

# THE VIEW FROM BRUSSELS: SOME CRITICAL ISSUES FOR THE FUTURE TRADE RELATIONSHIP

28 January 2020 | Brussels

Legal Briefings - By **Eric White and Lode Van Den Hende**

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The European Commission has started a debate with the Member States on the shape of the Union's future trade relationship with the UK and has made its views public in a [series of slides](#). The UK Government has so far not set out its position in anything like the same detail but has indicated a desire to follow the model of the EU's Comprehensive Economic and Trade Agreement with Canada (CETA) and to conclude the new agreement by the end of 2020, even anchoring in law a determination not to extend the transition period to allow more time for negotiation. In this View from Brussels, we look at some of the critical issues that will need to be resolved during the negotiations.

## ARCHITECTURE OF THE FUTURE RELATIONSHIP

The [Political Declaration](#) that was concluded together with the Withdrawal Agreement envisages a broad future relationship that would comprise in particular an “economic partnership” and a “security partnership”. The economic partnership was to have a free trade agreement (“FTA”) at its core and encompass, in addition to goods, also services (including financial services and some movement of persons), investment, transport, energy (including nuclear), sustainable development, fishing and a level playing field. The security partnership was to cover law enforcement, foreign policy, security and defence as well as cooperation in fields as diverse as illegal immigration and cybersecurity. In addition, the future relationship was also to include participation in many Union programmes. The political declaration suggests that this could be in the form of an association agreement, a special form of close relationship provided for in the EU treaties and used, for example, for the relationships with Norway and Ukraine.

The UK seems to be concentrating on, or at least prioritising, a simpler FTA based on CETA and seems to be distancing itself from the level of ambition expressed in the Political Declaration. The Commission's slides always recall the Political Declaration as their starting position and concentrate on the trade issues. The slides on the overall architecture and governance of a future agreement are rather brief. They recommend an overarching agreement with a common governing body and specialised committees covering various areas in which cooperation is agreed. There is a specific recognition that there could be "supplemental agreements" embedded in the comprehensive agreement.

As we discussed in the [previous View from Brussels](#), one of the mechanisms that could be used to permit an agreement to be concluded before the end of 2020 is to separate the negotiations into parallel strands so that the more complex issues do not delay those that can be settled by the end of the year.

One of the critical issues to be resolved early on will therefore be how to structure the negotiations. The drive for wide-ranging (or comprehensive) agreements is motivated by the belief that they make a balanced outcome easier to achieve since there are more possibilities for trade-offs. However, reconciling the interests of diverse stakeholders takes more time and increases complexity. Achieving an outcome as comprehensive and ambitious as envisaged in the Political Declaration by the end of 2020 appears well-nigh impossible.

## **GOVERNANCE AND ENFORCEMENT**

The Commission's slides are more specific when it comes to governance and enforcement. They propose a common governing body with specialised sub-committees for specific areas.

The dispute settlement mechanism that is proposed is modelled on that of the [Withdrawal Agreement](#) (which already allows in Article 178(2)(b) for cross retaliation in the future relationship) including fines, suspension of obligations and reference of EU law issues to the European Court of Justice.

The UK has not yet publicly addressed governance and enforcement issues in any detail (apart from referring to the CETA as a model) but they are of fundamental importance. Many international agreements contain apparently far-reaching provisions but have little impact in the real world. It is governance and enforcement that really determine the effects of an agreement.

## **DIRECT EFFECT**

One way to make the provisions of an international agreement really effective is to allow them to be invoked by private parties directly before domestic courts, that is to give them direct effect. The Withdrawal Agreement has given direct effect both in the EU and the UK (see its Article 4(1)). The Commission slides, however, describe the absence of direct effect as one of the defining differences between the EU Single Market regime and free trade agreements. This is true of the EU's recent trade agreements but is normally justified by the consideration that other jurisdictions generally do not allow their international agreements to have direct effect.

The UK has not so far expressed a view on the issue of the direct effect of its future agreements with the EU but this will be a critical question that will determine the nature of the relationship, its governance and its enforcement.

## **THE TRADE RELATIONSHIP**

There seems to be an assumption in the UK Government that negotiating an ambitious FTA should be simple since it has already been done with Canada (CETA). Indeed, since the UK is already closely-aligned to the EU, the UK argues that it should be possible to improve on CETA and achieve a "super CETA plus" agreement ("super" referring to less friction and "plus" to more sectors, especially in services). The Commission's slides do not mention CETA although they do refer in certain instances to following "EU FTA practice".

The difficulty with UK's assumption is that the outcome achieved in CETA reflects the respective trade interests and priorities of Canada towards the EU and of the EU towards Canada. These do not correspond to those prevailing between the UK and the EU. Once the negotiations start, these different interests and priorities will manifest themselves and need to be reconciled. Another reason why CETA is not necessarily a satisfactory template is that the objective of CETA was to liberalise trade that was previously restricted, whereas the objective of the future trade relationship between the EU and the UK is to preserve some of the free trade that previously existed between these partners and regulate the new trade barriers that can be created. The mechanisms of the EU-UK free trade agreement must therefore be designed to regulate divergence rather than to encourage convergence.

## **FISHERIES**

One specific example of how following the CETA model is not realistic concerns fisheries. The UK and the EU (unlike Canada) are neighbours and have enjoyed joint management of and access to fishery resources for 40 years. The Commission slides stress that fisheries, including access to waters and management of stocks, must be part of the trade agreement (with preservation of existing quotas) whereas the UK wants to restore its control of its fisheries as an independent coastal state. The UK will argue that fisheries is a separate issue not to be linked to trade.

The link between fisheries and trade appears, however, unavoidable. EU duties toward third countries on fish products are high and if the EU refuses duty free access to the UK for fish products (as it has for Norway, to give just one example), UK fishermen may in any event lose the benefit of their possibly increased fishing opportunities.

One proposal that is often made is that EU access to UK fisheries should be traded against better access for UK financial services providers to the EU. The political difficulty of achieving such a trade-off should be obvious to all.

## **REGULATORY ALIGNMENT AND LEVEL PLAYING FIELD**

Another area where the objectives of the EU and the UK diverge concerns regulatory alignment and the so-called level playing field.

When the original Irish Protocol (the so-called “backstop”) was agreed, the EU demanded, as the price for maintaining access to the internal market, that the UK maintains dynamic alignment with a large body of internal market rules and also accepts a number of level playing field provisions requiring in particular that the UK does not “regress” on environmental, tax and social protection and also to maintain alignment on EU competition and state-aid rules with an enforcement role for the European Commission. Similar provisions will still apply for Northern Ireland alone under the revised Protocol but are not yet agreed for the rest of the UK.

The Commission has indicated in its slides that applying the “FTA model” excludes mutual recognition of regulatory frameworks and regulatory decisions and that therefore border checks will apply. It may therefore be assumed that it will not seek any obligation of regulatory alignment. Instead, the focus will be on agreeing WTO plus obligations on technical barriers to trade and sanitary and phytosanitary measures.

With respect to the need for level playing field provisions relating to rules governing competition, state aid, state-owned enterprises, taxation, labour and social rights and the environment, including climate action, the Commission takes a different approach and seeks to go beyond what is normal in FTAs. It considers this necessary due to the geographical proximity of the UK and the economic interdependence and connectedness of the UK and the EU.

While FTAs often refer to standards in these areas, the EU's proposals go very far. They refer, for example, to “the application of EU State aid rules to and in the UK” enforced by an independent authority, to the “application by the UK of common standards in place at the end of the transition period” on various tax matters and to “non-regression from common standards in place at the end of the transition period” in respect of labour and social protection and the environment. All of these are to be enforced in the UK by independent bodies and be subject to dispute settlement and “autonomous interim measures” pending the outcome of the dispute settlement.

The problem with the Commission proposals on level playing field provisions is not only that they go beyond what is contained in other FTAs, but also that the EU is unlikely to be able to accept such obligations itself. The Commission stresses in its slides the importance of maintaining the autonomy of the EU legal system and the Court of Justice has also shown great sensitivity to the acceptance of such constraints.

The level playing field obligations are likely to be one of the most difficult and contentious issues in the forthcoming negotiations.

## **WHAT ABOUT INVESTMENT PROTECTION?**

While normal free trade agreements do not contain level playing field provisions of the kind envisaged by the Commission in its slides, they do often provide protection for investors against arbitrary or unfair action in the host country including provision for investor-state dispute settlement. In the case of CETA, which the UK takes as its model, these are particularly highly developed and including a provision for disputes to be settled by an independent Tribunal, which it is hoped will evolve into a multilateral Investment Court System.

The rationale for including specific protection for investors, including investor-state dispute settlement, in trade agreements is that it is not feasible to give them direct effect (see above). If the EU and the UK provide that the provisions of their future relationship not have direct effect, they will simultaneously diminish the value of any level playing field provisions that they include and emphasise the need for investor state dispute settlement.

There is no reference to investor protection in any of the EU slides or negotiating documents and the subject does not seem to have been raised by the UK as yet either. If they are not to be included, the future relationship between the UK and the EU will be CETA-minus or at least CETA-different.

## CONCLUSION

The above points are a non-exhaustive list of some critical issues that will need to be resolved during the forthcoming negotiations on the future relationship between the UK and the EU. It is to be hoped that the negotiating positions that are expected to be adopted by each party during the month of February will address them in a manner that allows constructive negotiations to be started.

[More on Brexit](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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