The post-Brexit food ingredient market: The flaws in the UK's 'common rulebook' Chequers plan

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In August, the UK published technical notices explaining the implications of a "no-deal Brexit", the UK's immediate departure from the EU on March 29 next year. Food ingredient companies now seek to get to grips with the impact on their businesses. These include the more obvious 'knowns' highlighted by the notices: customs declarations, tariffs, new business registration numbers. In addition, there are the more perilous 'unknowns' savoured by the media: traffic jams from Dover to London, inadequate lorry supply, food rotting at customs borders. As a result, one could be forgiven for not looking much beyond March 2019. Yet, both the UK and EU have sketched their perspectives on the rules that will govern future cross-Channel food trade. What lies in store for the food ingredient industry?

UK vision: common rulebook and business as usual

The UK government's vision for post-Brexit relations with the EU was laid out in its July White Paper (in the UK media referred to as the 'Chequers plan' after the UK Prime Minister's country house where it was finalised). The political aftermath of its publication (the resignation of UK negotiator David Davis and Foreign Secretary Boris Johnson) rather diverted attention from its substance. Although brief, it provides an insight into UK ambitions for food trade and exposes some of the difficulties that lie ahead for negotiators.

The Chequers plan steers a tenuous (but politically critical) course between asserting independence from Brussels and promising minimal damage to existing UK-EU trade. Firstly, the White Paper proposes to maintain the majority of EU rules in a "common rulebook". This rulebook will "encompass common rules that must be checked at the border" and therefore "remove the need to undertake additional regulatory checks of the border". While comically contradictory, the intention is clear: to keep trade flowing, the UK will need to retain a large number of EU standards. The UK secondly draws a distinction between "border" rules and those, such as marketing and labelling requirements, that do not need to match the EU's, as "they do not govern the way in which products are produced, but instead determine how they are presented to consumers". This approach foresees considerable reward, allowing the UK to "tailor its food policy

to better reflect business needs, improve value for money and support innovation and creativity". In short, continued smooth trade with the EU and more appropriate laws at home.

The EU perspective: UK as a third country will be treated as a third country

With Brexit negotiations so far prioritising the terms of the UK's departure, EU institutions have refused to be drawn on the detail of future trade arrangements. In March, the European Council's published Negotiating Guidelines outlining a framework for future trade with a UK outside the Single Market and Customs Union. This anticipates a comprehensive Free Trade Agreement (FTA), but one that "cannot offer the same benefits as Membership and cannot amount to participation in the Single Market". The food trade-specific arrangements foreseen are limited: an agreement establishing "disciplines" (or the dos and don'ts) of setting new EU and UK food rules, and a framework for "voluntary regulatory cooperation". In other words, continued trade is the goal, but with the UK as a third country and therefore no specific concessions. This will not be business as usual.

Where do these two visions coincide and what does it mean for the ingredient sector? On the optimistic front, UK pragmatism, shared experience and input into existing EU laws, and limits in resources, should preclude any regulatory revolution. If the UK's "common rulebook" replicates product authorisations, such as food additives, enzymes and novel foods, this will prevent the establishment of at least some of the most obvious forms of trade barrier. Significant divergence in other technical areas of food safety, such as contaminants, would also seem unlikely. Unilateral adoption of EU rules by the UK is "voluntary regulatory cooperation" at its most effective, and will be welcomed by the EU and its businesses. Given this continuity on both sides of the Channel, why would there be a problem? Unfortunately, the "common rulebook" scenario presented by the UK is at best naive, at worst deliberately misleading in three ways.

1. A common rulebook alone will not keep trade flowing

The UK's common rulebook story appeals to a basic logic: With decades of common standards, the UK and EU can have full confidence in each other's regulatory systems; border checks would be superfluous. Unfortunately, this logic has no traction in the EU regulatory context. For a substantial sector of foods – products of animal origin – the EU has established two steps for entry to the EU market. Firstly, a third country, once approved by the EU for public health and animal health purposes, must evaluate and list all businesses able to meet EU standards. Secondly, all animal products are subjected to documentary, identity and physical controls at the EU border. While a common rulebook may arguably facilitate the first step, it will not alleviate the need for the second. A future EU-

UK FTA can ease the burden of border checks. However, even in its most ambitious form (The EU-Canada Comprehensive Economic and Trade Agreement), cooperation has amounted to only simplifying certificate requirements and reducing the frequency of checks. The removal of border controls envisaged by the UK White Paper would open an unacceptable breach in the EU's existing controls.

For the majority of non-animal origin foods including ingredients, the burden of any additional checks (beyond any new customs procedures) will remain limited. Physical checks of non-animal products from the UK (and to the UK if it chooses to maintain comparable procedures post-Brexit) may take place, but the frequency of checks, determined by a Member State's evaluation of risk, will likely remain limited. By contrast, all cross-channel trade of ingredients of animal origin will have to pass through Border Inspection Posts and undergo mandatory checks. More worrying still for these manufacturers is the timeline for having the UK and its establishments approved. The auditing of third countries and listing of establishments typically takes two years. The UK and its food businesses can undoubtedly meet the required standards. But progress in negotiations and the EU's willingness and capacity to set in motion the necessary auditing prior to completing talks will be key to determining whether these steps can be completed on time. If this is not done, ingredient manufacturers will not have to worry about logistics and customs declarations; their products will simply not be allowed across the border. The EU has been at pains to highlight these requirements in a Notice to Stakeholders published in February. The UK's rather glib reassurances about "common rulebooks" fail to engage with these challenges.

2. A common rulebook or an EU one?

Whether termed as the UK's "common rulebook" or EU's "voluntary cooperation", the former should not be under any illusions as to the one-sided nature of this future relationship. Take the example of novel food authorisations. The UK will require some form of authorisation system for new products wishing to enter its market. Having had responsibilities for managing novel food applications until the introduction of the new Novel Food Regulation in January 2018, there are no questions as to the capacity of UK authorities to deliver such a system. However, no EU equivalence-type rule exists that recognises the authorisations of third-country novel foods. A change in EU legislation to specifically accommodate UK approvals would seem inconceivable. As a result, innovative ingredient manufacturers will need to consider, in addition to the uncertainties typically associated with EU approval, their strategy for the UK market: launch a parallel EU and UK authorisation or hope for a speedy UK update of its novel food list. This is an area where the rhetoric of the "common rulebook" may be exposed in reality. Even if setting out to copy EU legislation, in practice, there will be two

parallel rulebooks that at best will be out of sync (as currently experienced by European Free Trade Agreement countries due to delays in replicating EU law). Over time, rule divergence will inevitably increase, shaped by non-uniform risk assessment and the differing priorities of domestic business and stakeholders.

The 'common' element of the common rulebook characterisation is also misleading in that implies a UK involvement in decision-making of which there is very little prospect. The government will undoubtedly be seeking a status greater than that of simple rule taker, but the Council has explicitly rejected any such role for the UK as a third country. Neither should EU promises of FTA "regulatory cooperation" raise false expectations. Existing EU FTAs offer structures for reducing existing trade barriers, such as joint committees and information-sharing opportunities. At their most ambitious (again the case of Canada), accelerated procedures for managing particularly acute trade problems and early sight of upcoming EU measures are available. This in no way replicates the UK's influence today on EU decision-making.

3. The "common rulebook" will not give legal certainty for UK exporters

While convenient for placating both supporters and critics of Brexit, the UK's distinction between "border rules" and "presentational rules" is not particularly helpful. Most obviously, the distinction between the two is not so clear. Many labelling-related aspects of legislation – allergens, additive warnings, presence of GM materials – evidently have universal relevance to consumers. There would be no overwhelming cultural justification and obvious economic disadvantage for UK divergence in many presentational rules. This is not to say that there are no advantages to labelling rules more attuned to the needs of UK consumers. Yet, as noted by the UK White Paper, such national regulations are permitted today, provided they do not undermine the Single Market.

This leads to a fundamental point seemingly absent in UK government thinking and indeed barely touched upon in analysis of the impact of Brexit: the principle of mutual recognition. As a basic rule, the UK's exporters today do not need to worry about national rules in EU export markets. If a product is legally placed on the market in the UK it may, through mutual recognition, circulate throughout the Single Market. A recent Commission report on the effectiveness of this principle suggests that only 80% of the EU food market is harmonised, leaving a significant portion of food law governed by national rules. Those ingredient suppliers familiar with the trials of navigating national food supplement rules may not see the loss of mutual recognition as a great handicap. Many prefer to comply with local laws than risk legal challenge. Indeed, calculating which companies benefit from mutual recognition today is extremely difficult; the Single Market certainly works imperfectly. But, in the future, UK exporters first placing goods on the post-Brexit EU market will have no grounds for disregarding

or contesting idiosyncratic local rules, and limited access to the legal and practical mechanisms aimed at facilitating trade across the EU. Interpreting and complying with national rules will create additional complexities for UK exporters. This is another way that a "common rulebook" cannot be business as usual and why the damage to post-Brexit trade is currently understated.

It could be argued that the UK's "common rulebook" proposal is purely an ambitious opening negotiating move; the final trading relationship will be a refined version accommodating the demands of both parties. The dangers of this strategy are twofold. Firstly, the creation of false premises from the outset of negotiations risks disappointing stakeholders, reducing the likelihood of securing adequate political support for any deal. Secondly, the "common rulebook" solution is so divorced from current legal realities that it offers a limited basis for detailed talks. This could hamper discussions and increase the danger of missing pressing deadlines. Under the draft Withdrawal Agreement, a new trading relationship must be established by December 2020. There is little time to fantasise about "common rulebooks" and "trade as normal". The advantages to UK businesses of mutual recognition and influencing EU rules are the costly, but inevitable losses of Brexit. The focus must now be a narrow one of using existing bonds of trust and confidence to quickly secure the UK's status as a reliable third country for food export and hereby reduce border controls. In this respect, the UK's disingenuous Chequers plan is a worrying step in the wrong direction.