



## EU AND UK NEGOTIATING POSITIONS: ROOM FOR COMPROMISE?

The European Commission and UK government have set out their positions ahead of forthcoming trade talks. Both state that their aim is to maintain duty free, quota free access to each other's markets. Yet, at first sight, the conditions attached by each side appear incompatible. Is there room for compromise? We take a closer look.

### THE EU'S POSITION

The European Commission published the draft EU negotiating mandate on 3 February 2020. It must be adopted by the Member States – most likely on 25 February at the General Affairs Council – before negotiations can begin next month. The choices made in the mandate reflect the EU's aim to reach and ratify an agreement by the end of 2020, so that it can be applied from 1 January 2021. The short timetable is to accommodate the UK's insistence that the transition period must not be extended beyond 31 December 2020.

The EU's overriding position is to aim for a wide ranging free trade agreement with the UK, which must be treated as a "non-Schengen third country". As the UK will not be subject to the same obligations as a Member State, it cannot have the same rights and enjoy the same benefits as a Member State. Yet the EU argues that the UK's geographic proximity and current level of economic interconnectedness require the EU to impose more burdensome conditions on the UK than it does on any other state in order to try to avoid any risk of what the EU perceives as unfair competition from the UK.

### THE UK'S POSITION

The UK government's recent statement on its approach to the upcoming negotiations indicates that any agreement should respect the sovereignty of both parties and the autonomy of their respective legal orders. It also states that the government hopes to conclude a free trade agreement (which is at least as good as those the EU has agreed with Canada and Japan) as well as reaching separate agreements on fisheries, security and more technical areas such as air transport.

To meet its ambitions, the government has stated it will not accept any conditions that require the UK to adhere to EU rules, nor will it accept oversight of the European Court of Justice (CJEU) over any of the UK's laws. However, this does not mean that the UK will choose to water down its regulatory standards in order to increase its competitiveness; in a speech on 3 February 2020, Prime Minister Boris Johnson advocated high standards in areas such as environmental policy and social rights, but stated that the UK's commitment to high standards should not be governed by an international treaty with the EU.

### Key issues

- The UK formally left the EU on 31 January 2020 and a transition period will last until 31 December 2020.
- The EU and UK have both set out their demands and ambitions for the trade talks that will begin next month.
- Potential areas of disagreement include the "level playing field" provisions requested by the EU, access to UK fishing waters, the equivalence regime for financial services, Gibraltar and the role of the Court of Justice of the EU.
- Negotiations will begin in early March and will last until at least October 2020.
- Any agreement must be ratified by both sides before it can enter into force.

## Legal basis proposed by the EU

The Commission has proposed that Article 217 of the Treaty on the Functioning of the European Union (TFEU) should be the legal basis for the future agreement with the UK. Article 217 is the basis of the EU's 'association agreements' with a number of third countries, such as Ukraine. The Commission argued that Article 217 TFEU is appropriate given the "scope of the envisaged relationship and the ambitious and long-term relationship that it seeks to establish". It also allows the EU to achieve its other goal of tying everything up in a single agreement rather than a series of agreements (similar to the situation with Switzerland). The alternative substantive legal base would have been Article 207 TFEU, which was the basis for the EU-Canada deal for example, which envisages a less integrated relationship.

The procedure for the EU to conclude an agreement under Article 217 TFEU is set out in Article 218 TFEU, which provides that such an agreement can only be adopted by a unanimous decision of the 27 EU Member States in the Council. This effectively gives each Member State the right of veto, and reflects the importance of the future relationship with the UK to many Member States. In contrast, Article 207 TFEU generally allows the Council to approve an agreement by 'qualified majority', although unanimity may still be required for some types of agreement. In any event, the European Parliament must approve the conclusion of an agreement with the UK.

The Commission acknowledges in the draft mandate that the appropriate legal basis cannot be confirmed, however, until the content of the agreement is finalised at the end of the negotiations.

## POINTS OF CONTENTION

While the EU mandate covers the range of issues that will be included in the final agreement, we have focused below on the areas that will be most contentious between the two sides and where their respective red lines are likely to clash.

### Level playing field provisions

The EU's draft mandate runs to 33 pages and includes 14 references to "level playing field" provisions. The EU argues that duty free, quota free access to its market for goods can only be granted if the agreement also contains provisions to ensure that the UK cannot gain a competitive advantage over EU companies by lowering labour and environmental standards or granting State aid that would be illegal under EU rules.

Paragraphs 89 to 108 of the draft mandate set out the controversial proposals on the "level playing field", including proposals that would require the UK to apply EU State aid rules through 'dynamic alignment' (i.e. continued alignment with EU rules in the future) as well as 'non-regression' provisions with respect to current EU labour, social, environmental and climate change rules (and 'ratchet' provisions to prevent lowering of standards after any unilateral increase) and other commitments on competition, tax and sustainable development. These go well beyond the corresponding provisions in the EU-Canada or EU-Japan agreements, and would likely require the continued involvement of the CJEU in resolving any disputes.

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 Prime Minister dismissed EU requests out of hand: "There is no need for a free trade agreement to involve accepting EU rules on competition policy,

### What happens next?

- **3 Feb 2020:** EU published draft negotiation mandate and Prime Minister Boris Johnson set out UK position
- **25 Feb 2020:** EU mandate likely to be adopted at General Affairs Council
- **Early March 2020:** EU-UK negotiations can begin
- **March-June 2020:** Negotiating rounds
- **June/July 2020:** EU-UK High Level conference
- **June/July 2020:** "best endeavours to conclude a fisheries agreement"
- **August-October 2020:** Negotiating rounds
- **October-December 2020:** Conclusion and ratification of first agreement(s)
- **31 December 2020:** End of transition period foreseen by Withdrawal Agreement
- **1 January 2021:** Entry into force of new EU-UK agreement
- **From January 2021:** Negotiations on outstanding issues to continue

subsidies, social protection, the environment, or anything similar any more than the EU should be obliged to accept UK rules." The UK has indicated that it is prepared to accept commitments such as those in the EU-Canada agreement which, for example, prevent a party lowering its labour standards to encourage trade or investment.

## Fisheries

The EU has made agreeing a framework for the management of shared fish stocks a condition of the overall free trade agreement. The EU is requesting "continued, reciprocal access to markets and to waters with stable quota shares." The EU's draft negotiating mandate clearly links this to the overall free trade agreement.

This is in stark contrast to the UK position: the Prime Minister has insisted that Britain must become an independent coastal state at the end of 2020. In his speech on 3 February 2020, Boris Johnson said the government was ready to consider an agreement on fisheries but went on to refer to annual negotiations similar to the ones conducted by Iceland and Norway. He has insisted that British waters must first and foremost be for British fishing vessels.

Whereas EU fishermen have traditionally fished in UK waters, the UK catch has traditionally been sold in the EU market. A conceivable compromise is therefore one where the EU is granted access to UK waters, with UK fishermen able to continue to sell into the EU single market. The exact levels of access will be the focus of the negotiations.

The aim on the EU side is to reach agreement on fisheries by the middle of 2020, so that fleets have some certainty as to the conditions applicable from 1 January 2021 onwards.

## Financial services

The only tangible objective in the EU draft mandate on financial services, spelled out over paragraphs 42 and 43, is "voluntary cooperation on regulatory and supervisory matters". This should involve "informal exchange of information and bilateral discussions on regulatory initiatives and other issues of interest, for instance on equivalence". This is not surprising as the Commission has stated from the outset that assessments of equivalence and data adequacy will not be part of the overall agreement, but will be unilateral instruments issued by each party.

The Commission will start the assessment procedure immediately, but the commitment to conclude assessments by June 2020 – which was originally included in the Political Declaration – does not appear in the mandate.

Passporting rights and mutual recognition of standards for financial services will not be a feature of the future relationship between the EU and the UK. Falling under an equivalence regime is very different to benefiting from passporting rights; the existing equivalence regimes under EU law differ significantly in their scope, operation and impact. Only a few enable third-country firms to provide services to EU clients and counterparties without an authorisation in the EU, but even then are subject to conditions that are more restrictive than for EU firms benefiting from a passport. Others merely provide more limited accommodations to ease cross-border activity. All the regimes allow equivalence to be withdrawn unilaterally.

The UK has called for a "predictable, transparent, and business-friendly environment for financial services firms", including "enhanced provision for regulatory and supervisory cooperation arrangements with the EU, and for the structured withdrawal of equivalence findings."

*"In December 2020 whether there's a trade agreement or not there will be a cliff edge for financial services. Nobody should envisage the trade agreement directly mitigating these risks."*

Chris Bates

Head of Financial Regulatory  
Practice, Clifford Chance

## **Gibraltar**

According to the EU draft mandate, the final agreement will not cover Gibraltar. There is the possibility of having separate agreements between the EU and UK that do cover Gibraltar, but that will require Spain's prior consent.

In marked contrast, the UK Prime Minister stated that he would be negotiating on behalf of the "entire UK family" which would include Gibraltar.

## **Role of the Court of Justice of the EU**

The draft EU mandate seeks to maintain a role for the CJEU wherever a dispute raises a question of interpretation of EU law.

This is a red line for the UK, which starts from the premise that the agreement must respect the sovereignty of both parties and the autonomy of each party's legal order. The role of the CJEU is politically charged, and it will be important for the Prime Minister to demonstrate the UK has left the jurisdiction of the CJEU.

## **EU RATIFICATION**

The European Commission has published a draft timetable for the negotiations that takes account of the UK's refusal to contemplate any extension of the transition period. Negotiations will need to be completed by mid-October or early November 2020 in order to allow for ratification before the end of the year.

In order to stick to that timetable, it is important that ratification is limited to the European Parliament and government representatives in the Council rather than involving the national parliaments of the 27 Member States. The European Commission is therefore seeking to ensure the agreement is EU only, and does not stray into areas that would trigger Member State ratification requirements (for example, by including provisions on investor-state dispute settlement) which would add months to the timetable.

While there may be support among Member States for this approach, there will be reservations about the precedent it sets for future negotiations, not least the looming talks with the United States.

## **CONCLUSION**

Failing to have an agreement in place before the end of the transition period would lead to another "cliff edge" no deal scenario. Given the fundamental differences between the EU and UK positions on crucial aspects of the negotiations, however, reaching an agreement before mid-October or early November 2020 (so as to allow time for ratification before 31 December 2020) will present a number of challenges. Businesses on either side of the Channel will therefore continue to face uncertainty as we enter these negotiations.

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