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**Brexit:  
The negotiating  
positions of the UK  
and the EU**



# Brexit: The negotiating positions of the UK and the EU

## Introduction

The UK and the EU commenced negotiations for a future partnership on Monday 3 March 2020. Before the talks began, each side had published its own outline negotiating position.

This paper describes and then analyses the positions of the UK and the EU at the start of the talks; it complements an earlier paper on the issues in the negotiations.<sup>1</sup>

## The UK position

The British position was set out officially in a written statement from the Prime Minister on 3 February and in greater detail in a White Paper on 27 February (referred to as “the White Paper” hereafter).<sup>2</sup> In addition, there were less formal explanations of the UK position in a speech delivered by the Prime Minister on 3 February and a lecture delivered by the UK’s chief negotiator, David Frost, on 17 February.<sup>3</sup>

## The EU position

The EU Council adopted the EU’s negotiating directives on 25 February 2020. This was based on a draft published by the Commission on 3 February.<sup>4</sup> In addition to this detailed document, speeches by the President of the Commission, Mrs Ursula von der Leyen, and the EU lead negotiator, Michel Barnier, on 8 January and 26 February respectively provided further explanation of the EU’s position.<sup>5</sup>

## Overall approach of the parties

### The UK

The British Government’s overall approach has three aspects. First, it is seeking approximately 11 separate agreements, rather than a single comprehensive agreement,

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<sup>1</sup> Senior European Experts, *Britain and the EU: What next?*, January 2020

<sup>2</sup> HC Deb 3 February 2020, vol 671, cols 1WS-4WS; and HM Government, *The Future Relationship with the EU: The UK’s Approach to Negotiations*, CP211, 27 February 2020

<sup>3</sup> HM Government, ‘PM speech in Greenwich’, 3 February 2020; and HM Government, ‘David Frost lecture: Reflections on the revolutions in Europe’, 17 February 2020

<sup>4</sup> European Council, *Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement: Directives for the Negotiation of a New Partnership with the United Kingdom of Great Britain and Northern Ireland*, 5870/20 ADD 1 REV 3, 25 February 2020

<sup>5</sup> Speech by President von der Leyen at the London School of Economics, ‘Old friends, new beginnings: building another future for the EU-UK partnership’, 8 January 2020; and European Commission, ‘Speech by Michel Barnier to the students at ESCP Europe: Cooperation in the Age of Brexit’, SPEECH/20/340, 26 February 2020

such as the association agreements the EU has with a number of third countries. No reason has been given for this publicly, which is a change in position from the Political Declaration but it reflects a belief in government that a single agreement would enable the EU in future to threaten sanctions against unrelated areas if the UK was in breach of one part of the agreement (but, as experience in the EU/Switzerland relationship shows, a multiplicity of agreements does not guard against that eventuality).<sup>6</sup>

The Political Declaration, while undoubtedly not legally binding, was nevertheless entered into in good faith by the Johnson Government and endorsed by the deposit of our instrument of ratification and it gives effect to the provisions of Article 50 TEU to provide a framework for the future UK-EU relationship.

The most important of the proposed agreements is that on free trade, including services (such as financial services). There would then be others for policies such as fisheries, aviation, energy, mobility and social security, law enforcement and criminal judicial co-operation. The Government has specifically excluded some policies, including foreign and security policy and immigration.

The second aspect of the Government's approach has been to emphasise that, as the UK will be leaving the Single Market and the Customs Union as well as the EU, there must be complete political and legal separation between the EU and the UK. In practice this means no participation by the UK in EU institutions and no jurisdiction for the European Court of Justice (CJEU) in the UK. This is a continuation of the approach adopted by Theresa May's government but it has been given greater emphasis since the 2019 general election.

The third aspect of the UK's approach is to emphasise 31 December 2020 as a cut-off date. The Withdrawal Agreement makes provision for an extension to the transition period but the Government has been adamant that it will not agree to that.<sup>7</sup> If required however that would not necessarily preclude, if the EU agreed, extending negotiations beyond 31 December 2020, as indeed the White Paper implies might happen in respect of what it calls "technical issues" some of which (such as data protection) are of considerable importance (see below). However, even it were agreed to continue negotiations on individual sectors, termination of the transitional period at the end of December 2020 would result in EU law no longer applying in the UK (except for matters covered by the Withdrawal Agreement).

## The EU

The EU's approach differs from that of the UK in four important ways. First, it says that the negotiations "should be premised on the effective implementation of the Withdrawal Agreement and of its three Protocols", notably the protocol relating to Northern Ireland.<sup>8</sup> This follows reports in the UK media that the British Government is looking for ways to avoid checks on GB-NI trade required under the terms of the Withdrawal Agreement.

Second, the EU wants a single "close partnership" with the UK, as envisaged in the Political Declaration adopted alongside the Withdrawal Agreement, embodied in a comprehensive

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<sup>6</sup> Discussed in Sam Lowe, 'The Future EU-UK Relationship and the (relative) case for optimism', Centre for European Reform, 2 March 2020

<sup>7</sup> HM Government, *supra* n. 2, p. 4, para 9

<sup>8</sup> European Council, *supra* n. 4, p. 3, para 5

agreement that includes foreign policy and defence under “a coherent structure and be embedded in an overall governance framework”. In economic terms, this relationship must be based on a legally binding level playing field that prevents either party pursuing unfair competition. This approach is different from the more distant relationship proposed by the British, based on separate agreements, no single dispute resolution procedure and a limited commitment to a level playing field. As the House of Lords European Committee recently noted, the EU approach largely mirrors that of the Political Declaration whereas the UK’s approach is “in structure and in some content markedly different from the” Political Declaration.<sup>9</sup>

Third, the EU emphasises the ability to extend the transition period for up to one to two years under the terms agreed in the UK-EU Withdrawal Agreement.

Finally, the EU makes it clear that there can be no “cherry picking”, as it was referred to in earlier phases of negotiation. The UK cannot have the benefits of membership after leaving. Hard choices made by the UK will be reflected in the final relationship.

## **Trade**

### Goods

The UK proposes that trade in manufactured and agricultural goods between the parties should be tariff free, quota free and without any other charges or restrictions, provided the relevant rules of origin are met (and with streamlined customs provisions<sup>10</sup>). The EU takes much the same approach subject to satisfactory application of the Withdrawal Agreement, including the provisions relating to trade between Great Britain and Northern Ireland.<sup>11</sup> The UK also wants rules of origin to be applied in a way which permits goods to move between the EU and UK, for example for processing, without losing their certified place of origin (cumulation in trade jargon) but the EU is wary of the UK becoming (in Michel Barnier’s words) “an assembly hub for goods from all over the world” entering the Single Market as “British” goods.<sup>12</sup>

The parties agree that there should be trade remedies to deal with claims of dumping and other abuses. They also agree on the need to remove technical barriers to trade (TBTs); an important point as the UK currently benefits considerably from the reduction in TBTs through harmonisation and mutual recognition in the Single Market. The UK is seeking specific agreements on TBT use in several sectors, notably automotive, chemicals and medicinal products.

The EU wants access to fishing waters included in the trade chapters of the agreement, in contrast to the UK (see separate section below), and wants level playing field and dispute settlement provisions incorporated within it too. Level playing field issues cover state aid and competition (dealt with below) and employment and environmental issues (covered in the next section).

As regards measures in trade to protect human, animal and plant life and health in trade, ministers have said that the UK “will maintain a robust sanitary and phytosanitary (SPS)

<sup>9</sup> House of Lords European Union Committee, *8th Report of Session 2019–21: Report pursuant to section 29 of the European Union (Withdrawal Agreement) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement*, HL32 2019-21, 5 March 2020, p. 8, para 20

<sup>10</sup> But note that the so-called smart border proposed by HM Government could not be ready before 2025: see *ibid.*, p. 14, para 54, citing Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office.

<sup>11</sup> European Council, *supra* n. 4, p. 9, para 20

<sup>12</sup> See European Commission, *supra* n. 5

regime reflecting our existing high standards".<sup>13</sup> The UK wants an equivalence approach, *i.e.* that the parties should recognise each other's SPS regime as being equivalent. The EU's line is similar to the UK approach but wants the SPS regime to reflect the "precautionary principle" included in EU Treaties, to which the UK could well object.<sup>14</sup>

### Services

The UK and the EU agree on including provisions that promote trade in services and which give suppliers certainty about the rules. The UK calls for mutual recognition of professional qualifications and an approach that allows "balanced and reciprocal market access" with no discrimination between EU and UK service suppliers and the right to establishment.<sup>15</sup> The EU is more nuanced, suggesting recognition of professional qualifications where it is in the EU's interests and not committing itself to freedom of establishment for service providers. The UK suggests including audio-visual services but the EU specifically rejects that. In advocating an open market approach with an on-going commitment to liberalisation, the UK White Paper reflects the share of services in the UK economy (80 per cent) and the fact that whilst the UK has a deficit in trade in goods with the EU it has a surplus in services.

The Government's approach to investment is similar with an emphasis on open markets, no discrimination between the UK and the EU (including in respect of senior personnel to avoid residency/nationality rules) and on-going liberalisation. The EU largely agrees with this and shares the UK's desire to include financial services, professional and business services, telecoms and delivery services in the agreement. But while the UK wants to retain the right of road transport operators to provide services "to, from and through each other's territories with no quantitative restrictions", the EU is opposed to British road hauliers being able to carry goods between EU countries (often known as cabotage); something which would hurt UK hauliers (often self-employed people) very hard if implemented.<sup>16</sup>

On financial services, the Government's central proposal is that the agreement should "include legally binding obligations on market access and fair competition, in line with recent" Canadian FTA.<sup>17</sup> The EU's approach places emphasis on a voluntary system which respects the EU's regulatory autonomy. The UK believes that the EU should be able to certify the UK's financial services rules as equivalent by June 2020 as the UK currently has the same standards as the EU; it is not clear that the EU supports this timetable or the UK's proposed basis for agreeing equivalence.

On competition and state aid the Government says the agreement should commit the parties to effective competition laws but states that "this does not require legal or regulatory alignment" between the UK and the EU.<sup>18</sup> The EU wants the application of EU state aid rules in the UK (without CJEU oversight) but for state aid to be included in the dispute resolution procedure; the UK disagrees on both points.<sup>19</sup> The UK believes that the

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<sup>13</sup> HM Government, *supra* n. 2, p. 8, para 21

<sup>14</sup> European Council, *supra* n. 4, p. 12, para 30

<sup>15</sup> *Ibid.*, p. 13, para 36

<sup>16</sup> HM Government, *supra* n. 2, pp. 14-15, para 62; and European Council, *supra* n. 4, p. 20, para 73

<sup>17</sup> HM Government, *supra* n. 2, p. 13, para 54

<sup>18</sup> *Ibid.*, p. 15, para 66; see also HM Government, 'PM speech in Greenwich', 3 February 2020

<sup>19</sup> European Council, *supra* n. 4, p. 27, para 96

EU should accept (as the Prime Minister said at Greenwich) that the UK has a better record on state aid than many EU Member States.<sup>20</sup>

Finally, the UK wants the agreement to go further than WTO agreements on intellectual property.<sup>21</sup> It is less enthusiastic about recognising the EU's geographical indications for food and drink (*e.g.* Parma ham and Champagne), at least under present rules (although it had agreed to this temporarily in the Withdrawal Agreement).

### **Level playing field issues: employment protection & the environment**

The importance to the EU of the level playing field issues is apparent early in their mandate; paragraph 10 spells out that they don't just want a "a level playing field but one "that will stand the test of time". As Barnier explained in his speech, the UK may say that it wants a Canada-style free trade agreement (FTA) but the UK's trade with the EU is almost 10 times that of Canada's and London is 70 minutes by air from Brussels whereas Canada is 10 hours' flying time away.<sup>22</sup> It is this issue of proximity that is central to the EU's argument (and which was set out in the Political Declaration to which the UK subscribed) for including provisions to ensure fair competition through a level playing field in employment, the environment, and state aid and competition laws.

In relation to employment protection, the UK position is that the agreement should include "reciprocal commitments not to weaken or reduce the level of protection afforded by labour laws and standards in order to encourage trade or investment", in line with the EU-Canada FTA, with both parties having their own labour laws but re-affirming their commitment to the rights and principles agreed through the International Labour Organisation.<sup>23</sup> The EU wants a non-regression clause, meaning that neither party can lower their levels of, for example, existing employment protection in order to attract trade and investment.<sup>24</sup>

The same approaches are proposed in respect of environmental protection with both sides also undertaking to continue to implement multilateral environment agreements to which they are a party (*e.g.* on climate change).

### **Dispute resolution**

The UK wants the trade agreement managed through a joint committee (as is usual) and a dispute resolution mechanism. But it argues that there can be no "role" for the CJEU in the dispute resolution mechanism. The EU's wants a system of settlement applying to all parts of the agreement through independent arbitration panels and with panels required to refer any interpretation of EU law to the CJEU and for the panel to be bound by the CJEU's ruling (this approach was accepted by the UK in respect of the Withdrawal Agreement).<sup>25</sup>

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<sup>20</sup> See HM Government, 'PM speech in Greenwich', 3 February 2020

<sup>21</sup> The UK could, for example, remain in the Unified Patent Court as that was established by inter-governmental agreement outside the EU treaties: for further details, see Lord Anderson of Ipswich, HL Deb, vol 602, cols 1314-1316

<sup>22</sup> European Commission, *supra* n. 5

<sup>23</sup> HM Government, *supra* n. 2, pp. 16-17, para 75

<sup>24</sup> European Council, *supra* n. 4, p. 31, para 110

<sup>25</sup> *Ibid.*, p. 44, para 160

The UK wants its courts to interpret UK law just as the EU wants the CJEU to interpret EU law. And an effective arbitration mechanism would be beneficial for both sides – as the WTO dispute settlement panels have shown since they were introduced in the 1990s. However, WTO provisions offer no protection to the consumer, only to governments.

### **Fisheries**

The EU wants fisheries included in the single agreement; the UK wants a separate agreement on access to fishing grounds and the continuance of free trade in fish and fish products under the trade agreement. The UK wants annual negotiations between the UK and the EU about access to each other's exclusive economic zones and fishing opportunities whereas the EU wants continuing reciprocal access to each other's waters and a long-term agreement on quota shares.<sup>26</sup> The UK wants these fishing opportunities based on the scientific advice of the International Council for Exploration of the Seas and it rejects the EU principle of "relative stability" for sharing fish quotas (the basis of the Common Fisheries Policy), arguing that this is outdated.<sup>27</sup> It wants an approach similar to that the EU has with Norway.<sup>28</sup>

This will be one of the most contentious parts of the negotiation as both parties have a lot at stake politically (but less so economically). The fact that the UK wants market access for its fish and the EU access to some of UK waters provides a possible route to a deal.

### **Civil aviation**

Both the UK and the EU envisage two agreements, the first dealing with traffic rights and the second concerning aviation safety. The UK essentially wants to maintain the European market in air travel after Brexit but the EU does not want a non-Member State to benefit from its Open Skies policy.

### **Energy, Research & Nuclear Co-operation**

The Government is seeking separate agreements in all these areas. That for energy would include measures to tackle climate change following the Paris Agreement; that for research would include the UK participating in the EU post-2020 scientific research programme Horizon Europe; and that for nuclear matters would facilitate civil nuclear trade and the supply of medical isotopes. The EU is open to agreement on these issues.

### **Law Enforcement & Criminal Judicial Co-operation**

The UK wants an agreement on law enforcement co-operation, including with Europol (but without being a member), continuing data exchanges (including access to the Schengen Information System II, the Prüm system for DNA, fingerprints and vehicles, the exchange of criminal records, Passenger Name Record (PNR) data and real-time alerts for wanted persons). It also seeks a fast-track extradition system outside the European Arrest Warrant

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<sup>26</sup> European Council, *supra* n. 4, p. 25, para 89

<sup>27</sup> HM Government, *supra* n. 2, p. 19, para 3(b)

<sup>28</sup> See Senior European Experts, *The UK-EU Negotiations: Fishing*, February 2020

and co-operation between the UK and Eurojust.<sup>29</sup> This is a demanding list and the UK is adamant that it will not accept CJEU jurisdiction or oversight in these areas.

The EU is very clear that as a non-Schengen, non-EU member, the UK cannot expect the same level of access but it also sees the benefits of close co-operation in this field. The EU makes it clear that its offer of close co-operation in this field is conditional on the UK continuing to adhere to the European Convention on Human Rights (ECHR).<sup>30</sup> Mrs May's government made it clear that the UK would remain in the ECHR; there was no mention of the ECHR in the Conservative's 2019 manifesto.

### **Other issues**

In a section in the UK White Paper on what it calls "Technical and other processes beyond the scope of the future relationship negotiations", there are four items.<sup>31</sup> By far the most important is data adequacy.

The UK is seeking recognition from the EU that its data protection rules are adequate for the purposes of trade and co-operation with the EU; this is vital for trade in services and for co-operation in law and order. Although the UK describes this issue as "technical" it is seen as an issue of fundamental importance by the EU; it appears near the beginning of the EU mandate rather than at the end like the UK; and the EU suggests that data adequacy is a precondition of law and order co-operation. Without agreement on the transfer of data many UK-based businesses would face profound problems as data transfer is a routine aspect of their operations and the impact on law enforcement would also be severe.

### **Conclusion**

Comparing the UK and EU positions shows elements of agreement but also significant differences, partly as a result of ideological differences. The EU's approach is more legalistic, but that reflects the Treaties, the EU's rule of law culture and the fact that this approach has been very successful for the EU in the past. The Government of Boris Johnson clearly wants a more distant relationship with the EU than that envisaged by his predecessor (and indeed the one to which it agreed in the Political Declaration only last year) but it also wants a less structured, more flexible one.

The level playing field argument has been seen by many commentators as demonstrating a fundamental divide between the parties. The reality is more complex. The UK would like the flexibility to move away from EU rules in some areas, not least because that might make it easier to negotiate trade deals with other countries but it is unlikely to abandon the sorts of employment and environmental protection rules that have developed during EU membership because that would be politically unpopular at home. The more difficult divide is that between the EU's desire for legally binding (and therefore justiciable) commitments to be written into the agreement and the UK's objection to such an approach, which it sees as impinging on its sovereignty. Nevertheless, it is possible to see ways of bridging this divide if the will to reach agreement is sufficiently strong.

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<sup>29</sup> HM Government, *supra* n. 2, pp. 24-27, paras 27-53

<sup>30</sup> European Council, *supra* n. 4, p. 6, para 12 and p. 34, para 118

<sup>31</sup> HM Government, *supra* n. 2, p. 29

The ratification process in UK and EU is an issue not referred to in their negotiating documents but is of some importance. It is unlikely to be a problem in the UK given the size of Government's majority but it could prove problematic in the EU if the resulting treaty is a "mixed agreement" (*i.e.* requires national ratification as well as EU ratification), as may be the case with any provisions beyond trade.<sup>32</sup> In some EU Member States "national ratification" in fact also means agreement at regional level.

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<sup>32</sup> This would be the case if the agreement was made under Article 217 of the EU Treaties: see *supra* n. 9, pp. 10-12, paras 34-40 for a discussion of the implications of Article 217.



## Senior European Experts

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