CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

AGENDA

14th Meeting, 2020 (Session 5)

Thursday 11 June 2020

The Committee will meet at 9.00 am in a virtual meeting and will be broadcast on www.scottishparliament.tv.

1. **Negotiation of the future relationship between the European Union and the UK Government:** The Committee will take evidence from—

   Professor Sarah Hall, Professor of Economic Geography, Faculty of Social Sciences, University of Nottingham;

   Elspeth Macdonald, Chief Executive Officer, Scottish Fishermen's Federation;

   Allie Renison, Head of EU and Trade Policy, Institute of Directors.

2. **Consideration of evidence (in private):** The Committee will consider the evidence heard earlier in the meeting.

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Clerk to the Culture, Tourism, Europe and External Affairs Committee
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The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

Agenda item 1

Note by the Clerk	CTEEA/S5/20/14/1
PRIVATE PAPER	CTEEA/S5/20/14/2 (P)

Culture, Tourism, Europe and External Affairs Committee

14th Meeting, 2020 (Session 5) Thursday 11 June

Negotiation of the future relationship between the European Union and the UK Government

Note by the Clerk

Introduction

1. The Committee is currently holding a series of evidence sessions assessing the current position of the future relationship negotiations between the EU and the UK Government. Details of the Committee's scrutiny of the negotiations can be accessed at—
www.parliament.scot/parliamentarybusiness/CurrentCommittees/114740.aspx

Evidence session

2. This meeting is intended to provide an opportunity to take evidence with regard to three key aspects of the negotiations that represent areas of disagreement between the EU and UK at present. These are namely level playing field provisions, financial services and fisheries. The Committee will take evidence in a virtual meeting from—

    - Professor Sarah Hall, Professor of Economic Geography, Faculty of Social Sciences, University of Nottingham;
    - Elspeth Macdonald, Chief Executive Officer, Scottish Fishermen's Federation; and
    - Allie Renison, Head of EU and Trade Policy, Institute of Directors.

Supporting Information

3. The Committee has requested written evidence from witnesses who were previously, prior to the Covid-19 pandemic, scheduled to give oral evidence to the Committee. Written responses received to date can be accessed at—
https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114740.aspx

4. Written submissions from Professor Sarah Hall, Scottish Financial Enterprise and Clyde Fishermen's Association are provided in **Annexe A** to this paper. Briefings by Dr Filippo Fontanelli, Edinburgh University and a SPICe Academic Fellow, on level playing field provisions and financial services and a briefing from SPICe on fisheries are in **Annexe B** to this paper.

5. Publications on the future UK-EU relationship negotiations of relevance to this evidence session include—

- European Commission Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020

- UK Government's draft legal texts, Our Approach to the Future Relationship with the EU, 19 May 2020.

- Scottish Government COVID-19: the case for extending the Brexit transition period, 3 June 2020

- UK in a Changing Europe, Services and Brexit, 4 June 2020

- Professor Michael Heath and Dr Robin Cook, University of Strathclyde, 'Risks to North Sea fish stocks and wildlife if post-Brexit fisheries negotiations go awry', SPICe Guest Blog, 21 May 2020

- SPICe Issue 8: EU-UK Future Relationship Negotiations – UK legal text special edition, 2 June 2020

Stephen Herbert
Clerk
Culture, Tourism, Europe and External Affairs Committee
8 June 2020

ANNEXE A

Written Submission from Professor Sarah Hall

This evidence is provided by Sarah Hall, a Senior Fellow at UK in a Changing Europe and a Professor of Economic Geography at the University of Nottingham.

The evidence responds to the issues raised by the Committee with a particular focus on the services sector.

Extending the transition period

1. The UK's economy has been shaped in profound ways by the membership of the EU's single market. Whilst much of the public attention has focused on manufacturing, for good reasons, it is important to fully consider the implications of extending the transition period or not for the services sector. The UK is predominately a services economy. Services contribute around 81% of the economy and employ around 30 Million people or around 84% of jobs.[1]

2. The end of the transition period will bring significant changes to the services sector. For some activities, such as financial services, the impact will be felt most acutely in terms of the lack of single market access. For example, it is estimated that just over a quarter of this sector's activity currently stems from EU related business.[2]

3. Other parts of the services sector rely heavily on migrants from the EU in terms of labour markets including in financial services, education, the health service and road haulage. The end of free movement will mean that these labour market requirements will need to be met through the government's proposed new immigration regime. For some services, the proposed salary threshold proposed of £25,600 for migrants coming to the UK is unlikely to pose a significant barrier to entry – though employers will still have to go through the bureaucracy of applying for visas and there will be significant costs to pay that do not apply not to EEA nationals coming to work in the UK now. However, close to 80% of works in the hotel and restaurant sector and over 50% of those in the leisure sector earn less than £400 per week and hence may not be allowed to come and work in the UK.

4. Some services businesses have begun to plan for the UK's economic future outside of the EU. For example, in financial services, companies have begun to transfer assets and/or employees to European hubs including Frankfurt, Dublin, Luxembourg, Amsterdam and Paris in order to maintain single market access. Estimates suggest that over 320 firms may have already undertaken relocations of some kind to date.

5. There are significant and diverse implications for service sector businesses of leaving the single market including: greater barriers to single market access for exports; regulatory issues such as the likely requirements for permits in haulage;

[1] https://www.ons.gov.uk/economy/grossvalueaddedgva/datasets/nominalandrealregionalgrossvalueaddedbalancedbyindustry
[2] https://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2016/oct/OW%20report_Brexit%20impact%20on%20Uk-based%20FS.pdf

possible additional costs for the creative industries of accessing EU markets for live events; and greater administration for selling UK TV programming into the EU to name but a few. Responding to these changes will require time and planning. Given the considerable economic contraction that the UK economy is currently undergoing following COVID-19 there is a clear economic rationale to extend the transition period to give more time for services business to plan for the UK's future outside of the single market.

Leaving transition with a deal

6. The UK is seeking a Comprehensive Free Trade Agreement (FTA) with the EU. For the services sector, it is important to note that FTAs typically do not assist trade to the same extent as they do for goods.

7. The UK's negotiating position is based on the EU-Canada Comprehensive Economic and Trade Agreement (CETA). CETA goes further on assisting services trade than is typical in FTAs but does not replicate single market access. For example, government analysis undertaken in 2018 estimated that the value of services trade from the UK could decline by 8% without a deal and by 5% under a typical FTA.[3]

8. Whilst the UK's position is based on CETA, in some areas, it asks for greater single market access than CETA does. Academic research shows that economic trade is typically greater between geographically close trading partners such as the UK and the EU. This gives rise to EU concerns that the CETA deal may not be appropriate for its relationship with the UK because the UK could seek to obtain competitive advantage by de-regulating compared to the EU, for instance by lower reporting standards or using tax policy to attract international services investment. If a large and geographically close competitor to the EU does that, while retaining relatively easy access to the single market, it could make it harder for the EU to compete internationally whilst maintaining its own rules. This could leave to difficulties in agreeing the draft deal as set out by the UK.

9. In the services sector, there are also differences between the UK and the EU on the sectoral coverage of any deal. For example, the UK wants to include audio-visual services including the Television and film sectors but the EU does not include these typically in its FTAs.

10. The areas where the UK is seeking more to support services trade include on the mutual recognition of qualifications such as for lawyers and architects and on the ways in which financial services trade will be facilitated (discussed in more detail below).

11. At the same time as seeking greater market access in these areas than is typical in EU FTAs, the government is seeking to preserve its own regulatory autonomy, allowing the possibility of significant divergence. This is in stark contrast to service sector regulatory alignment that underpins the EU's single market in services. It is not yet clear whether there are any areas where the UK would be prepared to accept

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[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760484/28_November_EU_Exit_-_Long-term_economic_analysis__1_.pdf

greater regulatory alignment in return for securing greater market access to the single market.

Leaving with or without a deal

Below, I set out what the UK is seeking in three key service areas, how this compares to existing EU FTAs, notably the EU's deal with Canada and what the implications could be at the end of a transition, if a deal is made and under a no deal end to transition.

Financial services

12. The UK's financial service sector relies on the single market for the current size and shape of its EU exports. Single market access is currently facilitated through what are known as passporting arrangements between the UK and EU member states. Passporting means that a financial services firm authorized to undertake activity by the regulatory of one EU member state can apply for a passport that allows it to conduct the same business throughout the EU/EEA without the need for further authorization. Using passporting arrangements, it is estimated that 67% of UK financial services (not including insurance) supplied to the EU are delivered cross border from a UK base.[4]

13. Whilst passporting has continued during the transition period, it will end at the end of transition. The UK's draft agreement text follows CETA and seeks to allow the cross border supply of financial services between the UK and the EU. This may appear to be the same as current passporting arrangements. However, it is important to note that CETA does not match current passporting arrangements. It is usually interpreted as relating to only a limited types of financial services including particular aspects of insurance e.g. maritime, certain banking activities and portfolio management.

14. CETA also includes a most favoured nation (MFN) clause (and the UK's draft text includes the provision for the UK to include the same). The fact that this is in CETA is likely to limit the degree of bespoke single market access the UK may be able to negotiate since if the EU offered the UK a more favourable deal, it would have to offer this to Canada alongside other countries with whom it has trade deals including an MFN provision.

15. CETA relies on equivalence decisions in the place of passporting and the same approach is developed in the UK's draft agreement. These legal provisions enable financial firms outside the EU to conduct business within the single market and/or with EU counterparts without being subject to EU regulation in addition to their home country regulation, provided that the EU determines that the legal and regulatory system of the third country is deemed 'equivalent'. However, equivalence does not provide the same breadth of market access across the same number of services as passporting. For example, core banking services such as lending and deposit taking typically cannot secure single market access through equivalence.[5]

[4] https://www.cer.eu/sites/default/files/brexit_trade_sl_pbrief_6.12.18.pdf
[5] https://www.bba.org.uk/wp-content/uploads/2016/12/webversion-BQB-4-1.pdf

16. Equivalence also provides much less certainty because the EU can revoke its decision to grant equivalence with only 30 days notice. To try to overcome this, the UK draft agreement text seeks 'transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions' (p170) in order to provide UK financial services firms with more certainty about what type of EU market access they will have.

17. Beyond the question of equivalence and passporting, there are a number of areas where the UK's draft text goes beyond the market access provided for in CETA in small but important ways. For example, the UK's draft agreement seeks to essentially future proof the definition of what counts as a financial services supplier by including individuals or business who supply or 'wish to' supply financial services. The draft is also seeking greater collaboration on things like consumer protection through 'innovation' in financial services. Both of these differences might be read as an attempt to ensure that the fintech sector, which the UK has developed global leadership in, is protect by the proposed UK deal.

18. The UK draft is seeking the establishment of a Financial Services Committee that would meet once a quarter to oversee the implementation of the agreement. The importance the UK attaches to financial services is reflected in the fact that the equivalent committee under CETA usually meets once a year.

19. The UK is therefore seeking a slightly modified version of CETA in financial services. However, crucially it wants to secure this enhanced degree of market access without the level of regulatory alignment that would be typical of EU enhanced market access. This reflects the government's position that given the unique size and importance of financial services in the UK, it should not become a 'rule taker' from Brussels.

20. The Centre for Economic and Business Research (CEBR) estimated that leaving the single market with no, or only modest trading agreements in place beyond WTO terms would lead to export losses of around 15% in financial services.[6] Depending on the extent to which these are replaced by new trade relationships, this could lead to a decline in GDP of between 1.4 to 2%. Some of this could be reversed if additional trade deals and relationships are established between the UK and countries outside of the EU.

Mutual recognition of professional qualifications and business travel in the services sector

21. An important aspect of the negotiations for services relates to the rules governing who is able to travel between the UK and the EU to provide services. At the moment it is relatively easy to travel to do business in another member state, and UK professional qualifications, such as those needed to practice as a lawyer or an architect, are recognised throughout the EU. This is called the mutual recognition of professional qualifications.

[6] https://cebr.com/reports/the-economic-impact-on-services-from-the-uk-losing-single-market-access/

22. This is an important issue for business services, the largest form of UK-EU services trade, and most especially those that are reliant on what are called regulated professions. A regulated profession is one in which an individual is not authorised to provide the service in a particular country until they have met the regulatory requirements of that country to do so. This includes lawyers, accountants and architects, who are typically allowed to practice and use a professional title once they have undertaken approved education and training. This system of authorisation is typically nationally based so someone trained and qualified in one country cannot automatically practice in another. The process is usually managed by a trade association or a professional body which makes implementation of any changes as a result of the negotiations harder than if it was a government run process.

23. The UK negotiating document is ambitious in this area going beyond other FTAs and CETA. The position set out by the UK takes mutual recognition as the default (ie a continuation of the current single market access) and outlines a framework to facilitate this. In contrast, in CETA a framework is set out to work towards mutual recognition where it has been recommended by a Joint Committee on Mutual Recognition established by that agreement.

24. The EU's position is rather different. In a notice to stakeholders, the EU Commission has stated that:

> "The recognition of professional qualifications of United Kingdom nationals in an EU 27 Member State will be governed by the national policies and rules of that Member State, irrespective of whether the qualifications of the United Kingdom national were obtained in the United Kingdom, in another third country or in an EU-27 Member State" [7]

25. The non-recognition of UK qualifications would not just apply to UK citizens – it would also apply to EU citizens who hold a UK qualification and are working in other EU countries.

26. Legal services illustrate how the risks of not securing an agreement in this area might work out in practice. Currently solicitors have the right to be recognised as lawyers by other European bars, they have the protection of legal professional privilege (LPP) when advising clients in the EU and they have the right to represent clients at the Court of Justice of the European Union.[8] This is reciprocated with the UK's automatic recognition of other European bars, enabling the UK's legal sector to recruit lawyers from across the continent. Moreover, a UK limited liability partnership (LLP) can open branches within member states France. However, without a new agreement, this would not be the case in all member states. For example, UK LLPs would not automatically be recognised as a legal form in France, which requires 75% of partners holding 75% of shares to be fully admitted to an EU/EEA/Swiss bar.[9]

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[7] https://ec.europa.eu/info/sites/info/files/file_import/professional_qualifications_en.pdf
[8] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiOiID-7vnoAhWdQEEAHasyAoMQFjACegQIAhAB&url=https%3A%2F%2Fwww.lawsociety.org.uk%2Fpolicy-campaigns%2Fdocuments%2Ffuture-uk-eu-relationship-for-legal-services%2F&usg=AOvVaw3Fx5nMDaLYx3set55QbPDJ
[9] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiOiID-7vnoAhWdQEEAHasyAoMQFjACegQIAhAB&url=https%3A%2F%2Fwww.lawsociety.org.uk%2Fpolicy-

27. For some services, such as management consultancy, professional qualifications are less significant, but easy and frequent access to clients within the single market is important. Currently, such travel involves very little in the way of paperwork and fees. However, at the end of the transition period, if no deal is agreed, businesses could be faced with having to navigate the range of visa requirements and associated fees required by member states.

28. The UK is seeking to address this by including short term business trips and people moving between their firms' office for short periods of time, known as intra-company transferees, within the agreement.

29. The UK's draft agreement aims for individuals to be able to travel between the EU and the UK, and stay on a temporary basis in order to deliver services. Here the UK is following both CETA and the EU-Japan EPA which have gone much further than other FTAs in this area. For example, the draft calls for the requirements for visas to be dropped for short term business visitors. It also follows CETA in proposing that entry be granted for the families and dependents of service providers themselves. If this is agreed this will assist the range of individuals, from professional musicians, to management consultants and financiers who travel frequently between the UK and EU member states to provide services on a 'fly-in-fly-out basis', though this will still fall short of the ease of movement they currently enjoy.

30. Without an agreement there could be significant disruption to this mode of cross border service supply. In this scenario, individuals planning to travel from the UK to the EU will also need to consider any changes needed to the paperwork required to take equipment with them at the end of the transition period. For example, the Chief Executive of UK Music cautioned that the additional challenges associated with travel to the EU if a trade deal was not struck could lead to touring artists cancelling performances.[10]

Audiovisual

31. The audio visual sector (including film, TV and TV related businesses) is one of the services sectors where the EU and the UK appear farthest apart. In common with its other FTAs, the EU is proposing that the sector would be excluded from any deal with the UK. Meanwhile, the UK has included the sector in its draft agreement.

32. The UK's aim of including the sector within the negotiations reflects the fact that the UK has the largest audiovisual sector in Europe. Its GVA in 2014 was 20 percent larger than Germany's and 50 percent larger than France's.[11] It is particularly developed in Video on demand services (VoD), with 31 percent of the total EU market by value and 29 percent of subscribers. The sector employs over 200.000 people in

campaigns%2Fdocuments%2Ffuture-uk-eu-relationship-for-legal-services%2F&usg=AOvVaw3Fx5nMDaLYx3set55QbPDJ

[10] https://www.theguardian.com/politics/2019/oct/03/no-deal-brexit-may-make-touring-europe-simply-unviable-for-uk-artists

[11] https://www.mpa-emea.org/wp-content/uploads/2018/09/OO-UK-AV-sector-economic-contribution-report-FINAL-2018.09.21.pdf

the UK and has a £1.3 billion trade surplus with the EU.[12] The UK hosts three of the top ten broadcasters in the EU (Sky, BBC, ITV). In addition to television, the UK is a strong player in the European feature film sector. It ranks number two (after France) for the number of film exports in cinemas and on TV, and number one for the film exports on VoD. EU countries' markets account for a quarter of UK-origin films' worldwide theatrical admissions.

33. The UK's audiovisual sector has successfully exported into the EU through the use of two main regulations. First, the Audiovisual Media Services Directive (AVMSD) is based on the principle of 'country of origin' and essentially means that a UK broadcasting license issued by Ofcom to a UK channel allows that channel to broadcast throughout the EU without needing to comply with any additional regulations in these export markets. The advantages for providers are that they only need to comply with Ofcom rules in order to provide audiovisual services in any EU member state. The UK draft agreement sets out a process through which Ofcom, as the UK's regulator could be authorized by the EU 'without undue delay' such that a broadcasting licence issued by Ofcom would continue to be recognized within the EU's single market.

34. Without an agreement in this area, at the end of the transition period, the UK becomes a third-country, which means Ofcom will no longer be recognised under the AVMSD. As a result, the cost and complexity of exporting to the EU will increase as broadcasters and providers of video on demand services will need to ensure they meet the regulatory requirements to broadcast in their target export market.

35. The second piece of regulation is the Council of Europe's European Convention on Transfrontier Television (ECTT) which came into force in 1993. This convention guarantees that programming can be shared cross border via terrestrial, satellite and cable services but it does not include on demand – which didn't exist in any meaningful way in 1993. As a signatory to the Convention, at the end of the transition period, the UK will still have the right to broadcast to the other 20 member states who have ratified it, but not through on demand services. This is important because the Country of Origin principle has made the UK an attractive location for the headquarters of global broadcasters who use this base to produce on demand content for the EU.

36. In theory, the ECTT would mean that UK audiovisual services would maintain market access to at least the majority of EU member states at the end of the transition period. This is because the ACMSD also insists on quota provisions to promote content produced in Europe or 'European works'. These provisions envisage that a majority proportion of broadcasting time will be dedicated to European works (excluding the time apportioned to news, sports and advertising). The AVMSD defines European works as originating in an EU Member State or a European State which has signed the ECTT. This means that content produced in the UK will still be classed as a European work when the transition period ends.

37. However, if the UK seeks to use the ECTT as a fall-back, it is limited in a number of ways. First, it does include every Member State. Belgium, Ireland and Denmark did

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12 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726136/DCMS_Sectors_Economic_Estimates_2017_Employment_FINAL.pdf

not sign the Convention and Greece, Luxembourg, the Netherlands and Sweden have not ratified it. Second, VoD services are excluded from the scope of the ECTT. Given this is the medium that has the highest potential for growth, this is a major drawback for relying on the ECTT. Third, there is no enforcement mechanism in place for the ECTT.

Summary

38. The services sector is strategically important in the UK economy and needs to be considered in the negotiations because of the ways it is shaped by UK single market access.

39. At the end of the transition period, with or without a deal of the kind being sought by the UK, the services sector is likely to be smaller and differently structured with implications for wider economic growth.

40. For some areas, such as financial services, the impact on their EU markets could be such that it makes more sense trends already underway to move parts of their business to European financial centres such as Dublin and Paris to intensify in order to maintain market access. For other sectors that rely on low waged EU labour, such as food businesses and hotels, the end of the transition period could bring with it labour shortages as EU nationals are unable to travel to the EU to work because they do not meet the salary threshold set out in the government’s post Brexit migration regime.

41. In some ways, the UK’s draft agreement mirrors FTAs already agreed with the EU. However, this does not make EU agreement guaranteed. There are significant differences between the size and scope of UK-EU trade as compared to that with Canada which will understandably make the EU cautious in replicating Canadian agreements with such a close and large trading partner.

42. In other areas, such as professional services like law and architecture the UK is asking for more access to the single market than the EU has granted other countries. However, even in these areas, it is important to note that this does not replicate the UK current trading relationship with the EU. This has led some to argue, such as parts of the City of London, that there could be advantages in seeking complete regulatory control without any preferential single market access as would be expected within a FTA.

Written Submission from Scottish Financial Enterprise

Dear Joan,

Thank you for the opportunity to participate in the Culture, Tourism, Europe and External Affairs Committee's inquiry on the negotiation of the future relationship between the European Union and the UK Government and their implications for Scotland.

Scotland is home to a diverse and successful financial services industry which employs over 160,000 people across banking, life and pensions, general insurance, asset management and related professional services and serves the needs of millions of customers and clients in Scotland, the UK, and across the world.

Responding to COVID-19 is the paramount priority for Scottish Financial Enterprise (SFE) members at this time.

As an industry we recognise our vital economic role and our societal responsibilities in supporting our customers, colleagues, and communities during these difficult times. Our members are working extremely hard to ensure millions of personal and business customers continue to have access to financial services in its many forms, while our colleagues adjust to working from home and ensure the communities we live and work in are supported.

There is no question that the coronavirus crisis will continue to impact on the economy and society well into the future – perhaps for longer than we can fully appreciate at the moment. It's difficult to untangle the potential impact of COVID-19 and the potential impact of the United Kingdom leaving the European Union without a clear path from the current transition period. What we can say is that in both circumstances our members require certainty as soon as possible for both our industry and for our customers. Certainty on the phases and triggers for the reopening of the economy as lockdown restrictions ease and certainty as to the terms of a managed transition to a new trading relationship between the UK and the EU.

Our diverse membership includes the leading UK financial institutions and global businesses who continue to invest in Scotland. Our members maintain individual positions on Brexit and on the ongoing negotiation process. Broadly speaking, our members are seeking a managed transition and an agreement that allows access to the EU as well as close regulatory cooperation to avoid a no-deal Brexit. The industry has invested in securing access to EU markets through restructuring corporate and regulatory structures to account for the loss of regulatory "passporting". With many of our members located across the UK, they hold a UK level perspective given the uniform regulation of financial services across the UK.

Access to talent is critical for the growth and development of financial and related professional services. Our industry must be able to continue to access and retain vital

talent from across the EU and the rest of the world in line with the recommendations made in TheCityUK and EY report 'The UK's future immigration and access to talent'.[13]

The UK's approach to negotiations with the EU, which was published in February, includes important objectives for our industry, including mutual recognition of professional qualifications, civil judicial cooperation, establishing formal regulatory cooperation arrangements and structured processes for the withdrawal of equivalence findings. Our industry continues to track the resolution of these technical issues.

As the clients and customers of our members plan their businesses through and beyond the impact of the COVID-19 lockdown, it is important that any required adjustments arising from the UK and EU negotiations are understood with sufficient time to accommodate in operational and financial plans. Our banking members have undertaken a considerable amount of engagement with their business customers over the past 18 months to support the management of the risks arising from a variety of Brexit scenarios.

Our members continue to monitor developments in the UK and EU negotiations and remain in close contact with their regulators. SFE continues to work closely with the representative body for UK-based financial and related professional services, TheCityUK, on Brexit matters. We are members of their EU Strategy Group, The Europe Group and the European Technical Advisory Group.

SFE is committed to constructively engaging with both the UK and Scottish Governments on behalf of our members on the Brexit process, the COVID-19 response and recovery and other matters relevant to the financial services industry.

Yours sincerely,

Graeme Jones
Chief Executive, Scottish Financial Enterprise

[13] https://www.thecityuk.com/assets/2018/Reports-PDF/f7f8cf85d0/The-UKs-future-immigration-system-and-access-totalent.pdf

Written Submission from Clyde Fishermen's Association

Extending the transition period

- Views on whether the UK government should request an extension to the transition period.

We are a trade association representing many fishermen, we represent members who have a range of views on the relationship between the UK/Scotland/EU, and therefore it is difficult to present an overall opinion on the issue of extending the transition period. We are not privy to the full information on the capacity and resources which all of the involved parties need to have to secure a satisfactory arrangement. We would note that consideration must be given to the unusual impacts which COVID-19 has brought and how they will interplay with planning a transition. Namely the socio-economic considerations of transition should be considered with the best interests of domestic interests.

- Your reasons why an extension to transition is or is not required.

As noted we cannot be prescriptive about why an extension to transition should or should not happen, we would hope these matters will be sensibly considered by relevant governments. However we must stress that many industries, including our inshore fishing industries, have been very badly impacted by COVID-19 and the loss of EU and international markets which this has entailed. Many industries are reliant on a successful trading relationship with the EU and international markets therefore trade deals should be competently executed in an adequate timescale to protect domestic industries from any more significant damage.

- If you believe an extension to transition is required, how long such an extension should be for (one or two years).

We leave this decision to our government representatives to assess given they will be privy to a fuller picture in terms of capacity, again stressing that it will be essential to secure successful workable trading deals.

Leaving transition with a deal

- Whether you believe a deal will be agreed between the UK government and the EU by the end of 2020.

We cannot access how possible this will be, no matter the timeframe we have been consistent in noting that whilst having jurisdiction over fishing access is a very important factor for many fishermen, so too is having an effective trading agreement with the EU.

- Given the EU negotiating mandate and the UK government's negotiating priorities as set out in The UK's Approach to Negotiations, what an agreement might look like.
- Which sectors and policy areas you believe need to be covered by any deal.
- Any areas that you believe won't be or don't need to be covered by a deal.

Having looked over UK's approach to negotiations in respect to fisheries we feel it's important that the devolved nations lead on matters in their own jurisdiction. Initially it was considered that the rates of tariffs between Northern Ireland and the EU could be more favourable than those between Scotland and the EU, we would ask that mindfulness is paid to such possible differences in the trade negotiations. Effectively this type of deal could lead to Scottish fishermen being at a great disadvantage to their counterparts in Northern Ireland over the same stocks. We respect that trade and access in relation to fisheries is separated formally, however we also believe that practically trade is vitally important to fisheries. Tariffs on seafood could prove too much for many fishing communities.

We note the mechanism to resolve disputes is considered, however we would stress that even through the COVID-19 peak crisis points, tensions between French fishermen and some Scottish Fishermen reached a heated level over both issues of trade and access. We consider that direct action may still present a great threat to trade and access and any policies and negotiating strategies should have a robust mechanism in which to address these issues.

Leaving transition with no free trade agreement in place

- The likelihood of leaving transition without a trade agreement in place.

We would stress a sensible trade agreement will be important for our members in moving forward. Many of our fishing communities inshore are reliant on good trading relations with the EU. Lack of a sensible trading agreement could have a longterm negative impact on our inshore fishing communities.

- What would be likely to happen in terms of the negotiations and to UK-EU relations after the end of the transition period if there is no free trade agreement in place.

Direct action and tensions between access and trade are likely to drag on, having negative consequences for the domestic industry. If such problems cannot be solved through agreement it may be possible that we see other countries fill the current supply chains, for example South American or Danish seafood may start to replace our shellfish markets due to lower prices and easier access.

- The UK's preparedness for leaving the transition period at the end of 2020 without a free trade agreement in place.

COVID-19 has exposed a number of concerns about just what can happen when access to the EU markets is lost or significantly restricted. Fleets have been tied up, communities unable to work and exports slowed or completely stopped. Without a free trade agreement we could see high tariffs, or more worrying still administrative blockades on the transfer of goods such as fisheries. Currently China has a ban on Brown Crab exports due to testing levels, we could see similar blockages to trade due to issues such as testing or export certification. Any trade agreements should include measures that may seek to address such situations and prevent wherever possible blockages.

Comparing the Level Playing Field provisions in the EU and UK negotiating texts

The notion of Level Playing Field and the parties' negotiating positions

The expression "level playing field" (LPF) indicates a condition for the circulation of goods without tariffs between the UK and the EU: all companies competing in the same extended market must play by the same regulatory rules.

In practice, this means that companies across the territory of the Free Trade Agreement (FTA) should observe comparable standards of environmental protection, labour rights and social responsibility. Compliance with these standards is expensive, and a company that could avoid them would save on costs and thereby have a competitive advantage on competitors from other countries.

Level Playing Field: example of battery eggs
In the UK, eggs produced by battery chickens are prohibited, to protect animal welfare. Accordingly, egg producers face the costs of complying with this prohibition: larger units to host chickens are more expensive than small piled cages. Battery chicken farms which do not face these costs can sell their eggs at a cheaper price. If their eggs enter the UK market, foreign battery eggs can undermine the local production, thereby eroding their market share. The competitive advantage would not flow from the higher quality of the product, but from the lack of comparable standards (LPF) across the two countries.

Moreover, LPF provisions also concern the kind of support that producers can receive lawfully from the government. For instance, if a government or another public authority could provide its producers with unlimited state aids or subsidies, their goods would be cheaper to produce as a result, and could enjoy an unfair competitive advantage compared to goods from other countries. The European Commission President, Ursula von der Leyen summarised the scope of LPF in a speech, in London in January 2020, as follows—

> "Without a level playing field on environment, labour, taxation and state aid, you cannot have the highest quality access to the world's largest single market. The more divergence there is, the more distant the partnership has to be."[14]

[14] LSE speech, 8 January 2020, https://ec.europa.eu/commission/presscorner/detail/en/speech_20_3

Both the UK and the EU have in principle agreed to establish a LPF, but they differ on the specific obligations and the sanctions applicable in case of breach. On LPF commitments, the Political Declaration agreed in October 2019,[15] stated that "the precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties."

To preserve the viability of a deep Free Trade Agreement, with no tariffs and wide recognition commitments, the EU made stringent demands of the UK on LPF matters, which were reflected in its draft text published on 18 March 2020.[16]

In certain fields, like state aids, the EU asked that the parties' rules continue to mirror each other in the future ("dynamic alignment").[17] In the field of competition, the EU essentially transfused into the draft text the content of its antitrust law.[18] On labour and environmental protection, the EU introduced a binding obligation to retain high standards similar to those observed by both parties now ("non-regression").[19] It also included provisions locking in any higher level of protection achieved by both parties in the future ("ratchet-up").[20]

Non-regression v. dynamic alignment v. ratchet-up

If States A and B commit to **"non-regression,"** they are each free to pass new laws, as long as they do not weaken the standards they had at the time of the commitment. For instance, if A passes more advanced rules on workers' protection increasing the number of statutory leave days, B does not have to catch up. However, neither State can "regress," for instance reducing the holiday entitlement it granted at the time of the agreement.

Through a **"ratchet-up"** clause on future levels of protection, A and B can agree that, if both independently increase the level of protection on a given matter, the *new* level is subject to non-regression. For instance, if both A and B, successively, increase the holiday entitlement, the new shared standard would become entrenched. Neither could no longer amend its law to reduce it – even if B had no obligation to match A in the first place.

If States A and B commit to **"dynamic alignment,"** each new law passed by A in the relevant field must be mirrored by B to match the enhanced standard. If A passes the rule increasing the holiday entitlement, B must do the same, and vice versa. Alignment can be ensured either through a promise of *equivalence* (B, to catch up, must adopt "comparable" rules to those of A) or straight *compliance* (B must follow the same rules adopted by A).

[15] https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf

[16] https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf

[17] Article LPFS.2.2.

[18] Article LPFS.2.10-17.

[19] Article LPFS.1.2.5: "5. The Parties affirm their commitment to continue improving their respective levels of protection with the goal of ensuring high levels of protection in the areas covered by this Title." Specifically, see Article LPFS.2.26 (on tax avoidance); Article LPFS.2.27 (labour and social protection); LPFS.2.30 (environmental protection).

[20] Article LPFS.2.31 (labour and social protection); Article LFPS.2.36 (environmental protection).

The UK Government considered these requirements unnecessary, as it had consistently assured that it would retain high regulatory standards and refrain from "dumping",[21] making binding commitments redundant. The UK Government promised to maintain the protection granted by current EU rules, thus hinting to a de facto policy of "non-regression."

To support the effectiveness of the LPF obligations, the EU wants to establish a system of enforcement, to detect and punish competitive distortions caused by regulatory gaps and unlawful State support. Alleged breaches of LPF rules can be brought to an arbitration panel, which issues binding decisions. If the losing party fails to comply, the tribunal can impose penalties.[22] If the losing party fails to pay, the winning party can retaliate against it, for instance imposing new tariffs.[23]

An exception is made for certain LPF obligations relating to the parties' commitments to uphold international standards (on labour, environment, climate change, biological diversity, forestry, sustainable development). Disputes on these topics are not subject to the system of compulsory arbitration, but can be deferred to a special panel of experts, which can issue a non-binding decision.[24]

This EU position was systematically dismissed by the UK Government. According to Chief Negotiator Frost's letter to his EU counterpart Michel Barnier on 19 May 2020, the UK Government considers the avoidance of stringent LPF obligations in the Free Trade Agreement as a priority. If necessary, David Frost indicated that the UK would be ready to give up the plan of no-tariff trade across the board and agree to the application of tariffs in certain sectors:

> "We have nevertheless suggested that, if it is the mutual commitment to zero tariffs that makes these provisions necessary in your eyes, then we would be willing to discuss a relationship that was based on less than that, as in other FTAs."[25]

LPF provisions in EU-FTAs

According to the proposals in the EU draft agreement, the UK-EU agreement would impose more stringent LPF rules than are contained in most of its existing trade agreements such as with Canada and Japan. However, the LPF provisions asked for by the EU are not very different to those in the Association Agreement with Ukraine. The treaties with Canada, Japan and Korea, instead, were clearly and openly used as template for the draft prepared by the UK Government.

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[21] The reference to dumping is confusing, as dumping is not a private practice, not governmental. Presumably, the reference is to subsidised or low-quality exports.

[22] Article INST.20.

[23] Article INST.21.

[24] Article LPFS.2.50.

[25] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886168/Letter_to_Michel_Barnier_19.05.20.pdf.

LPF relating to governmental distortions

CETA, the EU-Japan Economic Partnership Agreement (EPA) and the EU-Korea FTA have few provisions on trade remedies, competition and subsidies. Chapter 7 of CETA, on subsidies, essentially recalls the WTO commitments of the EU and Canada. The EU-Japan EPA and EU-Korea FTA also identify which subsidies are outright prohibited (Article 12.7 EU-Japan EPA; Article 11.11 EU-Korea FTA). Both treaties contain a definition of the anticompetitive practices which the parties commit to address (Article 17.1 of CETA; Article 11.1 of EU-Korea; Article 11.3 of the EU-Japan, which contains a clear list).[26]

For comparison, the EU-Ukraine Association Agreement (AA) provides expressly for state aid provisions which must be interpreted in line with EU law as interpreted by the European Court of Justice (the "EU *acquis*").[27]

Standard-related LPF provisions

CETA, the EU-Korea FTA and the EU-Japan EPA include soft non-regression clauses on environmental and labour protection, which contain no obligation to ensure a high standard of protection or improve it progressively. The language is clearly aspirational, not binding—

> "each Party *shall seek* to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements …, and *shall strive* to continue to improve those laws and policies".[28]

These treaties only require the parties to effectively implement their current standards, as follows—

> "A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory".[29]

In case of breach of the CETA rules on labour or environmental protection, the aggrieved party can trigger consultations and, as a last resort, bring a complaint to an arbitration panel. Even if it finds a breach, however, the panel cannot impose penalties

[26] Reading: "for the European Union: (i) agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition; (ii) abuse by one or more enterprises of a dominant position; and EU/JP/en 323 (iii) mergers or concentrations between enterprises which would significantly impede effective competition; and (b) for Japan: (i) private monopolisation; (ii) unreasonable restraint of trade; (iii) unfair trade practices; and (iv) mergers or acquisitions which would substantially restrain competition in a particular field of trade."

[27] Articles 262 and 264.

[28] Article 13.3 of the EU-Korea FTA, emphasis added.

[29] CETA, Article 23.4.2. See also Article 16.2.2 of the EU-Japan EPA; Article 13.7 of the EU-Korea FTA.

or sanctions. The same procedure is established in the EU-Japan EPA[30] and the EU-Korea FTA. When the panel of experts finds a breach, "[t]he Parties shall make their best efforts to accommodate [its] advice or recommendations".[31] In other words, these dispute-settlement bodies cannot issue binding decisions.

For a comparison, the EU-Ukraine Association Agreement contains an actual obligation to ensure high standards of protection, and try to improve them using the EU *acquis* as a reference (Article 290):

> "the Parties *shall ensure* that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation".

Moreover, in case of dispute, the EU-Ukraine Association Agreement establishes an arbitration panel that can issue binding rulings (Article 311). If the losing party does not comply within a reasonable period of time, the complaining party can retaliate, for instance by imposing punitive tariffs to offset the harm suffered because of the breach.[32]

The EU negotiating mandate sets out more stringent LPF rules than those provided in the agreements with Canada, Japan and Korea, though not that with Ukraine. The declared reasons for more stringent conditions in an EU-UK trade agreement are the UK's geographic proximity and the higher ambition of the FTA with the UK, which should lead to a zero-tariffs regime for all goods.

LPF in the UK draft treaty

LPF rules feature throughout the UK Government's proposed draft treaty, as they concern both production standards (environment, labour, human rights) and State intervention (subsidies, competition).

In general, the UK text has few provisions on State intervention, which largely consist of reference to existing multilateral rules, and are not subject to the dispute settlement system. The draft treaty contains no discipline on government procurement and limited commitments on state aids. The impression is that the UK wants to retain as much freedom as possible to use governmental funding to boost the national economy. The rules on standards are largely inspired by the CETA, EU-Korea and EU-Japan texts.

LPF for distortions through State intervention

Chapter 4, on Trade Remedies, is a reference to the already applicable discipline on dumping, subsidies and safeguards of the World Trade Agreement (WTO). Article 4.4

[30] See Article 16.18 of the EU-Japan EPA.

[31] Article 13.15.2 of the EU-Korea FTA.

[32] Article 315.3: "In suspending obligations, the complaining Party may choose to increase its tariff rates to the level applied to other WTO Members on a volume of trade to be determined in such a way that the volume of trade multiplied by the increase of the tariff rates equals the value of the nullification or impairment caused by the violation."

invites the parties to exchange concerns before the investigation stage and collaborate during it. Accordingly, when the authorities of one party are checking whether imports from the other party are too cheap because of dumping or subsidies, a dialogue should take place between the parties.

Chapters 21 to 23 deal with Subsidies, Competition Policy and State Enterprises.

Chapter 21 on Subsidies essentially refers to the applicable WTO rules, and invites the parties to "express [their] concerns" to each other (Article 21.3.1) and cooperate in the ongoing and future efforts to create global rules on agricultural and fisheries subsidies (Article 21.4.1).

Chapter 22 on Competition policy contains a "recognition" of the importance of undistorted competition within the Free Trade Area, and a commitment to curb anti-competitive conduct by its parties (Article 22.2.2).

Chapter 23 sets common rules to identify State enterprises and monopolies and requires these entities to operate according to commercial considerations when they engage in commercial activies, and avoid discrimination against the entreprises by the other party (Article 23.5.1). These rules do not concern the exercise of governmental powers and the activities of procuring entities, which remain regulated by the Government Procurement Agreement of the WTO (Article 23.2.3). There is no carve-out from the rules of dispute settlement, therefore it should be possible to enforce Article 23 through the system of Chapter 33 on dispute settlement.

<u>Standards-related LPF</u>

Chapters 26 to 28 relate to certain regulatory standards that the parties commit to observe, in the field of sustainable development, environment and labour conditions.

Chapter 26 on Trade and Sustainable Development serves as an umbrella for the following two chapters and notes that "the rights and obligations under Chapters 27 and 28 are to be considered in the context of this Agreement" (Article 26.1.2). In most trade agreements, the language is typically the other way round: that economic provisions should be interpreted bearing in mind societal interests.

Chapter 26 contains no obligations. It institutes a Committee on Trade and Sustainable Development, to oversee implementation of Chapters 27 and 28.

Chapter 27 on Trade and Labour contains only a very tentative promise, with no binding force (Article 27.2) as follows—

> "Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party *shall seek to ensure* those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection".

It does not include the obligation to ensure a high level of protection, equivalent to that in Article 290 of the EU-Ukraine Association Agreement. This is in line with the language of CETA, EU-Korea and EU-Japan.

This provision falls short of a binding non-regression clause (let alone a promise to keep alignment). Article 27.3 requires the parties to ensure that their laws reflect their international obligations, most importantly under the Conventions of the International Labour Organization (ILO). Article 27.4, titled "Upholding levels of protection" is not a non-regression clause either. It provides an obligation to maintain and enforce the standards set in the law, but does not foreclose the possibility of amending the law, as follows—

> 2. "A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
> 3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment".

When one party believes that the other has breached the obligations in this Chapter (i.e., it has waived, or derogated from, its current labour legislation to attract investments and favour trade, or it has breached its international obligations under ILO treaties) a consultation process is established (Article 27.9) and a Panel of Experts (27.10) could hear the dispute. The Panel can issue recommendations that are not binding (27.10.12).

Chapter 28 on Trade and Environment is also closely modelled upon its CETA counterpart (Chapter 24).

It follows the same structure of Chapter 27. The parties recall the importance of environmental protection (Article 28.2) and their right to decide policies autonomously (Article 28.3). They confirm their commitment to observe existing international obligations (Article 28.4) and promise to apply their current laws (Article 28.5).

In case of disagreement, after consultations fail (Article 28.13), a Panel shall hear the dispute and issue non-binding recommendations (Article 28.14).
On both environmental and labour matters, the UK draft rules out the possibility to resort to the general dispute settlement procedure.

An overview of the respective positions on LPF is provided in tabular form below.[33]

[33] From https://www.ippr.org/files/2020-03/brexit-level-playing-field-march20.pdf.

Level playing field	EU position	UK position	Scope for compromise
Competition and state aid	Dynamic alignment with EU rules on state aid; and mirroring of EU rules on competition	Commitment to maintain effective competition laws, to notify each other of subsidies, and to consult on potentially harmful subsidies, but no alignment with EU rules	Low
Environment and climate change	Robust non-regression clause: commitment to not lower level of protection below level provided by minimum EU standards at end of transition period Possible equivalence clause: commitment to corresponding levels of protection over time	Non-regression clause: commitment to not lower level of protection provided by own standards to encourage trade or investment	Medium-high
Labour and social standards	Robust non-regression clause: commitment to not lower level of protection below level provided by minimum EU standards at end of transition period Possible equivalence clause: commitment to corresponding levels of protection over time	Non-regression clause: commitment to not lower level of protection provided by own standards to encourage trade or investment	Medium-high
Taxation	Commitment to good governance and curbing harmful tax measures, and alignment with specific EU legislation on taxation	Commitment to good governance but no alignment with EU rules	Medium

Level playing field	EU position	UK position	Scope for compromise
Competition and state aid	Enforcement by domestic authorities, including independent body; European Commission oversight for state aid For disputes about state aid, role for standard dispute resolution (arbitration and sanctions possible)	Enforcement of competition law through domestic procedures For disputes relating to competition policy or to consultation on subsidies, exemption from standard dispute resolution (no arbitration or sanctions possible)	Low
Environment and climate change	Enforcement by domestic authorities, including independent body For disputes about enforcement, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium-high
Labour and social standards	Enforcement by domestic authorities For disputes about enforcement, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium-high
Taxation	Enforcement measures unclear For disputes about alignment with EU tax rules, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium

Conclusion

The UK draft text, predictably, reflects the government's announcements that it would demand basic LPF provisions, in line with those seen in the EU agreements with Japan, Canada and Korea. Apart from the atypical expunction of the rules on government procurement, there is nothing novel in these rules.

The point remains that, judging from its negotiating position and draft text, the EU would probably consider these proposals unsatisfactory. The UK draft evinces a very limited commitment in the fields of state aids and sustainable development, and no binding process to ensure the effective application of these limited obligations. The

EU is on record requesting strong commitments on state aids, using EU law as a reference. The EU has also insisted on strong regulatory commitments regarding labour and environmental standards, supported by an enforcement mechanism that could authorise the imposition of sanctions or the raising of tariffs. The EU position, in short, is rather reminiscent of the rules of the EU-Ukraine agreement, an Association Agreement that takes into account the geographic relationship between the parties.[34] Like the UK, Ukraine is geographically close to the EU27. Unlike the UK, the Ukraine is in the midst of a process of accession to the EU.

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8 June 2020

[34] In terms of coverage, the EU-Ukraine AA does not warrant duty-free trade across the board, but appears wider than the other EU treaties discussed. Over time, Ukraine and the EU will eliminate respectively 99.1% and 98.1% of their respective duties *in trade value*. Under the EU-Japan treaty, EU abolished 99% of its tariff lines, Japan 97% of its. CETA prescribes the elimination of almost 99% of the tariff lines of the two parties. These numbers might be misleading, if the exceptions regard precisely sensitive products which counts disproportionately in terms of trade value.

Trade in Financial Services provisions in the UK draft agreement published

Why provisions on financial services are vital: the effect of losing passporting for the UK banking and financial sectors

EU member states have agreed to specific EU wide rules for financial services. In doing so, they provide a “passport” to their companies, that as a result can provide core banking services to customers across the entire EU. For companies based in EU member states, therefore, it is relatively easy to operate anywhere in the Union. For instance, banks can open a branch abroad (rather than establishing a separate subsidiary) and apply for the permission to provide services without much difficulty.[35]

Through the passporting system, providers authorised anywhere in the EU can sell services anywhere in the EU. Many UK banks and financial services firms take advantage of this scheme to trade outside their country of origin and to establish branches abroad. Many non-UK providers, conversely, use passporting to establish branches in London. These massive flows of trade in services fuel, in turn, other service sectors such as legal consultancy and data processing.

Non-EU banks and financial institutions cannot rely on “passporting.” Third country operators can do business in the EU only if the EU regards their home regulatory standards as satisfactory, and even then only with respect to a narrow range of services, which does not exhaust the services typically provided to customers. Moreover, the permission to provide services in one country will only work there and cannot authorise EU-wide operation. Non-EU providers must obtain a license in every country in which they wish to operate, and obtaining a license is not always possible. For example, the British Banking Association observe that—

> “Banks or financial services businesses from countries outside of the EU and the EEA cannot currently access the passporting regime. To do so they must either establish a regulated business inside the EU or alternatively they may apply for a license under the domestic licencing regime of each individual EU country in which any of them wishes to do business to provide services in that EU country only. Such licenses are not available in all EU countries, provide access only to a limited range of services and generally carry no rights to onward cross-border trade from the country of licensing”[36].

[35] For more information on passporting, see https://www.bba.org.uk/wp-content/uploads/2016/12/webversion-BQB-3-1.pdf.

[36] British Banking Association, ‘BBA Brexit Quick Brief No.3 – What is ‘passporting’ and why does it matter?, p.4

Mutual Recognition: Equivalence versus divergence

Therefore, to get access to the EU market, non-EU providers must rely on a system of equivalence. The EU conducts a test of "equivalence" of the modes of regulations and supervisions of other countries, depending on which it will authorise (or not) the operations of providers from that country.[37] These unilateral decisions can always be withdrawn. There are around 40 equivalence decisions to make in this sector (referring to different financial products, operations, concerns). The UK has also established a parallel system to make equivalence determinations in the future.[38]

The UK in the past has made demands that it should benefit from a privileged "equivalence" status, in light of its long-standing record of compliance with EU rules. However, EU authorities have noted the UK's assertions of its rights to diverge from EU rules after Brexit, a position that has led them to exercise caution in the granting of expedited or automatic equivalence.

In its negotiations guidelines, the EU expressly envisaged the application to the UK of the default system of unilateral assessment of equivalence, meaning that the "UK will be treated like other third countries",[39] with no passporting rights and no right to participate in the competent EU agencies. These rights, the Commission noted, marked the difference between "treatment inside [the] Single market eco-system and third country treatment".[40]

On 27 February 2020, UK Chancellor Rishi Sunak wrote to the Commission, seeking to provide assurances that, on the UK side, the equivalence assessment could be completed by the end of June 2020, and inviting the EU to move in a similarly expedited way—

> "At the end of the transition period, the UK and EU will start from a position of regulatory alignment. The UK and the EU should be able to conclude equivalence assessments swiftly and I see no reason why we cannot deliver comprehensive positive findings to the June timeline".[41]

In response, the Commission's executive vice-president Dombrovskis simply stated that the EU, in mid-March, was "mapping the equivalence areas internally" and that

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https://www.bba.org.uk/wp-content/uploads/2016/12/webversion-BQB-3-1.pdf?source=post_page---------------------------

[37] For more information on the equivalence criteria, see ESMA Consultation Paper, Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR, 31 January 2020, ESMA35-43-2131.

[38] The Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020, Section 11.

[39] https://ec.europa.eu/commission/sites/beta-political/files/seminar-20200113-fta_en_0.pdf

[40] Ibid.

[41] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869535/Chancellor_letter_to_Dombrovskis.pdf

"equivalence assessment will have to be forward-looking, taking into account of overall developments, including any divergences of UK rules from EU rules".[42]

The UK has also attempted to propose a system of "structured withdrawal" of equivalence decisions. In other words, the UK wants to secure a process whereby the EU, should it want to withdraw a certification previously granted to UK operators, would be subject to a predictable procedure, involving consultations. A similar process is provided in the EU-Japan treaty.[43]

Besides the EU's precaution against future regulatory divergence, it is plausible to assume that the EU's position also reveals a plan to divert business away from the UK, or at least threaten to do so to increase its negotiating leverage on other matters. For example, it has been observed that—

> "The EU position that the UK should simply rely on existing equivalence regimes is based on a mixture of its unease at the prospect of having little influence over a large financial centre on which it would continue to rely, together with the opportunity to lure financial services away from the City. Clearly, some member states, France being the prime example, sense that offering nothing beyond the current equivalence regime may aid their efforts to gain business while protecting their domestic financial sectors".[44]

It has also been observed that the burdensome process of obtaining the EU's equivalence certification could play a role in some businesses' strategic planning. For example the House of Commons European Scrutiny Committee noted—

> "[the EU could grant equivalence] in a piecemeal way, withholding equivalence for some financial services activity in a bid to force gradual relocation of EU-oriented operations from the UK to the remaining Member States".[45]

Market Access: Freedom of services without freedom of movement

Another potential issue of disagreement is the UK Government's approach to trade in services in a scenario of diminished freedom of movement. In the Single Market, providers and consumers are free to travel and establish their business abroad: the

[42] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200313-letter-evp-dombrovskis-uk-chancellor-sunak.pdf

[43] Annex 8-A.12: "Each Party may rescind at any time its decision to rely on the regulatory and supervisory framework of the other Party and revert to the application and enforcement of its own rules, if rules and supervision of the other Party are no longer equivalent in outcome, if the other Party fails to enforce its rules effectively or if there is insufficient cooperation of the other Party in the supervision of financial institutions. The Parties shall consult with each other in an appropriate manner prior to reverting to the application and enforcement of their own rules."

[44] https://www.linklaters.com/en/insights/blogs/tradelinks/financial-services-post-brexit-equivalence-does-not-mean-equal-to

[45] Communication from the Commission: Equivalence in the area of financial services; Council and COM number: 11595/19, COM(19) 349; Department: HM Treasury; ESC number: 40782, https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/229-i/22912.htm, 10.5.

freedom to provide and consume services and the freedom of movement of EU citizens and firms support each other.

As the UK seeks to end freedom of movement of persons and workers from the EU, its requests to maintain the smooth operation of UK financial services providers abroad could be objected to by the EU as an attempt to isolate and demand only the more convenient aspect of the freedom of movement of persons and businesses. The EU draft text reflects this general objection, which was expressly included among its general negotiating guidelines—

> "Integrity of the Single Market and the Customs Union; indivisibility of the four freedoms; no "cherry picking";
>
> UK's status as a third country: a non-member of the EU that does not live up to the same obligations as a member and cannot have the same rights and enjoy the same benefits as a member".[46]

Conversely, the UK draft text proposes specific commitments (on the freedom of movement of professions, the mutual recognition of their professional qualifications, the freedom of purchasing foreign services) that would alleviate the disruption of leaving the Single Market.

The EU draft text

In the EU draft text published on 18 March 2020, trade in financial services is regulated specifically as a sub-section of the chapter on regulatory framework, within Title VI on Services and Investment. It is four pages long, as most of the applicable rules are the general ones applicable to all services.[47] This part only restates the right to take prudential measures[48] and other exceptional measures[49] limiting financial services, and promises that foreign providers already established will be able to provide new services at the same conditions imposed on local providers.[50]

In essence, the EU draft text does not create a specifically *favourable* regime for financial services, nor a specific preferential treatment for the UK. On services in general, the EU text does not rely on a Schedule of the sectors covered, like the WTO Agreement on Trade in Services. Instead, it lists the sectors that are not covered, adopting the negative-list approach also used in CETA.[51] In the EU proposal, all non-excluded sectors and all modes of provisions are covered. Most economic sectors are included, including professional and business services, telecommunications services, courier and postal services, distribution services, environmental services, financial services, transport services. For all these sectors, the parties must observe

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[46] https://ec.europa.eu/commission/sites/beta-political/files/seminar_20200110_-_data_protection_adequacy_-_financial_services_en.pdf, slide 20.

[47] SERVIN.5.37.1.

[48] SERVIN.5.39.

[49] SERVIN.5.40.

[50] SERVIN.5.42.

[51] SERVIN.1.1.5.

the liberalisation commitment of granting unrestricted market access and avoid discrimination on grounds of nationality.

Domestic regulations, however, continue to apply in the absence of common rules shared by the parties to the trade agreement. Regulatory conditions (like the equivalence certification) are the main obstacle to free trade in financial services, and the crux of the negotiating impasse.

The UK draft text

The UK draft treaty published on 18 May 2020 contains an entire chapter dedicated to trade in financial services (Chapter 17).

The UK text makes ambitious demands relating both to market access to the EU and the conditions for mutual recognition. It also establishes a special bilateral Financial Services Committee to supervise the conduct of the parties. The EU draft treaty contains no such body, and defers all cooperation matters to the default procedures and bodies; that is, it grants no special treatment to the UK compared to other third countries.

Market access

On the access of UK services and firms to the EU market, the UK text requires each party to allow the provision of services that do not require the physical presence of the foreign supplier on that party's territory.

This means that the cross-border provision of financial services shall always be permitted (e.g., the provision of financial advice by a UK consulting firm to an Italian client, which does not require the UK provider to open an office in Italy). Namely, each party—

> "shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of the other Party located in the territory of that Party" without the need for each country to "permit such suppliers to do business or solicit in its territory".[52]

Conversely, Chapter 11 (on temporary movement of persons for business) grants the right for individuals to visit the territory of the other in pursuit of financial services products.[53] For instance, an Italian client should be allowed to travel to London to purchase the services of an English consultant.

With respect to new financial services, the UK text is more generous than the EU one, as it removes the condition that foreign service suppliers entitled to provide a new service be already established in the foreign jurisdiction.[54]

[52] Article 17.3.2.

[53] Article 11.6.3.

[54] Article 17.6.

The UK text also includes a provision that seeks to spare the "performance of back-office functions" carried out in one party from the regulation of the other party, as follows—

> "While a Party may require financial service suppliers to ensure compliance with any domestic requirements applicable to those functions, they recognise the importance of avoiding the imposition of arbitrary requirements on the performance of those functions".[55]

This rule seeks to facilitate the branching out of UK suppliers, which might retain parts of their offices in the UK or elsewhere, while assisting the operation of their EU branches, subsidiaries, affiliates or local suppliers. For instance, to avoid the equivalence obstacle race, a UK supplier might simply decide to migrate and establish itself as a Germany-based company, to enjoy passporting rights. Probably, that supplier would wish to maintain its London staff for back-office assistance, and the UK would like to protect City jobs. This provision requests the EU to refrain from restricting that UK-based back-office service (including through minimum capital or equivalence requirements).

Regulatory cooperation

The draft text does not mention expressly the demand for automatic or enhanced equivalence for UK suppliers. In this respect, it seems that the UK has definitely given up the demand to obtain a preferential access to the equivalence regime. Rather, it seems to focus on the removal of uncertainty in the management of equivalence assessment procedures.

The UK draft establishes a new Financial Services Committee,[56] which should supervise and facilitate the cooperation between the UK and the EU, limit the use of exceptions and provide a forum to discuss equivalence decisions.

In addition, the UK proposed that the parties shall maintain a dialogue aimed at establishing close regulatory cooperation. This cooperation would contribute to achieving, among other things, "(c) transparency and appropriate consultation in *the process of adoption, suspension and withdrawal of equivalence decisions*; and (d) consultation and information exchange on regulatory initiatives and other issues of mutual interest."[57]

In so doing the UK, while accepting that equivalence recognition would be the framework within which the parties' suppliers would need to operate, tried to introduce a process of "structured" concession, suspension and withdrawal of equivalence decisions.

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[55] Article 17.16.

[56] Article 17.18.

[57] Article 17.19.

Conclusion

The gulf between the EU and UK positions is wide, but it is narrower than before. There are no longer talks of introducing a co-decision process of equivalence or securing fast-track equivalence treatment.

Ultimately, the EU insists that in all respects financial services are like any other kind of services, and the UK is now a third country. There might be margin for obtaining more from the EU during the negotiations. In particular, a system of cooperation and consultation on regulatory matters, inspired by the EU-Japan agreement, seems possible.

The UK, on the other hand, tried to secure market access for the cross-border sale of services, and for the consumption of services abroad. On regulatory matters, it withdrew more ambitious demands and tried to build a structure of governance to limit the risk related to the unilateral management of equivalence decisions by the EU.

In summary—

> "The EU intends to retain the existing architecture and restrictions of financial services, and contends that any market access should be granted by either side unilaterally in its own interests. The UK proposes establishing a unique legal and governance arrangement and allowing mutual free market access under that arrangement".[58]

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8 June 2020

[58] https://www.globalfinregblog.com/2020/05/uk-government-publishes-draft-uk-eu-free-trade-agreement-with-financial-services-chapter/

Fisheries – UK Government Draft Framework Agreement

WHAT DOES THE DRAFT AGREEMENT DO?

The UK Government's Draft Framework Agreement for Fisheries sets out a proposed fisheries agreement between the EU and the UK. After the transition period ends on 31 December 2020, the UK will no longer be party to the Common Fisheries Policy (CFP), and new agreements on fisheries management will need to be reached with the EU and with other coastal states.

The Draft Fisheries Framework Agreement (DFFA) largely reflects the UK Government's original negotiating priorities set out in February 2020. It is published alongside, but separate to, a Draft UK-EU Comprehensive Free Trade Agreement (CFTA). Publishing a DFFA as a supplementary to a CFTA is in line with the UK Government's original position. Conversely, the EU view is that fisheries should form part of an overall economic agreement. The Draft Agreement proposed by the EU on 18 March 2020 includes fisheries as part of this agreement.

The EU's Draft Agreement looks different to the DFFA in some significant ways, and it also looks different to the original text of EU fisheries agreements with other coastal states, namely Norway and the Faroe Islands, which have some similarities with the DFFA. These similarities and differences are discussed below. However, it is important to remember that the original agreements between the EU and Norway and the EU and the Faroe Islands were published several decades ago, and working practice, examples of which is mentioned below, may go beyond what was set out in the original agreement.

In broad terms, the DFFA proposes that the current arrangements on determining fishing opportunities will end and that "in line with the UK's commitment to best available science, future fishing opportunities should be based on the principle of zonal attachment (see box 1).

Zonal Attachment
Zonal attachment refers to the idea that total allowable catch should be allocated based on the temporal and spatial distribution of stocks, rather than historical catches. There is no single method for determining zonal attachment, though the UK Government's fisheries white paper, Sustainable Fisheries for Future Generations (July 2018) has set out preliminary research for how this might be calculated.

The text of the DFFA outlines the basis for future cooperation on fisheries management between the UK and the EU. It proposes that—

- **Negotiations to determine TAC and access are carried out annually.** Under the CFP, negotiations on Total Allowable Catches (TAC) take place annually at the EU December Council. The DFFA proposes that the annual negotiations take place at the same time as other negotiations which affect both parties. A SPICe blog series explores this current process in more detail.

- **The division of fishing opportunities between parties is also determined annually based on the principle of zonal attachment.** This is in contrast to how opportunities are allocated under the CFP. Under the CFP, once TAC is agreed at the December Council, quota is allocated based on the principle of relative stability, where member states' share of the TAC is fixed based on historic landings.

- **Fishing opportunities could be changed as part of annual negotiations** based on changes in scientific evidence, unforeseen circumstances, or to correct errors.

In addition, it sets out new working arrangements on fisheries between the UK and the EU, including—

- **Reciprocal licence requirements** to be able to fish in each other's waters, and outlines the responsibility of the flag state to ensure that vessels comply with rules in other countries' waters;

- **Arrangements for independent fisheries management**, including a responsibility to notify the other party of any new fisheries management measure';

- **Creation of a new Fisheries Cooperation Forum** - "for discussion and co-operation in relation to sustainable fisheries management, including monitoring, control and enforcement." The forum is proposed to be up and running by 1 January 2021, and could be open to other coastal states on agreement of the parties;

- **Data sharing**, of data from vessel management systems (VMS) for the purpose of preventing illegal, unregulated and unreported (IUU) fishing, monitoring and enforcement, managing fisheries sustainably, developing marine and fisheries policies, etc;

- **Designation of Ports** in line with the North-East Atlantic Fisheries Commission Scheme of Control and Enforcement (Article 21) and other relevant UK and EU legislation, for the purpose of preventing illegal, unregulated and unreported fishing;

- **Dispute resolution:** Parties agree to consult with each other on how the agreement should be implemented, and to resolve any disputes;

- **Suspension of the agreement:** The agreement can be suspended if Parties disagree on its implementation or if one party fails to comply with the agreement. Notification in writing from the concerned party starts a three-month process where Parties must endeavour to find an amicable settlement; and

- **Amendments to the agreement** can be consulted on and agreed between the Parties.

HOW DOES THIS COMPARE TO OTHER EU FISHERIES AGREEMENTS WITH INDEPENDENT COASTAL STATES?

The UK Government has emphasised that it is seeking a fisheries agreement like that between other independent coastal states and the EU, notably Norway and the Faroe Islands. In the DFFA, the UK Government makes reference to agreements with both countries.

EU-Norway Agreement

The EU-Norway agreement, established in 1980, does take a similar shape to the one put forward by the UK Government. It provides for:

- Annual negotiations on TAC, quota allocations, and on access. Each party has a right to determine how many vessels of the other party will be allowed to fish in its waters, and how TAC is granted to those vessels.

- Arrangements for fishing opportunities to be adjusted if necessary to respond to unforeseen circumstances.

- Each party to establish measures for conservation and rational management of fisheries.

- The need for consultation in the event of a disagreement or failure to comply with the agreement, and provisions for terminating the agreement.

- Licensing by each party for the other party's vessels.

- The need to comply with parties' respective regulations.

- Cooperation between the two parties on management and conservation of living resources, including scientific research with regard to shared stocks.

However, there are some specific differences which are considered below.

Annual negotiations on quota allocations

The EU-Norway agreement does not explicitly mention the principle of zonal attachment as the basis for allocating fishing opportunities to each party. Rather, the basis within the EU-Norway Agreement is reaching a "mutually satisfactory balance in

their reciprocal fisheries relations", subject to the conditions in the Annex. A comparison of the text of both agreements is provided in Table 1.

Table 1: Comparison of quota agreements

EU-Norway Agreement	UK-EU Draft Fisheries Framework Agreement
Article 2 1. Each Party shall, as appropriate, determine annually for its area of fisheries jurisdiction, subject to adjustment when necessary to meet unforeseen circumstances, and on the basis of the need for rational management of the living resources: a. the total allowable catch for individual stocks or complexes of stocks, taking into account the best scientific evidence available to it, the interdependence of stocks, the work of appropriate international organizations and other relevant factors ; b. after appropriate consultations, allotments for fishing vessels of the other Party in accordance with the objective of establishing a mutually satisfactory balance in their reciprocal fisheries relations, and the conditions prescribed in the Annex	**Article 1** 1. The Parties shall negotiate annually to seek to determine the following matters for the next year: a. fishing opportunities, taking into account the best scientific evidence available to the Parties, the ICES-recommended TAC, the interdependence of stocks, the work of appropriate international organisations, socio-economic aspects and other relevant factors; b. the amount of fishing opportunities mentioned in sub-paragraph (a) above that will be available to each Party, based on the principle of zonal attachment; and c. any access for each Party's vessels to relevant waters of the other Party for fishing.

The Annex of the agreement stipulates that—

> "1. In determining the allotments for fishing under Article 2 (1) (b) of the Agreement, the Parties shall have as their objective the establishment of a mutually satisfactory balance in their reciprocal fisheries relations. Subject to conservation requirements, a mutually satisfactory balance should be based on Norwegian fishing in the area of fisheries jurisdiction of the Community in recent years. The Parties recognize that this objective will require corresponding changes in Community fishing activity in Norwegian waters.

> 2. Each Party will take into account the character and volume of the other Party's fishing in its area of fisheries jurisdiction, bearing in mind habitual catches, fishing patterns and other relevant factors. "

As such, an element of historical fishing patterns was included as part of reaching a "mutually satisfactory balance" in the original agreement. In practice more recently, the principle of zonal attachment has played a part in determining fishing opportunities between the EU and Norway. However, in relation to EU-UK fisheries relations Barnes *et al*. note in a blog for the London School of Economics that—

> "Zonal attachment is used in the EU Norway agreement, but would need to be developed for a much wider range of species in any EU-UK agreement. It is also highly vulnerable to changes in stock distribution from factors like climate change – something that has already effected the distribution of key species like cod. What establishing a new principle of zonal attachment would mean for devolved administrations seeking their 'fair share' must also be handled with care."

Agreeing a methodology for how zonal attachment should be calculated will also be complex as it may also have to take into account different stages of the life cycles of stocks of interest to each party. A recent article by the Institute for Government explains this problem—

> "[zonal attachment] rarely gives a precise answer to the question of what fish belong where – which is perhaps why the EU and Norway, which have claimed to apply the zonal attachment principle for four decades, have never disclosed the exact methodology behind their calculations. Imagine a herring which is spawned in Norwegian waters, spends some time off the Dutch coast, and then is eventually caught in the UK's EEZ. Which zone should it be counted under?"

In addition, provisions on annual negotiations and quota allocations also differ between the EU Draft Agreement on the future relationship between the UK and the EU, and the DFFA. Prof James Harrison notes in a contribution to the Culture, Tourism, Europe and External Affairs Committee's enquiry on the future relationship negotiations that, while both texts recognise the role of the International Council for the Exploration of the Sea (ICES) in setting evidence-based TAC/quota—

> "Where the two texts differ is on the details of the process and the ultimate objectives [for setting TAC/quota for shared stocks]. In this respect, the EU's draft text would seem to be more sophisticated, as it embeds the objective of MSY and the precautionary approach into the objectives of the fisheries agreement and it also calls for the development of long-term strategies for the sustainable conservation and management of shared stocks. Whilst the text does not commit either party to the adoption of such strategies, it nevertheless emphasises the need for a long-term approach to fisheries conservation and management which is to be welcomed and mirrors the approach taken by the EU with other coastal states in the North-East Atlantic. The EU text also sets deadlines for decisions to be made and default rules if no agreement is forthcoming."

While such long-term strategies are not included in the EU-Norway agreement as it was drafted, Prof Harrison points to the Agreed Record of Fisheries Consultations Between Norway and the European Union for 2020, which refers to the development of such joint EU-Norway long-term management strategies.

Fisheries management measures

Where both the EU-Norway agreement and the DFFA state the right of each party to take measures to ensure fisheries management, the EU-Norway agreement specifies that any measure should *"take into account the need not to jeopardise the possibilities for fishing allowed to fishing vessels of the other Party",* while the UK-EU DFFA requires that each part "shall notify" the other of any changes that would affect the vessels of the other party.

Similarly, the DFFA differs from the EU Draft Agreement on the future relationship between the UK and the EU.

While the EU draft agreement also requires parties to notify the other of any changes, the approach taken in the EU-Norway agreement is echoed in the EU draft agreement where the EU proposes that any changes to technical measures must be "proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1" The EU also propose consultation in the event that "the notified Party considers that these draft measures are liable to adversely affect its fishing vessels". This goes beyond the UK's proposal of simply notifying the other party, as discussed earlier. Professor James Harrison expands on these differences in the contribution to the Culture, Tourism, Europe and External Affairs Committee's enquiry referred to above.

EU-Faroes Agreement

The EU-Faroes agreement is not dissimilar to the EU-Norway agreement, but differs in how quota allocations are agreed. Similar to the EU-Norway agreement, it strives to allow a "satisfactory balance" between the parties' fishing possibilities, however the agreement stipulates that—

> "In determining these fishing possibilities, each Party shall take into account—
>
> (i) the habitual catches of both Parties,
>
> (ii) the need to minimize difficulties for both Parties in the case where fishing possibilities would be reduced,
>
> (iii) all other relevant factors.[18]"

The EU fisheries agreements with both Norway and the Faroe Islands are explored further in a SPICe briefing on the future relationship between the UK and EU on fisheries.

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SPICe Research, 8 June 2020