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THE VIEW FROM BRUSSELS: THE NEGOTIATION OF THE FUTURE PARTNERSHIP BETWEEN THE EU AND THE UK

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Legal Briefings

Negotiations on the Future Partnership between the UK and the EU have progressed through three rounds – held by video conference rather than face-to face given the current circumstances. According to the press-conferences, and in particular the introductory statement of the EU negotiator at the end of the third round, there are fundamental differences between the parties and little progress is being made. Both sides have, however, now produced fairly complete drafts of the future partnership that they would like to see.

The EU was the first to publish its draft while the UK has only just released its drafts of a suite of agreements, having insisted on keeping them confidential even from EU Member States until now. In this View from Brussels we compare the two sets of drafts and discuss some of the problematic issues and comment on how the difficulties might be resolved. In doing so we concentrate on the UK draft of a free trade agreement ("FTA") and the corresponding trade provisions of the EU draft.

SINGLE AGREEMENT V SUITE OF AGREEMENTS

The EU draft of the Future Relationship with the UK proposes a single framework with a single governance system (Article COMPROV.2). It is even expressly provided that future agreements between the EU and the UK will be treated as supplemental agreements governed by the common framework. The UK proposes a "suite of agreements" negotiated, applied and therefore enforced, separately.

The EU position clearly promotes coherence in the relationship. It can also facilitate the negotiation of a broad and ambitious agreement since the scope for trade-offs is increased. It needs to be understood in the context of EU dissatisfaction with its relationship with Switzerland which is made up of numerous sectoral and thematic agreements with little overall coordination (although there are linking clauses in the agreements).

The UK preference for separate agreements may be motivated by a desire to avoid retaliation being applied in one area of the future partnership as a result of a dispute in quite different area. It might also feel that its negotiating leverage over the implementation of the future partnership will be increased in the absence of centralised control.

In any event, the UK approach may become necessary because of the need for some areas of cooperation to be agreed quickly. Even if the transition period is extended for the maximum of two years (and the UK has stated it will not agree to any extension), experience in international negotiations shows that it will be exceedingly difficult to achieve agreement on the full range of issues within the time available. Also, an agreement on establishing a free trade area for goods and services needs to be in place by the end of the transition period to avoid serious economic disruption whereas agreement on judicial cooperation in criminal matters, for example, is not so time-critical.

Even within the area of trade, some issues may require more time than is available and there will be pressure not to allow failure to complete the more complex or controversial issues affecting cherished national regulatory autonomy from preventing conclusion of negotiations on the more straightforward elements such as avoiding tariffs and quotas on goods.

There may, in addition, be difficulty on the EU side in getting agreement amongst Member States on a broad range of issues on which they may have more divergent interests than on trade. The legal basis for the relationship advanced by the Commission, Article 217 TFEU, requires unanimity. For this reason, it may well be necessary that a broad future partnership only includes the more difficult topics by way of commitments to continue to negotiate (i.e. the "Work Programme" approach which we described as a possible solution in December 2019).

That is no doubt the reason why the EU draft provides for future agreements between the parties on matters that have been postponed to be "supplemental" to the initial framework. In this way, the EU hopes to keep all aspects of the future partnership under common management. However, in international law, subsequent agreements override earlier agreements (*lex posterior derogat*) and so it will always be possible to agree that future agreements are not part of the initial "framework" agreement.

LEVEL PLAYING FIELD PROVISIONS

It is usual for modern free trade agreements to include provisions that are now referred to as requiring a "level playing field". These are provisions setting out minimum regulatory standards to prevent regulatory standards being lowered to provide one party a competitive advantage, a so-called "race to the bottom".

What is unusual in these negotiations is that the EU and the UK currently (and uniquely in trade negotiations) have identical standards and rules. Therefore it appears convenient to rely on these current common standards and rules (which are in fact EU standards and rules) in defining the minimum standards and rules for the future partnership.

However, the EU negotiating mandate requires the Commission to seek and agreement that "should uphold common high standards, and corresponding high standards over time with Union standards as a reference point". This is taken to mean securing dynamic alignment of UK legislation with that of the EU.

In the fields of taxation, social rights, environmental protection and climate action an obligation of non-regression from existing standards is combined with a kind of ratchet mechanism. When a party increases its standard of protection it may not subsequently lower it below the level achieved by the other party. This is described in slightly varying terms in Articles in Article LPFS.2.27 and 2.28 for labour and social protection, LPFS.2.30 and 2.31 for environmental protection and Article LPFS.2.36 for climate action.

These "ratchet" provisions are a clever attempt to reconcile the demands of the EU Member States as expressed in the EU mandate with the need for balance and the impossibility of requiring the EU to follow the UK, if it were to increase its level of protection as would be necessary if a properly reciprocal obligation of dynamic alignment were to be agreed.

The UK drafts do not contain these provisions and provide only that the parties "shall strive to continue to improve such laws and policies and their underlying levels of protection" (see e.g. Article 27.2 on Trade and Labour Law and Article 28.3 on Trade and Environment in the UK draft FTA).

In the field of subsidy control, however, the EU proposes to go much further and would require the UK adopt changes to EU State aid law and policy and provides for the EU to be able to adopt appropriate "interim measures" until the UK does so (Article LPFS 2.9(1)(c)).

The UK draft avoids all references to State aid, preferring to employ the notion of subsidy as understood in the WTO Agreement, although it does propose a system of control (applicable equally to both parties) going beyond that of the WTO.

An additional feature of the EU proposal on State aid is that the EU is proposing that it (but not the UK) should be entitled, pending the outcome of a dispute settlement process, to adopt unilateral interim measures in the event that it considers that the UK has not complied with its obligations (Article LPFS.2.9).

The difference of opinion on the design of level playing field provisions is particularly stark as shown by the terms used in the public letter of the UK negotiator to his EU counterpart, where the EU proposal on State aid is described as "simply not a provision any democratic country could sign" and the public letter in response describing other UK demands as "unprecedented" and its approach as "cherry picking".

DISPUTE SETTLEMENT

Both parties propose systems of binding dispute settlement modelled on that developed by the WTO and adopted by the EU in many of its recent trade agreements. They both propose that certain areas be excluded from dispute settlement, with the UK going further than the EU in its exclusions.

One major difference between the parties is the EU proposal for a role for the Court of Justice of the EU ("CJEU"). There is a line of CJEU case-law that requires the CJEU to be the exclusive arbiter of issues of EU law. This is said to be required to ensure respect for the principle of the autonomy of the EU legal system. The EU relies on this to argue that the CJEU must be able to give binding rulings in disputes involving concepts of EU law. This approach was used in the Withdrawal Agreement, but was arguably necessary there because that agreement related to the unwinding of membership obligations and the continued application to the UK of EU law for limited purposes and so inevitably involved references to EU legal concepts. The agreement or agreements setting up the Future Partnership, however, will be of indefinite duration between sovereign equals and the UK has made clear that it wants no role for the CJEU.

The UK seeks to ensure this by avoiding reference to EU law and EU legal concepts so as to avoid creating any basis for a role for the CJEU in dispute resolution and therefore interpretation of the agreement. A clear example of this is the UK's insistence on referring to subsidy rather than State aid control.

Another notable difference between the parties is that the EU is proposing that arbitration panels should be able to impose financial penalties on a party found to be in breach rather than the classic WTO-style remedy of authorising, by way of countermeasures, the suspension of obligations of the complaining party.

NO DIRECT EFFECT

One matter on which the parties are, apparently, agreed is that there should be no possibility of private parties relying on provisions in the agreements by invoking them in the domestic legal systems of the parties. In other words, both want to exclude "direct effect". The EU provision providing for this is COMPROV.16 Private Rights, and it is copied into most of the UK drafts, even those designed to protect individuals such as that on social security and on law enforcement (see e.g. Article 34.5 of the UK proposal for an FTA).

A number of problems would be solved, if the Future Partnership were given direct effect in both jurisdictions, just as has been done for the Withdrawal Agreement.

Because EU law is directly enforceable before EU courts and the European Commission has extensive enforcement powers, the level playing field provisions of the EU draft provide an obligation on the UK to provide for enforcement by independent authorities and in some cases *individuals* (see Articles LPFS.2.29 for social protection, LPFS.2.32(1) for environmental protection) before national courts. It often states that the EU is deemed to be in compliance by virtue of its existing arrangements (see third subparagraph of LPFS.2.32(2) for environmental protection and Article LPFS.2.39 for climate action). These rather burdensome obligations and questionable deeming of the EU to be in compliance would not be necessary, if the agreement were directly applicable in both jurisdictions.

It is a feature of recent EU trade agreement practice to exclude direct effect, but this is due to the fact that most third countries do not agree to making international agreements enforceable in their legal systems. The UK is accustomed to direct effect from its long membership of the EU and, as noted above, has accepted it in the Withdrawal Agreement (see the second subparagraph of Article 4(1)). It is also a feature of many "European-style" free trade agreements and notably the EEA Agreement. There may well be reluctance in political circles to entrust the interpretation and enforcement of the Future Partnership to courts, even UK courts, but it is surely preferable to the solution advanced by the EU which is to impose *ad hoc* enforcement mechanisms on the UK alone (and to deem itself to already comply because of its existing mechanisms). That is a source of more imbalance and where the EU considers that the UK is not enforcing the agreement adequately through these mechanisms, there will be disputes and eventual retaliation.

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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