

Brexit - What does the Political Declaration tell us about the UK's future relationship with the EU?



Introduction

On Sunday, 25 November 2018 the European Council met to approve the draft UK-EU Withdrawal Agreement and the Political Declaration on the future relationship between the UK and the EU.

The Political Declaration was published on 22 November 2018. It has the common goal of establishing a bespoke "UK model" relationship, although how this will be achieved is up for debate. The Political Declaration adopts a sector-by-sector approach which, anticipates a model which would offer the UK a significant degree of market access for the sectors covered, subject to reciprocity and "a level playing field for open and fair competition", while acknowledging that the UK does not want full free movement of people and will want to conclude its own trade deals.

What is its status?

The Political Declaration is a non-binding statement of intent and contains the aspirational, but generally unspecific, language that is often the hallmark of international diplomacy. It is not a treaty, does not create legal rights and cannot be enforced or relied upon by governments, corporate bodies or individuals. It will be subject to approval by the UK Parliament (at the same time as it considers whether to approve the draft Withdrawal Agreement).

As the future relationship remains somewhat nebulous, the devil will be in the detail.

What does it do?

The Political Declaration is drafted with an eye to flexibility and to allow for changing political developments. It builds upon aspects of the arrangements in the Withdrawal Agreement, in particular the single customs territory, using those arrangements as the basis of a new relationship with the intention of creating:

"[A]n ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation." (Paragraph 3)

How deep will the future relationship be?

The depth of the new relationship will depend upon the extent to which the UK is prepared to accept continued and ongoing alignment with EU rules. The greater the alignment, the deeper the relationship:

"The Parties envisage that the extent of the United Kingdom's commitments on customs and regulatory cooperation, including with regard to alignment of

rules, would be taken into account in the application of related checks and controls, considering this as a factor in reducing risk." (Paragraph 28)

It appears that the relationship is likely to be deeper for goods than for services.

Will the UK cease to be subject to the European Courts?

Under the future relationship, the UK will not be subject to the direct jurisdiction of the Court of Justice of the EU ("**CJEU**"). However, to the extent that any dispute under the Withdrawal Agreement or the Relationship Agreement relates to EU law, the arbitral panels that oversee the Withdrawal Agreement and Relationship Agreement will refer such questions to the CJEU and accept its determination without question. This means that the CJEU, a court on which the UK will no longer have a judge and which has played a key role in expanding the role and powers of the EU, will have significant indirect jurisdiction over the UK. This will ensure consistency in the application of EU law and EU derived law in the UK and the EU.

Where do I find it?

To read the Political Declaration, click [here](#).

To read the PM's statement on the Political Declaration, click [here](#).

To read the Withdrawal Agreement, click [here](#).

Trade in Goods and Services

General

What the Political Declaration says on goods and services needs to be read against its overarching theme, that the future trading relationship cannot allow the UK an advantage and that there must be a level playing field for open and fair competition. However, this is balanced against the EU's stated acknowledgement that what is being offered to the UK is not an off-the-shelf deal.

Goods

The key points to note in relation to goods are:

- The Political Declaration offers a free trade area, with an express statement that there will be no tariffs or quotas on goods across all sectors. Despite the fact that the Political Declaration refers to the need to "*build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin*", the Political Declaration also recognises that that UK will have an "*independent trade policy*" from the EU. The ability of the UK to enter into separate free trade agreements clashes with the idea of improving on the proposed single UK-EU customs territory described in the Withdrawal Agreement. The Political Declaration does not explain how the arrangement would deal with a divergence between EU and UK independent trade policy which resulted in differing trade tariffs for third country imports (so as to remove the need for customs formalities).
- The Political Declaration states that both sides are determined to replace the backstop, which will be put in place as part of the Withdrawal Agreement to prevent a hard border between Northern Ireland and the Republic of Ireland (the "**Northern Ireland Backstop**"), by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border "*on a permanent footing*".
- The Political Declaration does not, however, offer frictionless trade in goods, instead referring to "*deep regulatory and customs co-operation*" and trying to avoid unnecessary barriers to trade in goods if compatible with regulatory autonomy. The text reflects the EU's desire to ensure the integrity of the Single Market and the UK's wish for sovereignty, admitting that customs procedures are indispensable in such circumstances.
- The Political Declaration refers to the possibility of using "*max fac*" arrangements as a way of avoiding the Northern Ireland Backstop taking effect: paragraph 26 refers to making use of all available facilitative arrangements and technology, mutual recognition of trusted traders' programmes, and mutual assistance (including the recovery of claims for taxes and duties). (If these are put in place, this would lessen border checks and regulatory hurdles.)

- As regards regulatory compliance and the cross-border supply of goods, the Political Declaration does not confirm that the parties will agree regulatory alignment and is a long way from the UK Government proposals of a common rulebook (as set out in the Chequers plan in July). Instead, the language used in the Political Declaration is altogether vaguer, referring to agreeing disciplines on “common principles” in the fields of standardisation, technical regulatory, conformity assessments, accreditation and labelling.
- The Political Declaration does not rule out the possibility of closer conformity or alignment or mutual recognition of regulatory assessments (paragraph 25, for example, refers to the UK “[*considering*] *aligning with Union rules in relevant areas*”), but neither does it provide clarity now on what might be put in place post transition.

Services

The Political Declaration does not offer any detail in respect of how trade in services between the UK and the EU will operate. However, there is a suggestion that the UK may be offered more in terms of access to the EU services market than a conventional free trade agreement typically provides for. The key points in relation to services are:

- A promise of “*substantial sectoral coverage*” (although this is required by WTO rules in any event in order for a free trade agreement to be allowed as an exception from WTO rules). Specifically mentioned are professional and business services, telecommunication services, courier and postal services, distribution services, environmental services, financial services, transportation services and other services of mutual interest.
- A positive statement that service providers and investors are to be treated in a non-discriminatory manner, including with regard to establishment, but as with the provisions in respect of goods, the level of access to the EU services market is likely to be linked to the degree of alignment by the UK with the EU regulatory framework.
- Again, the Political Declaration avoids reference to commitments on alignment, instead referring to the UK and the EU agreeing “*disciplines on domestic regulation*”.
- Digital services warranted a separate mention in the text, with the Political Declaration stating that the UK and the EU will agree provisions to facilitate electronic communication and to address unjustified barriers to electronic trade.

Commercial disputes

Although the Political Declaration covers future co-operation in the field of criminal justice, there is no statement on what the parties want to achieve in civil and commercial judicial co-operation. During the transition period of the Withdrawal Agreement, the UK will remain subject to, and benefit from, the current EU wide regimes on choice of courts and recognition of judgements. However, there is nothing in the Political Declaration that specifically provides for what will happen after the transition period. The UK has already confirmed its readiness to accede to another international convention on choice of courts and the 2005 Hague Convention. Although less extensive than the current EU wide regime, perhaps the UK and EU believe that this is an adequate replacement if no preliminary agreement on future reciprocity can be agreed.

Disciplines on domestic regulation

In paragraph 34 the Political Declaration makes provision for the UK and EU to agree “*disciplines on domestic regulation*” in respect of various aspects of services, including financial services, which is EU jargon meaning that UK and EU law should remain harmonised. This is likely to inhibit the UK Financial Conduct Authority’s long stated intention to raise UK financial services regulatory standards after Brexit as part of its drive to make the UK more competitive.

Competition

The EU has consistently made clear that whatever trade relationship is agreed between the UK and the EU, it must ensure a level playing field for “*open and fair competition*”. This is repeated on several occasions in the Political Declaration. Paragraph 79 of the Political Declaration provides that the UK (and the EU) will be required to give commitments to this effect.

UK competition law currently mirrors EU competition law and there are no immediate Government proposals to change this. Once the UK is no longer a Member State, it is envisaged that the European Competition Commission will cease to have jurisdiction in the UK, for example, to conduct dawn raids or to review transactions which have actual or potential effects in the UK. Such matter will fall under the exclusive jurisdiction of the UK competition authorities. However, under the terms of the Political Declaration, they will need to ensure that their actions do not disadvantage businesses operating in the EU.

In terms of State aid, the European Commission currently has exclusive jurisdiction to determine whether any “aid” that is given to UK based companies complies with EU State aid rules. The Government has confirmed that it will introduce UK specific State aid rules, which will mirror those in the EU, with the UK Competition and Markets Authority overseeing them.

Businesses operating in both the UK and the EU should expect close alignment on State aid rules and a lot of alignment on other competition issues.

Mobility

The Political Declaration contains broad principles as to how travel for business, work, study, family and tourism will be managed when free movement between the UK and the EU will come to an end. There is a recognition of the right of both the EU and the UK to apply their respective conditions on entry, stay, study and work but such conditions should reflect the principles stated in the Political Declaration.

The principles outlined are that:

- Arrangements should be consistent across all member states and reciprocal suggesting that the UK and the remaining member states cannot impose different requirements based on EU nationality.
- Short term trips, falling short of work or study, should be possible without visa requirements.
- Consideration should be given to system which allow for study, internships and research.
- Business travel should be accommodated. Business travel is not defined but key areas will include frontier workers i.e. those that live in one member state and work in another and the ability of employees of pan-European employers to visit the UK and the EU.

In summary, the Political Declaration itself does not flesh out how mobility will work when free movement ends but sets out the basis upon which the UK and the EU must now construct immigration structures.

Transport

As to transport, the declaration recognises that there will need to be arrangements to ensure that connectivity is preserved in respect of cross-border movement. Since, in the transport sector, there is a complex interplay between EU and international rules, the declaration also reflects the need to have regard to the international legal frameworks that apply. Overall, the aspirational language is low key. There seems to be little expectation that current levels of market access will be deliverable. But there is a strong endorsement of the need for cooperation among sectoral regulators.

Data protection and related issues

The Political Declaration echoes the sentiment of the outline declaration that accompanied the publication of the draft Withdrawal Agreement in respect of data protection (see paragraphs 8 to 10). The EU commits to assess the UK against the EU's adequacy framework and "endeavour" to make a decision in this regard before the end of 2020. A finding of adequacy would facilitate the seamless continuation of personal data transfers from the EU to the UK post-transition. The quid pro quo is that, in the meantime, the UK will take steps to facilitate transfers of personal data to the EU. In addition, the parties explicitly commit to make arrangements for the appropriate cooperation between regulators, which could be interpreted as a nod to the potential continuation of the ICO's participation in the operation of GDPR's one-stop-shop mechanism in some form.

The Political Declaration's general regulatory provisions could also overlap with the regulation and enforcement of data protection matters, such as the commitments to promote transparent, efficient and compatible regulatory approaches and avoid unnecessary regulatory requirements (paragraph 33), to develop disciplines on domestic regulation, including in the telecommunications and financial services sectors (paragraph 34) and to exchange information and share best practice (paragraph 35).

Looking beyond the Political Declaration's core data protection provisions, it is worth noting the parties' mutual cooperation commitments in connection with cybersecurity and data sharing for law enforcement purposes, which include establishing a "*broad, comprehensive and balanced security partnership*" to address threats including, amongst other things, cyber-attacks (paragraph 80); exchanging intelligence (including in the field of cyber threats); and contributing to a shared understanding of Europe's security environment (paragraph 105)

In addition, in the context of the digitalisation of trade, the Political Declaration contains provisions seeking to prevent unjustified data localisation requirements from being introduced and to facilitate non-personal data flows (paragraph 40).

How should Members be preparing for the Future Relationship?

As noted above, the Withdrawal Agreement and Political Declaration must be approved by the UK Parliament, which represents a significant hurdle.

By its nature the Political Declaration is merely a statement of high level principles and it offers the UK a choice between regulatory alignment with the EU (with consequential loss of control over its laws) or independence (with consequential introduction of border checks and other barriers to trade).

Accordingly, there is a long way to go before the detail of the UK's future relationship with the EU will be clear. However, assuming Mrs May secures sufficient support for her Brexit deal, it is possible to see the outline of the future relationship of the UK and EU emerging.

In the meantime, businesses are planning for three possible scenarios, namely - a hard exit; an agreed ("soft") exit, broadly on the terms of the Withdrawal Agreement; and a "no exit" scenario. The Political Declaration gives some guidance as to the boundaries for a negotiated exit, which Members should be factoring into their planning.

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