



POSITION PAPERS: TRACKING NEGOTIATIONS WITH THE EU

September 2017

ANALYSIS

The UK government has published a series of papers in advance of formal negotiating rounds with the EU to inform discussion and provide clarity to its position. The documents released covered:

- Confidentiality and access to documents
- Goods on the market
- Civil judicial cooperation
- Enforcement and dispute resolution
- Data protection.

The increase in clarity was roundly welcomed by the EU and the wider business community, including insurers. However, criticism has been expressed around the level of detail provided for such complex negotiations, together with certain inconsistency in providing a clear UK stance. While some were 'position papers', others were 'future partnership papers' that served to initiate an exchange of opinions, rather than drawing a line in the sand for the next stage of negotiations.

DISPUTE RESOLUTION

The UK's paper addressing dispute resolution was the most politically sensitive for Theresa May, given the red line she had set in her promise to end the jurisdiction of the European Court of Justice (ECJ) and "take control of our laws". In what was perceived to be a minor retreat from that position, the government committed to ending the "direct jurisdiction" of the ECJ.

Though no explicit priority was expressed in the paper, the government is expected to consider the European Free Trade Area (EFTA) Court a workable compromise, while the enforcement section of the paper sought to address agreements between businesses and individuals.

MAKING PROGRESS

Brussels is expected to hold firm to its view that it won't discuss trade until "sufficient progress" is made addressing big ticket issues including the Irish border, Brexit bill and citizens' rights. Such progress is not expected to have been made by the next EU council meeting in October for Phase 2 talks to begin.

Overall, the Brexit papers reflect a slight softening of the UK's position (when compared to the Lancaster House speech) but continues to seek a bespoke arrangement based on leaving the Customs Union and ending Freedom of Movement - in effect ruling out a Norway-style model.

WHAT DOES THIS MEAN FOR INDUSTRY?

In a similar vein to the wider services industry, the insurance sector is left wondering what plans the government has for services. Speculation had built that a services-specific paper was due to be published by the government, but that is not known for certain.

For UK insurers, clarity provided within the data protection was highly relevant, though the detail largely mirrored the Data Protection Bill due unilaterally in the UK parliament. In many respects then, it did not provide new news.

The paper addressing the enforcement and dispute resolution sought to offer a renewed sense of clarity around the politically contentious issue of the future role of the ECJ. However, the paper left open the possibility that decisions of the CJEU could still be taken into account in resolving any disputes, leaving necessary wiggle room for the government.

Overall, the sector remains eager for clarity on how Brexit more, broadly and a lack of a transitional period, specifically will impact business.

ANNEX ONE: SUMMARY OF UK BREXIT PAPERS

Enforcement and dispute resolution

- The government's paper called for the creation of a new legal dispute mechanism that would end the "direct role" of EU courts in the UK post-Brexit, in which the ECJ (European Court of Justice) is no longer the ultimate enforcer in matters of arbitration. Ending the role of the ECJ in UK law was identified as a red line by Theresa May in Brexit negotiations.
- The government outlined several models used by other countries that it says show there is no need for the ECJ to be the final arbiter. The paper functioned more of an illustrative guide than an outright position being assumed by the UK in Brexit talks. A 'future partnership' paper as opposed to a 'position paper', the document was considered to be a starting point for a conversation around enforcement and dispute resolution with the EU.
- Despite not laying out which of the legal dispute mechanisms the UK favoured, pre-briefing by Justice Minister Dominic Raab suggested that the UK favours the European Free Trade Association (EFTA) Court model, which resolves disputes that cover Norway, Iceland and Liechtenstein. National courts can refer questions to it, but unlike the top court its judgments aren't binding. This option is being perceived as a workable compromise.

Continuity in the availability of goods for the EU and the UK

- The paper set out the UK's proposals for the regulation of traded goods to ensure the availability of goods at the date of withdrawal and to support the move to a future relationship, noting a goal to seek an agreement with the EU which allows the freest and most frictionless trade possible in goods and services.
- While the paper refers to services, it means in cases "where goods are supplied with services". In that case, the paper proposes that there should be no restriction to the provision of these services that could undermine the agreement on goods.
- The paper noted that continued deep and integrated trade is mutually beneficial to both the UK and the EU, and that the European Union (Withdrawal) Bill will convert existing EU law into UK law to provide a power to make corrections to the law, which will ensure that rules such as common standards can continue to function. It outlined four principles that sought to provide legal certainty and avoid disruption for business and consumers with respect to the continued availability of goods in the EU and UK.

Confidentiality and access to documents

- The position paper on confidentiality and access to documents relates to information obtained by the UK and the European Union (EU) whilst the UK was a Member State.
- The UK believes that any agreement on confidentiality and access to official documents while the UK was a Member State should be reciprocal, and afford an equivalent level of protection post-Brexit. Protections concerning UK and EU data should also be on equivalent terms to those laid out in existing regimes.

Civil judicial cooperation

- The UK will seek an agreement with the EU that allows close and comprehensive cross border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.
- This new framework will be based on a commitment to build on the strong foundation of existing cooperation and belief in shared values such as the rule of law, respect for international law and democracy; Continue to collaborate at bilateral, regional and multilateral levels; and develop our relationship over time as our societies, the laws that govern them and opportunities for further cooperation develop.
- The framework is relevant for financial services as it would serve to clarify what rules apply to financial contracts after Brexit. The proposal sets out five points outlining the UK's approach to separation "should there be no future agreement" which are meant to provide a "smooth and orderly withdrawal."

Data protection

- This paper reflects a narrative already set out by the government in its Statement of Intent ahead of the impending Data Protection Bill. However, it does go further in outlining how the UK intends to remain adequate with the EU following Brexit.
- Underpinning the government's desire to maintain an adequate post-Brexit data regime with the EU, is the creation of a new UK-EU data relationship in which the EU recognises that the UK is compliant with EU data protection laws and wider global data protection standards, while also acknowledging that the UK will introduce a Data Protection Bill which will implement the incoming EU General Data Protection Regulation (GDPR) and Data Protection Directive (DPD).
- This proposed UK-EU model will be based around two key elements - regulatory co-operation and mutual recognition.

ANNEX TWO: UK POSITION PAPER TRACKER

Title of paper	Date of publication	UK position	EU reaction
Safeguarding the position of EU citizens living in the UK	26 June 2017	The UK has proposed that those with five years' residence can apply for "settled status". Those resident in the UK for less than five years will have temporary status before they reach the five-year period. Those citizens granted settled status will be treated like a comparable UK national. A grace period of up to two years will be in place for all EU citizens, including those who arrive after the cut-off date, allowing them to regularise their status to remain in the country.	Currently being negotiated with the EU in phase 1 of the talks. Areas of disagreement remain the specified cut-off date, future family reunion and the broader issue of compliance on enforcement.
Ongoing union Judicial and Administrative proceedings	13 July 2017	The UK want to ensure a smooth end to the jurisdiction of the CJEU. The position paper says that the CJEU should not be allowed to rule on UK cases which were not before the court on the day the UK leaves the EU, and this would apply even where the facts of the case occurred before withdrawal.	No noteworthy response.
Nuclear materials and safeguards issues	13 July 2017	The UK states it is leaving Euratom but want to continue working closely with the Euratom Community. Furthermore, the UK will look to agree Nuclear Cooperation Agreements with key non-EU states including the USA, Canada, Australia and Japan.	European parliament lead negotiator Guy Verhofstadt said "What is not possible is to go out of the Union but to stay a full member of Euratom".
Privileges and Immunities	13 July 2017	The UK has guaranteed the right for EU organisations to continue operating with the same "privileges and immunities" for a limited period after exit. In the future, the UK will seek a legally acceptable framework of privileges and immunities that allows for the smooth conduct of relations between the UK and the EU.	No noteworthy response.
Future Customs arrangement	15 August 2017	Sets out details on an interim period which would mean close association with the Customs Union for a time-limited period, and the possibility of two new broad future approaches. Either a highly streamlined customs arrangement with customs requirements that are as frictionless as possible, or a new customs partnership by aligning our approach to the customs border in a way that removes the need for a UK-EU customs border.	The Commission has said the publication of position papers was a "positive step" but will only address the customs issue once "sufficient progress" has been made on terms of withdrawal. European parliament lead negotiator Guy Verhofstadt said "to be in & out of the customs union and "invisible borders" is a fantasy".

Northern Ireland and Ireland	16 August 2017	Support for the Belfast Agreement should be written into the Withdrawal Agreement. The agreement should recognise the ongoing status of the CTA and associated rights. This will mean no passport controls for British and Irish citizens travelling within the CTA. The UK and the EU should also agree a common understanding of the principles of North-South and East-West cooperation including principles to test future models for border arrangements and energy. This includes no physical border infrastructure and maintaining the Single Electricity Market.	A European Commission spokeswoman said "We must discuss how to maintain the Common Travel Area and protect, in all of its dimensions, the Good Friday Agreement. It is essential that we have a political discussion on this before looking at technical solutions."
Continuity in the availability of goods for the EU and the UK	21 August 2017	The UK has said that goods on the market already should continue to be sold without new approval, preserving oversight of products for patient safety and consumer protection, propose eliminating unnecessary duplication of compliance, and ensuring there isn't any restriction on services that supply such goods.	European Commission spokesman Alexander Winterstein said these papers are "welcome" but as Michel Barnier has said "we have to have sufficient progress" on the first phase of the talks before discussing the future relationship.
Confidentiality and access to documents	21 August 2017	The UK believes any agreement on confidentiality and access to official documents while the UK was a Member State should be reciprocal, and afford an equivalent level of protection after the UK leaves. The protections concerning UK and EU data should also be on equivalent terms to those laid out in existing regimes.	Response made at the same time as paper above. Michel Barnier tweeted "Looking forward to discussing these papers with UK. Essential to make progress on citizens' rights, settling accounts and Ireland."
Providing a cross-border civil judicial cooperation framework	22 August 2017	The UK is seeking to end the direct jurisdiction of the Court of Justice, with a transitional period to mitigate this. The UK has committed to continuing its participation in The Hague and Lugano Conventions and incorporate Rome I and II into domestic law. Existing recognition of procedures and decisions would be retained in the event of no agreement being reached.	No noteworthy response.
Enforcement and dispute resolution	23 August 2017	The paper calls for the creation of a new legal dispute mechanism that would end the direct role of EU courts in the UK post-Brexit, in which the ECJ is no long the ultimate enforcer in matters of arbitration. The government outlines several models used by other countries that it says show there is no need for the ECJ to be the final arbiter in order to avoid any cliff-edge the UK stresses the need for an interim period in order to implement the new arrangements.	No noteworthy response.

The exchange and protection of personal data	24 August 2017	The paper reconfirms the government's ambition to ensure that the UK's data regime maintains maximum adequacy with the EU. It suggests a new UK-EU data relationship in which the EU recognises that the UK is compliant with EU data protection laws and wider global data protection standards, while also acknowledging that the UK will introduce a Data Protection Bill which will implement incoming EU data protection laws. This proposed UK-EU model will be based around two key elements - regulatory co-operation and mutual recognition.	No noteworthy response.
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FURTHER INFORMATION

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