

Comparison of proposed UK and EU FTA drafts

Provision	EU	UK	Comment
Definition of “financial services”	Broad definition running to 26 clauses and sub-clauses. (Article SERVIN.5.38)	Same broad definition plus: a broader definition of insurance; e-payments; market infrastructure for clearing; exchanges and central securities depositaries; and the marketing of financial services and agreements relating to financial services and products. (Article 17.1)	The wider UK definitions clause is consistent with its wider ambition for the financial services content of the FTA.
Cross-Border Financial Service Suppliers: National Treatment	Equal treatment regardless of nationality of firms. (Article SERVIN.3.3)	Equal treatment regardless of nationality of firms. Cross border purchases permitted without permitting the other party’s financial services firms to do business or solicit for business in the other’s territory. (Article 17.3)	The EU draft contains a provision which relates to the cross-border services generally, while the UK covers this in a provision within the financial services article of its FTA. The UK draft is more extensive and specific.
Cross-Border Financial Service Suppliers: Most-Favoured-Nation Treatment	The EU reserves the right to propose a text on most favoured nation (“ MFN ”) treatment. (Article SERVIN.3.4)	The UK reserves the right to propose a text on MFN treatment. (Article 17.4)	The EU covers this in a provision which relates to the cross-border services generally, while the UK covers this in a provision within the financial services article of its FTA. Given the ambition of the UK Government in respect of the financial services provisions of FTAs with Anglosphere nations, the EU stands to gain from any MFN arrangement in relation to financial services. Given the paucity of financial services provisions in EU FTAs, an MFN clause offers little potential gain for the UK.

Provision	EU	UK	Comment
Market Access	<p>No quotas.</p> <p>No restrictions on what type of legal entity may offer financial services.</p> <p>(Article SERVIN.3.2)</p>	<p>No quotas.</p> <p>No restrictions on what type of legal entity may offer financial services.</p> <p>(Article 17.5)</p>	<p>UK text contains more comprehensive provisions in relation to prohibiting various types of quotas.</p> <p>EU FTA includes a requirement for a service supplier to “establish a commercial presence” or to be resident in a Party’s territory in order to supply the cross-border service which the UK draft does not. This continues an existing tension between the liberalising trading instincts of the UK and the more protectionist instincts of some of the EU27 member states that has long been a feature of intra-EU financial services regulatory negotiations prior to Brexit.</p>
Financial Services new to the Territory of a Party	<p>No discrimination on grounds of nationality in respect of the supply of new financial services, but only for subsidiaries, not branches.</p> <p>(Article SERVIN.5.42)</p>	<p>No discrimination on grounds of nationality in respect of the supply of new financial services.</p> <p>A Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorisation for the supply of the service from the relevant regulator.</p> <p>Each Party shall endeavour to collaborate and share knowledge relating to developments in financial services.</p> <p>(Article 17.6)</p>	<p>The UK wording is wider and consistent with the UK drafting which does not require a firm to establish a commercial presence in order to have access to market access.</p>

Provision	EU	UK	Comment
Financial Information	No EU equivalent clause.	Data transfers permitted to the extent necessary for financial services business purposes, subject to normal data protection restrictions. (Article 17.7)	The UK is seeking some certainty on data transfers for financial services trade rather than solely relying upon a data protection adequacy finding under GDPR (similar to equivalence for financial services). The Commission has made it clear that the EU will not automatically recognise UK data protection as adequate, notwithstanding that the UK data protection rules are exactly the same as EU rules.
Clearing and Payment Systems	(Article SERVIN.5.44)	(Article 17.8)	EU and UK texts are identical and allow one party's financial institutions established in the other party's territory access to clearing systems, building on the UK's accession to SEPA.
Senior Management and Board of Directors	No requirement for an enterprise to appoint individuals of any particular nationality as executives, managers or members of boards of directors in order to be established in the other party's territory. (Article SERVIN.2.5)	No requirement for a financial service supplier to engage natural persons of any particular nationality as senior managerial or other essential personnel in order to be established in the other party's territory. No requirement that more than a minority of the board of directors of a financial service supplier of the other Party established in its territory be composed of nationals of the Party and/or persons residing in the territory of the Party. (Article 17.9)	The EU provision is of general application, while the UK provision applies only to financial services. The second limb of the UK provision is to protect the diverse nationalities and residencies of UK financial services directors. It does not prevent the mild protectionism of EU27 nations ensuring a number of board positions in companies established in their territories are reserved for their own nationals. In spite of this Mr Barnier has attacked the UK position as an attempt by the UK to ban all residency requirements for senior management.

Provision	EU	UK	Comment
Transparency	<p>Regulator's decision on authorisations for supply of a financial service must be made within a reasonable time period.</p> <p>Information on how authorisation applications will be assessed must be publicly available.</p> <p>(Article SERVIN.5.5)</p>	<p>Regulatory transparency in financial services.</p> <p>Regulator's decision on authorisations for supply of a financial service must be made within 180 days.</p> <p>Information on how authorisation applications will be assessed must be publicly available.</p> <p>(Article 17.10)</p>	<p>The EU provision is of general application, while the UK provision applies only to financial services.</p> <p>The lack of a maximum period in the EU text and reasonableness qualification makes it effectively open ended. The UK's 180 days for a decision to be made may be a dilatory half a year, but at least it is a finite period.</p>
Self-regulatory Organisation	<p>Any self-regulatory body a financial services firm is required to be a member of will observe the requirements of equal treatment regardless of nationality (Article SERVIN.3.3), MFN treatment (Article SERVIN.3.4) and no quotas (Article SERVIN.3.2).</p> <p>(Article SERVIN.5.43)</p>	<p>Any self-regulatory body a financial services firm is required to be a member of will observe the requirements of equal treatment regardless of nationality (Article 17.3), MFN treatment (Article 17.4) and no quotas (Article 17.5).</p> <p>(Article 17.11)</p>	<p>UK FTA and the EU FTA are the same except the UK FTA also refers to granting a privilege or an advantage in respect of the supply of financial services.</p>
Non-conforming Measures	<p>No equivalent provision in the Financial Services section of the EU draft FTA.</p>	<p>UK FTA Annexes are yet to be provided.</p> <p>(Article 17.12)</p>	

Provision	EU	UK	Comment
Prudential Carve-out	<p>Prudential carve out for measures relating to consumer protection, stability and integrity of financial services firms, stability and integrity of markets.</p> <p>(Article SERVIN.5.39)</p>	<p>Prudential carve out for measures relating to consumer protection, stability and integrity of financial services firms, stability and integrity of markets, plus measures for the maintenance of the safety, soundness, integrity, or financial responsibility of a financial service supplier.</p> <p>(Article 17.13)</p>	<p>The wording of the UK FTA and EU FTA are largely the same, the UK FTA provides an additional carve-out for measures relating to financial services suppliers.</p> <p>Mr Barnier’s stated objection to the UK text is that it limits the scope of the prudential carve out, but the UK text in fact extends its scope.</p> <p>It is possible that there is something in the unpublished annexes to the UK text which has the effect to which Mr Barnier objects.</p>
Specific Exceptions	<p>Exceptions to the non-discrimination clause for public bodies in respect of:</p> <ul style="list-style-type: none"> - monetary and related credit policies - exchange rate policies <p>(Article SERVIN.5.40)</p>	<p>Exceptions to the non-discrimination clause for public bodies in respect of:</p> <ul style="list-style-type: none"> - monetary and related credit policies - exchange rate policies <p>(Article 17.14)</p>	<p>UK wording differs significantly from EU draft and the UK FTA exceptions are more extensively drawn than those in the EU FTA.</p>
International Standards	<p>Best endeavours obligation to adhere to international standards in financial services for:</p> <ul style="list-style-type: none"> - regulation and supervision - money laundering and terrorist financing - tax evasion and avoidance <p>(Article SERVIN.5.41)</p>	<p>No equivalent provision in the Financial Services section of the UK draft FTA.</p>	<p>The UK Government has a policy of not repeating obligations it has under other international agreements in FTAs, for reasons of brevity and to avoid unnecessary duplication. Such duplication also carries the implication that the parties are not serious about their international obligations, which the UK government perceives as a slight on its integrity.</p>

Provision	EU	UK	Comment
Recognition of Prudential Measures	No equivalent provision in the Financial Services section of the EU draft FTA.	A Party may recognise prudential measures of a third country and provide the other Party with adequate opportunity to negotiate accession to the agreement or to negotiate a comparable agreement. (Article 17.15)	The UK's approach to prudential arrangements with third countries is on the global norm of mutual recognition of standards, an approach with which the EU is uneasy. It seems that the EU considers this clause risks pulling the EU into arrangements which limit the EU's regulatory and decision-taking autonomy.
Performance of back-office functions	No equivalent provision in the Financial Services section of the EU draft FTA.	Delegation of back-office functions to be permitted subject to compliance with any domestic requirements applicable to those functions, provided those requirements are not arbitrary in effect. (Article 17.16)	Mr Barnier alleges that this provision "could create a significant risk of circumvention of financial services regulation", which, on the basis of the published text seems a rather strong interpretation.
Dispute Settlement	No equivalent provision in the Financial Services section of the EU draft FTA.	15 strong dispute settlement panel with power to suspend parts of the financial services chapter of the FTA only for infringements of the financial services chapter of the FTA. (Article 17.17)	Just as the EU prefers single agreements to a series of agreements, it prefers the scope of remedies in those agreements not to be segmented. In particular, in respect of a breach of a specific part of a trade agreement it prefers to be able to suspend any part of that agreement in order to be able to apply maximum pressure to the other party. This provision would limit the remedy of suspension of the financial services section of the FTA to breaches of that section. This is unacceptable to the EU.

Provision	EU	UK	Comment
Financial Services Committee	No equivalent provision in the Financial Services section of the EU draft FTA.	Creation of a Financial Services Committee (" FSC ") specifically to oversee the implementation of the financial services chapter to meet every three months. (Article 17.18)	Press reports at the time the UK FTA was published suggested that the FSC would be the setting in which any intention to withdraw a determination of equivalence could be discussed. Even allowing for ad hoc meetings, the EU's belief that this would at the very least delay such decisions seems well founded, even without seeing the content of the annexes. This is what Mr Barnier fairly describes as the UK "trying to turn our unilateral [equivalence] decisions into co-managed ones".
Regulatory Cooperation	No equivalent provision in the Financial Services section of the EU draft FTA.	This article calls for regulatory co-operation, the detail of which is set out in the unpublished Annex 17-F. (Article 17.19)	

eversheds-sutherland.com

© Eversheds Sutherland 2020. All rights reserved.

Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

This information is for guidance only and should not be regarded as a substitute for research or taking legal advice.