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# Britain and the EU: What next?



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## **Introduction**

With the passing of the *European Union (Withdrawal) Act 2020* and the ratification by both the EU and the UK of the Withdrawal Agreement, the first phase of the UK's departure from the European Union has been completed. The second phase will in many ways be more complicated than the first. The Withdrawal Agreement addressed important questions about the UK's departure from the EU – citizens' rights, financial liabilities, the special circumstances of Northern Ireland and urgent legal matters connected with the UK's separation from the EU – but it did not decide what sort of relationship the UK will have with the EU in future. This relationship will need to cover issues such as trade, foreign policy and defence, transport and travel, fisheries, police co-operation and security and education and research.

This phase will be affected by the decision of the British Government to restrict the time period in which it intends to negotiate to the end of 2020. The EU has never negotiated even a trade-only agreement with a third country in as short a period as 11 months.

Yet it is not only the UK that will be affected by Brexit; the EU will also face a period of adjustment. Some aspects of that will quickly become apparent, for example there are difficult budgetary questions following the departure of one of EU's largest net contributors as it draws up the next seven-year budget from 2021, the Multi-annual Financial Framework.

There is much more to the UK's relationship with the EU than trade and budgetary payments. The UK's advocacy of free market, free trade policies will be missed by like-minded EU Member States but its absence will be seen as an opportunity by others. Decisions about the future of EU will not emerge for some time and the delay may be increased by the launch of the proposed conference on the future of the EU in 2020.

This paper covers the UK negotiations with the EU over their future relationship and looks briefly at how the EU plans to address some important questions about its future in 2020 and beyond. It has been prepared for a seminar at Regent's University London in March 2020 and is being published as a contribution to debate.

## **The future partnership negotiations: process**

The negotiations on the future partnership between the UK and the EU are expected to begin in March or April. These negotiations will be conducted under Articles 207 and 218 of the Treaty on the Functioning of the European Union (formerly, the Treaty of Rome). Article 207 deals with the common commercial policy (notably trade) negotiations and 218 provides the legal basis for the EU's relationships with third countries and international bodies.

The authorising of the opening of negotiations, the adoption of negotiating directives and the decision to agree the text of agreements lies on the EU side with its Council of Ministers. The negotiations themselves will be led by the European Commission which will first submit recommendations for the negotiating directives to the Council. The Council will also nominate the EU's lead negotiator, expected to be Michel Barnier, who led the EU's negotiating team for the Withdrawal Agreement. The EU Member States normally steer trade negotiations with third countries through the Trade Policy Committee, made up of representatives of each Member State. It has been suggested that in this instance the Council will set up an ad hoc working party of Member States similar to that established for the Withdrawal Agreement as the talks with the UK will cover more than just trade issues.<sup>1</sup>

On the UK side it is far from clear what the process for agreeing a negotiating mandate will be, whether Parliament will have a say and who will negotiate on the UK's behalf.

Once the EU has adopted its negotiating directives (mandate), most likely at the European Council at the end of March, talks can begin with the United Kingdom. Initially, they are likely to be about the scope of the negotiations, methods of working and a possible timetable. The UK will by that stage need to have worked out its own objectives, recognizing that the short period of time envisaged for the negotiation and the relative lack of preparation on the UK side gives advantages to the EU.

One key question for the negotiators will be whether they choose to run talks in parallel on different aspects of a future partnership or whether they are sequential beginning with, for example, trade relations. Negotiations in parallel on multiple topics might stretch the capacity of both sides but it might also ensure that they make progress on what they have acknowledged already is a relationship that is, and will continue to be, multifaceted. It would also reduce but not eliminate the risk of a potential "WTO deal" exit at the end of 2020.

The process for the ratification of any agreement(s) is important. If what is agreed is characterised in the EU legal order as a "mixed agreement", that is, one that requires ratification by the individual Member States under their own national ratification procedures as well as the consent of the EU collectively, this will take longer.

Article 207 provides for ratification by the Council of Ministers by qualified majority in respect of trade, except in areas where the EU treaties require unanimity (aspects of trade in services, investment and intellectual property). The same principle applies under Article 218(8) to non-trade policy areas where EU laws are adopted by unanimity (foreign policy and defence, VAT, social security, the EU budget and some parts of justice and home affairs).<sup>2</sup> Under Article 218(6) the European Parliament must also give its consent to the agreement.

Without ratification, the agreement would not come into force on 1 January 2021 and there would be a period when the UK and the EU had to trade with one another on World Trade Organisation terms, which would mean the imposition of significant tariffs on imports of EU goods into the UK and on the export of UK goods to the EU. This would particularly affect

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<sup>1</sup> Agata Gostynska-Jakubowska, 'How should the EU 'get Brexit done'?', Centre for European Reform, 28 November 2019

<sup>2</sup> See European Council, 'Unanimity', 28 January 2020

British farmers and the agri-food sector. There are however precedents (Ukraine for example) for implementing trade provisions of agreements ahead of ratification.

### **The future partnership negotiations: issues**

When the UK and the EU agreed the Withdrawal Agreement in October 2019 they also jointly adopted a Political Declaration setting out the framework for the future relationship between the parties.<sup>3</sup> This document contains the broad outline of the kind of relationship the UK and the EU would like to achieve between them but it is written in general terms and important questions remain to be decided by the UK Government in respect of its domestic policy and between the parties in the talks. The declaration is not legally binding and it is to be expected that both sides will formulate a series of negotiating objectives. In the case of the EU, each Member State will be looking not only to the general interest of the EU but also to specific risks and opportunities for its own economy.

#### Trade in goods

A big issue is trade in goods. During the transition period (until 31 December 2020) the UK continues to trade with the 27 EU Member States on the same basis as it did as a member. No post-Brexit trade agreement between the UK and the EU could match the current relationship in terms of the ease of movement of goods and access to service markets.<sup>4</sup> The UK's decision to leave the Single Market and the Customs Union as well as the EU makes this inevitable.

The overriding issue is whether or not the UK is prepared to accept the continuance of a "level playing field" with the EU as the quid pro quo for a zero tariffs, zero quotas agreement as the EU has suggested. The term "level playing field" refers to economy-wide rules and standards in the areas of competition/state aid, social and employment protection, the environment and taxation governance. Both parties committed themselves to a level playing field in the Political Declaration. But following the 2019 general election, it is possible that the British Government will want UK regulatory regimes to diverge from those of the EU, rather than accept existing EU rules as the basis for trade. Government sources have hinted that this latter approach is likely but it has not been publicly confirmed and in any case the possible consequences for the trade relationship will not be known until the EU reacts to it.

The UK may try to negotiate a high degree of commonality in some sectors whilst enabling divergence in others. This approach may be rejected by the EU because of fears that the UK could become an aggressive free market country, operating within the European economy on the basis of lower taxes, lower product and environmental standards, as well as less generous employment protection. What has been called the "Singapore style" of economy could represent a significant threat to higher cost western and northern European economies.

Neither the UK nor the EU will be negotiating in a vacuum. The UK Government will be under pressure from British businesses to avoid a cliff edge caused by the UK leaving the Single Market at the end of 2020 without a workable alternative relationship agreed with the EU (see

<sup>3</sup> See HM Government, 'New Withdrawal Agreement and Political Declaration', 19 October 2019

<sup>4</sup> In 2018, the UK exported £291 billion in goods and services to the EU, representing 45 per cent of UK exports. UK imports from the EU amounted to £357 billion and 53 per cent of all UK imports. UK trade with the EU accounts for about eight per cent of UK GDP; the same figure for the EU is 2.3 per cent. See Matthew Ward, *Statistics on UK-EU trade*, House of Commons Library Briefing Paper CBP-7851, 16 December 2019; and 'Does the EU need us more than we need them?', Andrew Walker, *BBC News*, 23 December 2018

below); businesses based in EU countries will have similar concerns about the risk to their exports to the UK, which has a deficit in trade in goods with the EU, and also to avoid a trading relationship which involves too much additional friction in the form of regulatory checks and rules of origin controls in contrast with the present Single Market regime.

Both the UK and the EU have indicated that they wish to establish a relationship for goods trade based on zero tariffs, zero quotas and the smoothest possible customs arrangements. But their ability to agree such an arrangement will depend on the interaction between the trade negotiations and other issues (see especially fishing below) and on what solutions are found to the level playing field question.<sup>5</sup>

### Services and investment

Both parties committed in the political declaration to achieving what they describe as “ambitious, comprehensive and balanced arrangements on trade in services and investment”, going beyond their commitments as parties to the WTO and those that have been adopted in recent free trade agreements between the EU and other countries. While this ambition may be shared, there are likely to be different views as to the meaning of “comprehensive and balanced arrangements” and UK restrictions on the free movement of people, which still remain to be determined, will affect this area. The UK side apparently sees potential trading opportunities through the expansion of digital services which could involve greater regulatory divergence.

EU Member States, on the other hand, are interested in the opportunity to attract financial services and related inward investment from the UK to their own countries. Given its £32 billion a year fiscal contribution to the economy, the UK government will need to do what it can to protect financial services from the likely losses that will follow the UK leaving the Single Market. The parties have agreed to try to assess the equivalence of their financial services regimes before the end of June 2020.<sup>6</sup>

Data transfer is a cross-cutting issue that affects many businesses (and not for profit organisations). Between 2005 and 2015 the volumes of data entering and leaving the UK increased 28 times; three quarters of these were exchanged with EU countries.<sup>7</sup> The UK has adopted the General Data Protection Regulation, the EU’s most recent legislation on the subject, since the 2016 referendum. If the UK Government is willing to maintain an equivalent data regime to the EU’s in the future, then data transfer between UK and EU businesses, universities and other organisations should be able to continue subject to the European Commission finding the UK’s standards as equivalent to EU ones (known as an “adequacy decision”).<sup>8</sup> But if the UK wishes to adopt a different approach, based on lower data protection standards, then data transfer is likely to be restricted or stopped with serious adverse consequences across the economy and society.

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<sup>5</sup> It is not only the EU that seeks a level playing field in trade; that is US policy under President Trump and the revised North American Free Trade Area Agreement is seen as an example of that approach: see Office of the United States Trade Representative, ‘United States-Mexico-Canada Agreement’, 17 January 2020

<sup>6</sup> HM Government, *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom*, 19 October 2019, p. 9, para 36. Even if the EU accepts UK financial services regulation as “equivalent”, the enhanced access it would give is less than the current ‘passport’ to do business in the EU; ‘equivalence’ requires keeping UK rules in line with the EU’s, which may prove unacceptable.

<sup>7</sup> ‘A no-deal Brexit may trigger a data disaster, and UK companies don’t have a clue’, Daphne Leprince-Ringuet, *Wired*, 24 September 2019

<sup>8</sup> Necessary because the UK will become a “third country” under the GDPR after Brexit.

### Other economic issues

Intellectual property and public procurement are two important economic issues on which the parties have indicated they wish to reach agreement. Energy is another area where the parties will want to achieve a high level of co-operation because of the inter-relationship between UK and continental European energy markets.

### Research

The Political Declaration speaks of continued co-operation on scientific research and innovation. The UK has hitherto been a substantial net beneficiary from its participation in these programmes and has also benefited from the network of international co-operation thus established. A new seven-year EU programme will come into being in 2021 to replace the current Horizon 2020 programme in which the UK will have no participation unless this can be negotiated during 2020.

### Travel and mobility

The parties have agreed in principle on visa free travel for short term visits, expected to be up to three months. But there are a number of other matters which they have done no more than agree to consider, including allowing people to move between the EU and the UK and vice versa for such purposes as research, study training and youth exchanges. They have also agreed to look at social security co-operation (essential if recipients of UK pensions living in the EU after 2023 are to get their state pensions uprated annually<sup>9</sup>) and arrangements for international family law to enable judicial cooperation in matrimonial and parental matters.

### Transport

The EU and the UK have agreed in principle that there should be a comprehensive air transport agreement to cover passengers and cargo, dealing with issues such as market access, aviation safety and security, the management of air traffic and ensuring open and fair competition. They have also agreed to ensure continuing high standards of aviation safety and security, including through co-operation between the European Aviation Safety Agency and the UK's Civil Aviation Authority. The level of access to the EU market and the degree of co-operation on safety are likely to depend on the extent to which the UK agrees to follow EU rules.

The other major transport question is access for freight and passenger road transport operators. At present, British road hauliers and coach companies can drive their vehicles across the EU with the minimum of bureaucracy because of Single Market rules. UK transport operators are anxious to secure similar easy access after Brexit. But in recent years there have been concerns within the EU about the undercutting of EU transport hauliers by companies legally based in low cost Member States but operating their businesses in higher cost ones. The EU will therefore seek assurances from the UK that it will maintain the current standards governing road hauliers and not try to establish itself as a base for low cost haulage companies who wish to avoid EU requirements.

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<sup>9</sup> The UK has made a unilateral commitment to uprate the state pension for UK citizens living in the EU until March 2023: see HM Government, 'Uprating guarantee for UK State Pension recipients living in the EU after Brexit', 1 September 2019

## Fishing

One of the most contentious areas for the negotiations will be fishing, partly because fishing has become a talismanic issue for many Brexit supporters, as it is for interested European governments, some of whom had traditional fishing rights in British waters prior to the Common Fisheries Policy (CFP). British fishermen have argued for several decades that the UK has been a major loser from the CFP and that Brexit will give United Kingdom the opportunity to reduce foreign fishing in UK waters, enabling British fishermen to develop new fishing opportunities.

In reality the picture is more complex. The United Kingdom's proximity to other countries means that it cannot establish a large exclusive economic zone around itself in the way which some countries, for example Iceland, have been able to do. Moreover, all major fish stocks in UK waters will still need to be managed jointly with the EU as they are "shared stocks" which also swim in EU waters. This limitation of geography is compounded by the fact that the United Kingdom agreed in the 1964 London Fisheries Convention which formalised historic foreign fishing rights within the 12 mile limits of the signatory countries (all now EU states except for the UK).<sup>10</sup> The Convention was later incorporated into EU law. Since 2016, the British Government has announced its intention to withdraw from the Convention although it has yet to take legal powers to do so.

Several EU Member States, France, Belgium, Ireland, Denmark, the Netherlands and Spain wish to maintain their existing access to UK fishing grounds as well as their current quota shares on shared stocks. This gives the UK some leverage in the negotiations. But at the same time a substantial part of the UK's fishing catch is exported to the EU and is highly vulnerable to tariff barriers and transport delays. So there is a trade-off between EU access to UK waters and UK access to EU markets. Both parties have committed themselves to trying to reach agreement on the question by 1 July 2020 in order to allow them to agree detailed rules (including quotas) for fishing in 2021.

In terms of growing the fishing sector, which currently contributes around £1.4 billion to UK GDP, making it one of the smallest economic sectors, this will be difficult in view of the need to reach agreement with the EU as well as to reach agreement with some non-EU fishing countries, especially Norway and Iceland. Opportunities for the UK fishing sector will continue to be restricted by the need to maintain fish stocks over time.

## Home affairs and internal security

The political declaration says that both parties agree in principle to establishing a wide-ranging security partnership. This would cover both law enforcement and criminal matters as well as those concerning foreign policy and defence. These two aspects of security have been separated here for convenience and are likely to be similarly separated in the negotiations.

The UK has benefited greatly from EU co-operation on crime and justice. UK police and prosecutors have made extensive use of the EU's European Police Agency (Europol) and its related justice arm, Eurojust, which facilitates investigations across jurisdictional boundaries. UK police forces have been extensive users of the various shared databases

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<sup>10</sup> Text available on the UK Government's website: See HM Government, *Fisheries Convention*, Cmnd. 3011, June 1966

operated by the EU (ECRIS, Schengen Information System, PNR and Prüm<sup>11</sup>). Furthermore, the basis for extradition between the EU and the UK has been the European Arrest Warrant for the last 15 years (and several Member States have constitutional or other bans on extraditing their citizens to non-EU countries).

The political declaration provided some detail on the kind of crime and justice partnership that the UK and EU envisage. In particular, it said that the future partnership should cover data exchange, operational co-operation between law enforcement agencies, judicial co-operation in criminal matters and measures to counter money laundering and terrorism financing. There was further detail on the need to maintain exchanges of passenger name record data and the exchange of other data, such as that concerning DNA, fingerprints, vehicle registration and criminal records.

Agreement on these issues will depend on an effective system of dispute resolution. This is of particular importance to data exchanges as these concern the rights of individuals protected by the EU's GDPR legislation and also by its Charter of Fundamental Rights. There are also issues over extradition where the ideal arrangement for the UK would be the continuance of the European Arrest Warrant (EAW) (rather than a return to using the far slower and less comprehensive 1957 Council of Europe Convention on Extradition<sup>12</sup>). For the UK, it is particularly important to ensure smooth extradition arrangements with Ireland where the EAW has been invaluable in depoliticising extradition.

### Foreign policy & defence

The political declaration said that both parties are committed to establishing "close and lasting co-operation on external action to protect citizens from external threats". The declaration identified the need to strengthen international peace and security, including through the UN and NATO, and addressing the causes of problems such as terrorism and illegal migration. The parties also indicated that they wish to continue to co-operate on development policy.

The details of a foreign and defence policy agreement were barely outlined in the political declaration but they suggested a structured approach. This would enable the UK to support EU positions on important foreign policy goals, including working together on sanctions regimes and the UK would be able to contribute to EU-led international operations whether civilian or military. The parties also propose to continue working to improve the capabilities of their defence forces and in the exchange of intelligence.

The departure of the UK from EU removes its second largest military power. But the French government has indicated its desire to continue bilateral cooperation in defence and security with the UK as set out in the Lancaster House agreement.<sup>13</sup> Given the trends in US policy towards Europe, evident under the presidencies of both Barack Obama and Donald Trump, this is an area where the UK and EU are likely to reach a measure of agreement. The real question is how much influence the UK will have over EU policy in practice and the

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<sup>11</sup> For more information on these databases, see Tim Durrant, Lewis Lloyd \* Maddy Thimont Jack, *Negotiating Brexit: Policing and criminal justice*, Institute for Government, 6 September 2018, p. 11

<sup>12</sup> Council of Europe, *European Convention on Extradition*, 13 December 1957, ETS 24

<sup>13</sup> See HM Government, *Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic for Defence and Security Co-operation*, Treaty Series No. 36 (2011), Cm 8174

impact of its loss of ability to mobilise the EU in support of UK foreign policy goals – as it did so effectively, for example, after the Salisbury poisonings in respect of action against Russia.

The idea of creating a European Security Council, which would include the UK after Brexit, has recently been floated but this has not been pursued so far.

### Overseas territories

The UK has 14 overseas territories (UKOTs) of which nine were directly associated with the EU. In addition, Gibraltar as a European territory of a Member State for which the UK was responsible became part of the EU and detailed arrangements were agreed at the time of UK accession in 1973. This status ends with Brexit and new arrangements will need to be agreed with Spain for the period after the end of 2020. Brexit has major implications for the UKOTs particularly in respect of market access for their exports of goods and services into the EU and in the case of Gibraltar particularly, the movement of people. The EU is also a major funder of UKOTs with direct funding for UK overseas territories 2014-20 amounting to €76 million and many UKOTs benefiting from other funding streams and programmes, including those that support development in the poorer territories.

The EU's 2013 Overseas Association Decision (OAD) facilitated easier trade between the EU and the UKOTs. Many UKOTs are heavily dependent on access to the EU Single Market for their exports. In the case of the Falkland Islands, its government has estimated that 70 per cent of the island's GDP is dependent on such access. Bermuda, a major provider of specialist financial services within the EU, benefits from the recognition of its regulatory system through the EU's equivalence rules. Businesses in Gibraltar have expanded in recent years as a result of their access to the EU's financial services market without needing to be registered separately in host countries; as a result over 60 insurance companies have based themselves in Gibraltar.<sup>14</sup>

The Crown dependencies of the Channel Islands and the Isle of Man have a different relationship with the EU from Gibraltar but it will also be necessary to make arrangements for them by the end of 2020.

### Dispute settlement

The parties have set out some principles which will form the basis of a dispute settlement procedure in the final agreement. The main initial forum for settling disputes will be the Joint Committee of representatives of the EU and the UK. The agreement is likely also to make provision for mediation and for independent arbitration. The parties have agreed in principle that where there is a question of the interpretation of EU law, the matter will be referred to the European Court of Justice for a binding ruling on the interpretation of Union law.

While this is a contentious area, it is important to business in particular that the two parties agree an effective dispute settlement procedure so as to avoid conflicts between the UK and EU in the future, which could be economically costly for both sides; and also to avoid further problems caused by disputes being subject to undue delay or remaining unresolved.

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<sup>14</sup> For a discussion of the problems facing the UKOTs, see Peter Clegg, 'Brexit and the Overseas Territories: Repercussions for the Periphery', *The Round Table: The Commonwealth Journal of International Affairs*, 105(5), 2016, pp. 543-555

United Kingdom Union issues

Finally, UK national issues will play a part in the negotiations. Devolution, especially in respect of Scotland, will be important. All three devolved administrations in Scotland, Wales and Northern Ireland withheld their consent from the *European Union (Withdrawal Agreement) Act*; while this did not affect the ratification of the Withdrawal Agreement, it does indicate the tensions already existing between the UK Government and the devolved administrations.<sup>15</sup> There are also some specific devolution aspects to important issues in the negotiations (such as fishing).

Northern Ireland and the impact of the sea border with Great Britain that the government accepted in order to reach the Withdrawal Agreement with the EU last autumn will remain highly controversial. The details of this agreement will need to be settled by the end of 2020.

The economic impact of Brexit will also be a key factor. If there is evidence of a hard economic landing, the prospect of a very limited trade agreement focused on goods or the possibility of no trade agreement at all at the end of 2020, the political repercussions could be significant. The Government's own analysis showed that the areas likely to be worst-hit by such a Brexit would include the regions that have just elected significant numbers of new Conservative MPs – the northeast of England, Yorkshire and the Midlands.<sup>16</sup>

**Developments in the EU**

The Conference on the Future of Europe is an idea originally proposed by President Macron of France and later adopted by other EU Member States. The plan is that this body be jointly set up by the European Commission and the European Parliament and it would draw up proposals for the future of the EU in meetings held between 2020 and 2022.

The concept is that the conference will have an open debate about the EU beginning with its democratic structures and later considering EU policies. Although promoted by the Parliament and the Commission, it is proposed that EU citizens will have a role to play in its deliberations.

As this project has yet to be fully agreed, it is unclear how the conference would operate or what it could achieve. Any changes to EU policies would need to pass through the EU's established policy-making procedures and changes to the structures of the EU are likely to require Treaty changes which in turn would need to be ratified by all Member States before they could come into force and in some cases such ratification would require the holding of national referendums.

President Macron's initiative was followed by the French Government's decision to veto enlargement of the EU into the Western Balkans, a decision that ran contrary to agreed EU policy on enlargement and which surprised many observers.

Taken together these developments could be seen as indicating that the EU is about to enter a period of internal reflection. Yet it is Macron's stated intention that the EU should play a bigger role in the world at a time of erratic trends in the formation of US foreign policy and the growing power (both economic and military) of China.

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<sup>15</sup> *European Union (Withdrawal Agreement) Act 2020*, c. 1

<sup>16</sup> HM Government, *EU Exit: Long-term economic analysis*, Cm 9742, 28 November 2018

## **Conclusion**

The UK faces a formidable task in seeking to negotiate a future partnership with the EU in under 12 months. If the outcome were to be only a fairly basic trade in goods agreement by the end of 2020, extremely serious problems could arise for sectors not so covered.

Although the government's large majority may insulate it from defeat in the Commons, it will be affected by the economic consequences of Brexit on businesses and communities. The EU will aim to protect its own economic interests in a world where Europe is having to work harder to make its voice heard and to ensure that the UK (as a third country) does not manage to hold on to identical benefits to those of EU members after leaving.

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## Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

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 [senioreuropeanexperts.org](https://senioreuropeanexperts.org)

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