

THE ANIMAL WELFARE CONSEQUENCES OF THE UK'S FUTURE TRADING RELATIONSHIP WITH THE EU

In the United Kingdom (UK) government's White Paper on Brexit, entitled 'The United Kingdom's exit from and new partnership with the European Union', it is shown that the UK intends to leave the EU single market and it indicates that the UK will leave the customs union as well. Instead, the UK will pursue a separate Free Trade Agreement and a new customs agreement with the EU. This briefing will explain what this means, how the UK's continued membership of the World Trade Organisation (WTO) will impact this, and what the consequences will be for animal welfare in the UK.

The UK wants to Regain Trade Competence

A red line for the UK seems to be autonomy on trade policy setting. This implies that the UK will have to leave the Customs Union. All European Union (EU) member states bind themselves to certain rules which hand over competence for trade policy-setting to the EU. Upon leaving the EU, the UK will get back some of these competences to set its own trade-policy. However, the UK is still a member of the WTO and so it will continue to be bound by the rules set out by the WTO treaties.

States are the highest source of authority in the world order, due to the concept of nation state sovereignty. Therefore, international treaties can only come into effect if sovereign states consent to them by ratification. Neither the EU nor the WTO could exist without the consent of its founding members and each subsequent ratifying member. While the UK has exercised its sovereign right to remove itself from the EU, it remains a member of the WTO and is bound by the WTO treaties to which it is a signatory. This will affect the impact of Brexit on the UK's ability to set trade policy and how this will affect animal welfare. Various uncertainties prevail, including whether the 164 WTO members will have to agree to the UK's tariff concession schedules now that it will be a member independently of the EU. Also, it is unclear how certain WTO bindings will apply to the UK once it leaves the EU. For instance, will the UK still receive some of the EU's share of Tariff Rate Quotas,

and what will happen with the calculation of 'Total Aggregate Measures of Support' which determine the level of subsidies WTO members may award.

World Trade Organisation Rules

The WTO is not as far-reaching an organisation as the EU. Its mandate extends only to the liberalisation of trade and the reduction of trade barriers between its members. The WTO treaties require its members to reduce tariffs (taxes on imports or exports) and charges having equivalent effect, remove quantitative restrictions on trade, and remove other barriers to trade such as prohibitive labelling requirements. There has been much talk of the UK raising tariffs on imports after leaving the EU. This only applies to trade with the EU, where trade took place on a more favourable basis than that agreed under WTO rules. However, the UK will not regain the power to increase tariffs for imports from any country above the bindings agreed within WTO rules. It may only reduce tariffs, not increase them.

Another central feature of the WTO rules is that they aim to remove discrimination between its members in setting trade policy. One of the most important obligations in this regard is the so-called 'Most-Favoured Nation' (MFN) principle (Article I.1 of the General Agreement on Tariffs and Trade 1947 (GATT)). This principle requires that if a WTO member offers any preferential trade treatment (such as a lower tariff) to a WTO member, it must also extend this same treatment to all other WTO members equally.

Free Trade Areas/Agreements, Customs Unions, and the Common/Single Market

There is an exception to the MFN principle in WTO law that allows states to enter into Free Trade Areas or Customs Unions (GATT Article XXIV). This is why the EU member states can eliminate all tariffs between each other, but not offer this same treatment to third states. This is also why states can enter into bilateral Free Trade Agreements offering better market access than is offered to all other states.

Free Trade Agreements (FTA) would be contrary to WTO rules if it were not for an exception that allowed for this. This is because FTAs, by nature, involve one state offering market access to a specific trading partner or group of trading partners that is better than the market access offered to all other trading partners. The General Agreement on Tariffs and Trade 1994 states in Article XXIV that WTO members may, as an exception to the MFN principle, enter into Free Trade Areas and Customs Unions.

A free trade area exists when two or more states decide to eliminate substantially all tariffs and other barriers to trade between them. Crucially, the term 'substantially all' has never been defined. The WTO's Dispute Settlement Body has noted, however, that 'substantially all' trade is not as much as all the trade and is more than merely some of the trade. Noting the significance of agricultural products in international trade, it is highly likely that 'substantially all' trade must be interpreted to include them. A Free Trade Area is different to a customs union. A customs union

consists of a free trade area, plus harmonisation of the states' external trade policy. This means that the states eliminate all internal barriers to trade (both financial and administrative), but also apply the exact same tariffs (and measures having equivalent effect) to all third states. These external tariffs remain bound by the tariff bindings agreed at the WTO. The European Union is an example of a customs union and its external trade policy is called the 'common commercial policy'.

WTO rules require that the purpose of a customs union is to 'facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories'. It only permits customs unions to be created if 'the duties and other regulations of commerce imposed' at its institution are not, on the whole, 'higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be'. A Customs Union must also allow for the removal of trade barriers for "substantially all" trade between members of the Customs Union. However, no dispute has ever found a Customs Union to be illegitimate on the basis that it does not include the removal of barriers to trade for substantially all trade. This is including the EU's Customs Union Agreement with Turkey which excludes agriculture.

The European Union 'internal market' (also referred to as the 'single market') is another step on from a Customs Union. The internal market includes the customs union, plus measures to permit the free movement of labour, capital and enterprise.

Leaving the Internal Market, Leaving the Customs Union

It has been clear since Theresa May's Brexit speech delivered at Lancaster House that the UK would leave the internal market. However it had not been clear until the release of the Brexit White Paper whether the UK would seek to become a part of the Customs Union. The intention is that the UK will not seek to remain a member of the Customs Union, but will instead pursue a separate Customs Agreement with the EU. How this agreement would differ from membership of the European Economic Area (which grants members access to the Customs Union) is unclear. The WTO rule regarding "substantially all" trade leaves uncertainty regarding what flexibility the UK will have or indeed what flexibility the EU will be able to offer.

Controlling immigration is a clear red line for the British Government and so leaving the internal market was a required step for the UK because the internal market permits the free movement of persons (and goods). It would be possible to leave the Customs Union but remain a part of the internal market. Norway is in this position currently and, while it can negotiate its own trade deals, it is required to accept the free movement of people and to comply with European legislation. Leaving the Customs Union has become the preferred course of action of the UK government so that it can regain control of its external trade policy by pursuing its own free trade deals. This is a required step because Article 3(1)(a) of the Treaty on the Functioning of the European Union states that the Customs Union and the common commercial policy are within the exclusive competence of the EU. This means that EU member states have no power to act in these areas. This would also be

true if the UK were to leave the EU but remain a part of the Customs Union. As a member of the Customs Union, the UK would be bound to the EU's Common External Tariff and all other aspects of the Common Commercial Policy.

Negotiating a Customs Agreement

It is possible for the UK to gain access to the Customs Union whilst remaining outside of the internal market, following the model that Turkey currently utilises. The UK has indicated that it will pursue this Turkish model. Turkey is not a member of the EU but it has a separate customs agreement. This agreement excludes agricultural products and precludes Turkey from negotiating its own FTAs. For this reason, pursuing a separate customs agreement with the EU could dramatically reduce the benefits the UK receives as a full member of the customs union at present.

First, the UK would likely be bound by the EU's common commercial policy, without getting to impact what direction it takes. Turkey is required, under its Association Agreement with the EU, to apply provisions and implementing measures which are 'substantially similar' to those of the EU's common commercial policy. This means Turkey can no longer negotiate its own trade deals and decide on its own external trade policy. The Association Agreement also does not allow Turkey to gain immediate access to the markets with which the EU negotiates access in free trade agreements. However, those partners do immediately gain access to the Turkish market when such free trade agreements are concluded. Turkey is obliged to provide this, without having had any input to the negotiations towards the conclusion of the FTA. This would clearly be a difficult situation to justify to the British voters. Trying to pursue an independent trade policy whilst also pursuing a customs agreement with the EU would be a very 'difficult balancing act, which would severely curtail the UK's leverage in future trade negotiations with third [countries](#)'. Further, Turkey is still required to perform customs checks on exports to the EU. This may be a suboptimal position for the UK to adopt.

Negotiating a Free Trade Agreement

If the UK fails to negotiate a Free Trade Agreement with the EU before it leaves the EU (two years after triggering Article 50 of the Treaty on European Union), and no transitional arrangements are negotiated, the UK and the EU will revert to WTO rules and will then impose tariffs and barriers to trade on each other. A Free Trade Agreement could see the two partners agree to remove these barriers to trade, but without such an agreement, they will begin to apply tariffs compliant with the tariff bindings negotiated at the WTO. This will result in higher costs of doing business and, ultimately, higher prices for consumers. It is unclear if the UK will inherit the EU's WTO tariff regime or whether it will have to negotiate its own. This is the set of tariff bindings agreed to by the WTO member states and applicable to each member. If the UK does not simply adopt the EU's tariff regime, settling on the UK's bindings could be time-consuming because it would ostensibly have to reach agreements with all 164 WTO members.

It has been noted that even pursuing a Free Trade Agreement is unlikely to result in a situation in which trade is as free as it is now. Some non-tariff barriers to trade would likely continue, such as rules of origin.

Consequences of the UK's Direction for Animal Welfare

1. Future Trade Deals

The UK will be able to negotiate its own FTAs but will now have less leveraging power to negotiate its own trade deals, because it is not a part of the economic powerhouse that was the EU-28 bloc. Therefore, it may be less capable of negotiating deals in its own long-term interest. It may be particularly difficult for the UK to ensure that interests such as animal welfare are included and protected within future trade deals, especially if the UK is keen to agree deals quickly. The EU has considerable negotiating power and it already struggles to negotiate for animal welfare in trade deals. For example, the Comprehensive Economic and Trade Agreement negotiated between the EU and Canada has vague language on animal welfare but adds new Tariff Rate Quotas for products such as beef and chicken. Awarding these TRQs means that The EU can import these products without requiring equivalence with EU animal welfare standards. Therefore, cheaper food produced under standards which would be illegal in the EU can enter the market.

2. Agricultural Subsidies (WTO Rules)

Upon leaving the European Union, the UK will no longer be a part of the Common Agricultural Policy (CAP). The CAP is an income support measure for farmers and includes payments for high welfare production. The Common Agricultural Policy is not necessarily linked to the Customs Union. For example, Turkey's Customs Union with the EU does not extend to agriculture. It is unclear whether the EU would require the UK to align its agricultural policy with that of the EU when negotiating for a customs agreement.

The UK government sets out a guarantee in the Brexit White Paper that the agricultural sector will 'receive the same level of funding that it would have received under Pillar 1 of CAP until the end of the Multiannual Financial Framework in 2020'. However, the 'scope and generosity of the UK's support for agriculture will be constrained by WTO rules'.

The WTO's Agreement on Agriculture sets various limits on the kind of domestic support that can be provided to farmers. This is so that unfair market distortion does not occur. There are three kinds of support under this agreement: Green Box measures (those with no or minimal trade distorting effects), Blue Box measures (direct payments under production-limiting programmes) and Amber Box measures (everything else). No expenditure limits apply to Green or Blue Box measures. Amber measures are only permitted if they amount to product-specific support under '5% of the value of that product's output that year', or non-product specific support under '5% of the country's total agricultural production'.

The EU is currently operating within the limits set by the WTO rules. However, it is not clear what the situation would be for the UK once it leaves. If the UK does not continue to receive part of the

EU's entitlement, it will only be able to implement de minimis Amber Box measures amounting to less than 5% of the value of production (or 5% of total agricultural production). This may be difficult for the UK to meet in certain areas and may mean that the UK has to lower the farming support provided after Brexit, including support provided for protection of animal welfare.

It is also unclear which, if any, of the EU's Tariff Rate Quotas the UK can inherit. It is also unclear if the 58 Free Trade Agreements the EU has already agreed can be carried over to the UK. As a Free Trade Agreement can take around seven years to negotiate (eg EU-Canada and EU-South Korea), the UK may need to utilise templates from EU FTAs in order to conclude negotiations quickly once it can begin to look at this in March 2019.

3. Rules of Origin

One of the concerning consequences of being outside of the Customs Union is that the EU and the UK will begin to check the origin of products they trade with each other. This will mean delays at borders with trucks and shipments having to undergo previously non-existent checks. There will be no free-flow of goods as before. It is likely that a future Free Trade Agreement will cover rules of origin and regulatory cooperation and, for example, mutual recognition of these rules in each partner. However, this will not do away with the need for some kind of check at the border. This will cause potentially expensive delays and will also make journeys increasingly difficult for live transports of animals which may be subject to lengthy delays.

Conclusion

Unfortunately, it is not easy to point to one single option for the UK's post-Brexit trading relationship with the EU that will be best for animal welfare. All potential routes have their own sets of challenges and risks that will need to be monitored closely to ensure that animal welfare is not marginalised. The biggest risks for animal welfare with Brexit include the lack of influence of the UK on EU animal welfare and trade policy, and the fact that the UK has had no competence over trade policy while it has been a member of the EU, so we do not know what it will do in practice for animal welfare.

Generally, it is problematic that the UK will now prioritise gaining market access to the EU market and to those of other trading partners. Gaining market access will likely be prioritised much more significantly than animal welfare. Therefore, the UK may not have the motivation or the negotiating power to ask for animal welfare to be included in future trade deals.

However, this is not to say that animal welfare is safe in the hands of the EU in trade negotiations. The EU dropped animal welfare as a priority when negotiating the CETA deal with Canada, in order to include provisions on geographical indications. However, the EU does have significantly more negotiating power to be able to argue for the inclusion of animal welfare in trade deals. Conversely, if the UK were to remain a part of the Customs Union bound by the EU's FTA negotiations it would

have no power to push for animal welfare if the EU's priorities changed and it no longer pursued animal welfare protection in trade deals. On balance, it seems that in the context of Brexit and animal welfare, the UK may be better off having the freedom to negotiate its own trade deals, as long as it acts on its citizens' concerns for animal welfare and pursues this in its trade policy. The other drawback of remaining inside the customs union, for animal welfare, is that the UK could not unilaterally decide to ban live exports or restrict trade in any other poor-welfare product. Only time will tell if the UK will indeed act on these issues independently, but we can be certain that it would be impossible for the UK to do so independently as a member of the customs union.