater opportunities in terms of developing international trade policy, including that for the agri-food sector. At the same time, nonetheless, it must also be recognised that, until the UK ceases to be a Member State, the ability to conclude new trade agreements will be circumscribed by reason that under the Treaty on the Functioning of the European Union the UK has ceded to the EU exclusive competence in respect of the common commercial policy, covering *inter alia* the conclusion of tariff and trade agreements relating to trade in goods and services.²⁹

In this context, three areas of particular significance may be explored.

First, as indicated, the UK will have scope to set its own tariff rates, so long as these comply with WTO rules. And, since WTO rules fix only maximum tariff rates, there will be the opportunity for the UK to impose lower or even nil rates, which in the agri-food sector would have the potential also to reduce food prices. Indeed, it has been argued by Economists for Britain that tariff reductions should be

²⁶ *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R.

²⁷ See generally, J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: a Commentary* (Oxford University Press, 2007).

²⁸ *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product*, WT/DS381/AB/R.

²⁹ Treaty on the Functioning of the European Union, Article 3(1)(e) and Article 207. There may nonetheless be scope for the UK to enter into negotiations both with third countries and in relation to the terms of its WTO membership prior to BREXIT: for a clear and concise discussion of these issues, see, eg, L. González García, *Brexit: What Trade Agreements can the UK Negotiate Whilst being a Part of the EU?* (2016) (available at <https://www.matrixlaw.co.uk/resource/possible-united-kingdom-negotiate-trade-agreement-eu-ftas-third-countries-new-legal-status-within-wto-part-eu/>).

made without necessarily seeking reciprocal measures from trading partners, the “option of unilateral free trade” being regarded as the “optimal arrangement” to achieve the wishes of the vote for BREXIT; and, moreover, this course of action is expressly regarded as capable of sweeping away “current EU protectionism in food”.³⁰ On the other hand, the consequences for domestic food production of such a unilateral approach are likely to be severe: by way of illustration, a sheep farmer may be presented with the prospect of tariff-free imports into the UK market while facing tariffs on exports. And, more generally, there is the live prospect of the UK becoming more dependent on imported food, leaving it vulnerable to higher prices or even food shortages in the event of tightened supplies globally.

Secondly, while there would seem to be general consensus that the UK will remain a WTO member in its own right post-BREXIT (having earlier being an independent member of the GATT),³¹ there is less certainty as to how it will “re-acquire” WTO rights and obligations. As stated by the Director-General of the WTO, Robert Azevêdo, “the UK would also need to re-establish its terms of trade within the WTO. The UK, as an individual country, would of course remain a WTO member, but it would not have defined terms in the WTO for its trade in goods and services. It only has these commitments as an EU member. Key aspects of the EU’s terms of trade could not simply be cut and pasted for the UK. Therefore important elements would need to be negotiated”.³²

For the present, it is evident that the UK Government is already taking steps to establish the UK’s WTO Schedules post-BREXIT, this being seen as a precursor to any agreement with the EU on the UK’s trading relationship with the EU. In the words of the Minister for Trade Policy, Lord Price, “[w]e do not need to accede to the WTO as we are already a member, but we need to go through the technical process of

³⁰ Economists for Britain, *A Vote for Brexit: What are the Policies to Follow After and What are the Economic Prospects?* (2016) (available at <http://www.economistsforbrexit.co.uk/a-vote-for-brexit>).

³¹ That said, the issue is not completely free from doubt: for discussion, see L. Bartels: ‘The UK’s Status in the WTO after Brexit’ (2016) SSRN: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2841747.

³² Robert Azevêdo, Director-General of the WTO, *Azevêdo Addresses World Trade Symposium in London on the State of Global Trade* (7 June 2016) (available at https://www.wto.org/english/news_e/spra_e/spra126_e.htm).

adopting our own schedules. Clearly, that is the first thing we need to do”.³³ And in early December 2016 it was reported that Liam Fox had opened talks with the WTO over terms of membership.³⁴ The exercise would not, however, appear free from uncertainty in that the WTO rules are reticent on how commitments and obligations are to be established if a member leaves a customs union or ceases to be bound by a free trade agreement.

This may be illustrated by the rules governing permitted levels of domestic support to farmers. The EU is able to provide such support up to 72.4 billion Euros *per annum*;³⁵ but the entitlement is recorded in the name of the EU without differentiation as between Member States. Indications from the Director-General of the WTO and the UK Government are that the proportion which may be ascribed to the UK post-BREXIT would be a matter for negotiation (although it is not conceptually impossible to argue that the entitlement remains with the continuing Member States so as to lead to a zero schedule for the UK).³⁶ Arguments which could be advanced in such a negotiation could include that the entitlement should be shared proportionately either in accordance with current support patterns³⁷ or in accordance with the contribution of the UK to the EU’s overall entitlement as calculated when the WTO Agreement on Agriculture was concluded.

A positive factor amidst this uncertainty is that there is currently significant “headroom” in terms of levels of domestic support to farmers, with the EU granting only 5.9 billion Euros in 2012/13, a small fraction of its permitted 72.4 billion Euros ceiling.³⁸ Nonetheless, this “headroom” is to a large extent generated by the categorisation of its domestic support as “green box” and therefore

³³ Lord Price, Minister for Trade Policy, Department of Trade and Industry, giving oral evidence to the House of Lords Select Committee on the EU Internal Market Sub-Committee and the External Affairs Committee (13 October 2016) (available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/42068.html>).

³⁴ *Financial Times*, 5 December 2016.

³⁵ WTO, *Committee on Agriculture, Notification by EU*, G/AG/N/EU/26, 2 November 2015.

³⁶ For reference to this possibility, see, eg, A. Swinbank, ‘Brexit or Breman? Future Options for UK Agricultural Policy and the CAP’ (2016) 15(2) *Eurochoices* 5-10.

³⁷ Bartels (n 31).

³⁸ WTO, *Committee on Agriculture, Notification by EU*, G/AG/N/EU/26, 2 November 2015.

exempt; and not only has such categorisation been questioned,³⁹ but it will also act as a constraint on UK agricultural policy if exemption on the same basis is to be sought.

Thirdly, WTO rules may impact upon any attempts to adopt a less precautionary approach in terms of inputs for agricultural production. For some time prior to the Referendum, BREXIT was regarded in certain circles as an opportunity to row back on controversial EU legislation which prohibits the use of certain neonicotinoids on the basis of a finding of the European Food Safety Authority that they present high acute risks for bees.⁴⁰ And, even more controversially, at the time of the Referendum, the EU institutions were engaged in complex initiatives which could have seen no extension to the licence for glyphosate, the active ingredient in Monsanto's key herbicide, Roundup, on the basis of scientific studies that it causes cancer.⁴¹ However, if the UK were, for example, to adopt a less precautionary approach with regard to glyphosate, the advantages gained in terms of weed control might be more than offset by the scope for other WTO members, including the EU, to restrict or even ban the import of crops grown with the chemical (although it should at the same time be emphasised that such measures would only be valid under the SPS Agreement if they were no more than necessary to protect human, animal or plant life or health and were also based on "sound science").⁴²

³⁹ See, eg, F. Smith, 'Mind the Gap: 'Greening' Direct Payments and the World Trade Organization', in J.A. McMahon and M.N. Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar, 2015) 412.

⁴⁰ Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances, [2011] OJ L 153/1, as amended by Commission Implementing Regulation (EU) No 485/2013 of 24 May 2013, [2013] OJ L 139/12. On this aspect, see also National Farmers Union, *EU Referendum: UK Farming's Relationship with the EU* (National Farmers Union, 2016) 20.

⁴¹ In the event, the licence was extended, subject to conditions: see, eg, European Commission, Frequently Asked Questions on Glyphosate (29 June 2016) (available at http://europa.eu/rapid/press-release_MEMO-16-2012_en.htm).

⁴² See, eg, Article 2:2 of the SPS Agreement: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence [subject to an exception where a provisional measure is adopted in case of insufficient relevant scientific evidence]".

A Final Thought

The future for agri-food trade policy post-BREXIT is complex. In any event, the UK government must navigate the WTO rules while addressing the needs of a wide range of stakeholders from consumers to producers, including both exporters and importers. At first glance, simple solutions might seem an attractive way through the maze, but when these solutions are closely interrogated their implementation may be more challenging than immediately appears. Existing agri-food trade policy has been hard won, with the balance between the competing interests of the various stakeholders shifting constantly over time. Great care must be taken, therefore, before moving forward into as yet uncharted territory.