



BRIEFING PAPER

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The UK-EU future relationship negotiations: governance

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Summary

Governance is one of the principal sticking points in the negotiations on the future UK-EU relationship. The UK and the EU differ on both the general structure of the future relationship, in terms of its institutional setup and oversight, and on the details of how dispute resolution between the parties is to work in the future relationship. The EU has proposed a draft treaty covering all aspects of the future EU-UK partnership with an overarching governance structure and a general dispute mechanism (with some exceptions to it). The UK has proposed ten separate treaties each with their own bespoke governance framework.

The EU's proposed dispute settlement involves a two-stage process beginning with consultation in a joint committee, followed by binding arbitration if the dispute cannot be resolved by consultations. The arbitration panel would have to refer matters requiring interpretation of EU law to the Court of Justice of the EU (CJEU). The UK rejects the involvement of the CJEU in dispute settlement. It includes arbitration for some of its agreements, but in others it proposes a consultation process without arbitration. Where those consultations do not resolve a dispute, suspension of the agreements (in whole or in part) would be the parties' last resort.

1. Introduction

In Paragraph 118 of the October 2019 Political Declaration setting out the framework for the future relationship between the EU and UK, the UK and EU agreed that:

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. Where appropriate, the Parties may establish specific governance arrangements in individual areas.¹

Following the first three rounds of negotiations between the UK and the EU, Michel Barnier (as lead EU negotiator) identified governance as one of the [four sticking points](#) in the EU-UK Future Relationship negotiations to date. On 5 June 2020, he [confirmed](#) that governance remained a sticking point after four rounds of talks:

¹ [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 17 October 2019,

2 The UK-EU future relationship negotiations: governance

On the governance of our future relationship, we were unable to make progress on the issue of the single governance framework establishing legal linkages between our different areas of cooperation.

This briefing paper summarises the key differences between the UK and EU approach on governance matters. Governance, in short, covers both the overall *management* and *structure* of international agreements, and the matter of *dispute resolution* when the parties to agreements find that they disagree about the meaning or compliance with aspects of those agreements.

The UK and the EU differ on both the general ‘structure’ of the future relationship, in terms of its institutional setup and oversight, *and* on the details of how dispute resolution between the parties is to work in the future relationship, in ways that will be set out in the next two sections.

2. Structure of the Agreement(s)

2.1 General Setup

There are fundamental differences in the approaches preferred by the UK and EU when it comes to the structure of the future relationship.

The EU has consistently indicated that it wishes to see a *single overarching framework* that covers all the policy areas in which the EU and the UK reach agreement. In terms of institutional operation, there can be slight differences between the different policy areas—for example, they may need specific ‘Councils’ to oversee progress on and compliance with a given set of agreed rules—but the EU seeks *one* single oversight structure for the future relationship, including a single general dispute resolution mechanism to which exceptions in specific policy areas exist.²

The EU wants to avoid a similar relationship to the one that it has with Switzerland, with which it has multiple agreements without a coherent governance structure.³ A unified governance and dispute resolution mechanism would enable the two parties to suspend co-operation in one sector where there was an unresolved dispute in another sector.⁴ In a speech to the European Parliament on 17 June, the European Commission President Ursula von der Leyen said:

Governance may sound like an issue for bureaucrats.

But this is central for businesses and private citizens both in the UK and in the EU to ensure that what has been agreed is actually done.⁵

The UK, on the other hand, has consistently [expressed](#) a preference for bespoke agreements in different policy areas, each of which comes with its own institutional structure and dispute resolution mechanism, as the best way to preserve the UK’s

² See the Commons Library Briefing Paper 8923 [The UK-EU future relationship: the March 2020 EU draft treaty and negotiations update](#), where the EU and UK negotiating positions, as well as the EU’s draft treaty proposal, are set out in detail.

³ See Section 3 of Commons Library Briefing Paper 8483 [Brexit: Proposals for the future UK-EU relationship](#), 18 April 2019. The EU has proposed a new agreement with Switzerland to bring greater clarity to the relationship and introduce a more effective dispute resolution system, but Switzerland has been [reluctant to agree](#).

⁴ See *The Guardian*, [Dispute mechanism is key sticking point in Brexit talks, says Von der Leyen](#), 17 June 2020.

⁵ [Speech by President von der Leyen at the European Parliament Plenary on the preparations for the European Council of 19 June 2020, and the negotiations for a new partnership with the United Kingdom](#), 17 June 2020.

sovereignty. The Cabinet Office Minister, Michael Gove, told the Commons Committee on the Future Relationship with the EU on 27 April that in seeking a single overarching treaty, the EU position “suggests that it regards the UK not as a fully sovereign, independent state but as a state that is in an association-agreement-style relationship with the EU”.⁶ He said that association agreements “tend to be used for countries that are on the path to EU membership” giving the example of the EU-Ukraine association agreement.⁶

The EU published a [draft text](#) covering all aspects of the proposed future partnership on 18 March. The UK Government published the [ten separate treaty texts](#) it is proposing on 19 May. These comprise a [comprehensive free trade agreement](#), and separate agreements on fisheries; air transport; aviation safety; energy; civil nuclear co-operation; social security co-ordination; law enforcement and judicial co-operation in criminal matters; transfer of unaccompanied asylum-seeking children; and readmission of people residing without authorisation.

While the specific type of institutions that the UK proposes for each of the proposed agreements are effectively identical to those proposed by the EU for its governance ‘framework’, the remits of the ‘Joint Committees’ set up under the UK proposals are agreement-specific. The EU, meanwhile, wishes for a single Joint Committee to oversee the entire range of agreements.

In four rounds of negotiating, the parties appear not to have come any closer to finding common ground here. Michel Barnier [noted](#) on 5 June 2020 that all the EU is asking for is what the EU and the UK agreed to in the Political Declaration (in paragraph 118). David Frost, the lead EU negotiator, merely [stated](#) that “any [agreed] deal must of course accommodate the reality of the UK’s well-established position on the so-called ‘level playing field’, on fisheries, and the other difficult issues” – where governance is one of these “other difficult issues”.

2.2 Specific Institutional Issues

One further area of institutional governance where the EU and the UK appear to have different positions and do not appear to be coming closer relates to the EU proposal for formal inter-parliamentary cooperation. The EU Draft Treaty here proposes a “Parliamentary Partnership Assembly”,⁷ and Michel Barnier [noted](#) after the third round of negotiations that the UK was not engaging with the EU on this proposal. The EP adopted [recommendations](#) on the negotiations on 18 June 2020 that affirms its interest in establishing a Parliamentary Partnership Assembly in paragraph 166.

This may not, however, amount to a UK rejection of an inter-parliamentary cooperation forum. Michael Gove, Chancellor of the Duchy of Lancaster, and David Frost were questioned about the EU proposal for the Parliamentary Partnership Assembly by the House of Lords EU Committee on 28 May, and Mr Gove here made clear (in Question 17) he had no objection to inter-parliamentary cooperation but that it was up to the Parliaments to develop dialogue on this through their own initiative, and the UK position is merely to ensure that in creating such a consultation body “there was no abridgement of the sovereignty of either the EU or the UK”.⁸

⁶ Committee on the Future Relationship with the European Union, [Oral evidence: Progress of the negotiations on the UK’s Future Relationship with the EU](#), HC 203, 27 April 2020. The EU also has association agreements with several non-accession countries. See Commons Library Briefing 8645, [UK-EU relations after Brexit: an Association Agreement?](#)

⁷ See [EU Draft Treaty](#) (18 March 2020), Art INST.5.

⁸ House of Lords Select Committee on the EU, [Uncorrected oral evidence: Progress of UK-EU future relationship negotiations](#), 28 May 2020, Question 17.

3. Dispute Resolution in the Agreement(s)

As discussed in Section 2, a key difference in the UK and EU approaches to dispute resolution is overarching: the EU wishes to see one ‘standard’ dispute resolution mechanism, set out in Part 5 of its draft treaty text, to which there are some area-specific exceptions, whereas the UK wishes to see bespoke dispute resolution mechanisms under each agreement it proposes. This itself is a sticking point, but the proposals the UK makes for specific policy areas (which to the UK represent different ‘agreements’) can also be assessed for their similarities and differences to the EU proposal on the same policy area.

3.1 On Trade Generally

The UK’s general dispute resolution proposal for what it has termed the Comprehensive Free Trade Agreement (CFTA) is *prima facie* very similar to what the EU proposes as the ‘standard’ dispute resolution mechanism in Part 5, covering the entire future relationship. Following consideration of a dispute in the Joint Committee overseeing the CFTA, the UK (much like the EU) proposes that either party can bring a dispute before independent arbitrators, who will give a binding decision on the dispute.⁹

Where the UK proposals differ fundamentally is on what this arbitration panel does with questions of EU law. In the EU Draft Treaty text, when an issue of interpretation of EU law arises before a panel, the arbitrators are obliged to ask the CJEU for an interpretation of that EU law term or concept—and are equally obliged to apply the CJEU interpretation when deciding the dispute.¹⁰ This is a standard condition in EU external agreements that *incorporate* EU law, so as to ensure that the autonomy of EU law is preserved.¹¹ This was also envisaged in the Political Declaration, and also applies in the Withdrawal Agreement where a dispute in the Joint Committee is referred to arbitration.¹²

The UK proposals, on the other hand, do not mention the CJEU. Instead, they propose that arbitration panels can interpret the agreements in line with the Vienna Convention on the Law of Treaties’ interpretative rules.¹³ This reflects the UK position in the [command paper](#) setting out the Government’s approach to the negotiations which states that each agreement should have its own appropriate governance arrangements “with no role for the Court of Justice”.

Depending on how many references to EU law terms or concepts make their way into the future relationship agreement on trade, this will be a disagreement on which the EU cannot compromise; the CJEU has long declared international agreements where a non-CJEU body is allowed to interpret EU law and assign it a binding meaning as contrary to EU law, most recently in *Achmea*.¹⁴

In terms of sanctions, where a party fails to comply with an arbitral ruling, the EU and UK texts are again more similar than they are different: both parties envisage an equivalent temporary suspension of obligations under the (trade) agreement until the losing party complies with the decision.¹⁵

⁹ See EU Draft Treaty Part 5; and [UK Draft CFTA](#) (19 May 2020), Chapter 33.

¹⁰ See EU Draft Treaty, Art INST.16.

¹¹ See on this point the CJEU ruling in *Achmea*, discussed in House of Commons Library Briefing [CBP-8145](#).

¹² See Commons Library Insight, [Brexit next steps: The Court of Justice of the EU and the UK](#), 7 February 2020.

¹³ See UK Draft CFTA, Art 33.16.

¹⁴ *Ibid.*

¹⁵ See EU Draft Treaty, Art INST.21 and UK Draft CFTA, Art 33.22.

3.2 On Specific Areas of Trade

Both the EU and the UK have set out exceptions to their general dispute settlement proposals for specific areas of policy that fall under the overall ‘trade’ heading. Unfortunately, the areas where exceptions are sought are not wholly identical, nor are the exceptions.

On **subsidies**, the UK proposal applies the same dispute settlement mechanic to nearly all issues, with the exception of consultation commitments set out in the agreements.¹⁶ The EU proposal applies the standard dispute settlement mechanism to all aspects of state aid, including the provisions on subsidies..

On **financial services**, the UK proposes a modified version of the normal dispute settlement mechanism applicable under the CFTA. This still envisages a first stage of ‘political’ resolution and then arbitration, but it wishes a ‘Financial Services Committee’ (as a subcommittee of the Joint Committee for the CFTA) to oversee that first stage—and has specific provisions on the panellists that can serve on an arbitration panel concerning Financial Services.¹⁷ The EU proposal applies the standard dispute settlement mechanism to all aspects of financial services.

Both parties propose that the chapter on **competition policy** should not be subject to the main dispute settlement mechanism; the UK text does not specify any alternative dispute resolution mechanism,¹⁸ whereas the EU text indicates that a domestic enforcement body for competition policy *will* be required, but does not specify what (in the case of the UK) such a body should look like.¹⁹ (For the EU Member States, it will be the existing bodies that oversee EU competition law.)

The UK proposals on **trade and labour** as well as **trade and environment** exclude the application of the main dispute settlement mechanism, and propose an alternative that commences with consultation between the Parties (before the Joint Committee) but instead of stage 2 arbitration, a *panel of experts* will be the second-round enforcement mechanism. Alternatively, the parties can also resort to conciliation or mediation to resolve disputes.²⁰ Under the EU proposals, both **labour** and **environmental policy** are subject to the ‘standard’ dispute settlement mechanism with *additional* domestic enforcement.²¹

On **taxation**, neither party wishes to apply the general dispute resolution mechanism set out in the CFTA or the Future Relationship Agreement, but also have not proposed alternative dispute settlement mechanisms.²²

Finally, on two ‘trade’ issues, the EU provides for specific exceptions to the ‘standard’ dispute settlement mechanism, but the UK does not expressly. These are **good regulatory practices and regulatory cooperation**, where the EU explicitly indicates there will be not be any dispute settlement and the UK proposals simply do not mention dispute settlement; and **small and medium enterprises (SMEs)**, where the EU Draft Treaty Text does not apply Part 5 to commitments on information sharing with SMEs.²³ The UK CFTA text has no specific chapter devoted to SMEs.

¹⁶ See UK Draft CFTA, Art 21.8.

¹⁷ See UK Draft CFTA, Art 17.7.

¹⁸ See UK Draft CFTA, Art 22.4.

¹⁹ See EU Draft Treaty, Art LPFS.2.17.

²⁰ See UK Draft CFTA, Art 27.8-27.11; Art 28.13-28.15.

²¹ See EU Draft Treaty, Art LPFS.2.29, LPFS.2.32 and LPFS.2.37.

²² See UK Draft CFTA, Art 29.2 and EU Draft Treaty, LPFS.2.25.

²³ See EU Draft Treaty, Art GRP.15 and Art SME.4.

3.3 Other (Areas of) Agreement(s)

The EU's Draft treaty text includes a governance framework covering all aspects of the future partnership, whereas—as discussed—the UK has proposed bespoke agreements with separate governance systems and dispute resolution mechanisms for different policy areas. The dispute settlement mechanisms in the proposed UK agreements beyond the CFTA are considered here. As will be clear from the discussion, what marks the majority of these is that the UK does not wish to see binding arbitration as a dispute settlement mechanism in the majority of its proposed non-trade agreements.²⁴

The UK's proposed agreements on **Civil Nuclear Cooperation** and **Energy** set out a process akin to the CFTA dispute settlement mechanism, but bespoke from it. Stage one of dispute settlement foresees the parties engaging in discussions before a specific Joint Committee under the Civil Nuclear Cooperation or the Energy agreement – and stage two foresees binding arbitration.²⁵ The EU proposes to apply the standard dispute settlement mechanism to **civil nuclear cooperation** and **energy**.

Regarding **air transport**, the UK proposed agreement proposes not only distinct bodies to oversee dispute settlement, but it also indicates a specific arbitration procedure.²⁶ Likewise, for the agreement on **civil aviation safety**, it proposes a separate Joint Committee, but here wishes to see no secondary level of dispute resolution: it discusses consultations, and as an alternative (or in addition), suspension of commitments.²⁷ The EU proposals, meanwhile, do not specifically address dispute settlement regarding **air transport**, though they do indicate that where the parties have concerns about the flight authorisation of specific air carriers, this is to be resolved through consultations, and suspension of authorisations are the outcome of a failure to resolve the dispute.²⁸ The chapter on **aviation safety**, likewise, only mentions consultations and suspension of commitments.²⁹ There thus appear to be some differences between the UK and EU on the dispute resolution processes proposed on **air transport**, but not on **aviation safety**.

The UK's proposed agreement on **law enforcement and judicial cooperation in criminal matters** establishes a specific Joint Committee, which oversees only consultations and 'good faith' endeavours to resolve disputes by mutual agreement. Where this fails, the agreement can be terminated or suspended, in whole or in part, after (in principle) a three-month notice period.³⁰ The EU proposes applying the standard dispute settlement mechanism to matters of **law enforcement and judicial cooperation in criminal matters**.

The UK also proposes specific agreements on **family reunions of unaccompanied children** and so-called **readmissions** (regulating asylum and migrant returns), where disputes are resolved before specific Joint Committees.³¹ The EU texts only discuss cooperation on these areas, no binding agreements, and as such do not contain dispute settlement proposals.

²⁴ The exceptions are Civil Nuclear Cooperation, Energy, and Air Transport.

²⁵ See [UK Draft Civil Nuclear Agreement](#), Art XXI, and [UK Draft Energy Agreement](#), Chapter 6.

²⁶ See [UK Draft Air Transport Agreement](#), Art 27.

²⁷ See [UK Draft Civil Aviation Safety Agreement](#), Art 15.

²⁸ See EU Draft Treaty, Art AIRTRN.7.

²⁹ See EU Draft Treaty, Art AVSAF.13.

³⁰ See [UK Draft Law Enforcement and Judicial Cooperation in Criminal Matters Agreement](#), Part 13, Article Institutional 3.

³¹ See [UK Draft Agreement on the transfer of unaccompanied asylum-seeking children](#), Art 15, and [UK Draft Agreement on the readmission of people residing without authorisation](#), Art 24.

In its draft agreement on **social security co-ordination**, the UK again only proposes dispute settlement before a Joint Committee,³² whereas the EU text applies the entire general dispute settlement mechanism to **social security**.

For its proposed **fisheries agreement**, the UK proposes intra-partes consultation alongside or alternative to suspending commitments made.³³ The EU here again proposes applying the entire general dispute settlement mechanism.

Finally, absent from the UK texts are proposals on **foreign policy** cooperation, as the UK does not wish to conclude any formal agreements in this area. The EU published a separate text on foreign policy, security and defence on 18 March, which would form part of the Agreement on the New Partnership with the UK published on the same day³⁴. There is no specific exclusion from the general dispute settlement mechanism, and so the assumption is that it would apply.

4. Conclusion

The big sticking point remains that the UK seeks bespoke agreements, with bespoke institutions and individualised dispute settlement processes, whereas the EU wishes to see a single overarching agreement, with a single institutional setup and one general dispute settlement process to which exceptions exist.

The main disagreements about the *process* of settling disputes involves the role of the CJEU, which the UK does not accommodate and which the EU will insist upon. Beyond that, there are several areas (as set out in Section 3) where the EU wishes to see a two-stage dispute settlement process take place—starting before a Joint Committee, and ending with binding arbitration—but where the UK only proposes a single-stage dispute resolution mechanism, in the form of Joint Committee resolution or consultations. Where those consultations do not resolve a dispute, suspension of the agreements (in whole or in part) are the parties' last resort.

If a Future Relationship is to be agreed between the UK and the EU by the end of July 2020, as the UK Prime Minister [wishes to see happen](#), the parties will have to move quite significantly on these positions to find a middle ground.

³² See [UK Draft Social Security Agreement](#), Art 37.

³³ See [UK Draft Fisheries Framework Agreement](#), Art 8-9.

³⁴ [Part 3 \(Security Partnership\), Title II](#) of the Agreement on the New Partnership with the UK, 18 March 2020.

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