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19 May 2020

M. Michel Barnier
UK Task Force
Secretariat General
European Commission

(by email)

Dear Michel

UK DRAFT LEGAL TEXTS

As I indicated during the last negotiating Round on 15 May, the Government has decided to make public the various draft legal texts we have sent you in recent weeks. The texts are available at

<https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

and you may of course now share them, and this letter, direct with Member States.

We are making the texts public as a constructive contribution to the negotiations, and in particular as a response to your suggestions in the last two Rounds that it would help you explain our proposals in more detail to Member States. We are very clear that we are not seeking to negotiate directly with Member States and that it is for you, as the EU's negotiator, to manage any differences of perspective that may emerge. I hope that today's publication will facilitate that work and clear up any misunderstandings about the purpose and effect of what we have put to you.

I would like to make three specific points that may help in that process.

First, we have tried to be clear consistently that we are looking for a suite of agreements with a Free Trade Agreement at the core. We do not seek to remain part of the Single Market or Customs Union, as we do not believe this is in the UK's interest.

Accordingly, as you know, our legal texts draw on precedent where relevant precedent exists (and we have made pragmatic proposals where it does not, for example on road transport or energy cooperation). So, for example, our draft FTA approximates very closely those the EU has agreed with Canada or Japan. Our draft fisheries agreement is

very close to the EU / Norway Agreement. Our aviation proposals are similar to those the EU has agreed with other third countries. Our draft civil nuclear agreement is very close to similar cooperation agreements that Euratom (and indeed the UK) has concluded with other third countries. And so on.

Given this reality, we find it perplexing that the EU, instead of seeking to settle rapidly a high-quality set of agreements with a close economic partner, is instead insisting on additional, unbalanced, and unprecedented provisions in a range of areas, as a precondition for agreement between us.

Second, we find it surprising that the EU not only insists on additional provisions, but is also not willing even to replicate provisions in previous FTAs. For example, your proposals to us contain no provision for mutual recognition of conformity assessment (which the EU agreed with or proposed to Canada, Australia, New Zealand and the US); no sector-specific provisions for key industries with particular technical barriers such as motor vehicles, medicinal products, organics and chemicals (agreed with or proposed to one or more of Canada, South Korea, Chile and the US, among others); and no equivalence mechanism for SPS measures (agreed with or proposed to Canada, Japan, New Zealand, Australia, Mexico and Mercosur).

In services, the EU is resisting the inclusion of provisions on regulatory cooperation for financial services, though it agreed them in the EU-Japan EPA. The EU's offer on lengths of stay for short-term business visitors (Mode 4) is less generous than CETA, and does not include the non-discrimination commitment found in EU-Mexico. The EU has also not proposed anything on services which reflects the specific nature of our relationship: indeed your team has told us that the EU's market access offer on services might be less than that tabled with Australia and New Zealand.

Overall, we find it hard to see what makes the UK, uniquely among your trading partners, so unworthy of being offered the kind of well-precedented arrangements commonplace in modern FTAs.

Third, on the "level playing field". We agreed in good faith a set of commitments in the Political Declaration in this area. Although it continues to be suggested that we are not willing to deliver on these commitments, as you know, our text sets out a comprehensive set of proposals designed specifically (as the Political Declaration puts it) to "prevent distortions of trade and unfair competitive advantages". Our proposals are closely modelled on similar arrangements already agreed by the EU with similar countries, notably in the Canada FTA. Commissioner Hogan described the Canada provisions in March as "solid and anchored in a vast network of underlying international conventions and agreements", and no doubt this is why the EU has found it possible to come very close to zero-tariff, zero-quota access in this and other agreements (some eliminating tariffs on over 99% of tariff lines) without finding it necessary to go beyond such standard "level playing field" provisions.

The EU is now asking the UK to commit to much more than that. Your text contains novel and unbalanced proposals which would bind this country to EU law or standards, and would prescribe the institutions which we would need to establish to deliver on these provisions. To take a particularly egregious example, your text would require the UK simply to accept EU state aid rules; would enable the EU, and only the EU, to put tariffs on trade with the UK if we breached those rules; and would require us to accept an enforcement mechanism which gives a specific role to the European Court of Justice. You must see that this is simply not a provision any democratic country could sign, since it would mean that the British people could not decide our own rules to support our own industries in our own Parliament. Similar issues manifest themselves across labour, environment, climate change and taxation. We have been clear that the UK will have high standards and, in many cases, higher standards than those in the EU. However, we cannot accept any alignment with EU rules, the appearance of EU law concepts, or commitments around internal monitoring and enforcement that are inappropriate for an FTA.

The EU has used various arguments to justify its proposals:

- You claim that we are being offered a future relationship of unprecedented depth. As I have set out, this is not obvious on the basis of the evidence we have so far. 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. You have said that you are not willing to have such discussions.
- You claim that it is the level of economic integration between the UK and the EU which justifies such provisions. In fact, as a share of our economy, the UK is already less integrated in trade terms with the EU than Switzerland, Norway, or Ukraine. Alternatively, you justify it in terms of trade flows: yet the EU did not insist that the US made any “level playing field” commitments in the TTIP negotiations beyond those typical to an FTA, although US and UK trade flows with the EU are roughly similar.
- You claim that the provisions are required on grounds of “proximity”. This is a novel argument in trade agreements and is hard to justify from precedents elsewhere. The US and Canada, for example, trade together through a trade agreement without provisions of the kind the EU would like to see. This proximity argument amounts to saying that a country in Europe cannot expect to determine its own rules, simply on the grounds of geography, and that it must bend to EU norms. That is not an argument that can hope to be accepted in the 21st century.

I could set out similar concerns about the EU’s approach in other areas:

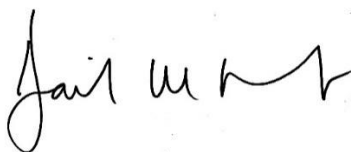
- on fisheries, where the EU's position that access to our waters after the end of this year should be the same as now is clearly not realistic;
- on governance arrangements, where you propose a structure that is not replicated in other EU agreements with third countries except those which aspire to join the EU;
- on law enforcement, where you describe EU proposals as providing for an unprecedentedly close relationship, but in fact they do not go beyond agreements you have made with other third countries, many of whom have far less data to offer the EU and are less closely involved in the mutual fight against crime. We do not agree that the simple fact of putting a set of standard measures into a single agreement can itself justify the exceptional and intrusive safeguards you are seeking in this area.

Overall, at this moment in negotiations, what is on offer is not a fair free trade relationship between close economic partners, but a relatively low-quality trade agreement coming with unprecedented EU oversight of our laws and institutions.

It does not have to be like this. I remain convinced that it would be very straightforward for us to agree a modern and high-quality FTA and other separate agreements, like those you have agreed with other close partners around the world, and that we could do so quickly. I do hope that in the weeks to come the EU will think again about its proposals in a way that will enable us to then find a rapid and constructive alternative way forward.

I am copying this letter to Jeppe Tranholm-Mikkelsen, Secretary General of the Council, and David McAllister at the European Parliament.

With best wishes

A handwritten signature in black ink, appearing to read 'David Frost', with a stylized flourish at the end.

DAVID FROST
Sherpa and EU Adviser

M. Michel Barnier
UK Task Force
Secretariat General
European Commission