

Analysis: The UK's draft FTA for the EU-UK relationship

On 19th May 2020, the UK government finally published its [draft Free Trade Agreement](#) (FTA) for the EU-UK future relationship, which it had submitted to the EU around two months earlier. Alongside an [equivalent draft from the EU](#), it forms the basis for ongoing trade negotiations. The UK's draft FTA is analysed below in terms of what it would mean for the UK and for trade justice.

Top lines:

The UK government is proposing a poor deal that rejects protections for workers and the environment, fails to protect the NHS and other public services from liberalisation rules, and would not enable goods to flow freely due to the refusal to align minimum regulatory standards.

The proposed deal is very different from the EU's proposal. This makes 'no deal' considerably more likely as the two sides may not be able to reach agreement, especially considering the refusal of the UK government to request an extension to the transition period.

1. Social and environmental regulation

- The UK refuses to accept the EU's proposed mechanism - the 'level playing field' - for locking in place minimum standards on labour rights and environmental protection.
- The emphasis is on ensuring regulations don't create obstacles to trade, rather than that they uphold high standards of labour rights, public health, animal welfare and environmental protection.

Downward pressure on regulation, rather than protection of high standards

In the [EU's equivalent document](#), there is a long section outlining the 'level playing field' that would underpin trade. This would require both sides not to reduce workers rights, environmental protections or other standards below current levels, and in some cases that the UK keep up with improvements made in the EU. This section is glaringly absent from the UK's draft FTA. The UK is proposing that there be no fixed floor on standards in the treaty.

Instead, the chapters that handle regulation are mostly aimed at damping regulation down rather than propping it up. Chapters 5 (Technical Barriers to Trade), 6 (Sanitary and Phytosanitary Measures), 12 (Domestic Regulation) and 25 (Good Regulatory Practices and Regulatory Cooperation) have stated objectives such as to ensure that 'regulations... do not create unnecessary obstacles to trade' (Art. 5.1.1.a.) and 'promote a... predictable regulatory environment' (Art. 25.1.1.a). 'Good Regulatory Practices' appear to be defined as those which give plenty of consideration to the idea of just not regulating at all (Art. 25.7.2). Contrary to many people's expectations, these chapters therefore do not outline the regulations that must be followed in order to trade; rather they regulate and limit the ways in which countries can regulate companies. Article 25.1.2 does say, "Nothing in this Chapter shall affect the right of a Party to regulate in pursuit of its public policy objectives," but such 'right to regulate' protections are widely [considered to be legally weak](#).

Weak language and thin content on key regulatory areas

Chapter 6, which covers food and farming regulation, includes some more promising objectives such as ‘to protect human, animal and plant life or health, and the environment’ and to ‘enhance co-operation... on animal welfare and on the fight against antimicrobial resistance’. However the subsequent content on these topics is weak, with no further specific content on protecting health or the environment, while the sections on animal welfare and antimicrobial resistance contain non-binding commitments such as to ‘provide a framework for dialogue’ (Art. 6.10.1). More positively, the document does recognise animal sentience (Art. 6.11.1) and the need for a One Health approach to antimicrobial resistance (Art. 6.10.2).

Chapters 26 (Trade and Sustainable Development), 27 (Trade and Labour), 28 (Trade and Environment) and 29 (Relevant Tax Matters) use very weak language, for instance the parties will ‘strive to promote’ trade that contributes to decent work and environmental protection by ‘encouraging the use of voluntary best practices’ (Art. 26.3.2 a and b). Transparency is entirely optional, as ‘Decisions or reports of the Committee on Trade and Sustainable Development shall be made public, unless it decides otherwise’ (Art 26.4.4.a).

No effective protection of workers’ rights, environmental standards or tax avoidance measures

The document explicitly rejects any protection of shared minimum labour standards, by ‘recognising the right of each party... to establish its level of labour protection’ (Art. 27.2). They commit only that ‘A Party shall not derogate from... its labour law and standards *to encourage trade...or investment*’ (Art. 27.4.2, emphasis added). This gives workers no more protection than is already provided in their national law, while [previous use of this trade provision](#) has shown that it is extremely difficult to prove that derogation from these standards is being done specifically to encourage trade. Although the chapter insists that it is binding (Art. 27.11.3), it is subject only to the meekest of dispute resolution procedures in which a Panel of Experts writes a report, on the basis of which the Parties ‘shall endeavor... if appropriate, to decide on a mutually satisfactory action plan’ (Art.27.10.12). No sanctions are made available in case such an action plan is not followed.

Identical provisions are included in the Trade and Environment chapter, including a rejection of shared minimum standards (Art. 28.3), the caveat that derogation from environmental law is prohibited only if it was done specifically to encourage trade or investment (Art 28.5.2), and a toothless process for dispute resolution (Art. 28.15.1). Furthermore there is some concerning language included that Parties must take into account relevant ‘scientific information’, which could be [a nod to a US-style approach](#) where regulations are based only on proven risks rather than precaution. However this is softened a little by the subsequent clause, which states that ‘a lack of full scientific certainty shall not be used as a reason for postponing *cost-effective* measures to prevent environmental degradation’, though the inclusion of the term ‘cost-effective’ rather limits the reassurance provided (Art.28.8.2, emphasis added). Article 28.10 on Trade in Forest Products makes no firm commitments; rather it ‘encourages’ and ‘promotes’ good practices. Climate change will apparently be addressed in a separate agreement on energy so receives no meaningful mention (see footnote on p253).

The chapter on tax co-operation comprises just six lines of text, one of which specifies that that chapter is not subject to dispute resolution (and is therefore not binding). The rest expresses vague support for efforts to promote good tax governance, but offers no meaningful protection against tax avoidance.

2. Goods

- The UK wants zero tariffs and other measures to keep goods moving freely across the border.
- However, failure to prevent regulatory divergence creates significant potential for border friction and delays in supply chains.

Aiming for free and frictionless trade in goods

The UK clearly wants free and frictionless trade in goods between the UK and EU. To this end, they request zero tariffs (Art. 2.6), the bare minimum of import and export restrictions (Arts 2.12 and 2.13), simplified border procedures (Art. 7.2.7) and flexible Rules of Origin (Arts. 3.3 to 3.26). They also request an Approved Economic Operator scheme (Art. 7.12), and a system of Roll On, Roll Off ports (Art. 7.16), both of which require documentation and checks to be handled in advance of shipments arriving at borders. All of these measures could help to reduce border friction.

Frictionless trade is a challenge when regulations diverge

However, as discussed in point 1, this draft FTA fails to address one of the biggest sources of friction: divergence in regulations. This issue is widely acknowledged: in February 2020, the [Financial Times](#) reported that, “The BRC [British Retail Consortium] has accepted that so-called “frictionless trade” is not possible given the British government’s aim of diverging from EU rules and regulations.”

By refusing to adopt the EU’s proposed ‘level playing field’ and by removing measures such as the ‘common rulebook’, as proposed in Theresa May’s [Chequers Agreement](#), the government are opening up significant space for UK regulations to become very different - and potentially much less stringent - than those required in the EU. This will mean that shipments of goods travelling to the EU from the UK will need to be checked to ensure they comply with EU rules; compliance cannot be assumed, as may be possible if we agree to binding standards that match EU levels of protection. Some checks may be done away from borders, but this won’t always be possible and will still take time and ultimately slow the flow of goods.

Border friction will affect many industries including vital supplies such as [food](#) and [medicines](#). A [parliamentary report](#) has noted a risk of increased costs to the NHS as well as threats to the availability of world class drugs, stating, “With any significant friction at the border, it is possible that the UK could become a ‘second tier’ state for pharmaceutical imports, reducing access to new and innovative medicines.” The [British Chambers of Commerce](#) have stressed that border checks and delays, rather than tariffs, are likely to be the biggest driver of price increases following Brexit. The UK’s draft FTA does little to answer these concerns.

3. Services and Investment

- The government wants liberalisation, but this could restrict our ability to regulate services in the public interest, or to bring privatised services back into public ownership.
- The NHS is not ‘off the table’ as promised, and nor are other public services exempt from the rules.
- A negative list system and soft ratchet clause are used to push the rules onto nearly all industries.
- Investors receive considerable ‘rights’, but the controversial Investor-State Dispute Settlement (ISDS) mechanism is not included.

A push for progressive liberalisation

The UK wants ‘the progressive and reciprocal liberalisation of trade in services and investment’ (Art. 8.1.1). As tariffs have never been applied to services trade or investment, this means removing other ‘irritants’ that prevent or disincentivise services companies from doing business or investing in companies overseas.

The NHS and other public services are not (yet) taken off the table

Liberalisation is especially controversial for public services. Trade rules can restrict countries' ability to regulate services in the public interest (see point 1), and can lock in the privatisation of public services where it has already occurred, such as the outsourcing of hospital cleaning or the privatisation of our water supply and railways. For this reason, there have been calls to keep the NHS 'off the table' in trade deals. Public concern on this topic has centred around the UK's proposed deal with the US, but similar risks would apply if the UK allows healthcare to be covered by trade rules in its deal with the EU.

This draft FTA does not clearly exclude healthcare or other public services from the proposed liberalisation rules. The draft deal appears to use the newer and more controversial 'negative list' approach, in which all services are subject to the rules of the chapter unless specifically excluded (Arts. 9.1, 9.7 and 10.7). There are two ways that such exclusions could be made. Firstly, a high level exclusion can be made in the text of the deal itself. This is done for air services and financial services (Art. 8.1.6), but no such exemption is made for the NHS or other public services. There is an exclusion for 'services supplied in the exercise of governmental authority', but this trade law phrase means [a service that is supplied not in competition with any other supplier or for a fee](#), so healthcare (which is also supplied by private providers) and almost all other public services in the UK are not exempt via this exclusion. Another exclusion is provided for 'government procurement of a service purchased for governmental purposes' (Art. 9.1.2.a), but given the arms-length nature of the modern NHS it is doubtful whether private services purchased by NHS bodies would be covered by such an exemption.

Secondly, a weaker approach for exempting services from trade rules is to use the Annex to list every subsector of services and investments that should be excluded from the scope of the deal. The Annex has not yet been filled in, so we don't know if the government plan to try and exempt healthcare and other public services using this method. Even if used, this approach is risky as [mistakes can easily be made](#), with services being covered by the rules when the intention was to keep them exempt.¹ Furthermore, the draft deal pushes the Parties to progressively reduce the services that are exempt using what appears to be a soft 'ratchet clause': "Each Party shall endeavor... to reduce or eliminate the non-conforming measures set out in... Annexes 9 and 10," (Art. 8.5.1). This makes it unlikely that the full range of health services, public services and the important ancillary services that support them (e.g. hospital cleaning, school catering, medical engineering and device repair) would be excluded.

The lack of exemption for healthcare is deeply worrying, and contrasts with [pledges from the UK government](#): "The Government has been clear that when we are negotiating trade agreements, we will protect the National Health Service (NHS). The NHS will not be on the table. The services the NHS provides will not be on the table." It would also represent a real change from the status quo, as [healthcare has to date been exempt](#) from liberalisation requirements under EU law.

What it means for public services if they are covered by the deal

As it appears that healthcare and other public services may be covered by this trade deal, we should consider which other provisions will then impact upon them. Chapter 12 of this draft FTA places limitations on how governments will be allowed to regulate service industries (see point 1). Furthermore, in the Investment chapter, various regulations that might be applied to companies are specifically prohibited, including rules that would require companies to hire local people as staff rather than bussing in its own workforce, rules requiring them to use locally-produced goods as inputs, and rules requiring that they invest a proportion of profits in research and development (Art. 10.6). These kinds of regulations may be important for the public interest, yet they will not be allowed if this draft FTA is adopted.

¹ The Shadow Health Secretary, Jonathan Ashworth, [reported in 2009](#), "When countries first listed their services sectors at the WTO, more than 1,400 commitments of 7,040 were later found to have been listed in error, including by the US, which has one of the largest and most experienced negotiating teams in the world."

Our ability to bring services back into public ownership is challenged by Articles 9.3 and 10.2 on Market Access. They both state, “A Party shall not adopt... measures that impose limitations on the number of service suppliers, whether in the form of... monopolies [or] exclusive service suppliers,” (Arts. 9.3.a.i and 10.2.1.b.i). If it were decided, for example, that the publicly-owned NHS should do all hospital cleaning, this could be construed as a monopoly of that service, which is prohibited by this clause. Similarly, if we were to bring back British Rail to run all UK railways, this would be an exclusive service supplier, and therefore is likely to be prohibited.

Regulating companies when they have no legal presence

A further concern arising from the draft Services chapter is the statement that companies cannot be required to have a presence within the country as a condition of doing business (Art. 9.4). Although this has been the norm while in the EU, this has new importance once we lose the legal supervision that the EU provides, as it could make it difficult to regulate services that are provided from across the channel. If a structural engineer from an EU country sends designs for a building that later falls down, or an EU company provides sub-standard online counselling to UK residents that causes psychological harm, it could be hard to prosecute those companies if they have no legal presence in the UK that can be required to attend court.

No ISDS in the Investment chapter

Some good news is to be found in the Investment chapter, as certain problematic provisions that are often included in such chapters are not present. In particular, the highly controversial Investor-State Dispute Settlement (ISDS) system is not included, so investors will not have access to their own special court as a fast-track to sue governments. Some of the most unreasonable investor protections are also not included, such as a right to ‘fair and equitable treatment’, ‘full protection and security’ or protection from ‘indirect expropriation’, all of which have been used elsewhere as the basis of claims that retaliate against important public interest regulations.²

4. Digital

- The proposals replicate problematic US digital trade rules, and reflect the wishes of big tech industries.
- Computer code secrecy is enabled, potentially contributing to fraud, bias, safety and fairness issues.
- Privacy of sensitive information and fair sharing of digital revenues could be at risk from data flow rules.

New technologies, new trade rules, new risks

Digital chapters have only recently begun to be included in trade agreements, and as such their impacts are only just beginning to be understood. However, civil society organisations worldwide have [deep concerns](#) relating to human rights, privacy, workers rights, inequality, and economic development related to digital trade provisions. It is therefore concerning that the Digital chapter in this draft FTA bears considerable similarity to the most far-reaching digital trade provisions yet invented - those in the [USMCA](#) trade deal in North America.

Risks to data privacy and fair digitalisation

² A fuller explanation of these provisions is provided at <https://www.tjm.org.uk/trade-deals/bilateral-investment-treaties>

Various provisions in this draft FTA raise alarm. The UK opens up space to reduce personal data protection standards below the levels provided by the EU's General Data Protection Regulation (GDPR), which is considered a worldwide [gold standard](#) (Art. 18.13.5). Despite this, they demand that countries allow the transfer of data across borders (Art. 18.14.2) and they ban any requirements that data be processed or stored in its country of origin (Art. 18.15.2). These provisions could make it difficult to ensure that people's [private data](#), including sensitive data such as health records, is protected, and they could [limit efforts to develop new models of data ownership](#) that give citizens and workers a fairer share of the wealth generated in digital industries. On emerging technologies such as Artificial Intelligence, the UK plans to 'employ risk-based approaches that rely on industry-led standards' (Art. 18.18.3.b), which may imply a rejection of the precautionary principle in our use of these new technologies.

Source code and algorithm secrecy creates fraud, safety and discrimination risks

Among the most worrying sections is Article 18.11 on Source Code. This states, "No Party may require the transfer of, or access to, source code of software, or algorithms contained in that source code owned by a... person of the other Party." Source code is the computer coding that makes software, apps and smart devices function. It is now found in products ranging from cars to pacemakers, and used to make key decisions about people's lives such as [what benefits they are entitled to](#) and whether their [immigration application](#) should be approved. Algorithms are the basic ideas and flowchart-style instructions that lie behind the code.

There are many [good reasons](#) why a government or regulator may need access to, or transfer of, this computer coding. It may need to be checked for quality to ensure the decisions it generates are [fair](#), and that they do not replicate [racial](#) or [gender](#) bias. Safety checks may be needed to ensure that devices such as [vehicle brakes](#) and [smoke detectors](#) function properly. Transparency would help to prevent and uncover fraud, such as the Volkswagen emissions scandal in which [cars were coded to cheat during emissions tests](#). Transfer of computer code may be needed to ensure that people have [fair access to digital products](#) such as medical apps or self-driving vehicle technology, especially if they were created using the data of UK citizens. It is therefore deeply worrying that the UK hopes to sign away its rights to access source code and algorithms via this draft FTA.

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