

The UK-EU Trade and Cooperation Agreement

December 31, 2020

On 24 December 2020, the UK and EU finally agreed a deal – now formally named the Trade and Cooperation Agreement – to govern significant aspects of the trade relationship between the UK and EU from 1 January 2021 onwards. It will be directly relevant to all businesses that trade in either direction between the UK and EU and indirectly relevant to others who deal with such businesses. The short time – a matter of days, and many of them public holidays – between the publication of this Agreement and the date of its (provisional) application leave businesses with little time to adjust to it. In this note we set out the framework and key elements.

Context

The UK ceased to be an EU Member State on 31 January 2020, although many of the effects of that change have not yet been felt due to the Transition Period from 1 February 2020 to 31 December 2020, introduced by the **Withdrawal Agreement**, during which EU law has effectively continued to apply in and to the UK. The Withdrawal Agreement remains in place going forward; aside from the Transition Period, it covered other issues arising from the UK's withdrawal that are of continuing relevance, including certain rights of UK and EU citizens and specific arrangements regarding Northern Ireland.

From 1 January 2021, the UK is a non-EU country (a "third country" in EU terminology) and the Trade and Cooperation Agreement (the TCA) is an international treaty. However, this status would not necessarily have ensured that it was as free from the ambit of EU law as the UK government had promised¹. It is therefore important to note the provisions in the TCA which seek to ensure, beyond doubt, that the interpretation of it is to be governed only by international law principles and not by the "domestic law of either party" (which, for the EU would certainly include EU law)². This makes the TCA distinct from certain other EU free trade agreements which envisage EU law as being relevant in certain contexts³. The practical takeaway here is that while businesses may, in practice, compare the new relationship and processes with those that have applied while the UK was an EU Member State, the TCA is based only on international law, and most notably the GATT⁴ and the GATS⁵.

As the TCA was agreed only days before the end of the Transition Period, there is not sufficient time for the European Parliament to ratify the TCA before the Transition Period ends. However, the European Commission has noted that having the TCA in place on 1 January 2021 is "a matter of special urgency", and has accordingly proposed its application on a provisional basis (the Council of the EU, and the UK, including Parliament, have already given approval)⁶, and UK Parliament approved it on 30 December), pending ratification by the EU Parliament by 28 February 2021⁷.

Architecture of the TCA

The TCA is only one part (albeit a central part) of the overall package of agreements reached on 24 December 2020.

Other "supplementing agreements", which will also form part of the UK-EU relationship include:

- a Nuclear Cooperation Agreement;
- an Agreement on Security Procedures for Exchanging and Protecting Classified Information (the Security of Information Agreement); and
- a series of Joint Declarations on a range of important issues where further cooperation is foreseen, including financial services regulatory cooperation, subsidies, road hauliers and the declaration of adequacy decisions.

There are various ways to categorise or group the various provisions of the TCA. The European Commission identifies four major pillars of cooperation⁸:

- a **free trade agreement** creating a "free trade area of unprecedented ambition";
- broad **economic, social and environmental cooperation** in areas of mutual interest (notably road transport, aviation, energy, climate change, fishing, EU funding programmes and social security coordination);
- a **new framework for citizens' security** ; and
- a **governance framework** that includes a hierarchy of oversight bodies and robust disputes provisions including an arbitration tribunal.

The TCA is not however structured by reference to pillars. Rather, it consists of four components:

- general and institutional arrangements;
- economic arrangements (including provisions on trade in goods and services, and level playing field guarantees);
- arrangements on law enforcement and judicial cooperation in criminal matters; and
- provisions on dispute settlement, basic values and safeguard measures.

The institutional arrangements

The governance of the TCA is to be conducted through a hierarchy of bodies established by the TCA, all of which are to be co-chaired by an EU and a UK representative, making decisions by mutual agreement:

- a **Partnership Council** (with EU and UK co-chairs at ministerial level) to oversee the attainment of the TCA's objectives and facilitate its implementation. It will consider "any issue relating to the implementation, application and interpretation" of the TCA, and shall have a range of powers, including powers to amend the substantive (but not the institutional) provisions of the TCA itself. The configurations of the Partnership Council will vary depending on the issues at hand (eg Transport minister for transport issues, Trade minister for trade issues etc);
- a **Trade Partnership Committee** which assists the Partnership Council and supervises the work of the Trade Specialised Committees;
- **10 Trade Specialised Committees and 8 Specialised Committees**, each focussing on a specific area of competence; further committees may be established;
- **4 Working Groups**, each under the supervision of the relevant Trade Specialised Committee; further working groups may be established; and
- a **Parliamentary Partnership Assembly** may be established if the EU and UK Parliaments wish it, as a forum for

exchanging views on the arrangements, but with very limited powers.

The powers given to these bodies, culminating in the Partnership Council, should enable the parties to make any necessary adjustments to the TCA and/or to any specifics of its operation, assuming goodwill and cooperation. However, the mutual consent decision-making model between the EU and UK representatives may, in the event that tensions arise, be the cause of bottlenecks, especially noting the role given to these bodies, including the Partnership Council, in the consultation stage of dispute resolution.

It is not yet clear how often each committee will meet or where, but each committee must meet at least once a year. Nor is it clear what oversight the UK Parliament (or the European Parliament) will have over the activities of these committees, or indeed who will sit on them.

The TCA also creates an obligation for both the EU and UK to consult "domestic advisory groups" and "civil society organizations" on the implementation of the TCA and any supplementing agreement. This includes non-governmental organisations, business and employer organisations as well as trade unions. The EU and UK must "promote interaction between their respective domestic advisory groups, including by exchanging, where possible, the contact details of members of their domestic advisory groups."

Dispute mechanism and safeguard measures

The dispute process was a sensitive part of the TCA negotiation in the context of, in particular, the UK's insistence that the CJEU should have no role, and the EU's insistence on robust enforcement mechanisms in view of the lack of trust consequent, it appears, in the UK government's proposed Internal Market Bill, of elements which were inconsistent with its Withdrawal Agreement commitments vis à vis Northern Ireland.

The core elements of the dispute resolution process (which apply not only to the TCA but also to other Supplementing Agreements) are (i) a consultation phase to be conducted in the framework of a Specialised Committee or the Partnership Council, followed (if no resolution has been achieved) by (ii) referral of the matter to an arbitration tribunal. Additionally, either party may also take safeguard measures (including the re-imposition of tariffs) "if serious economic, societal or environmental difficulties of a sectorial or regional nature, including in relation to fishing activities and their dependent communities, that are liable to persist arise". In principle, these measures may be taken only one month after notification to the Partnership Council, with the caveat that "when exceptional circumstances requiring immediate action exclude prior examination, the party concerned may apply forthwith the safeguard measures strictly necessary to remedy the situation".

Some provisions, including the level playing field provisions, have their own enforcement measures, including suspension of TCA obligations and the use of rebalancing measures⁹. It is notable that the European Commission's explanatory memorandum to the Council¹⁰ emphasises the robustness of the enforcement and safeguard powers, while the UK government's summary¹¹ gives only brief reference to these safeguard measures, observing that they must be "strictly proportionate and time-limited".

Core trade elements of the TCA

Trade between the UK and EU will be very different under the TCA relative to how it was as an EU Member State. Announcing the deal on 24 December, the UK Prime Minister observed that "there will be no palisade of tariffs on January the 1st, and there'll be no non-tariff barriers to trade". However, although the TCA ensures tariff-free trade in goods between the UK and EU in many cases, this will depend on the goods themselves fulfilling certain conditions (notably as to origin); and even if there is no future legislative or regulatory change in either the UK or the EU, there will in fact be significant non-tariff barriers to trade between the parties, both in relation to goods and services, that did not exist when the UK was an EU Member State.

There is more detail than can be summarised in this note, but we draw out some key elements here:

Trade in goods

The TCA includes relatively ambitious measures on trade in goods. While cross-border traders will notice more friction and more restrictions than they have been accustomed to, the TCA goes some way to preserving the flow of trade in goods:

- **no tariffs or quotas:** there will be no import tariffs or other customs duties or quotas on imports of EU-origin goods into the UK or of UK-origin goods into the EU;
- **rules of origin:** to benefit from the no-tariffs provision, a product must originate in the UK or EU. The TCA provides for a number of ways in which a product's origins can be determined, revolving around where a certain proportion of a product's components are made and where it is assembled. Different methods are applicable to different kinds of product and in a world of cross-border supply chains, this is a complex area that can easily give rise to disputes. The fact that importers can self-certify that a product qualifies for this "preferential tariff" treatment under the rules of origin will help to reduce the administrative burden in one sense. However, in order to self-certify, the importer needs to be in a position either to rely on a statement of origin made by the exporter, or to have sufficient knowledge of the supply chain to be confident of where it is considered to originate under the rules. Notably, while the TCA allows for bilateral cumulation for both materials and processing (ie materials originating in the EU which are then incorporated into a UK product are deemed to be UK-origin materials and vice versa), it does not allow for any form of cross-cumulation which had been sought by the UK (which would have enabled greater flexibility in the use of materials from third countries while maintaining UK origin for the end product). This may cause some products assembled in the UK or EU, but using materials sourced outside of the UK/EU, to fall outside the reach of the no-tariff concession;
- **sanitary and phytosanitary goods:** in parallel with the TCA, the EU has granted the UK "national listed status", although there will be border checks and specific declarations for SPS products, and the UK and EU can "maintain fully independent SPS rules ... preserving each party's right to independently regulate". Either party may unilaterally reduce border checks to simplify the process of SPS imports;
- **customs formalities:** despite the UK government's ambition for frictionless trade, there will be a need for export and import declarations and other administration for cross-border trade. However the TCA provides for recognition of each party's Authorised Economic Operator ("trusted trader") scheme, enabling streamlined procedures for registered traders; and
- **product conformity assessments:** there is no cross-recognition of conformity standards; accordingly, with a few exceptions, products will have to undergo two separate conformity assessment processes in order that they can be validly placed on both the EU and UK markets (although there are simplified arrangements for some sectors – eg wine, chemicals, motor vehicles and parts, medicinal products and organic products). Additionally, certain simplification measures are included such as acceptance of self-declaration of conformity (where internal regulations so allow) and allowing labelling to take place (in most cases) in the country of import rather than the country of origin.

Services

As expected, the provisions in relation to services are similar to those seen in other recent EU FTAs, and fall well short of the freedoms of movement, and establishment and provision of services, that UK businesses enjoyed within the EU. However, there are some valuable commitments worth noting:

- **national treatment/non-discrimination:** investors and enterprises from the incoming party must be accorded

treatment no less favourable than is accorded to investors and enterprises of the home party;

- **local presence:** neither party may require a services provider to be established in that party as a condition of provision of a cross-border service.
- **most favoured nation treatment:** if either the UK or EU subsequently offers investors or businesses from another country more favourable terms as regards establishment than are offered in this TCA, those terms must be extended to investors and businesses from the UK/EU as well; and
- **visa-free entry rights:** visa-free entry from the UK to EU (and vice versa) for certain work purposes is to be allowed for up to 90 days in a 180-day period, although there are restrictions on the scope of this.

Of greater note as regards services is what is not included. In particular:

- there is no mutual recognition of **professional qualifications**; the TCA provides for the possibility of such recognition in the future on a profession-by-profession basis through the Partnership Council, but there is no guarantee of any such agreements. Professionals will therefore need to meet separately the requirements of each EU Member State in which they wish to provide services. Lawyers are granted some specific mutual access benefits although subject to exclusions; and
- for **financial services**, UK firms can no longer exercise EU passporting rights to provide services in the EU (and nor can the EU into the UK). Please see our note Post-Brexit EU-UK Trade and Cooperation Agreement – Key considerations for financial services for an analysis of the impact on financial service provision, in the absence of an Equivalence assessment by the European Commission.

Transport

The TCA contains some measures to ensure continued commercial transport connectivity and movement of goods away from the border, albeit with significantly more restrictions than have applied until now. In particular:

- **road transport:** UK and EU hauliers will be able to move goods to, from and through each other's territories, although there are limits on the number of cabotage operations that a haulier may take in the other's territory (for UK hauliers this is one cabotage operation and one cross-border operation, or two cross-border operations); and
- **air transport:** air carriers will no longer have cabotage rights within the other's territory. UK carriers may continue to operate flights from the UK to any EU destination and back, but may not operate flights between two EU destinations. Bilateral agreements between the UK and the relevant EU Member State will be needed for onward carriage of goods (eg London-Frankfurt- Dehli).

Data Protection/GDPR

Chapter V of the EU's GDPR¹² prohibits the transfer of personal data outside the EEA without additional protections (principally an "adequacy decision" that the laws of the third country contain adequate protections for such data or that the recipient entity would have included additional compliance measures (in practice standard contractual clauses)). The UK has carried the GDPR over into UK law as retained EU law (with necessary operational amendments):

- **data transfer from the EEA to the UK:** it had increasingly appeared likely that there would be no adequacy decision in place by 1 January 2021. The TCA does not itself contain such an adequacy decision, but it avoids – or at least postpones – the problem for businesses by providing¹³ that transfers of personal data from the EEA to the

UK are not treated as transfers to a "third country" until the earlier of:

- the date on which the European Commission issues an adequacy decision regarding the UK; or
- 1 May 2021 (which will automatically be extended to 1 July 2021 unless either side objects).

Businesses can therefore continue to transfer personal data from the EEA to the UK for at least the next 4-6 months without additional compliance measures. The inclusion of this provision may also suggest that the European Commission is close to reaching an adequacy decision, in relation to the UK, such that 4-6 months will be sufficient time to allow that adequacy decision to be finalised:

- **data transfer from the UK to the EU:** this is not referenced in the TCA. However, the UK ICO treats all EEA jurisdictions, and all jurisdictions with an existing adequacy decision from the European Commission, as adequate, thereby avoiding any corresponding concern.

Level playing field provisions

This part of the TCA was one of the last parts to be agreed, touching as it does on the tension between the UK's objective of being outside of the ambit of EU law, and the EU's aim to ensure that it could not be undercut by subsidised imports or products with lower compliance standards from the UK. The key elements of the balance struck are that:

- neither side is required to dynamically align with the rules of the other in relation to state aid, environmental protection, the fight against climate change and carbon pricing, social and labour rights, and tax transparency. However, both sides commit to high standards, or in some cases non-regression of standards, in these areas;
- the parties have committed to a set of "detailed principles" as regards state aid/subsidies; and
- the level playing field provisions are not subject to the general dispute settlement arrangements, but rather contain their own mechanisms for redress through arbitration. Additionally, in relation to the provisions on labour and social, environmental or climate protection, and with respect to subsidy control, there is provision for either party to take separate rebalancing countermeasures if material impacts on trade or investment between the parties arise as a result of significant divergences between the parties in these areas.

Northern Ireland

While the TCA is an agreement between the UK and EU, the situation of Northern Ireland remains subject to the provisions in the Withdrawal Agreement. The Protocol on Northern Ireland effectively creates a customs and regulatory border between Great Britain and Northern Ireland. The TCA will not govern trade in goods between the EU and Northern Ireland and goods entering Northern Ireland from Great Britain will count as imports. There will be facilitations for goods moving between Great Britain and Northern Ireland. In terms of services, Northern Ireland will be subject to the UK's rules.

Other aspects of the TCA

The TCA spans over 1000 pages, and covers more detail and more topics than can be addressed in a short summary note. Dentons will be continuing to analyse the TCA and will be issuing more materials focussing on specific aspects of the TCA and the wider framework of EU-UK trade after Brexit in the coming weeks and months. In the meantime, for advice on how your business may be affected, please contact your usual Dentons contact or any of those listed as contacts for this note.

1. By comparison, it is notable that the Withdrawal Agreement, also an international treaty, clarifies in Article 4(4) that provisions referring to Union law or to concepts or provisions thereof shall be interpreted in conformity with CJEU case law.
2. See in particular Articles 13 and 16 TCA.
3. For example Article 322 of the EU-Ukraine Deep and Comprehensive Free Trade Agreement envisages a role for the CJEU in the interpretation of EU law concepts.
4. General Agreement on Trade and Tariffs.
5. General Agreement on Trade in Services.
6. See this Council press release
7. The Commission has deemed this agreement an EU-only agreement (ie that all aspects of the agreement are within EU competence), under Article 217 TFEU such that only European Parliament ratification is needed; ratification by national or regional parliaments of Member States is not required.
8. See Commission brochure "EU/UK Trade & Cooperation Agreement; a new relationship with big changes", issued on 24 December 2020. Note, however, that the TCA itself makes no reference to pillars.
9. See for example:
 - GOODS.19 on measures in case of breaches or circumvention of customs legislation;
 - LPFOFCSD.3.12 on remedial measures in the area of level playing field, and 9.4 in relation to rebalancing measures;
 - ROAD.11 on remedial measures in road transport);
 - AIRTRN.8 on refusal, revocation, suspension or limitation of operating authorisation in air transport;
 - FISH.14 on remedial measures in the area of fisheries;
 - FISH.9 on compensatory measures in case of withdrawal or reduction of access;
 - UNPRO.3.1 and UNPRO.3.20 on suspension and termination of the participation of the UK in a Union programme; and
 - INST.24 on temporary remedies or to take appropriate safeguard measures in accordance with Article INST.36.
10. Commission note COM(2020) 855
11. UK-EU Trade and Cooperation Agreement - Summary at paras 96 (in relation to the level playing field provisions) and 177 (in relation to the general safeguard measures).
12. Regulation (EU) 2016/679 of 27 April 2016.
13. TCA, Article FINPROV 10A.

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