



HM Government

TECHNICAL NOTE: OTHER SEPARATION ISSUES - PHASE 2

Background

1. In December 2017, the UK Government confirmed the joint UK and EU desire to establish a deep and special future partnership. Both parties also agreed, as part of the Joint Report published in December¹, that there were a number of areas relating to the UK's separation from the EU where further discussion would be required to reach agreement. These issues were defined as "Other Separation Issues" and are distinct from citizens' rights, Northern Ireland and the financial settlement. This technical note describes the UK Government's approach to "Other Separation Issues".
2. The UK has been clear since the start of the negotiations that in the majority of cases its future partnership will provide for a smooth transition to a comprehensive future economic and security partnership for business and citizens and the effect of these wind down provisions will be minimal. It has committed to engage in these negotiations in good faith with the aim of moving swiftly to the substantive discussions for its future relationship.

UK approach

3. The UK and the EU published a series of papers in 2017 to outline respective positions for negotiations on "Other Separation Issues". The issues included:
 - a. nuclear materials and safeguard equipment (Euratom);
 - b. ongoing Union judicial proceedings;
 - c. ongoing Union administrative proceedings;
 - d. functioning of the Union's institutions, agencies and bodies;
 - e. goods placed on the market under Union law before withdrawal;
 - f. ongoing police and judicial cooperation in criminal matters;
 - g. ongoing judicial cooperation in civil and commercial matters;
 - h. ongoing public procurement procedures;
 - i. customs, VAT and excise related matters for an orderly withdrawal of the UK from the Union;
 - j. intellectual property rights; and
 - k. use of data and protection of information obtained or processed before withdrawal.
4. While good progress was made in identifying areas of agreement and disagreement across the "Other Separation Issues", the UK and the EU agreed in December to return to these issues at a later date. The UK and the EU now need to reach

¹ Joint Report from the Negotiators of the European Union and the United Kingdom Government, December 2017

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf

agreement on “Other Separation Issues” as part of the UK’s Withdrawal Agreement with the EU.

5. With the exception of a small number of separation issues (for example cases pending before the Court of Justice of the European Union (CJEU)), the UK’s view is that the future economic and security partnership the UK and the EU agree will supersede the individual positions the UK and the EU reach for “Other Separation Issues”. For example, the arrangements the UK and the EU put in place as part of the future partnership for goods will determine whether any wind down procedures are required for goods that are already on the market. The UK thinks it unlikely that they will be required. The UK therefore envisages putting in place the substantive arrangements for a smooth transition to a new legal order at the point of agreeing the future relationship, and the effect of these separation wind down provisions will be minimal.
6. The UK acknowledges the EU’s desire to set out provisional wind down arrangements for the UK’s departure from the EU. However, the UK believes that those arrangements are contingent on the future relationship being agreed and is therefore only prepared to engage substantively on these technical issues on the basis that any discussion on separation issues is without prejudice to the future relationship, and does not detract from the negotiations on the future relationship. More detail on the UK’s approach for each of the “Other Separation Issues” is included as an Annex to this note.

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Nuclear materials and safeguard equipment (Euratom)

Background

1. In the December Joint Report, both parties agreed principles for addressing the key separation issues relating to the UK's withdrawal from Euratom. This includes agreement that the UK will be responsible for international nuclear safeguards in the UK and is committed to a future regime that provides coverage and effectiveness equivalent to existing Euratom arrangements. Both parties have also agreed the principles of ownership for special fissile material (save for material held in the UK by EU entities) and responsibility for spent fuel and radioactive waste.
2. As the UK position paper [Nuclear materials and safeguards issues](#) of 13 July 2017 and subsequently the Written Ministerial Statement of 11 January 2018 set out, the UK's ambition is to maintain a close and effective relationship with the Euratom Community and the rest of the world that harnesses the UK's and the Euratom Community's expertise and maximises shared interests.

UK approach

3. The UK's objective is to ensure that its departure from the EU and Euratom does not prohibit it from building on joint successes. It is in the interests of both the EU and the UK that its relationship should continue to be as close as possible.
4. Agreement has already been reached on most of the Euratom separation issues. The UK expects to be able to reach agreement on the few remaining issues. This will cover the rights of the Euratom Community whereby the Community could retain some limited rights over material owned by EU entities and held in the UK on the date of withdrawal; the transfer of ownership of Euratom safeguards equipment to the UK; and reciprocity in relation to responsibility for radioactive waste whereby the UK and EU both reaffirm their commitment to meeting their existing international obligations.

Ongoing Union judicial proceedings

Background

5. In the December Joint Report, both parties agreed that the CJEU should remain competent for UK judicial procedures registered at the CJEU on the date of withdrawal, and that those procedures should continue through to a binding judgment.
6. This update is further to the UK position published on 13 July 2017 [Ongoing Union judicial and administrative proceedings - position paper](#).

UK approach

7. The UK's objective is to secure an agreement that allows for pending cases to reach completion in a smooth and orderly way, in order to not adversely affect those involved.
8. The UK expects to be able to reach agreement on the few remaining issues during the next round of technical discussions, having made good progress during the previous phase. In particular, the UK and the EU will need to discuss the role of the UK at the CJEU in the period during which pending UK cases are being heard, in order to agree in which cases the UK can intervene, and the rights of representation for UK lawyers at the CJEU. The UK will seek to ensure that it can continue to be involved in cases before the Court which may have a read across to UK cases, and to ensure that there is continuity and certainty for parties represented by UK lawyers.

Ongoing Union administrative procedures

Background

9. In the December Joint Report, both parties deepened their understanding of the respective positions in relation to ongoing administrative procedures, and explored some areas, such as competition, state aid and examinations of the Community Plant Variety Office.
10. This update is further to the UK position published on 13 July 2017 [Ongoing Union judicial and administrative proceedings - position paper](#).

UK approach

11. At the time of withdrawal, there will be a number of administrative procedures being undertaken by institutions, offices and agencies of the Union which concern the UK or UK natural or legal persons. The UK's objective is to ensure there is clarity as to the status of these administrative procedures, in order to ensure certainty for those involved in or affected by them.
12. There are many different categories of administrative procedures, and different administrative procedures will follow different processes. The UK has made clear that a single approach is unlikely to be appropriate or desirable.

Functioning of the Union's institutions, agencies and bodies

Background

13. In the December Joint Report, both parties agreed that an arrangement which closely mirrors existing Union privileges and immunities should remain applicable to activities that took place before withdrawal and as regards new activities foreseen in the Withdrawal Agreement. Both parties also agreed to continue to ensure compliance with obligations of professional secrecy and that classified information and other documents obtained by both sides whilst the UK was a Member State should retain the same level of protection as before withdrawal.
14. This update is further to the UK position on [Privileges and Immunities](#) published on 13 July 2017, and on [Confidentiality and Access to Documents](#) published on 21 August 2017.

UK approach

15. The UK and the EU have completed substantive discussions in this strand and reached agreement on the core issues. The UK expects to build on this progress during the next round of technical discussions, including resolving the final outstanding issue related to the lifting of EU immunities.

Goods placed on the market under Union law before withdrawal

Background

16. In the December Joint Report, both parties agreed the need to provide legal certainty and minimise disruption to business and consumers. Both parties have agreed the principles that goods placed on the UK and the EU markets under Union law before withdrawal may freely circulate on the markets of the UK and the EU with no need for product modifications or re-labelling; be put into service where provided in Union law; and that the goods concerned should be subject to continued oversight. Through detailed technical discussions the UK and the EU have reached a shared understanding of issues that will need to be resolved before an agreement can be concluded in this area.
17. As set out in the [*Continuity in the availability of goods for the EU and the UK - position paper*](#) of 21 August 2017, the UK aims to secure a future relationship that continues to facilitate its deeply integrated trade in goods, including through maintaining zero tariffs and minimising non-tariff barriers. The UK's continued engagement with the approach to the goods on the market discussions, set out here, is without prejudice to the UK's ambition for the future relationship. The UK anticipates that in the majority of cases the end-state arrangements will provide for a smooth transition to a comprehensive future economic partnership and the effect of these wind down provisions will be minimal. The nature of this future relationship will ultimately determine whether any wind down provisions are required for goods on the market at the withdrawal date.

UK approach

18. In concluding the agreement in relation to goods placed on the UK and the EU markets prior to exit, the UK's objective is to minimise disruption to business and consumers, and to facilitate cooperation that better allows the UK and the EU market surveillance and enforcement authorities to take action with respect to unsafe products.
19. As part of this agreement, the UK remains clear that compliance activity carried out in the UK and the EU prior to the withdrawal date under Union law - whether or not in relation to goods already placed on the market - should be recognised as valid by the EU and UK after exit to further minimise disruption to the availability of goods after the withdrawal date. This includes, but is not limited to, batch inspection of medicines, type approval of vehicles and compliance activities that assure the safety of food products. The EU's mutual recognition agreements with Switzerland and the United States of America establish provisions that recognise the validity of certificates on the termination of the agreement. The UK is seeking to establish comparable arrangements through the Withdrawal Agreement that build on these precedents, and the UK is committed to exploring with the EU how to implement this in a mutually beneficial way.

Ongoing police and judicial cooperation in criminal matters

Background

20. In the December Joint Report, both parties agreed that there is a clear need to provide legal certainty and clarity in criminal matters. The UK and the EU broadly agree on the principle that all structured and formalised cooperation procedures ongoing on the day of withdrawal and which have passed a certain threshold (to be defined) should be completed under Union law.
21. As set out in the [Security, law enforcement and criminal justice - a future partnership paper](#) of 18 September 2017, the UK has ambitions for a deep and special future partnership in this area. Therefore, the approach set out here is without prejudice to the UK's ambition for the future relationship, and the UK anticipates that many of these provisions will be superseded by an agreement on the future relationship.

UK approach

22. The UK's objective is to provide for the orderly completion of ongoing cooperation in the area of police and judicial cooperation in criminal matters, not only to protect the safety and security of citizens in both the UK and the EU, but also to provide legal certainty for individuals and for law enforcement and judicial authorities.
23. It is important that there is a clear process for cases already underway in this area at the point of exit. The UK will continue to press for certainty in this area as a means of minimising operational disruption for individuals, and for law enforcement and judicial bodies.

Ongoing judicial cooperation in civil and commercial matters

Background

24. In the December Joint Report, both parties agreed there is a need to provide legal certainty and clarity. The UK and the EU have had productive discussions thus far and have seen a good deal of commonality of approach to wind down cooperation on civil judicial cooperation in the event that these principles are needed. The UK and the EU have a shared understanding of the approach to wind down cooperation on applicable law in contractual and non-contractual matters, and judicial cooperation procedures and requests for information.
25. As set out in [Providing a crossborder civil judicial cooperation framework - a future partnership paper](#) published on 22 August 2017, the UK has ambitions for a deep and special future partnership in this area. The approach set out here is without prejudice to the UK's ambition for the future relationship, and the UK remains of the view that in the majority of cases the end-state arrangements will provide for a smooth transition to a comprehensive future economic partnership for business and citizens and the effect of these wind down provisions will be minimal.

UK approach

26. The UK position on separation issues was set out in Annex A to the future partnership paper of 22 August 2017. In the interests of providing legal certainty and ensuring that litigants' legitimate expectations when arranging their affairs are respected, the UK is seeking to agree a shared approach on the few remaining issues during the next round of technical discussions.
27. The UK expects to be able to reach agreement on the right approach to the recognition and enforcement of judgments, the way in which existing choice of court clauses are dealt, and ongoing judicial cooperation procedures at the point of exit, as well as a limited number of outstanding secondary issues.

Ongoing public procurement procedures

Background

28. The UK's priority is to ensure that public procurement continues to function as smoothly as possible, avoiding disruption to public procurement markets for the benefit of suppliers and procurers.
29. In September 2017, the EU published a paper on [Ongoing public procurement procedures](#), which suggests that ongoing UK and EU public procurements on the date of withdrawal should be governed by Union law until their completion, and in accordance with the principle of non-discrimination. In practical terms ongoing procurement procedures should continue to be carried out under the relevant provisions of national law applicable at the moment of launching the procedure in question, in accordance with Union law governing public procurement procedures.
30. The UK aims for an ambitious future relationship on public procurement, and therefore the approach set out here is without prejudice to the UK's aims for the future relationship.

UK approach

31. The UK's objective is to ensure that the public procurement regime operates appropriately once the UK leaves the EU. This will give legal certainty and continuity to businesses, contracting authorities and employees, on day one of EU exit.
32. The UK broadly agrees with the EU's position. The UK will be seeking further reassurances about the ability of UK companies to bid into EU-level procurement exercises organised by the EU institutions before the date of withdrawal, and to be treated equally, without discrimination. The UK also believes that the EU's position should be extended to cover ongoing procurement contracts with both the EU Member States and the EU institutions.
33. In addition, the UK and the EU will need to reach a common understanding on the protection of confidential information of UK and EU suppliers as well as in matters relating to defence and security. This will include the handling of existing exclusions in the defence and security field that are relevant to ongoing joint procurements at the point of withdrawal.

Customs, VAT and excise related matters for an orderly withdrawal of the UK from the Union

Background

34. At present, the customs treatment of goods as they enter and leave the UK is governed by the EU's Union Customs Code; and VAT and excise rules are governed by VAT and excise Directives and Regulations. Therefore, as the UK leaves the EU, issues around customs, VAT and excise arise in relation to both separation and the future economic partnership.
35. In the EU position paper, '[Customs related matters needed for an orderly withdrawal of the UK from the Union](#)', published in September 2017, the EU set out seven general principles that it believes should be incorporated within the Withdrawal Agreement.
36. The UK's approach on these issues is without prejudice to its ambition for the future relationship, and the UK anticipates that many of these provisions will be superseded by an agreement on the future relationship. The UK's overarching aspirations for future customs arrangements are fully outlined in the '[Future customs arrangements: a future partnership paper](#)' of 15 August 2017.

UK approach

37. The UK agrees with the broad principle put forward in the EU's paper that movements of goods which commence before the UK's withdrawal from the EU Customs Union should be allowed to complete their movement under the rules which were in place at the start of their movement. The UK looks forward to discussing in more detail with the EU how this principle will be applied practically after the UK's withdrawal so that the requirements applying to traders and customs officials at the border are clear.
38. The UK and the EU agree that ongoing administrative cooperation, together with exchange of information that started before withdrawal, should be completed under the current EU rules on a reciprocal basis. New administrative cooperation launched after the date of withdrawal should be discussed as part of the framework for the future economic partnership. The payment of customs debt to the EU should be considered alongside negotiations on the wider financial settlement.

Intellectual property rights

Background

39. Intellectual property rights underpin both the UK economy and those of the EU Member States, allowing individuals and businesses to protect brands, innovative products, creative works and cultural heritage. The UK is recognised as being one of the best countries in the world in which to protect and enforce intellectual property rights and that will not change.
40. The EU position, as set out in its paper [Intellectual property rights \(including geographical indications\)](#), published on 21 September 2017 is that the protection of certain EU and EU-derived intellectual property rights (including geographical indications) should continue in the UK and the EU after exit.
41. The UK has ambition for a substantial future relationship on intellectual property, and therefore the approach set out here is without prejudice to that aim. The UK remains of the view that in the majority of cases the end-state arrangements will provide for a smooth transition to a comprehensive future economic partnership for business and citizens and the effect of these wind down provisions will be minimal.

UK approach

42. In many areas, the UK's position is closely aligned to that set out by the EU in their September position paper. Where the UK and EU agree that intellectual property rights are within the scope of separation discussions, the UK's overall objective is to provide maximum clarity and legal certainty for users, applicants and right holders by agreeing arrangements appropriate to each of the different types of right.
43. In the future, where the UK does not have existing domestic legislation to protect certain types of rights, it will establish new schemes. This approach will help form the basis for a strong ongoing cultural and economic relationship with the EU.

Use of data and protection of information obtained or processed before withdrawal

Background

44. The exchange and protection of data and information are important for the economies of the UK and the EU, and for wider cooperation, including on law enforcement matters. On 24 August 2017, the UK published a paper on [*The Exchange and Protection of Personal Data – A Future Partnership Paper*](#), setting out the UK's ambition for a future relationship with the EU on personal data. The approach set out here is without prejudice to the UK's ambition for the future relationship. The UK remains of the view that in the majority of cases the end-state arrangements will provide for a smooth transition to a comprehensive future economic partnership for business and citizens and the effect of these wind down provisions will be minimal.
45. The EU published a paper in September 2017 on the [*Use of data and protection of information obtained or processed before the withdrawal date*](#). The paper sets out a series of principles under which the UK can keep the data and information it received prior to exit from the EU.

UK approach

46. The UK and the EU should agree to continue to provide appropriate protections for data and information exchanged before exit and pursuant to the Withdrawal Agreement. The EU will process all UK data and information received prior to the date of withdrawal in accordance with Union law.
47. The UK has strong domestic standards, and will continue to play a leading global role in the development and promotion of high data protection standards and cross-border data flows. It is important to note that UK law will be aligned with Union law at the point of exit. The Government is progressing the UK's new Data Protection Bill, which will replace the 1998 Data Protection Act so as to give effect to the EU's new data protection framework (General Data Protection Regulation (GDPR) and Law Enforcement Directive).
48. On this basis, the UK's objective is to agree early in the process a basis for the continued free flows of data between the EU (and other EU adequate countries) and the UK from the point of exit until such time as new and more permanent arrangements come into force. The UK believes this is in the interest of both the UK and the EU.