



THE DRAFT POLITICAL DECLARATION: THE FUTURE FOR THE UK AND EU AFTER BREXIT

The UK and the EU have released a [draft Political Declaration](#) on the future relationship between them. This follows the provisionally agreed [draft Withdrawal Agreement](#) published on 14 November 2018.

This briefing considers the contents and implications of the long-awaited Political Declaration. What does it mean for goods and financial services, customs and regulation and the UK's desire to have an independent trade policy?

For our detailed analysis on the draft Withdrawal Agreement, see our briefing [UK and EU agree Brexit deal – what does it mean, and what happens next?](#)

THE DRAFT POLITICAL DECLARATION

The 26-page draft Political Declaration builds on the seven-page bullet point outline Political Declaration released on 14 November.

It covers a wide range of economic and security issues and intends to establish the "parameters of an 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".

It is a very high-level document and it is important to note that it is a statement of intent, rather than being legally binding.

It does not compel the UK and EU to agree anything, and it does not stop them from agreeing something very different to what is suggested in the draft.

It leaves open a number of important and contentious questions. It is ambiguous for example on whether the UK and EU would be in a customs union with a common external tariff.

Nonetheless, the release of the draft Political Declaration is a key moment in the Brexit negotiations. It reflects the advancement of the negotiations and the will of the UK and the EU to ensure a future relationship is in place on 1

Key issues

- A draft 26 page Political Declaration was released on 22 November 2018. It expands on the previous seven-page bullet point outline.
- It is a statement of intent, and not legally binding. The parties could in future go in the direction set by the Declaration, or another direction entirely.
- It is an important step towards ensuring that there is a framework for UK and EU economic relations post-Brexit.
- It sets a broad framework that is comparable to a modern-day FTA with additional foreign policy, security and other features.
- The Declaration is ambiguous on many of the key economic issues. For example, it does not commit to or rule out a customs union between the UK and EU.
- For goods, there would be no tariffs, fees, charges or quantitative restrictions across sectors, although it is difficult to see how this is compatible with the independent UK trade policy also foreseen in the Declaration.
- For financial services, the provisions are widely drafted and focus on regulatory autonomy and equivalence.
- For services, arrangements would go beyond the UK and the EU's WTO commitments and would build upon recent EU Free Trade Agreements.

January 2021. It is a significant step towards clarifying the future relationship between the UK and the EU.

The draft Political Declaration states that the UK and EU will approach the new relationship with "high ambition with regard to its scope and depth" and they "recognise that this might evolve over time". The overarching institutional framework of the future relationship could take the form of an Association Agreement, which is the arrangement in place between the EU and Ukraine.

What does it mean for goods, tariffs and customs?

The draft Political Declaration states that the UK and the EU will seek to negotiate a comprehensive free trade area "combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition".

The new relationship may resemble a modern free trade agreement such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA) or the EU-South Korea FTA. There is no mention of "frictionless trade", which was a key UK ask.

If a trade agreement following the approach in the draft Political Declaration is a hybrid trade agreement, it is likely to require unanimity and ratification by each individual member state's national and sometimes regional parliaments.

On tariffs and customs, paragraph 23 of the draft Declaration states that the UK and EU will have "no tariffs, fees, charges or quantitative restrictions across sectors" and there will be "ambitious customs arrangements that... build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin".

This last statement is likely to be contentious because on one reading it implies that the UK could stay in a customs union with the EU. Of course, "build on" could mean that, or any number of other things.

On the other hand, paragraphs 26 and 27 which focus on customs facilitation, say that UK and the EU will have "ambitious customs arrangements" which make "use of all available facilitative arrangements and technologies".

These facilitative arrangements and technologies would also be considered in developing any alternative arrangements for ensuring the absence of a permanent hard border on Ireland.

The draft Political Declaration also leaves open the extent of checks and controls for goods entering and leaving the UK and the EU. Paragraph 28 acknowledges that "the extent of the [UK's] commitments on customs and regulatory cooperation... would be taken into account in the application of related checks and controls" and combined with the use of available facilitative arrangements, could lead to a variety of outcomes for administrative purposes as well as checks and controls.

What does it mean for the UK's independent trade policy?

It is unclear. It largely depends on whether the UK goes down the route of a customs union, and on the extent of regulatory alignment. The US government for example has expressed a desire for the UK to ensure that it has enough autonomy to allow a range of products into the UK which are currently not exported. If the UK maintains high levels of regulatory alignment and remains

"This balance must ensure the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms. It must also ensure the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum including with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom."

(Political Declaration, Para 4)

in a customs union with the EU, then its ability to conduct an independent trade policy will be constrained.

The Political Declaration does state that the future agreement should recognise "the development of an independent trade policy by the United Kingdom beyond this economic partnership" but it does not go into the modalities of how that might be achieved.

There is no reference to the UK's proposed "facilitated customs arrangement" outlined in the UK Chequers White Paper.

What does it mean for financial services?

First, it is noteworthy that financial services gets its own heading. This is still quite rare in free trade agreements and was a key UK ask. That said, the content of the Political Declaration on financial services is limited. It does not contain the extensive mutual recognition commitments that the UK had originally sought. Instead, the provisions focus on regulatory autonomy and equivalence, which means that UK financial institutions would not have the same cross border market access that they have now in some significant areas of financial services – most notably corporate lending and insurance.

Furthermore, the elements of the Political Declaration dealing with financial services are bounded by very strong prudential carve-out language, allowing each party to take "any" measures necessary for prudential reasons.

Paragraph 38 says that the UK and the EU will have equivalence frameworks in place and that both the UK and the EU should start equivalence assessments with respect to each other as soon as possible after the UK leaves the EU, with the aim of concluding these assessments before the end of June 2020.

This aims to address some of the cliff-edge issues that will arise at the end of the transition period. There is still however the risk of a disruptive hiatus if formal equivalence, or related recognition or registration, decisions are only adopted or become effective after the transition period has ended. Even if the parties are willing to adopt equivalence decisions, these only partially address the impact of the change in regulatory status that will occur at the end of the transition period, when the UK is treated as a third country under EU law.

It is also worth noting that the Declaration says nothing about expanding the existing equivalence regimes – it simply says that it will keep them "under review".

In addition, since both parties are to retain full regulatory autonomy, reviews could restrict the extent of existing regimes. There are already proposed amendments to existing EU legislation to make the regimes for third-country investment firms, CCPs and trading venues more restrictive and additional changes might be brought into effect during the transition (or implementation) period, especially if it is extended.

The UK and the EU further agree that it is in their mutual interest to ensure "close and structured cooperation on regulatory and supervisory matters" and such cooperation would be based on principles of regulatory autonomy, transparency and stability.

Paragraph 39 goes on to explain that this cooperation should include "appropriate" consultation in the process of adoption, suspension and withdrawal of equivalence decisions, information exchange, regulatory

"The future relationship should be based on an overarching institutional framework covering chapters and linked agreements relating to specific areas of cooperation, while recognising that the precise legal form of this future relationship will be determined as part of the formal negotiations."
(Political Declaration, Para 120)

initiatives as well as other issues of mutual interest. The use of the word "appropriate" is telling and allows for little, or comparatively extensive, consultation.

What does it mean for services in general?

For services, the UK and EU would seek to conclude "ambitious, comprehensive and balanced arrangements on trade in services and investment in services and non-services sectors" that seek to go "well beyond the Parties' WTO commitments" and that build upon recent EU Free Trade Agreements.

These arrangements are intended to have substantial sectoral coverage, covering for example, professional and business services.

In terms of market access, the Declaration in paragraphs 31 and 32 makes clear that the arrangements on services should include provisions on market access, national treatment under host-state rules and performance requirements imposed on investors. This on the face of it would be a very different situation to the one that applies today, and implies a substantially lower level of cross-border market access.

The Declaration also discusses regulatory aspects of the future relationship between the UK and the EU on services. Regulatory approaches would be "transparent, efficient, compatible to the extent possible, and which promote avoidance of unnecessary regulatory requirements". Such approaches would include "appropriate" arrangements on professional qualifications which are in the UK and the EU's mutual interest and are necessary to the pursuit of regulated professions. This is conservative language that could result in limited or more extensive access depending on the commitments made.

The Declaration does not address mutual recognition of judgments or other co-operation on civil justice issues, which had been a focus of attention for both the legal and financial services industries.

What about the backstop?

The Declaration states in paragraph 19 that "The Parties recall their determination to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing."

That is the intention, but what remains unsaid is the fact that if the future agreement is not able to replace the backstop, then the backstop would continue to apply until such a time as it could be replaced with a mechanism that would have equivalent effect.

It is therefore possible that the backstop and a future agreement could be in simultaneous legal operation. This may seem implausible and even bizarre, but it is a possible consequence of the way that the backstop provisions are crafted.

Other provisions

The Declaration covers a range of other topics.

On data protection, the European Commission aims to adopt data equivalence decisions by the end of 2020 and within the same timeframe, the UK would take action to ensure the "comparable facilitation of transfers of personal data" to the EU, in light of the UK establishing its own international transfer regime.

On regulation generally, the Declaration is replete with references to ensuring "a level playing field for open and fair competition". In particular, paragraph 79 establishes that the future relationship should have provisions covering "state aid, competition, social and employment standards, environmental standards, climate change, and relevant tax matters" to ensure such an environment. This is linked to market access – "The Parties should consider the precise nature of commitments in relevant areas, having regard to the scope and depth of the future relationship." The clear message here is that the EU will not tolerate giving the UK extensive market access if the UK seeks to "out regulate" the EU.

Measures on migration would be reciprocal and are intended to include short term visa-free travel. The UK and the EU would also consider conditions for the entry and stay of those entering the UK or the EU for the purposes of research, study, training and youth exchanges.

Provisions on the free movement of people would be without prejudice to the Common Travel Area (CTA) which applies between the UK and Ireland and any arrangements would be in addition to the commitments made on the temporary entry and stay of people for business purposes in defined areas, as set out in the Services provisions of the draft Declaration – see paragraphs 32 and 59 respectively.

The UK and EU intend to agree a new Comprehensive Air Transport Agreement (CATA), market access for freight and passengers in terms of road transport, rail, maritime transport and fishing. Most of these areas do not contain detail on how much access there would be. On fishing – a key priority for the EU – there is more detail, with the parties intending to agree a new fisheries agreement by 1 July 2020. See paragraph 76.

WHAT NEXT FOR THE POLITICAL DECLARATION?

The UK and EU must agree the draft Political Declaration. The UK and EU must then separately approve it. In the UK that will be part of the process under section 13 of the EU (Withdrawal) Act 2018. In the EU that will require approval of the European Council and the European Parliament.

The Declaration states that the parties intend for the new relationship to be negotiated and come into force by the end of 2020.

The "forward process" (set out in paragraphs 138-147) then takes place in two phases. First, before the UK's formal withdrawal from the EU on 29 March 2019, the parties will engage in "preparatory organisational work". Then, once the UK has left and is formally a third country in relation to the EU, the EU will take steps to open formal negotiations under Article 218 of the Treaty on the Functioning of the European Union.

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