

The agreement on the future relationship: a first analysis

Marley Morris

December 2020

Find out more:

<https://www.ippr.org/research/publications/the-brexit-eu-uk-trade-deal-a-first-analysis>

SUMMARY

After 11 months of intense negotiations, the UK and the EU have struck a deal on their future relationship at the eleventh hour. This deal is one of the most critical agreements the UK will negotiate in the post-Brexit era, given it comprises the basis of the future economic and security relationship with its nearest trading partner. For this reason, it is important that the deal comes under proper scrutiny.

This briefing, published shortly after the text of the agreement has been released, offers a first attempt at assessing the deal and its implications. We recognise that, given the tight time frames, this is not a complete analysis of the agreement. Instead, this briefing aims to highlight some of the key provisions in the text and their significance for the future UK-EU relationship, as well as for the UK's own domestic policy.

As expected, our assessment finds that the agreement offers clear benefits to the UK and the EU, which would have been lost if no deal had been negotiated. For instance, the agreement provides for:

- Tariff-free and quota-free trade in goods between the UK and the EU
- Continued social security coordination between the UK and the EU, including healthcare coverage for EU and UK visitors
- Continued UK and EU data-sharing for security purposes, including sharing of information on DNA profiles, fingerprints, vehicle registrations, and passenger name records

However, it is clear that under this deal the UK and the EU's economies will no longer be as integrated as now, which is likely to have a significant impact on trade flows. Due to the UK's exit from the single market and customs union, there will still be a range of new trade barriers between the UK and the EU, starting from January 1 next year. There is no agreement on mutual recognition of professional qualifications, equivalence of SPS (sanitary and phytosanitary) measures, or passporting for financial services. Businesses trading into the EU will have to contend with new customs checks and formalities, technical regulatory barriers, as well as animal and plant health requirements for agri-food products.

The agreement also has important implications for future UK policy on labour and environmental protections, as well as rules for state aid. A key element of the negotiations was the so-called 'level playing field' – the rules for fair competition designed to underpin the trade agreement. However, the commitments on labour and environmental standards are considerably weaker than expected; there is only a commitment not to lower current levels of protection to the extent that any reductions may affect trade or investment. Given it is notoriously difficult to prove that any lowering of protections affects trade or investment, the deal is unlikely to prevent the UK government from weakening EU-derived labour and environmental policies if it so chooses.

In summary, the agreement secures critical benefits for the UK, most notably through maintaining tariff-free trade. Yet as the foundation for the future relationship between the UK and its closest neighbour and trading partner, this is a strikingly thin deal. In aiming for an agreement which guarantees maximal sovereignty, the UK government has watered down the 'level playing field' requirements on areas such as labour and environmental protections and secured only limited benefits in market access. In the short-term, this is likely to lead to disruption to trade flows, including at the border. Over the longer term, the economy will adapt to the new arrangements, but barriers to UK-EU trade will likely lead to slower growth and a more prolonged economic recovery.

THE AGREEMENT ON THE FUTURE RELATIONSHIP

The agreement is broken into different parts, which we look at in turn. Each part includes a number of sections called 'headings', broken down into subsections called 'titles'. We do not include every title and heading in this analysis; instead we focus on some of the key elements of the agreement.

Part One: Common Provisions

The agreement opens with some common provisions which underpin the future UK-EU relationship. This includes a 'good faith' clause, which commits both the UK and the EU to taking the appropriate measures to fulfil the obligations of the agreement, and by the same token refraining from taking measures that could jeopardise the objectives of the agreement. However, this part also makes clear that there is no obligation for the UK to interpret the text in accordance with EU law (and vice versa).

This part also contains the overarching arrangements for governing the agreement on the future relationship. It creates a framework for managing the implementation and development of the agreement, based on a Partnership Council made up of UK and EU representatives and co-chaired by a UK government minister and a member of the European Commission. Alongside the Partnership Council, the agreement also establishes a number of specialised committees, focusing on various elements of the future relationship. The Partnership Council and the specialised committees have the power to make decisions in certain areas which are binding on both the UK and the EU.

Outside these core elements of the framework, the agreement provides for a Parliamentary Partnership Assembly, made up of MPs and MEPs, which can make non-binding recommendations to the Partnership Council. There are also provisions for domestic advisory groups, made up of civil society organisations, which are meant to advise on relevant issues in the agreement, such as the level playing field conditions on labour and environmental protections. The agreement additionally includes the creation of a Civil Society Forum to discuss the implementation of the agreement, involving civil society organisations such as NGOs, business groups, and trade unions.

Part Two: Economy and Trade

Trade in goods

At the heart of this title is a commitment to maintain tariff-free and quota-free trade in goods between the UK and the EU, including all industrial and agricultural goods. This is an important commitment within the overall agreement, because without it the UK and the EU would be required to impose stringent tariffs on a range of goods from January 2021.

However, accompanying the commitments on tariffs are provisions on 'rules of origin', which are the arrangements for determining where goods traded between the UK and the EU originate and so whether they are eligible for tariff exemptions. These provisions are complex, but the core principle is that products exported to the EU qualify for preferential treatment if they have been wholly obtained in the UK, if they have been produced from materials exclusively from the UK, or if they have been sufficiently processed in the UK (provided certain conditions are met – eg the amount of non-UK materials used does not exceed a particular value). The same principle applies in relation to EU imports to the UK.

Importantly, there are provisions for full bilateral cumulation, which allow for any materials from the EU used in making UK products to be considered as UK materials for the purpose of determining whether the product counts as originating from the UK. Similarly, they allow for any production carried out in the EU to be taken into account when assessing whether a UK product meets the rules of origin. This is an important provision which should help to preserve UK-EU supply chains.

But the complexity and challenges involved in documenting that a product meets the relevant rules of origin will likely be arduous for many businesses; indeed, some will find it easier and less costly to forgo preferential exemptions and alternatively to accept tariffs on their products. For now, the EU has agreed to offer flexibility in documenting origin for the first year of the agreement, which should help business to adapt to the new rules.

Also within this title is a chapter on sanitary and phytosanitary standards (SPS) – ie plant and animal health. This chapter aims to affirm the rights of the UK and the EU to introduce conditions on importing animal and plant products for the protection of food safety and animal welfare, while at the same time ensuring these do not create unnecessary barriers to trade. The chapter contains certain rules to limit the extent of new trade barriers and to reduce the risks of delay, but it will not prevent new SPS checks on imports at the end of the transition period, including physical checks at the border.

Similarly, the chapter on technical barriers to trade (TBT) seeks to manage how the UK and the EU impose technical regulations, labelling requirements and conformity assessment procedures (ie processes for determining whether a product meets a standard) on imports in order to facilitate trade. This is done through provisions on transparency and cooperation, on the continued use of self-certification where this already takes place, and on the promotion of international standards. There are also some specific commitments on reducing non-tariff barriers relating to particular sectors, including medicine products, motor vehicles, and wine. In general, however, this chapter does not prevent new technical barriers to trade. For instance, it will not prevent UK regulatory and conformity assessment bodies from losing their ability to certify goods for the EU market in January 2021.

Finally, the chapter on customs facilitation aims to ease trade in goods between the UK and the EU through cooperation on customs. This includes a commitment on working towards simplified customs procedures, basing customs controls on risk management (in order to target high-risk consignments), and creating a partnership programme for Authorised Economic Operators ('trusted traders' which benefits from fewer checks due to their reliability). There are also commitments on how to manage roll-on, roll-off traffic at ports – for instance, by agreeing to allow for import documents to be processed in advance of goods arriving. But this does not prevent the need for new customs controls from January 2021 onwards.

Services and investment

This title includes a number of chapters aimed at supporting cross-border services trade and investment between the UK and the EU, including specific provisions on telecommunications, legal services, and financial services. There are commitments on ensuring market access for investors and service suppliers and on treating each party's investors and service suppliers in the same way as its own investors and service suppliers. There are also provisions to allow for temporary business travel, intra-company transfers, and other relevant forms of short-term mobility between the UK and the EU.

However, there are a number of exemptions to these commitments for specific sectors (for instance, audio-visual services), and in general they do not prevent either the UK or the EU imposing licensing or qualification requirements which affect trade in services. The provisions in this title are therefore not comparable to the current principle of free movement of services. For instance, in financial services, the agreement does not protect UK passporting rights (ie the right of firms authorised to sell financial services in the UK to be able to operate in an EU member state without further authorisation). There is also no firm agreement on

mutual recognition of professional qualifications – a key ask by the UK in the negotiations.

Digital trade

The agreement includes an additional title on digital trade, which aims to facilitate cross-border data flows. This includes a number of provisions on data flows and electronic transmissions, such as prohibiting any requirements for data to be stored or processed in a particular country. The title on digital trade also includes joint commitments on consumer protection, such as restrictions on unsolicited direct marketing communications (spam), as well as commitments on the protection of personal data and privacy.

Alongside the main sections on trade in goods and services, this part also includes titles in a number of further areas related to the future economic partnership, including in intellectual property, public procurement, energy and transport:

Intellectual property

This title specifies joint rules on the protection of intellectual property rights, covering areas such as copyright and related rights, trademarks, and patents. There is no agreement, however, on recognising and protecting new geographical indications (ie a sign or a name on a product corresponding to its origin where the product has certain qualities or a reputation as a result of that origin – such as Cornish Pasties). Existing geographical indications were protected under the previous Withdrawal Agreement.

Public procurement

As with intellectual property, public procurement is another common cross-cutting area in modern trade agreements. This title aims to ensure that either party can access each other's public procurement markets. It goes beyond WTO rules by ensuring non-discriminatory treatment for small-value procurement for locally established suppliers (ie EU suppliers established in the UK and vice versa). However, these rules do not require the UK to continue following EU legislation on public procurement and give it significant flexibility to diverge from current rules.

Energy

This title includes arrangements for trade in energy, including the gas and electricity industries. In particular, it promotes fair competition in gas and electricity markets and encourages the efficient use of interconnectors (ie physical cables connecting electricity across borders) between the UK and the EU. However, it does not allow for continued UK membership of the single electricity market, which will result in the less efficient distribution of electricity across interconnectors in future.

As part of this title, the agreement includes broad commitments on the use of safe and sustainable energy and energy efficiency. For instance, there are provisions reaffirming the UK's ambitions on its share of energy coming from renewable sources.

Level playing field

The 'level playing field' has been one of the most contentious areas of the negotiations. The EU has argued that an agreement which maintains tariff-free and quota-free trade must be underpinned by rules on fair competition (ie a 'level playing field'). They have sought agreement on strict conditions covering state aid and competition rules, labour and social protections, environmental and climate change measures, and taxation policy. The UK, for its part, has supported the principle of upholding fair competition and high standards, but has resisted any commitments which it considers as impinging on its sovereignty.

The results of these challenging negotiations are a complex compromise. On labour and environmental protections, the UK and the EU have agreed to a non-regression clause which prevents either party from reducing or weakening their own levels of protection at the end of the transition period in a manner "affecting trade or investment" between the two parties. This means that in order to demonstrate a breach of the non-regression clause either party would have to show that any attempt to lower labour or environmental standards affects trade or investment, setting a very high bar for proof. The text also includes commitments on implementing a system of carbon pricing, as well as on effectively implementing certain international agreements, such as the fundamental Conventions of the ILO (International Labour Organisation) and the Paris agreement.

Where there are disputes over a potential breach of the non-regression clause, the UK and the EU do not have recourse to the standard dispute resolution

mechanism for the agreement. Instead, the UK and the EU are expected to first attempt to resolve the dispute through consultations and then, if this is unsuccessful, through convening a 'panel of experts' to issue a report on whether the party in question has conformed with the relevant obligations. The agreement also provides scope for either side to take remedial action (eg through temporary tariffs) if the panel of experts' report is not acted upon. This means that there is the possibility of imposing sanctions where there has been a breach of the non-regression clause.

On state aid, the UK and the EU have agreed to a set of principles for managing subsidies. These in large part reflect the underlying rules and case law which currently apply to EU state aid measures. However, compared to current arrangements, it gives considerably greater flexibility over how these principles can be delivered. To enforce the agreement, there is a commitment to maintain an independent body to manage controls over subsidies and there is scope for formal dispute settlement through an arbitration tribunal. Either side can also unilaterally take remedial measures if there is evidence that a subsidy will cause (or there is serious risk it will cause) a significant negative impact on trade and investment between the UK and the EU. This can then be challenged through an arbitration tribunal.

A particularly contested issue in the negotiations was how to resolve future divergences in legislation – for instance, what to do if workers' rights in the UK do not keep pace with EU protections over time. To address this, the text includes a 'rebalancing clause' which allows either party to take action to rebalance the agreement where serious divergences in the areas of labour or environmental standards (or state aid) create material impacts on trade or investment. This means that, where the UK fails to keep pace on EU levels of labour or environmental protection and this affects trade or investment, the EU could take necessary and proportionate measures (eg introducing tariffs) in response. The criteria for being able to use these rebalancing measures is strict: any assessment of the impacts of divergence must be based on "reliable evidence" and not on "conjecture or remote possibility". Moreover, when one side intends to take rebalancing measures, the other side can request an arbitration tribunal to decide whether such measures are allowed before they are enacted. This means that rebalancing measures are only likely to be used in a rare number of scenarios.

Finally, there is also an option for either side to request a review of the agreement after a minimum of four years, if they consider that there have been repeated divergences and rebalancing measures or if a measure having material impact on trade or investment has been in place for 12 months. The review would focus on whether the agreement has the appropriate balance of rights and obligations, in light of the divergence between the two sides, and whether a modification to the deal is necessary. If no modified agreement can be reached

after a year of negotiations, then either party has the option of terminating the trade part of the agreement altogether.

Transport

These headings include important provisions on maintaining transport connectivity, particularly in the aviation and road transport sectors. The heading on aviation includes an agreement on the third and fourth air traffic rights, allowing UK air carriers to make scheduled or unscheduled flights to EU countries, and vice versa. It does not, however, allow UK air carriers to make journeys transporting people or cargo between two different parts of the EU.

On road transport, this heading includes an agreement allowing the transport of goods by road hauliers between the UK and the EU, provided they have a valid operator's license and the driver has a Certificate of Professional Competence. UK road hauliers are also granted the right to make up to two additional laden journeys within the EU before returning (including one laden journey within a member state), allowing them to travel back to the UK loaded with goods.

As a condition for continued air and road connectivity, there are specific rules for fair competition, extending beyond the more general 'level playing field' provisions discussed above. This includes provisions on maintaining current levels of consumer protection in relation to air travel and on complying with rules on driving and working time, rest periods, and breaks in relation to road haulage.

Social security coordination and short-term visas

This title includes provisions on short-term visas and social security arrangements. At the UK's choice, it does not include a long-term commitment to provide reciprocal visa-free travel. Instead, it simply notes that the UK and the EU have agreed to provide visa-free travel for short-term trips for the moment, leaving open the possibility of this changing in future.

A separate protocol includes arrangements for how to coordinate benefits for UK and EU citizens in a number of situations – for instance, UK citizens living in the UK and working in the EU, UK citizens temporarily visiting the EU, and UK citizens moving residence to the EU (and vice versa). This covers a range of benefits, including sickness benefits, maternity benefits, and pensions. It also

covers healthcare for people on temporary trips to the UK or EU (ie replicating the European Health Insurance Card).

Fisheries

Fisheries has been another area of contention throughout the negotiations on the future relationship. While the UK will regain control of its exclusive economic zone (EEZ – the area extending to at most 200 nautical miles from a country's shore where it can claim exclusive rights for fishing), there is still a strong mutual interest in the UK and the EU continuing to access each other's EEZs. The main dispute has related to the issue of quota shares – ie for each fish stock, the proportion of the total allowable catch (the catch limit) which the UK and the EU can catch. The EU had asked for the quota shares to be fixed over time and to be based on historical arrangements to ensure stability for member states. The UK, for its part, had asked for annual negotiations on quota shares based on 'zonal attachment' – that is, based on where different fish stocks are located in the UK's and the EU's EEZs – in order to increase quota shares for UK fishers.

The resulting compromise involves a 5 ½ year transition period to allow for EU member state fisheries industries to adjust to the new arrangements. UK quota shares will gradually be increased over this period. Beyond this point, negotiations on access arrangements will take place on an annual basis. The agreement also includes specific arrangements for dispute resolution. Where one side believes there has been a breach, they may respond by suspending access to its water or imposing tariffs on fisheries products (or suspending other aspects of the agreement if this is justified by the scale of the breach). An arbitration tribunal must also be urgently convened to make a ruling on the matter.

Parts Three and Four: Law Enforcement and Judicial Cooperation in Criminal Matters; and Thematic Cooperation

The future relationship does not simply cover economic ties. There are also a number of agreements in relation to security, including cooperation on both internal law enforcement and on health and cyber security.

Law enforcement and judicial cooperation in criminal matters

This part aims to facilitate cooperation between the UK and the EU in a number of areas of policy in order to tackle crime. Of particular importance are the UK's continued participation in the Prüm legal framework, allowing exchange of data on DNA profiles, fingerprints, and vehicle registration, and an agreement on continuing to share Passenger Name Record data (PNR) used for flights between the UK and the EU. However, there are no provisions for continued access to SIS II, an EU database of alerts on individuals and objects of interest to law enforcement.

There are also agreements on continued cooperation and information exchange with Europol and Eurojust, respectively the EU's law enforcement and criminal justice cooperation agencies. The title includes further arrangements on how the UK or EU member states should respond to arrest warrants, including specifications on the grounds on which arrest warrants can be refused. This is not, however, equivalent to continued participation in the European Arrest Warrant.

This part of the agreement is contingent on both sides continuing to uphold the European Convention on Human Rights. Where there are any deficiencies in the UK or the EU's protection of fundamental rights or the rule of law, either party has the right to suspend it. In addition, where there are serious deficiencies in the protection of personal data – for instance, if the EU withdraws an adequacy decision on data protection permitting cross-border data transfer – then it may also be suspended.

Thematic cooperation

Alongside this part, there is a further part covering other areas of UK-EU cooperation, including cooperation on health and cyber security. There is, however, no agreement on irregular migration and no replacement of the Dublin Regulation, which helps EU countries manage responsibilities for asylum applications. This will make it harder for the UK to return asylum seekers to EU countries and will create new barriers for asylum seekers looking to reunite with family members in the UK.

Part Five: Participation in Union Programmes

This part of the agreement covers the arrangements for the UK to participate as a third country in EU programmes, such as the Horizon Europe programme. It includes various rules guiding the participation of the UK in these programmes,

including the condition that the UK must make annual payments into the EU budget, in the form of a participation fee and an operational contribution.

Part Six: Dispute Settlement and Horizontal Provisions

Core to this part is the title on dispute resolution, which sets out the process for resolving disagreements on the interpretation or application of the agreement. The approach laid out here is similar to the one taken for the UK-EU withdrawal agreement. At first, if either the UK or the EU believes that the other has breached the agreement, they should enter into consultations. If consultations do not resolve the dispute, then it may go to an independent arbitration tribunal, which makes an objective assessment and a binding decision on the issue.

If the arbitration tribunal finds that either party has breached the agreement, then they must act to comply with its ruling. Where the party does not comply, they are obliged to present an offer of “temporary compensation”. If there is no agreement on temporary compensation, then the other party can choose to temporarily suspend some of the obligations of the agreement – eg through the imposition of new tariffs.

Finally, this part of the agreement includes provisions for either the UK or the EU to unilaterally take ‘safeguard measures’ where it faces serious economic, societal or environmental difficulties. This allows for a temporary ‘emergency brake’ in moments of extreme difficulty, though if ‘safeguard measures’ appear disproportionate they can be counteracted through ‘rebalancing measures’ or challenged through the agreement’s arbitration procedure.

REFERENCES

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (2020). <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>

European Commission (2020) ‘Questions and answers: EU-UK Trade and Cooperation Agreement’. https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

Prime Minister’s Office (2020) ‘UK-EU Trade and Cooperation Agreement: Summary’. <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>

ABOUT IPPR

IPPR, the Institute for Public Policy Research, is the UK's leading progressive think tank. We are an independent charitable organisation with our main office in London. IPPR North, IPPR's dedicated think tank for the north of England, operates out of offices in Manchester and Newcastle, and IPPR Scotland, our dedicated think tank for Scotland, is based in Edinburgh.

Our primary purpose is to conduct and promote research into, and the education of the public in, the economic, social and political sciences, science and technology, the voluntary sector and social enterprise, public services, and industry and commerce. Other purposes include to advance physical and mental health, the efficiency of public services and environmental protection or improvement; and to relieve poverty, unemployment, or those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage.

Registered charity no: 800065 (England and Wales), SC046557 (Scotland)

This paper was first published in December 2020. © IPPR 2020

The contents and opinions expressed in this paper are those of the authors only.