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The Brexit Negotiations (2): What is the UK's Opening Position?

This is our second Alert on the Brexit negotiation¹, which started on Monday, June 19, 2017. Having outlined the EU's opening position, we now turn to that of the United Kingdom. The main source used is the UK Government's "White Paper" entitled *"The United Kingdom's exit from and new partnership with the European Union"*, which was presented to the UK Parliament in February 2017.² We also set out additional considerations based on the result of the recent UK general election, which may affect the extent to which the Government is able to pursue the approach outlined in the White Paper.

The White Paper

The White Paper is a 75-page document, which is in many respects aspirational, setting out what the UK *would like to achieve* and with a significant emphasis on trade. The theme is one of a "Global Britain", seeking partnership with the EU.

Interestingly, the UK emphasises that it sees the negotiations as unusual because the UK starts with the same rules as in the EU: *"Unlike most negotiations, these talks will not be about bringing together two divergent systems, but about managing the continued cooperation of the UK and the EU. The focus will not be about removing existing barriers or questioning certain protections but about ensuring new barriers do not arise"*.³

The White Paper has 12 sections⁴, following "12 principles" which the UK states will guide its approach.

The most important points are as follows:

1. Providing certainty and clarity.

The UK stated that it would introduce "the Great Repeal Bill" to convert the body of existing EU law into domestic law. This Bill was to enable the preservation of the rights and obligations that already exist in the UK under EU law and provide a basis for future changes in UK law. Therefore, existing EU law will remain part of UK law on the day the UK leaves the EU, with adjustments as required.⁵ Material changes, if any, would come later.

¹ https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-06-19-The%20Brexit-Negotiations-What-is-the-EUs-Opening-Position.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

³ P. 5.

⁴ Those not covered below are: strengthening the (British) Union; protecting workers rights; ensuring the UK remains the best place for science and innovation; cooperating in the fight against crime and terrorism.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

2. Taking control of UK laws.

First, the White Paper emphasises that the sovereignty of Parliament is a fundamental principle of the UK constitution. After the UK's exit, the UK's laws will be made in London (and regional assemblies in Edinburgh, Cardiff and Belfast).

Second, the White Paper explains that the UK will bring an end to the jurisdiction of the Court of Justice of the European Union ("CJEU") in the UK. Nevertheless, it is stressed that the UK Government will continue to honour the UK's international commitments and comply with international law.

Third, the UK Government advocates the adoption of suitable "dispute resolution mechanisms" for the future relationship with the EU. The UK Government cites as examples the systems in the EU-Canada Comprehensive Economic and Trade Agreement ("CETA")⁶, or the Free Trade Agreement between the EU and South Korea⁷, while noting that whatever may be agreed will depend on the specific negotiations between the UK and the EU.

3. Protecting ties with Ireland and maintaining the "Common Travel Area".

First, the White Paper emphasises the importance of trade between the UK and Ireland (over £43 billion), and observes that many people commute regularly across the borders between Northern Ireland and Ireland (some 14,000). The Government states that it wants to protect the special rights for Irish and Northern Irish citizens in existing agreements and to maintain the ability to move freely between the UK and Ireland, notably through the "Common Travel Area" ("CTA"). (This is a pre-existing special travel zone for the movement of people between the UK, Ireland, the Isle of Man and the Channel Islands.)

Second, the UK Government states that it has an explicit objective on EU exit to ensure that full account is taken of the particular work with the Irish Government and the circumstances of Northern Ireland, safeguarding business interests, cooperation on law enforcement and security agencies.

4. Controlling immigration.

First, the UK Government makes clear that it must control the number of people coming to the UK from the EU. While the UK will remain open to immigration, especially high-skilled immigrants arriving lawfully, the EU Free Movement Directive⁸ will no longer apply and the migration of EU nationals will be subject to UK law.

Second, however, the UK Government confirms that existing EU students and those starting courses in 2016-2017 and 2017-2018 will continue to be eligible for the duration of their course.

Third, the Government also makes it clear that it is still working on its assessment of the impact of Brexit on the different sectors of the economy and the labour market.

Finally, the Government notes that implementing any new arrangements for EU nationals will be complex.

⁶ A "CETA Joint Committee" with disputes going to an ad hoc arbitration panel, if necessary.

⁷ Which provides for an arbitration system.

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

5. Securing rights for the EU nationals in the UK and UK nationals in the EU.

First, the UK states that some 2.8 million EU nationals are resident in the UK, many from Poland, whereas some 1 million UK nationals are long-term residents of other EU countries, with large numbers in Spain, France and Germany.

Second, interestingly, the UK also notes that under the EU Free Movement Directive those who have lived continuously and lawfully in a country for at least five years automatically have a permanent right to reside.

Third, the UK Government states that it would like the issue of the rights of EU citizens living in UK and UK nationals living in the EU to be resolved soon. For instance, access to healthcare for UK citizens living in the EU is a priority for the UK Government. The Government therefore emphasises that it wants to reach a reciprocal deal on such issues at the earliest opportunity.

6. Ensuring free trade with European markets.

Although the UK Government states that it will not seek membership of the EU Single Market, it stresses that it will be pursuing a new “*strategic partnership with the EU*”, including a Free Trade Agreement *and* a new customs agreement.

First, the UK Government states that it will look for “*the freest possible trade in goods and services between the UK and the EU*”. The UK will seek a specific model for its situation, including a new customs agreement with the EU. The agreement “*may take in elements of current Single Market arrangements in certain areas*”.⁹ The UK suggests that the arrangement should be fully reciprocal and in the UK and EU’s mutual interests.

Second, the White Paper shows that the UK has a £61 billion trade deficit (a UK deficit *in goods* of £89 billion, with a £28 billion surplus *in services*) with the EU27 and presents other figures showing a close trading relationship. For instance, the White Paper notes that producers in EU Member States rely on UK firms in their supply chain and that the UK often contributes a significant share of the foreign content in the EU countries’ exports.¹⁰

Third, the White Paper provides detailed information for certain markets. For example:

- As regards goods, the White Paper points out that European Standards Organisations (“ESOs”) are not EU bodies and the British Standards Institution (“the BSI”) will retain membership in the international organisations in charge of developing standardisation. The UK Government’s theme is that the BSI will continue to work with ESOs so that complying with standards should not be an issue. The UK Government states that a new partnership should allow for “*tariff-free trade in goods*” that is “*as frictionless as possible*” between the UK and the EU Member States.
- As regards agriculture, food and fisheries, the White Paper also emphasises that the UK is a net importer of agri-food goods (£28 billion), whilst having significant exports to the

⁹ Para. 8.3, p. 35.

¹⁰ Para. 8.8, p. 39.

EU (£11 billion), and underlines that this shows the UK and the EU's mutual interest in continued levels of market access in the future.¹¹

- As regards services (excluding financial services), the White Paper states that in the future partnership with the EU, the UK will be aiming for “*the freest possible trade in services*” between the UK and the EU27.
- As regards financial services, the UK Government notes that the financial sector is a very important part of the UK's economy. Not only in London, but in other parts of the UK. The UK notes that both UK and EU firms benefit from financial services passports (over 5,000 UK firms to the EU; and around 8,000 European firms to the UK). The UK Government states again therefore that the new partnership should aim for the “*freest possible trade in financial services between the UK and the EU*”.
- The UK Government also argues that market fragmentation should be avoided as well as the possible disruption or withdrawal of services. The UK's argument is that it is a global “*hub for money, trading and investment*” which is useful to Europe as a whole. The White Paper underlines that over 75% of the EU27's capital market business is conducted through the UK. The UK also argues that EU27 firms have an interest in continuing to serve UK customers.
- As regards energy, the White Paper emphasises that disruptions should be avoided. The UK Government is aware of the importance of interconnections with the EU for gas and electricity. The UK is therefore considering all options for the UK relationship with the EU on energy to avoid disruption, in particular as regards the all Ireland single electricity market.
- As regards transport, the White Paper notes that the four transport modes will have to be considered in the negotiations (aviation, road, rail and maritime). However, the UK Government stresses the interest for all sides to seek arrangements to support affordable and accessible air transport, as well as maintaining connectivity. The UK also notes that some 80% of cross-border road haulage between the UK and EU is handled by foreign hauliers.
- As regards communication networks, the White Paper notes that the UK Government wishes to ensure that UK telecoms companies can continue to trade as freely and competitively as possible with the EU and to let European companies do the same in the UK. As regards content carried over electronic communications, it is recalled that the UK is the EU's biggest broadcasting hub and is seeking to preserve the ability for businesses to trade as freely as possible.

Fifth, as for what it calls “cross-cutting regulations”, the White Paper recognises the role of areas such as *competition law* and *IP*. The Government states that it will seek to maintain the stability of *data transfer* between the UK and the EU Member States (noting that the European Commission can recognise data protection in third countries as “*essentially equivalent*” to that in the EU).

¹¹ Para. 8.15, p. 41.

Sixth, the UK notes that it will need to discuss with the EU and the Member States, its relationship with several European agencies, such as the European Medicines Agency, the European Food Safety Agency and the European (Financial Services) Supervising Authorities.

Finally, the UK makes clear that it wants to be able to negotiate its own preferential trade agreements, without being bound by the EU's Common External Tariff, or the EU Common Commercial Policy. It will therefore seek a "*new customs arrangement*" which will allow it to do so, while also allowing for trade between the UK and EU, "*as frictionlessly as possible*".

It is not entirely clear what this means, but one possibility would be that goods manufactured in the UK ("of UK origin") or the EU ("of EU origin"), could move freely, without duties, between the UK and the EU, with duties only applicable to goods from outside the UK or from outside the EU, when moving to the EU or the UK respectively.

7. Securing new trade agreements with other countries.

First, the UK Government wishes to develop further trade with the growing export markets around the world through a variety of trade tools, since the importance of trade with markets outside the EU has grown.

Second, the UK Government states that the UK can have an independent trade policy without the need to reflect the position of the EU27 and, as a result, will have the opportunity to negotiate deals better suited to the UK and make quicker progress with new partners.¹²

Third, the UK states that its WTO membership will be the "bedrock" on which it will build future trade relationships. After Brexit, the UK aims to establish new schedules covering trade in goods and services at the WTO, replicating as far as possible its current position as an EU Member State.

8. Delivering a smooth, orderly exit from the EU.

The UK Government stresses that it wants to avoid a "disruptive cliff edge" on exit. It aims to reach an agreement by March 2019, but believes that a phased "implementation process" may be in the UK and the EU's mutual interest. However, "no deal is better than a bad deal" and the UK will pass legislation to mitigate the effects of that.

Conclusion

Finally, the UK states that "*[i]t remains overwhelmingly and compellingly in the UK's national interest that the EU should succeed. ... [The UK vote to leave the EU] was no attempt to do harm to the EU itself or to any of its remaining Member States. Rather the vote was driven by a desire to restore [the UK's] own parliamentary democracy, national self-determination and to become even more global and internationalist in action and in spirit*".¹³

The UK general election

In the UK general election on June 8, 2017, the Conservative majority was lost, so the Conservative party no longer has a majority by itself (a so-called "Hung Parliament"). As a result, the Conservatives are in negotiations with the Democratic Ulster Party ("DUP") to see if they

¹² Para. 9.7, p. 55.

¹³ P. 67.

can reach an understanding to establish a majority on key votes, but the Conservatives currently govern as the largest minority in Parliament.

The election result was interpreted by some as an indication that many “Remainers” (those who wanted the UK to stay in the EU) had voted against the Government to signal that they wanted the UK to negotiate an exit arrangement as favourable as possible to the UK. It was suggested that meant staying as integrated as possible with EU markets to protect jobs and the economy, rather than prioritising limits on immigration and issues of sovereignty.

It is not yet clear what the Government’s weaker majority will mean for its approach to Brexit.

- Some have suggested that the UK Parliament will be in a stronger position to demand more flexibility on Brexit issues, insofar as it has to approve the final Brexit agreements and related legislation. For example, it has been suggested that the UK might be more flexible on possible trade options in order to retain as much trade with the EU, or that the UK should consider allowing CJEU jurisdiction in some cases.¹⁴
- Another idea is that there should be a cross-party parliamentary committee involved in, or at least consulted about the negotiations from the UK side to secure Parliamentary approval.¹⁵
- It may be noted also that Labour opposed the Great Repeal Bill, preferring an “EU Rights and Protections Bill”, retaining workers’ rights, equality law, consumer rights and environmental protections.
- It is also not clear what impact an alliance with the DUP might have on any issues related to Ireland.

However, yesterday, the Government indicated that it is still committed to the Great Repeal Bill. It also announced related legislation on seven issues, which it considers must be addressed in the next two years, so that the UK is ready to handle these issues after Brexit: customs, trade, immigration, fisheries, agriculture, nuclear safeguards and international sanctions. For example, the Customs Bill will create a new legal basis for a standalone UK customs regime on Brexit, a subject currently handled at EU level.¹⁶

The Government also indicated that it intended to implement the EU General Data Protection Regulation, the EU data protection rules which are due to come into force in 2018. This is partly to meet the UK’s obligations while a member of the EU, but also to help the UK maintain its ability to share data with other EU Members States and internationally after Brexit.¹⁷

Many of these aspects appear likely to evolve as the UK Government seeks to achieve *both* consensus in the UK on the way forward *and* agreement with the EU.

¹⁴ See, <https://www.ft.com/content/e79e9f26-4f67-11e7-bfb8-997009366969>.

¹⁵ See, e.g. <https://www.theguardian.com/politics/2017/jun/13/brexit-negotiations-cross-party-support-jeremy-corbyn>

¹⁶ See, the BBC report on <http://www.bbc.co.uk/news/uk-politics-40345280>.

¹⁷ See, the BBC report on <http://www.bbc.co.uk/news/technology-40353424>.

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