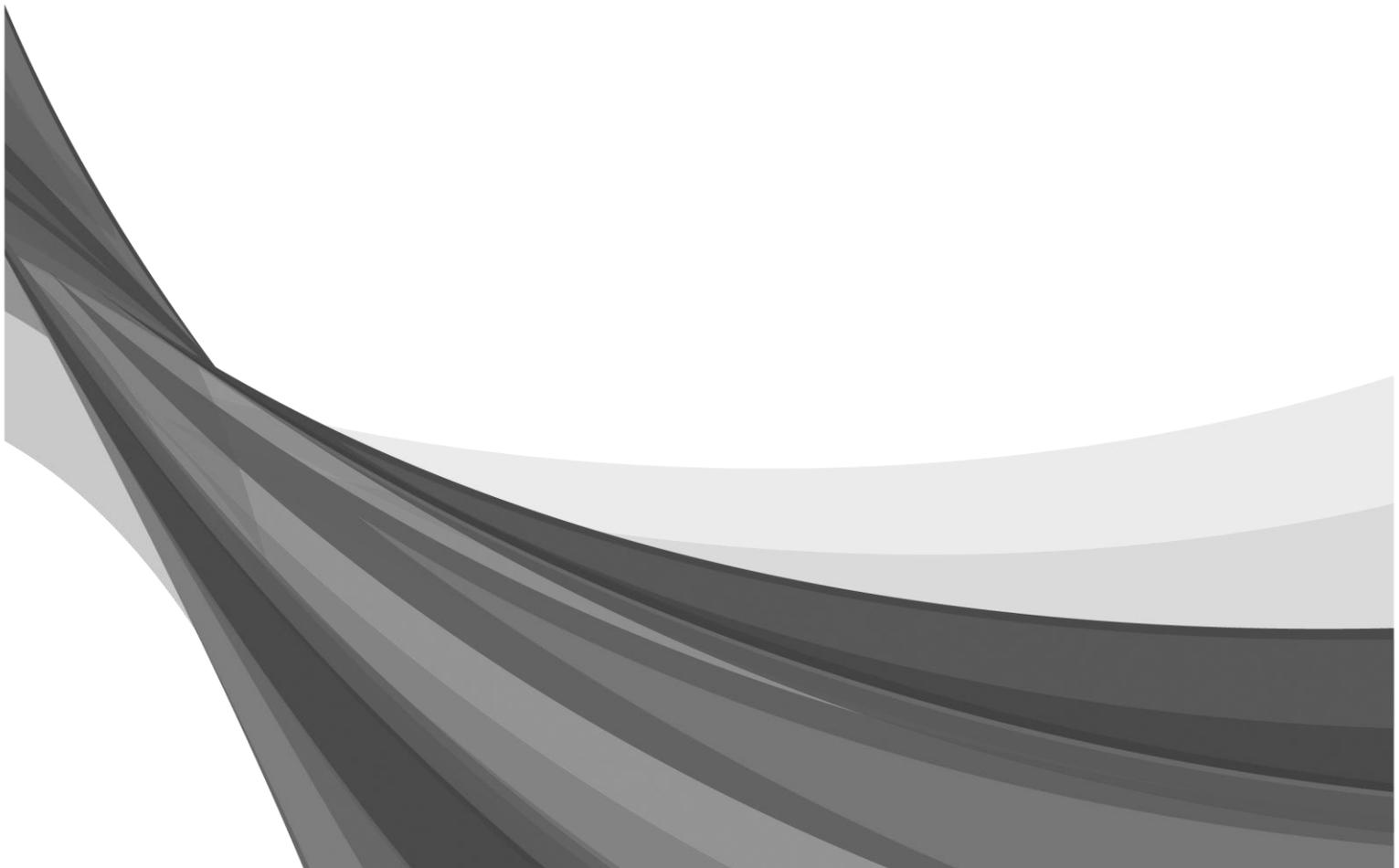


Briefing



US and EU trade negotiations

April 2020



Introduction

The TUC exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions.

On 18 March 2020 the EU published its draft agreement with the UK and sent it to the UK.¹ Due to the Covid-19 pandemic, the agreed schedule of meetings has been cancelled and replaced with exchange of written texts and ongoing communications on these.²

The draft text the UK government has sent to the EU has not been published and the UK government has asked the EU not to share it with member states. The last public official document that sets out the government's red lines is the mandate published in late February.³

On March 2 the government published its objectives for a UK-US trade deal.⁴ Government officials have confirmed that negotiations with the US have been affected significantly by Covid-19 although have not officially stated the talks are on hold.

This briefing analyses:

- The draft EU agreement for negotiations with the UK; and
- The UK mandate for negotiations with the US

The TUC is concerned that the government's negotiating objectives for a deal with the US will undermine possibilities for the UK to secure a deal with the EU that locks in high standards and protections for good jobs and public services.

¹ https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom_en

² <https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>

³ <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

⁴ UK government (2020) 'UK-US free trade agreement', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf

Should the government follow the path suggested by its stated objectives for a UK-US deal, the UK risks becoming committed to a deal that lowers employment rights, protections for public services and personal data security and throws workers out of good jobs and into precarious employment.

The TUC is calling for the UK to prioritise negotiating a deal with the EU that guarantees good jobs, rights and other protections rather than a deal with the US that stands to undermine these standards.

The TUC is calling for a deal with the EU that involves:

- Tariff and barrier free trade for goods and service sectors
- Dynamic alignment on rights to keep UK workers protected by the same level of rights as those found across the EU
- A role for the European Court of Justice in the process of enforcement
- Complete exemption for public services through a 'positive list' approach to service listing
- No version of an Investor-State Dispute Settlement court system that allows foreign investors to challenge governments for actions that threaten profits

The EU's proposed trade agreement with the UK goes a significant way to fulfilling these objectives. This reflects the successful lobbying of the TUC with trade unions across the EU. The ETUC has established a coordination group with its affiliates that includes sector federations to monitor the different thematic negotiation tables. The ETUC has also facilitated meetings with the Commission's officials which have also clarified the EU's position. Trade unions believe, however, that there are still areas the EU agreement needs to be improved. Unions are calling for stronger provisions in the EU agreement to protect workers (see pp.8-10).

The TUC and the US union centre the AFLCIO released a joint statement on 13 March on shared priorities for any trade deal

between the UK and US. This stated the need to protect workers' rights, public services and personal data. It called on the UK government to prioritise getting a good deal with the EU to ensure workers in the UK are protected by high standards and to protect the millions of jobs that depend on trade with the EU, as the UK's closest and most integrated trading partner with a high standard of employment rights.⁵

This briefing examines the implication both of the draft EU-UK agreement, and the draft UK negotiating mandate for a deal with the UK under the following headings:

1. Promoting good jobs
2. Protecting workers' rights
3. Public services
4. The possibility of investor state dispute settlement mechanisms; and
5. Transparency

1. Promoting good jobs

EU draft agreement

Millions of jobs in the UK rely on the barrier and tariff free trade the UK currently has with the EU. While the EU's proposed agreement would not offer the same level of tariff and barrier free trade as the UK currently has while in the EU customs union, the EU's proposed agreement could ensure a large number of these jobs are preserved.

The EU's proposed agreement would remove tariffs and quotas on goods traded between the UK and EU (art. Goods 1, 5, 10). The agreement would also enable products composed of content from both the UK and EU to be eligible for tariff free access to other markets via EU and UK trade deals - so called 'cumulation' in rules of origin arrangements (art. ORIG.4). Although, as the UK

⁵ TUC and AFLCIO (2020) 'UK and US unions call for trade that delivers for workers', available at: <https://www.tuc.org.uk/news/us-and-uk-unions-call-trade-deal-delivers-workers>

government has not sought to remain in the EU customs union, goods between the EU and UK will be subject to customs and regulatory checks.

The EU's draft agreement would also reduce barriers in trade in services between the UK and EU – eg. a UK retail company trading in the EU. The agreement states that services and investors from the UK and EU will not be subject to discrimination, with some restrictions (art. SERVIN.2.2 and 3). The agreement also seeks to reduce barriers to temporary workers providing services between the EU and UK ('mobility of worker' provisions in art. SERVIN.4.1.3 and 4), although those providing services would be subject to licence applications, fees and assessment of qualifications.

Threats from a US deal

The government's negotiating objectives for a UK-US deal make clear such a deal could not compensate for the shortfall to GDP and loss of jobs that would result from additional barriers and tariffs in trade between the UK and EU. The government projects that a UK-US deal could only create an increase in GDP of 0.16% while it has projected that additional barriers and tariffs on UK-EU trade will lead to a fall of GDP of about £150 billion or 4.9%.⁶

Even the Computer Generated Equilibrium modelling the government chooses to use in its objectives document – which trade unions believe has severe limitations⁷ - indicates there will be job losses from a deal with the US, particularly in financial services, retail and manufacturing of transport goods.

⁶ UK government (2018) 'EU exit: long term economic analysis', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760484/28_November_EU_Exit_-_Long-term_economic_analysis_1_.pdf#page=12

⁷ The government's objectives document provides a forecast of the impact on jobs using Computer Generated Equilibrium (CGE) modelling. Trade unions and a number of economists, such as Jeronim Capaldo, have raised concern about this form of modelling as it assumes the labour market is static. As the government's document states CGE modelling 'assumes that both the supply of labour and overall rates of employment and unemployment in the economy are fixed in the long-run.' Clearly this is not a realistic approach, particularly as we are on the brink of a global recession exacerbated by the Covid-19 pandemic.

The TUC is also concerned that the US is likely to use the threat of tariffs on key UK goods such as those it has already applied to steel, aluminium and Scotch whiskey to pursue its interests in a trade deal with the UK. The imposition of additional tariffs would threaten thousands of jobs in key industries in the UK.

2. Workers' rights

EU draft agreement

The TUC welcomes that the EU's draft agreement provides a basis to keep workers in the UK protected by the same level as rights agreed at EU level – although there are areas it still needs to go further as detailed on pp. 9-10.

The EU's draft agreement states that as a general principle the EU and UK must commit to fair competition on the basis of a level playing field between them and to maintain high standards in the areas of state aid, competition, taxation, social and labour protection and the environment (art. LPFS.1.1.3). The EU's draft agreement states that this level playing field is needed due to geographic proximity and economic interdependence between the UK and EU.

The EU's draft agreement states that the EU and UK should not go below the level of protection set by these common standards at the end of the transition period in the following areas:

- Fundamental rights at work
- Occupational health and safety
- Fair working conditions and employment standards
- Information and consultation rights at company level
- Restructuring

The EU's draft agreement also sets a requirement for the UK continue to improve the level of protection in state aid, competition,

taxation, social and labour protection and the environment. It also says there should be a commitment by UK and EU governments to review the agreement in the future with a view to add new areas and increase the level of protection over time (art. LPFS.1.1.5-6).

The EU's draft agreement would not prevent either the EU or the UK from setting their own standards and regulating their own levels of protection in labour conditions and social protection among other things (right to regulate art. GRP.1.3; LPFS.1.2.1; SERVIN.1.1.1).

The EU's draft agreement also binds the parties to continued commitment to respect the European Convention on Human Rights (article Comprov.4), which would prevent the UK from denouncing the European Convention on Human Rights – an option mooted in Conservative manifestos in 2017 and 2019. Other sources of international law that the parties commit to are ILO core conventions and the revised European Social Charter (art. LPFS.2.40), however unions know the UK's record in practice to uphold these commitments could be considerably improved.

The level playing field provisions would be included in the scope of dispute settlement mechanism. If there is a dispute it will firstly be considered by the 'partnership council' (art. INST.1) – a political body comprised of government ministers. The work of the partnership council will be supported by specialised committees, including on the level playing field; expert representatives of each party will sit on these committees. The decisions of both the partnership council and the committees will be binding on the parties but will be arrived at by mutual consent – it means that in practice the EU will never override the UK if there is a divergent interpretation of the agreement, which is a major limitation when it comes to level playing field commitments (art. INST.2. 2.a; 3; 4).

If the partnership council believes there has been a violation it can refer the case to an arbitration panel that will adopt decisions

binding on the parties (art. INST.30.2). In case of disputes that entail a question of interpretation of EU law, the arbitration panel must refer the issue to the European Court of Justice that will issue rulings binding on the arbitration panel (art. INST.16).

If the arbitration panel finds that the UK or EU has violated the agreement, they can mandate the offending country to pay a penalty fee or suspend their ability to access the UK-EU agreement either in whole or part (art. INST.21). Unlike other trade agreements, demonstrating that a violation has an effect on trade does not appear to be required to trigger a suspension of the agreement, nor that domestic remedies have to have been exhausted.

Threats from a US trade deal

While the EU's draft agreement provides a basis to keep workers in the UK protected by the same level as rights agreed at EU level, the government's objectives document for a UK-US deal states 'the US maintains high labour standards and, as such, additional imports from the US resulting from a free trade agreement will be produced in line with such standards.' However, the US has significantly weaker protections for workers than those currently in place in the UK – many of which are derived from EU law as the TUC has detailed.⁸ There is, therefore, a risk that US businesses used to a much weaker regime of workers' rights will pressure the US government to insist in negotiations with the UK that employment rights are a 'barrier' to trade that must be reduced in order to make it easier for them to do business in the UK.

The US has, to date, only ratified two of the core ILO conventions. Core ILO conventions it has not ratified include those on freedom of association, collective bargaining and child labour.⁹ US law permits

⁸ TUC (2016), 'Workers' rights from Europe: the impact of Brexit', available at: <https://www.tuc.org.uk/research-analysis/reports/workers-rights-europe-impact-brexite>

⁹ International Labour Organisation (2020), 'Ratifications of the United States of America', available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871

children as young as twelve to work on family farms and sixteen-year olds to work picking tobacco, despite evidence that young people are particularly vulnerable to the toxins in tobacco and the chemicals used in its production.¹⁰

A number of other rights workers have in the UK – often due to EU law - are also absent in the US. There is no federal right to sick pay, maternity pay or holiday pay while employees have no right to a notice period for dismissal or the right to be accompanied by a union rep.¹¹ At the state level, 'right to work' laws have been introduced in 27 states that severely curtail freedom of association. 'Right to work' laws require trade unions to provide representation to non-members which starve unions of funds and makes them effectively unable to operate.

The TUC shares the concerns of US unions that workers' rights in the US could also be undermined further by a trade deal with the UK. This threat is suggested by the UK government's stated objective to bring down 'barriers' to trade in sectors that are currently subject to US government regulations on social and employment standards. The government explicitly cites the maritime sector as an example. The TUC is concerned that in this process the UK government might seek to weaken the Jones Act which prohibits the use of non-US flagged boats for the transport of goods between US ports which has been important for protecting employment standards for maritime workers in the US.

Furthermore, while the UK government's objectives document states that it will 'ensure parties reaffirm their commitment to international standards on the environment and labour' in a UK-US trade deal, it does not detail how these rights will be enforced. The document does suggest there will be some enforcement process, which is

¹⁰ Ramchandi, Ariel (2018), 'The overlooked children working in America's tobacco fields', *The Atlantic*, available at: <https://www.theatlantic.com/family/archive/2018/06/child-labor-tobacco/562964/>

¹¹ TUC (2019) 'Importing US working practices to the UK- the risk to workers' rights', available at: <https://www.tuc.org.uk/blogs/importing-us-working-practices-uk-risk-workers-rights>

welcome, however there is no detail of what this enforcement process will entail.

Areas unions are seeking improvements to the EU's draft agreement

The EU's draft agreement clarifies at the outset that provisions of EU law shall be interpreted in accordance with European Court of Justice (ECJ) case-law (art. Comprov.14). However, this in practice only applies to the provisions relating to state aid where the UK courts would be required to request the European Court of Justice to give a preliminary ruling on a question relating to the interpretation of state aid rules listed in an annex. Such ruling would be binding on UK courts (art. LPFS.2.6.2).

Unions are seeking to ensure a role for the ECJ in the enforcement of level playing field commitments as the provision in the EU's draft agreement relies exclusively on domestic mechanisms: the EU and the UK commit to maintain adequately resourced labour inspection systems, effective administrative and judicial procedures, remedies and sanctions that are effective, proportionate and dissuasive to deter violations (art. LPFS.2.29).

In its present form, the agreement also does not confer rights to individual workers or companies (art. Comprov.16.1). This means that an individual will not be able to rely in a domestic court or elsewhere on the provisions of the agreement to defend their rights. The draft agreement expressly prohibits the possibility of an individual's right of action against an alleged breach of the agreement by either the EU or the UK (art. Comprov.16.2).

3. Public services

Threats from a US deal

While the UK government objectives document states 'the NHS will not be on the table' in negotiations with the US, its objectives make clear there will be no exemptions for public services in general or

specific exemptions for key areas such as NHS medicines in a trade deal with the US (it takes a 'negative list' approach to services listing). This means public services that have been privatised already are likely to be included in the agreement. Given the significant extent of privatisation in UK public services, much of the UK public sector could thus be included in a deal with the US.

Any public service that was included in a UK-US deal would not be able to be brought back into public ownership as the US government could state this was a breach of the government's commitment to liberalise sectors included in the trade deal.

The US government could challenge the way the government seeks to regulate any public service that was included in a UK-US deal. This is due to the fact the US government could argue that such regulation was a 'barrier' to its companies being able to deliver a service in the public sector (such as providing catering in a hospital) or a form of discrimination against US companies. This could mean that important protections a future government might introduce for public services - such as regulations to provide affordable medicines through the NHS voluntary pricing and access scheme (VPAS) or public procurement rules - could potentially be challenged by the US government.

If Investor-State Dispute Settlement is included in a UK-US agreement, furthermore, foreign investors could also challenge these rules too (see section 4, below).

Additional threats to NHS pricing are also opened up by the government's objectives on intellectual property in a UK-US deal. Intellectual property chapters in free trade agreements can allow countries to extend the length of patents for their products in a foreign market. While the UK's objectives document states intellectual property commitments in a deal with the US will 'not lead to increased medicine prices in the NHS', there is no

commitment to exempt NHS medicines from the intellectual property provisions. This raises the risk that US drug companies will be able to use intellectual property provisions in a UK-US trade deal to insist on longer patent times for their drugs in the UK market, hampering the ability of the NHS to ensure medicines are kept at prices that are good value for money.

EU draft agreement

Unions are concerned that the EU draft agreement does not currently contain guaranteed protection for public services as it uses the 'negative list' approach whereby only services listed are protected from further privatisation. There are exclusions listed for some aviation services, audio-visual, national maritime cabotage and inland waterways transport (art. SERVIN.1.1.5) but health and social care is not listed, although it may be listed in annexes that have not yet been made public (Annex SERVIN 1 and 2).

4. Investor-State Dispute Settlement

Threats from a US deal

Threats to public services and workers' rights posed by a UK-US deal would be increased if the notorious Investor-State Dispute Settlement (ISDS) court system was included in the deal. ISDS is a court system that is included in trade deals to provide foreign investors with a special court system that allows them to sue governments for introducing any measures that threaten their profits. This court system has been used in the past to challenge minimum wage laws and government attempts to renationalise public services.¹² The US has sought to include ISDS in its past trade deals and the UK government's objectives document does not rule out the inclusion of ISDS in an agreement with the US. The government's objectives states 'the Government ...sees the case for establishing appropriate dispute mechanisms that enable disputes

¹² Trade Justice Movement (2019), 'ISDS- the big threat to human rights hidden in our trade deals', available at: <https://www.tjm.org.uk/blog/2019/isds-the-big-threat-to-human-rights-hidden-in-our-trade-deals>

to be resolved in a timely manner, while also providing predictability and certainty for businesses and stakeholders.'

EU draft agreement

There is no indication the EU would want to include ISDS in a UK-EU agreement.

5. Data privacy/security

Threats from a US deal

The UK government states an intention to broadly include digital sectors in an agreement with the US. It states that the 'government will seek to 'maximise opportunities for digital trade across all sectors of the economy.' Broad inclusion of data in an agreement with the US would mean that the government had less power to regulate how US companies use data obtained in the UK and use artificial intelligence. This would make it more difficult for the UK government, trade unions or individuals to prevent personal data from being abused.

This puts workers' rights at risk as artificial intelligence (AI) may be used to monitor and control workers. There is already evidence of AI being used in the recruitment process, work allocation, scheduling of work and disciplinary measures which can give rise to discrimination issues, as well as other types of unfairness.

Public services are also threatened if a UK-US trade deal gives multinational companies more control over data, as it could mean:

- companies can sell personal data for profits
- companies can use personal data to target individuals for marketing or political purposes
- companies can use personal data for their own commercial research purposes – this could mean an American drug company could use NHS data to research new medicines and then sell it back to the NHS at extortionate prices.

EU draft agreement

There are protections in the EU's draft agreement for data (art. DIGIT.7). This builds on EU data protection regulation. The EU commission has also proposed further regulation of high risk AI applications.¹³

6. Transparency

Unless trade unions are meaningfully involved in trade negotiations, trade deals cannot promote the protections for workers' rights, public services and good jobs that are needed.

While the EU commission has published its draft agreement with the UK, the TUC regrets that the UK government has not shared its proposed agreement with the EU with unions. The TUC is also concerned the government did not meaningfully consult trade unions on its negotiating objectives with the US prior to publishing them.

The UK government's failure to meaningfully consult unions on trade negotiations contrasts to the situation in EU countries and the US, where trade unions have had sight of documents relating to negotiations with the UK.

The TUC is calling for the government to consult trade unions on the text of its negotiations with the EU, US and all other countries.

¹³ European Commission (2020) 'White paper on artificial intelligence', available at: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf
EU and US trade negotiations