



The Political Declaration

What does it tell us about the UK-EU future relationship?

23 November 2018



Introduction

On Sunday, 25 November 2018 the European Council convened to obtain Member State approval on both the draft Withdrawal Agreement (“**WA**”) and the political declaration on the future relationship between the UK and the EU (“**PD**”). In due course the UK Parliament will also need to approve both documents before the agreement can be ratified.

On 22 November 2018, a much fuller version of the PD was published, now up from seven pages to 25. This contains the aspirational, but generally unspecific, language that is often the hallmark of international diplomacy. The PD has the common goal of establishing a much deeper relationship than any free trade agreement – it is a bespoke “UK model”. How this will be achieved is up for debate. The PD builds on the single customs territory provided for in the WA and it is clearly stated that trade in goods will be “as close as possible”.¹

The broad approach is one of reciprocity. In addition, the PD adopts a sector-by-sector approach which, consistent with regulatory autonomy, anticipates a model which would offer the UK a good level of market access for the sectors covered, subject to reciprocity and “a level playing field for open and fair competition”. However, it should be noted that the PD acknowledges that the UK does not want full free movement of people and will want to conclude its own trade deals. In addition, the relationship will need to comply with the EU’s aim to protect the integrity of the Single Market.

It would appear that for financial services the deal will be based around the EU’s existing equivalence regimes, however, there is a big question mark over what will be negotiated in the broader services arena. The objective in relation to services suggests a less close relationship than in relation to goods. The PD refers to “ambitious, comprehensive and balanced arrangements on trade in services”, respecting each party’s right to regulate.

As the PD is still inevitably an embryonic document, the devil will be in the detail.

¹ Forming part of a customs territory with the EU will not prevent the UK from entering into its own trade deals.

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What is its status?

The PD is a non-binding statement of intent as to what will be included in the future Relationship Agreement between the UK and the EU². It has been agreed by the UK and the EU's negotiators, agreed in principle at a political level and subject to endorsement by the Prime Minister and the President of the Commission at the special EU Council meeting on Sunday 25 November 2018. Therefore, if it is endorsed by the EU Member States, it will be subject to approval by the UK Parliament at the same time as it considers whether to approve the draft Withdrawal Agreement. It is not a treaty, does not create legal rights and cannot be enforced or relied upon by governments, corporate bodies or individuals.

What does it do?

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

"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. Where the Parties consider it to be in their mutual interest during the negotiations, the future relationship may encompass areas of cooperation beyond those described in this political declaration." (Paragraph 3)

How deep will the new 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, which can obviate the need for customs checks at the border:

"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 will be deeper for goods than for services.

How broad will the new relationship be?

The UK will be entitled to participate in EU programmes provided that it abides by the EU's rules and pays for the privilege:

"the Parties will establish general principles, terms and conditions for the United Kingdom's participation in Union programmes, subject to the conditions set out in the corresponding Union instruments, in areas such as science and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space. These should include a fair and appropriate financial contribution." (Paragraph 11)

Will the UK cease to be subject to the CJEU?

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 WA or the Relationship Agreement relates to EU law (which will include all the EU law with which the UK remains closely aligned and the EU law governing any EU agency or institution in which the UK continues to participate), the arbitral panels that oversee the WA 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.

²

In Article 50 of the TEU, a state leaving the EU enters into a Withdrawal Agreement and then, in respect of its future relationship with the EU, a Relationship Agreement. We use that terminology in this briefing. It should be noted, however, that the UK Government also refers to the RA as a Future Economic Partnership ("FEP").

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Who wrote it?

The PD has been put together at speed over the last week. We detect the hand of more than one draughtsman judging by the variations of style and terminology used. This inconsistency may give rise to difficulties in interpreting the PD when negotiating its translation into the legally binding Relationship Agreement.

Where do I find it?

- To read the PD, click [here](#).
- To read the PM's statement on the PD, click [here](#).
- To read the WA, click [here](#).



Trade in Goods and Services

General

What the PD says in terms of 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 in the document 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 PD 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 PD refers to the need to "build and improve on the single customs territory provided for in the WA which obviates the need for checks on rules of origin", the PD 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 WA. The PD 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 PD states that both sides are determined to replace the backstop, which will be put in place as part of the WA 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 PD 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 parties will form separate markets and distinct legal orders. Moving goods across borders can pose risks to the integrity and proper functioning of these markets, which are managed through customs procedures and checks"
- the PD 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 PD 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 PD is more vague, referring to agreeing disciplines on "common principles" in the fields of standardisation, technical regulatory, conformity assessments, accreditation and labelling

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- the PD 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. There may be more uncertainty arising from arguments as to whether particular regulations meet any new mutually agreed principles.

As regards practicalities in the short term:

- in terms of contingency planning for businesses, even assuming the WA is approved by all relevant parties in the UK and the EU, and taking an optimistic view on the future progress of trade negotiations, the introduction of customs formalities and additional regulatory controls is likely, with the need to factor these into delivery timetables and performance obligations
- for the aerospace, medical, and chemical industries, the PD will be a disappointment. There is no commitment for the UK to join EU agencies, only statements of the parties exploring the possibility of UK co-operation with the European Medicines Agency, the European Chemicals Agency and the European Aviation Safety Agency
- confirmation that the economic partnership “should ensure no tariffs, fees, charges or quantitative restrictions” on goods is useful, however, there remains some uncertainty as to whether the UK will, in fact, decide to align itself fully with the EU’s regulatory framework. The PD offers the UK a choice: it can choose maximum 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).

Services

The PD 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 in Paragraph 29 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 PD 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 PD 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 PD 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. Although during the transition period of the WA, the UK will remain subject to and benefit from the current EU wide regimes on choice of courts and recognition of judgements, there is nothing in the PD that continues this. The UK has already confirmed its readiness to accede to another international convention on choice of courts, the 2005 Hague Convention, and, 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 now.

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Financial Services

Equivalence

When the Chancellor set out the UK's opening negotiating position on financial services earlier in the year, the goal of the UK Government was mutual recognition of standards in financial services that would have permitted trade to continue substantially as it currently does under the financial services "passports".

When the EU rejected this, the UK Government proposed "enhanced equivalence", which would have broadened and deepened the EU's equivalence regimes for third countries under some of the Financial Services Directives and Regulations. Crucially, enhanced equivalence would have lengthened the period of notice that needs to be given before withdrawing a finding of equivalence from 30 days to six months and made that withdrawal subject to arbitration. This too was rejected by the EU.

In the WA there is no mention of any equivalence regime that would extend or depart from the current regimes. There is also no agreement that the UK will be considered equivalent or even that the equivalence assessments will be completed before the end of the transitional period. Instead, there is a non-binding agreement that the EU will endeavour to complete equivalence assessments by the end of June 2020. It is not clear from the WA whether or not the EU is prepared to extend the 30 days' notice period for withdrawing a finding of equivalence, however, the PD does provide for co-operation on financial services which,

"should include transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions". (Paragraph 39)

This is counterbalanced, however, by the following commitment:

"respecting the Parties' regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest." (Paragraph 37)

The text of the PD treats the UK like any other third country outside the EU or EEA for the purposes of financial services. In other words, the DP has the same effect as a no-deal or reliance on WTO standards, which are hardwired, in any event, into the Financial Services Directives.

The UK is entitled to seek an equivalence assessment for the limited access to the EU's financial services markets available under the equivalence regimes under the individual directives offering third country firm access or special treatment.

Provided the EU meets the June 2020 timetable for the equivalence assessment mentioned above, UK financial services firms will know six months before the end of the transitional period the basis on which they will be able to access the EU financial services markets when the transitional period comes to an end on 31 December 2020.

The significance of the equivalence assessment is that some, but not all, EU financial services legislative acts contain mechanisms (third-country regimes) allowing financial institutions based in third countries to gain access to EEA markets. A common precondition for these mechanisms to be available is that the third country's regulatory regime has been deemed to be equivalent to that of the EU. The majority of EU financial services legislative acts do not contain equivalence regimes relating to access rights. The legislative acts that currently contain equivalence provisions relating to access are MiFID II and the AIFMD. Broad third country regimes are not available for deposit-taking, lending, mortgage lending, insurance mediation and activities relating to UCITS.

The limited scope of the equivalence regimes and the right of the EU to withdraw an equivalence finding, mean that even in the likely event that the UK is found to have equivalence, the equivalence regimes will have limited effect. Like other third country institutions, UK institutions will have to seek authorisation in an EU27 Member State, as many now are. Similarly, like other third country institutions once the Temporary Permissions Regime expires in the UK, EU27 institutions will need to be PRA and/or FCA authorised.

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Establishment

In Paragraph 31 the PD provides that service providers and investors (which includes financial services per Paragraph 30) should be “treated in a non-discriminatory manner, including with regard to establishment.” It is unclear quite what the extent of this provision is meant to be, but under the EU Treaties the right of establishment means the right to conduct business through a branch. To what extent this may be the case will depend upon how the PD is translated into a Relationship Agreement.

Disciplines on domestic regulation

In Paragraph 34 the PD 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 FCA’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 PD. Paragraph 79 of the PD 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 PD, they will need to ensure that their actions do not disadvantage businesses operating in the EU.

In terms of State aid, the European Competition 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 PD 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 PD.

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, that fall short of work or study we expect, 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

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In summary the PD 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 PD echoes the sentiment of the outline declaration that accompanied the publication of the draft WA 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 PD'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 PD'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, including to:

- establish a "broad, comprehensive and balanced security partnership" to address threats including, amongst other things, cyber-attacks (Paragraph 80)
- exchange intelligence (including in the field of cyber threats) and contribute to a shared understanding of Europe's security environment (Paragraph 105)
- promote security and stability in cyberspace through increased international cooperation, including to share information on cyber-incidents, techniques and origin of attackers, threat-analysis and best practices to help protect the EU and UK against common threats (Paragraph 110)
- put in place arrangements to respond to evolving threats, disrupt terrorism and serious criminality, facilitate investigations and prosecutions, and ensure the security of the public (Paragraph 85)
- exchange data (including PNR, DNA, fingerprints and vehicle registration data) in a "timely, effective and efficient" manner (Paragraph 86)

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

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How Eversheds Sutherland can help

Since June 2016, our lawyers and consultants have advised various institutions passporting into the UK from EU27 Member States and passporting from the UK into the EU27 on Brexit planning and Brexit related issues.

We would be happy to discuss how we can help you with your Brexit planning and execution of those plans.



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