



## THE EU-UK FUTURE RELATIONSHIP: WHAT HAPPENS AFTER BREXIT?

The UK is preparing to leave the EU at midnight CET on 31 January 2020. The EU and the UK will then have until 31 December 2020, the end of the transition period provided for by the Withdrawal Agreement, to negotiate an agreement on their future relationship. Failing to reach such an agreement would lead to another "cliff edge" no deal scenario. We explore the measures taken by each side to prepare for this next round of negotiations and what to expect from the months ahead.

### THE BOTTOM LINE

The stated aim of the UK is to reach an agreement with the EU where trade continues as today, free of duties and free of quotas. However, the UK government has also stated that the UK must be free to diverge from EU rules, dismissing the idea that the UK will "align" automatically with the EU.

The EU argues that duty free, quota free access to its market can only be granted if the agreement also contains provisions ensuring a "level playing field" across a wide range of policies and laws. The EU's starting point for negotiating the level playing field provisions could be those set out in the version of the [Protocol on Ireland / Northern Ireland](#) that was part of Theresa May's Withdrawal Agreement of November 2018.

If the UK insists that it must be free to diverge from EU rules, the EU will not offer full duty-free, quota-free access to its market.

This is the crux of the negotiation and a recipe for difficult negotiations.

### NEXT STEPS FOR THE EU

#### Who will lead the negotiations for the EU?

The European Commission has set up a new Task Force for Relations with the United Kingdom (UKTF), which replaces the Article 50 Task Force (TF50). It is made up of six units, covering the different aspects of the negotiation (for example economic affairs, citizens' rights, security, climate and energy). UKTF will lead all aspects of the future relationship negotiations with the UK.

The UKTF reports directly to Commission President Ursula von der Leyen and will coordinate the work of several Directorates-General (DGs), including DG TRADE, which would normally take the lead on negotiations with third countries. The EU's Brexit negotiator, Michel Barnier, has been appointed head of the UKTF and will effectively continue in his role as chief negotiator with the support of a new deputy, Clara Martínez Alberola, who gained

#### Key issues

- The next round of negotiations will begin in early March 2020.
- The EU and UK have until 31 December 2020 to agree their future relationship.
- The EU will only grant duty free, quota free access to the single market if the UK commits to a level playing field.
- The UK aims to be able to diverge from EU rules, while continuing to enjoy duty free, quota free access to the EU.
- Any agreement would need to be signed and ratified by the EU (and possibly each Member State) before it can fully enter into force.
- UK ratification will be in accordance with the Constitutional Reform and Governance Act 2010.
- The UK will also require an Act of Parliament to implement any agreement into domestic law.

extensive Brexit experience as Chief of Staff to the former Commission President Jean-Claude Juncker.

Michel Barnier's former deputy in TF50, Sabine Weyand, is now the Director-General of DG TRADE and will take part in the trade aspect of the negotiations. Similarly, the new Trade Commissioner, Irishman Phil Hogan, and High Representative of the Union for Foreign Affairs and Security Policy, Josep Borrell, will also play key roles in the talks.

## How will the EU conduct the negotiations?

Article 50 of the Treaty on European Union (TEU) sets out the process by which a Member State can leave the EU, and will cease to apply once the UK exits the EU on 31 January 2020. The next round of negotiations will see the EU negotiate with the UK as a third country in accordance with either Article 217 of the Treaty on the Functioning of the European Union (TFEU) if the agreement is to be a wide-ranging association agreement, or Article 207 TFEU if it is to be a free trade agreement. Article 217 TFEU is, for example, the legal basis of the association agreement with Ukraine. Article 207 TFEU is the legal basis for the recent Economic Partnership Agreement with Japan, the Comprehensive Economic and Trade Agreement (CETA) with Canada, the EU-Singapore Free Trade Agreement (FTA) and the EU-Vietnam FTA.

To begin comprehensive future relationship negotiations with the UK, the Council will first need to agree (by qualified majority) a negotiating mandate for the Commission. The Commission is already preparing a draft mandate that could be made public as early as 3 February, and the Council is expected to approve this at a meeting on 25 February 2020. This would allow the Commission to open negotiations on or before 1 March 2020. The Council will regularly be informed about the state of negotiations and may adapt the mandate if required.

The UKTF is holding a series of briefings with the 27 remaining Member States on the different topics that will be negotiated with the UK. From these briefings we have a good idea of the approach the EU will take.

Once the talks are underway, the Commission will keep the European Parliament and Member States informed of progress. Parliament's Brexit Steering Group, led by MEP Guy Verhofstadt, will be replaced by a new "UK coordination group" from 1 February 2020. It will be made up of 13 MEPs and headed by German MEP David McAllister, from Chancellor Merkel's CDU party. Similarly, the Council's "Ad hoc Working Party on Article 50" is also likely to be replaced once its mandate expires after the UK leaves the EU on 31 January 2020. For previous treaties, the Council has typically appointed the Trade Policy Committee (TPC) as its special committee, including during the negotiations for CETA, the EU-Singapore FTA and the EU-Mercosur trade deal.

## What are the EU's main objectives?

The guiding principles of the next stage of negotiations are set out in the [Political Declaration](#) on the framework for the future relationship, which accompanies the [Withdrawal Agreement](#). It outlines in 26 pages the areas for future cooperation. This includes everything from trade and foreign policy to security, defence, space, transport, energy, climate action, services and access to fishing waters.

The overriding aims of the EU for the next phase of negotiations are that (i) the future relationship cannot afford the same access or level of integration as

### EU team: key individuals

- Michel Barnier, Head of the UKTF
- Clara Martínez Alberola, Chef de Cabinet to Michel Barnier
- Phil Hogan, European Commissioner for Trade
- Sabine Weyand, Director General, DG TRADE
- Ursula von der Leyen, President of the European Commission
- Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy / Commission Vice-President and Commissioner for a Stronger Europe in the World
- David McAllister, MEP (Germany, CDU/EPP)
- João Vale de Almeida, EU Ambassador to the United Kingdom (from 1 February 2020)

*"But the truth is that our partnership cannot and will not be the same as before. And it cannot and will not be as close as before – because with every choice comes a consequence. With every decision comes a trade-off. Without the free movement of people, you cannot have the free movement of capital, goods and services. Without a level playing field on environment, labour, taxation and State aid, you cannot have the highest quality access to the world's largest single market."*

Speech by Commission President von der Leyen at the London School of Economics, 8 January 2020

full EU membership and (ii) the integrity of the EU single market and customs union must be upheld. Recent speeches by Trade Commissioner Phil Hogan and Commission President Ursula von der Leyen have clarified that any deal the UK receives will necessarily be "far inferior" to the benefits and market access it enjoyed as a Member State.

In light of the UK's stated intention not to extend the transition period, 31 December 2020, EU officials are considering limiting the negotiations during that period to key areas including trade in goods (and possibly services), fisheries, security, foreign policy, transport and aviation. This would increase the likelihood that a bare-bones arrangement will be in place before 1 January 2021. At the same time, the EU has urged the UK to consider extending the transition period (which, under the terms of the Withdrawal Agreement, can only be done once and must be agreed by both sides before 1 July 2020).

On trade, the EU's core priority is to protect the integrity of the single market by ensuring that a duty free, quota free FTA is underpinned by a 'level playing field' in employment and other social rights and environmental, State aid, competition and tax rules. The Political Declaration states that the precise nature of the level playing field should be commensurate with the scope and depth of the future relationship and economic connectedness of the EU and the UK. This was set out in two sets of slides issued by the European Commission in January 2020 entitled: "[Level playing field](#)" and "[Free trade agreement](#)". However, the extent of the EU's objectives has yet to be fully defined, including whether it will seek to extend the scope of the level playing field to additional sectoral rules, to bind the UK to "non-regression" from existing rules or to "dynamic alignment" with future changes to EU rules and to give the Court of Justice of the EU (CJEU) a role in adjudicating on UK compliance.

An idea of what the level playing field provisions might look like can be found in the version of the Protocol on Ireland / Northern Ireland that was part of Theresa May's Withdrawal Agreement of November 2018. The "backstop" envisioned by the Protocol covered the whole of the UK, in the context of the UK remaining in a form of full customs union with the EU, and listed over many pages the specific EU laws and disciplines that the UK would commit to adhere to. It also included dynamic alignment with EU State aid rules and full CJEU oversight for the EU law concepts outlined in the Protocol. The all-UK backstop provisions were removed from the Withdrawal Agreement in October 2019, when the then new UK Prime Minister opted to return to a Northern Ireland only backstop.

These proposals are very different from the much more limited level playing field disciplines provisions in the EU's other FTAs, which go a large way towards eliminating duties and quotas but do not grant full duty-free, quota-free access to the EU market. For example, the treatment of employment rights in the agreement with Japan is limited to commitments to International Labour Organisation standards and any disputes are settled via a bilateral arbitration panel.

The UKTF is expected to follow the EU's typical negotiating strategy of "nothing is agreed until everything is agreed", which was also adopted during the Article 50 negotiations. This enables the EU to attach extraneous conditions to agreeing an FTA, such as insisting on a level playing field and retaining its existing access to British fishing waters. It could also restrict the

*"There is no way the EU will ever sign up to a trade deal that allows tariff-free, quota-free and frictionless access to UK goods coming in to the EU if there isn't a level playing field in terms of how they're produced, because that would be unfair competition."*

Simon Coveney, Tánaiste as reported in the press, 20 January 2020

UK's overall access to the single market where it chooses to diverge from EU regulatory standards.

However, even if the FTA does cover services, the EU's proposals on financial services seem likely to be limited to commitments on establishment and very limited commitments on cross-border services with a 'prudential carve-out' reserving each party's "right to regulate". As with other FTAs, these seem unlikely to go much further, if at all, than the EU's existing international commitments. The EU is also constrained by existing 'most-favoured nation' obligations under other FTAs that might require the EU to extend any new commitments made to the UK to existing trade partners.

The Political Declaration does envisage that, during the transition period, the parties will review the equivalence of each other's financial services rules under their existing legal frameworks for third countries. However, the Political Declaration also makes clear that the parties retain full regulatory autonomy to make decisions in their own interests, although it does envisage that there should be transparency and appropriate consultation on the process of adoption, suspension and withdrawal of equivalence decisions. The Political Declaration also envisages that during the transition period the Commission will undertake a review of the adequacy of the UK's data protection standards for the purposes of the EU restrictions on international data transfers.

### **How would the agreement(s) come into effect?**

The EU ratification process will depend on the type of agreement reached with the UK.

Agreements covering issues that are the exclusive competence of the EU (for example an agreement limited to trade in goods) can be ratified by the EU institutions (by the Council at qualified majority, after obtaining the consent of the European Parliament at simple majority). An agreement which touches both on competencies exclusive to the EU and to EU Member State competences (for example a trade agreement that also deals with regulatory or investment issues) is called a mixed agreement. Mixed agreements must be approved by both the EU institutions and by all Member States in accordance with their own constitutional requirements, a process which can take several years.

The EU has set out its intended approach in slides issued by the European Commission in January 2020 entitled: "[Architecture and legal nature of the partnership](#)", which reveal that the EU will aim for a single agreement with three key components (covering general provisions, economic issues and security) to ensure the most pressing issues are agreed (such as the flow of goods) by 31 December 2020. Other aspects of the relationship could then be concluded within "supplementing agreements" either at the same time or at a later stage. However, the European Commission will consider that the provisions on the level playing field (environment, social, State aid,...) are part of this initial agreement because duty free, quota free access will require such provisions.

Any agreement would need to be signed and ratified by the EU (and possibly each Member State if the agreement goes beyond trade provisions) before it can fully come into effect. However, where ratification by each Member State is required, an agreement can enter into 'provisional application' before it is fully ratified if provisionally approved by the Council, the European Parliament and each Member State.

## NEXT STEPS FOR THE UK

### Who will lead the negotiations for the UK?

The UK government has announced that it will abolish the Department for Exiting the European Union (DEEU) once the UK has withdrawn from the EU on 31 January 2020. In its place, the government intends to set up a unit called "Taskforce Europe" which will run directly out of Number 10 and the Cabinet Office.

Taskforce Europe will consist of 30 to 40 members and will be headed by David Frost, the UK's lead Brexit negotiator as of July 2019. The new task force will operate under the personal oversight of the Prime Minister, who intends to take ultimate responsibility for the progress of the talks.

### How will the UK conduct negotiations?

The 12 December 2019 general election saw the Conservative party win a commanding majority of 80 seats in the House of Commons, breaking the deadlock in Parliament and strengthening the government's domestic position to conduct the negotiations.

As originally drafted in October 2019, the European Union (Withdrawal Agreement) Bill (WAB) contained a number of provisions giving Parliament oversight over the opening and conduct of the negotiations. However, the government removed these provisions from the WAB before re-presenting the bill to the new Parliament in December 2019. Now that the [European Union \(Withdrawal Agreement\) Act 2020](#) (WAA 2020) has finally passed all its Parliamentary stages, received Royal Assent and become law, this means that the government is free to open negotiations and set its own objectives as of 1 February 2020 without the need for Parliamentary approval.

The government also removed the provisions of the WAB which required the government to report to Parliament every three months on the progress of the talks. Instead, section 13B of the European Union (Withdrawal) Act (as amended by the WAA 2020) now provides that the government will only need to report to Parliament in the event of a request for a dispute resolution procedure between the UK and the EU under Article 170 of the Withdrawal Agreement. As our separate [briefing on the WAA 2020](#) explains, this affords the government considerable flexibility and discretion in its negotiation strategy and approach to the talks, watering down the role of Parliament in the overall conduct of the negotiations.

### What are the UK's main objectives?

Stephen Barclay, Secretary of State for Exiting the European Union, has indicated that the UK will publish its objectives for the negotiation in February 2020. The government has repeatedly insisted that an ambitious agreement with the EU can be concluded by 31 December 2020 without the need for an extension. To this end, section 15A of the European Union (Withdrawal) Act 2018 (as amended by the WAA 2020) prevents the government from requesting any extension to the transition period.

The government has stated that it will seek a duty free, quota free FTA whilst resisting the EU's demands for a level regulatory playing field and for CJEU oversight. However, whilst UK Chancellor Sajid Javid has said that the UK will not agree to regulatory alignment with the EU, it is unclear how much the government intends to diverge from EU regulatory standards in the future. For example, whilst the government may be particularly reluctant to agree to

#### UK team: key individuals

- David Frost, Europe Advisor to the UK Prime Minister and Head of Taskforce Europe
- Boris Johnson, Prime Minister
- Dominic Cummings, Chief Special Advisor to Prime Minister Boris Johnson
- Tim Barrow, UK Ambassador to the European Union (from 1 February 2020)

*"There will not be alignment, we will not be a rule taker, we will not be in the single market and we will not be in the customs union."*

Interview of UK Chancellor Sajid Javid with the Financial Times, 17 January 2020



'dynamic' regulatory alignment (which would require keeping up to date with all future EU regulatory standards, over which the UK would have no influence), the government could be prepared to agree to non-regression from existing standards. However, as argued in a paper by Sam Lowe of the Centre for European Reform (CER): "The moment the UK obtains the right to choose whether it diverges or not from EU rules, it will – in most areas – be treated by the EU as if it has already done so."

### **How would the agreement(s) come into effect?**

The initial version of the WAB provided that the government would need the backing of Parliament to ratify any future agreement. However, the government removed this mechanism in December 2019, before the WAA 2020 became law.

Instead, any agreement with the EU will need to be ratified in accordance with section 20 of the Constitution Reform and Governance Act 2010, which requires all treaties to be laid before Parliament for 21 sitting days. Once the review period expires, the government can proceed to ratify the treaty. The House of Commons can block this procedure by passing a resolution opposing the treaty, however this is unlikely to occur given the Conservative Party's considerable majority.

In addition, the government will require the passage of an Act of Parliament to give effect to the obligations under the agreement in UK domestic law. This would normally be passed before ratification but again, the Government's majority means that this should not present a difficulty.

### **THE CLIFFORD CHANCE TRADE AND INVESTMENT POLICY UNIT**

As political forces reshape the complex rules of international trade, our Trade and Investment Policy Unit offers unparalleled insights into how policy developments affect cross-border business. The Unit brings together Clifford Chance experts from across our global network. Together, we advise States and companies on all aspects of trade and investment law and policy, including free trade agreements, WTO law, export controls, customs rules, FCPA and Bribery Act issues, sanctions, national security review and investment protection. Our specialists have extensive experience handling a wide range of trade and investment disputes, including investment arbitrations, sanctions matters and anti-corruption cases.

## CONTACTS

### Michel Petite

Avocat Of Counsel,  
Paris

T +33 1 4405 5244  
E michel.petite  
@cliffordchance.com

### Simon James

Partner, London

T +44 20 7006 8405  
E simon.james  
@cliffordchance.com

### Simon Gleeson

Partner, London

T +44 20 7006 4979  
E simon.gleeson  
@cliffordchance.com

### Kate Gibbons

Partner, London

T +44 20 7006 2544  
E kate.gibbons  
@cliffordchance.com

### Claudia Milbradt

Partner, Düsseldorf

T +49 211 4355 5962  
E claudia.milbradt  
@cliffordchance.com

### Jonathan Lewis

Partner, Paris

T +33 1 4405 5281  
E jonathan.lewis  
@cliffordchance.com

### Thomas Voland

Partner, Düsseldorf

T +49 211 4355 5642  
E thomas.voland  
@cliffordchance.com

### Axelle D'heygere

Associate, Brussels

T +32 2 533 5980  
E axelle.dheygere  
@cliffordchance.com

### Gail Orton

Head of EU Public  
Policy, Paris / Brussels

T +33 1 4405 2429  
E gail.orton  
@cliffordchance.com

### Dan Neidle

Partner, London

T +44 20 7006 8811  
E dan.neidle  
@cliffordchance.com

### Grzegorz Namiotkiewicz

Partner, Warsaw

T + 48 22 429 9408  
E grzegorz.namiotkiewicz  
@cliffordchance.com

### Daniel Badea

Managing Partner,  
Bucharest

T +40 21 6666 101  
E daniel.badea  
@cliffordchance.com

### Katrin Schallenberg

Partner, Paris

T +33 1 4405 2457  
E katrin.schallenberg  
@cliffordchance.com

### Gunnar Sachs

Partner, Düsseldorf

T +49 211 4355 5460  
E gunnar.sachs  
@cliffordchance.com

### Marian Husár

Senior Associate,  
Prague

T +420 222 55 5271  
E marian.husar  
@cliffordchance.com

### George Bumpus

Trainee Solicitor,  
London

T +44 20 7006 1271  
E george.bumpus  
@cliffordchance.com

### Phillip Souta

Head of UK Public  
Policy, London

T +44 20 7006 1097  
E phillip.souta  
@cliffordchance.com

### Chris Bates

Partner, London

T +44 20 7006 1041  
E chris.bates  
@cliffordchance.com

### Marc Benzler

Partner, Frankfurt

T +49 69 7199 3304  
E marc.benzler  
@cliffordchance.com

### Jessica Gladstone

Partner, London

T +44 20 7006 5953  
E jessica.gladstone  
@cliffordchance.com

### Frédéric Lacroix

Partner, Paris

T +33 1 4405 5241  
E frederick.lacroix  
@cliffordchance.com

### Jurgen van der Meer

Partner, Amsterdam

T +31 20 711 9340  
E jurgen.vanderveer  
@cliffordchance.com

### Vladimír Rýlich

Senior Associate,  
Prague

T +420 222 55 5210  
E vladimir.rylich  
@cliffordchance.com

### Josh Kennion

Trainee Solicitor,  
London / Paris

T +33 1 4405 5432  
E josh.kennion  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Avenue Louise 65, Box 2,  
1050 Brussels, Belgium

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.