

Briefing on EU-UK negotiations (mid-May 2020)

The [third round of UK-EU negotiations on the future relationship](#) took place in the week of May 11. Alongside the main issues at stake in the negotiations there were also technical discussions between the teams on transport, law enforcement co-operation, social security, mobility and participation in EU programmes. In his press conference following the completion of the third round, Michel Barnier [gave a downbeat assessment](#) and said the EU would not negotiate away European values nor the essential elements of the customs union or single market. The UK Chief Negotiator David Frost urged the [EU to reconsider some of its positions on key issues by the middle of next month](#) such as the level playing field more in line with past EU trade agreements and that the UK would not budge on issues critical to its regulatory sovereignty. He said very little progress had been made.

The EU has published a [draft negotiating text for the proposed agreement](#) plus an [agreement on foreign and security co-operation](#) should the UK wish to seek such an agreement. The UK has submitted its own draft legal text and on fisheries and several other proposed co-operation areas to the UK Taskforce at the European Commission, but so far these texts have not been permitted by the UK Government go to EU member state ambassadors for consideration. That is likely to change this week, as these draft texts are published by the UK Government.

Timings

By the end of June, the Joint Committee (one of the EU-UK political institutions created by the Withdrawal Agreement) is supposed to consider any application by either side for an extension of the transition period beyond December 31. The UK Cabinet doubled down last week on its position not to propose or accept (should the EU propose it) any prolonged period through extending the transition period. In part, this is a position of principle borne of the principal UK red line on repatriating sovereignty as soon as possible and ending the jurisdiction of the CJEU for most purposes in relation to the UK (GB). Additionally, it is also seen as a negotiating tactic. The UK Government believes it may be able to extract concessions or a reboot of the EU position as the clock runs down beyond June towards the end of October (the effective deadline for any deal to be provisionally applied in time for January 2021). A fix may yet be possible on extension if required – as late as October.

A review of progress in the negotiations is expected at the High-Level summit in the middle of next month between the UK Government and the EU institutions. It is not currently expected that EU heads of government will participate individually in this process. Any radical changes in EU positions would not be expected out of this process.

Neither will it provide an opportunity for any political rebooting of the process hoped for by the UK Government by the EU member states. Again, October may prove to be a more crucial month than June.

Also next month the European Council is due to [meet on June 18/19](#).

The Joint Committee is the institution by which any extension agreed in June would be given effect to. Increasingly, this appears unlikely.

The following scenarios appear plausible:

- No extension agreed in June – talks are collapsed by either or agreement of both sides. No trade agreement in place for 1 January. Both sides trade on their tariff schedules, WTO and other international agreements where possible, or no agreements where not.
- No extension agreed in June – talks continue but reach crisis point by October with end of transition period looming.
- No extension agreed in June – talks continue, and legal fix is found in October to extend negotiating period.
- Extension agreed in June – transition period extended until end December 2021.

The first three scenarios all require the UK Government ensuring imminently that companies are prepared for an apparent end to the transition period on 31 December 2020.

It is also the case that amendments [can be made to the Withdrawal Agreement](#) as recommended by the Joint Committee. These are meant to be confined to circumstances where there are unforeseen events or to correct errors or address deficiencies at the time of adoption. Another mechanism could be a possibility if the Withdrawal Agreement has to be supplemented with another provision or agreement to permit any extension to the period as late as October or November this year. June may not be the crucial month in this regard after all.

What are the major points of disagreement between the two sides?

Level playing field – Since 2017, the EU has been concerned that Brexit presented a challenge to the European model on areas such as environmental, labour or other social regulation. If the UK chose to negotiate a low or no alignment agreement (which is what has happened) then it could undercut on regulation in order to secure an economic advantage in terms of production. To avoid this, the EU developed the idea of a modern level playing field on matters such as state aid, competition policy, and potentially also environmental, labour, climate change and social regulation. In the revised Political Declaration on the future relationship in October, references were

made to having such a level playing field as the prerequisite of a zero-tariff, zero-quotas deal for both sides. In the PM's speech in Greenwich in early February, this approach was rejected. This has formed the basis of the UK's negotiating position since then. The EU counters by arguing due to the economic proximity and ties between the EU and the UK, any deal would require a modern level playing field set of requirements.

UK Cabinet Ministers have floated the possibility of a deal with tariffs instead of a zero-for-zero deal on tariffs and quotas through eliminating the LPF provisions in their entirety. The EU Chief Negotiator Michel Barnier countered by saying that such a deal was not part of his negotiating mandate as set by the member states, and even if it were, it would take years to agree tariffs on a product line by product line basis involving the economic interests of 27 member states.

Human rights protection – UK negotiators have sought access to several EU databases in terms of beneficial cooperation. EU negotiators have emphasised that in terms of police and judicial cooperation in relation to crime, database access must be underpinned by EU law and CJEU jurisdiction, which the UK's red lines otherwise rule out.

The EU has also said the UK must provide an on-going domestic commitment to its legislation on the protection of human rights (currently the Human Rights Act). The UK team believes this is an incursion into its sovereignty.

The EU is also concerned about the implementation of the agreed rules on the protection of (EU) citizens' rights in the UK. It issued a weighty [guidance document](#) on this last week. It has launched [infringement action](#) against the UK on this.

Governance of the agreement – the EU envisages a single form of governance and dispute resolution processes for the overall agreement encompassing the defence and security cooperation agreements, fisheries, as well as the provisions on trade in goods and services. Actions in one area by either side could have consequences in others or in the performance of the entire agreement. This could include sanctions and fines.

The UK differs markedly, seeking subject specific dispute resolution mechanisms without fines and being keen wherever possible to base these on arbitration and limited any binding references to the CJEU.

Fisheries – the UK is prepared to accept arrangements similar to those of Norway, Iceland and the Faroe Islands with the EU on fisheries management, while respecting its position as an independent coastal state with an exclusive economic zone (EEZ) in waters 200m from its land borders. By contrast, the EU is seeking annual setting of common quotas and fishing rights in part based on recent and other historical

practices. It may be prepared to move to species specific quotas. Nevertheless, a major disagreement in principle remains.

There are also disagreements on other areas – on conformity assessment, the EU are refusing a UK offer on mutual recognition of conformity assessment on goods. That means UK labs could not do tests on goods to EU standards which would be accepted in the EU. This would be a major problem as manufacturers would require having conformity assessment done in EU labs at additional expense. Furthermore, if this were the final position in any agreement, or if no agreement were reached at all, the UK would then be confronted with the choice of rejecting goods with CE marking or admitting products with CE marking, having its own UKCA marking and goods with either marks circulating in the UK (specifically GB) market. Potentially companies may then have to consider having both marks on the goods if they seek to trade them in NI or the EU.

The EU has also so far expressed a lack of interest in a veterinary agreement with the UK on the New Zealand-EU model. Such an agreement would have the effect of potentially reducing physical sanitary and phytosanitary checks on products of animal origin in terms of official controls on food from GB to the EU and vice versa down from 10% to around 1-4%.

The UK side is not pursuing a safety and security agreement with the EU. This means that exit and entry summary declarations will be required as part of customs formalities on goods entering and exiting the EU's customs territory from a third country (the UK in the form of GB). These will also be required on NI-GB and GB-NI goods flows. The UK explains its position in terms of alignment to the EU's Union Customs Code (UCC) being unacceptable for the UK in the form of GB, and the CJEU jurisdiction underpinning this. The UCC will of course be given effect to in NI in terms of the Protocol.

On some of these issues, these refusals could well be an EU negotiating tactic to focus UK minds on the wider issues (eg. fisheries, LPF, governance) upon which there is still no agreement. On a veterinary agreement, this position may also be related to implementation of the Protocol on Ireland/Northern Ireland. Progress there may yield more results on a veterinary agreement.

On rules of origin, the UK is seeking diagonal cumulation with the EU and its current FTA partners. This would provide flexibility in terms of complying with preferential rules of origin over qualifying content. The EU's position is that this is not possible without renegotiation of all its existing FTAs, and is instead offering diagonal cumulation of UK material through the [PEM Convention](#).

We expect developments this week on the implementation of the Protocol. An exchange of letters occurred between the UK Government and the European Commission last week. Documents this week are likely to outline UK preparations in terms of SPS and other checks at ports in Northern Ireland, in pursuance of the commitments in the Protocol. Should these be satisfactory for the Commission they may yet build an element of trust which could assist the UK-EU negotiations.

Business readiness for expiry of transition period

We should also expect the UK Government to begin to issue preparedness notices beginning in the new month or so if a December deadline for exiting the transition period is ostensibly the strategy they are following for now and expect businesses to prepare for. The EU has already begun to launch a [series of these notices](#) for EU-based companies and others in terms of the end of the transition period.

That means business will have to prepare fully in those areas such as chemicals, product authorisations, customs and VAT where we know there will be considerable changes whatever is negotiated or whether any future relationship agreement is reached at all. Other areas will be more dependent on if or what anything can be agreed in the negotiations, eg. on tariffs, rules of origin, conformity assessment and markings. Readiness notices on those may have to wait until later in the year.