

The Main Trade Provisions of the UK-EU Trade and Cooperation Agreement

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At 11pm on December 31, 2020 (midnight Brussels time), the UK's Brexit Transition Period ended and a new era was entered into, an era where trade relations between the EU and the UK will be governed by the Trade and Cooperation Agreement (TCA) agreed between the EU and UK and implemented into UK law by the European Union (Future Relationship) Act 2020.

While the relationship between the EU and UK will inevitably evolve in the coming years, the TCA has established the fundamental nature of that relationship. A number of preliminary observations can therefore be made as to the TCA's likely impact on particular industry sectors and business activities. In this piece, we consider the main provisions of the TCA as they relate to trade.

TRADE IN GOODS

The TCA provides for tariff- and quota-free trade between the UK and the EU, provided that goods meet agreed rules of origin. These are rules which ensure that only "originating" goods can benefit from the market access arrangements. The rules also allow for full cumulation as between the UK and EU, i.e. processing activities also count towards origin, not just the materials used. Importantly, under the TCA, businesses will be able to self-certify origin.

The TCA does not contain a principle of free movement of goods, and so businesses will inevitably face new regulatory checks and controls. To ease the flow of goods, the UK and EU have agreed on international standards to which references will be made to ensure that domestic product standards and technical regulations are based on the same reference points. This is intended to make compliance with the other party's standards easier.

Arrangements to share information are envisaged and there are a number of sector-specific annexes (which cover medicinal products, motor vehicles and equipment and parts thereof, pharmaceuticals, organic products and wine) in addition to measures which ensure that each party has the right to regulate on sanitary and phytosanitary rules.

CUSTOMS

The UK is now no longer a part of the EU customs union and therefore customs controls apply (except for trade between the EU and Northern Ireland where the Withdrawal Agreement's Protocol on Ireland and Northern Ireland

applies).

In respect of customs, the TCA is based on an existing WTO Agreement and World Customs Organisation Convention and provides for customs arrangements covering all trade in goods. Measures are in place to address administrative barriers through mutual recognition of “trusted trader” (Authorised Economic Operators (AEO)) schemes; this means that AEOs that have been assessed and recognised under either the UK or EU scheme will face fewer (but not no) controls. There are also measures to deal with cooperation in respect of “RORO” ports. The core provisions are accompanied by a Protocol on mutual administrative assistance in customs matters.

CROSS-BORDER TRADE IN SERVICES

The UK has now lost automatic rights for its service suppliers to offer services across the EU (and *vice versa*) but the TCA contains various obligations intended to secure continued market access across a range of sectors and includes obligations to:

- ensure service suppliers do not face limitations;
- provide for non-discriminatory treatment between UK and EU service suppliers and investors;
- ensure cross-border trade is not inhibited by establishment requirements;
- prevent nationality restrictions on senior personnel; and
- ensure that the Agreement keeps pace with the Parties’ future free trade agreements.

However, these principles are all subject to various reservations in the TCA which may be imposed on service providers supplying services in the other party’s territory. Provisions in the TCA also address services regulation in a number of areas, including on the mutual recognition of professional qualifications, telecommunications, delivery services, international maritime transport services, legal services and financial services.

Financial services are covered by the TCA but only in the same way that they are covered in EU trade agreements with other third countries. The TCA does not include provisions concerning equivalence frameworks for financial services as equivalence decisions as unilaterally made and the EU has not yet finalised its assessment of the UK’s equivalence in 28 areas on which it has issued questionnaires. The TCA does confirm that the UK and EU will keep open their respective markets for operators to supply services through establishment.

There is a clear commitment for the Parties to review services and investment provisions, with a view to introducing future improvements.

DIGITAL TRADE AND DATA PROTECTION

Provisions in the TCA are intended to promote trade in digital services and provide for cooperation on digital trade issues, including emerging technologies. The TCA also contains a guarantee that digital signatures or documents will not be discriminated against on the basis of being digital. Online consumer protection and anti-spam provisions are also included in the TCA.

In terms of data protection, the TCA introduces a transition period which, unless an adequacy decision is reached in the interim, lasts for four months (extendable to six, unless one Party objects) and during which transmission of personal data from the EU to the UK will not be considered as a transfer to a third country provided that the UK rules remain in the form they will be from 1 January 2021 apply and that certain powers are not exercised without agreement of the EU.

PUBLIC PROCUREMENT

The TCA provides for a transparent and non-discriminatory framework of rules for trade in public procurement, based on the WTO Government Procurement Agreement (GPA). The UK and EU have also agreed an extension of market access coverage beyond the GPA, which includes: the gas and heat distribution sector; private utilities that act as a monopoly; and a range of additional services in the hospitality, telecoms, real estate, education and other business sectors.

The language used by both sides on this in summaries/FAQs about the agreement perhaps reflects what the UK and EU believe the interests of their respective audiences to be, with the UK stating “The Agreement ensures that the UK can maintain a separate and independent procurement regime and will enable the Government to enact reform of our system” whilst the EU chose to emphasise “EU companies will be able to participate on an equal footing with UK companies in bids for procurement tenders covered by the agreement, and vice versa”.

LEVEL PLAYING FIELD

A level playing field was one of the major sticking points in the deal (the others being fishing and dispute resolution), with “sovereignty” having been a key watchword for the UK’s negotiators. The concern of the EU has been that the UK might diverge from EU rules with the possible result that UK companies may be more competitive than EU companies bound by EU rules.

The TCA recognises the rights of the Parties to set their own policies and priorities and determine the level of protection but the parties have entered into certain commitments in an attempt to prevent distortions:

- Competition - both Parties have committed to maintaining their standards of competition law and to maintaining their competition authorities;
- Subsidies - the TCA ensures that each Party will have in place its own system of subsidy control (which shall be shaped by some broad principles) and that neither Party is bound to follow the rules of the other. Both sides need to be transparent about the subsidies they grant. In order to address a subsidy granted by the other Party that is causing or at serious risk of causing significant harm to its industries, a reciprocal mechanism has been agreed upon which allows for quick action;
- Taxation - On taxation, the Parties are committed to upholding international standards on tax including on the exchange of tax information, anti-tax avoidance and public tax transparency;
- Social and labour standards – the EU and UK have agreed to uphold levels of protections in terms of fundamental rights at work, occupational health and safety standards, fair working conditions and employment standards, information and consultation rights and restructuring of undertakings;
- Environmental – the parties have agreed to standards of environmental and climate protection including industrial emissions, waste management, preservation of the aquatic environment, emissions and removal of greenhouse gases etc. There are also guarantees within the TCA which go over and above the non-regression commitments; and
- Additional measures - both parties also committed to additional disciplines on their State-owned enterprises, designated monopolies and enterprises. Particular commitments are also in place for environmental and climate protection and labour and social standards so that these cannot be lowered in a way that affects trade or investment as between the UK and EU.

The TCA contains provisions concerning dispute settlement and a “rebalancing mechanism” which allows the Parties to review the balance of the TCA over time and enter into a negotiation on amendments to the economic provisions. There is also the ability for unilateral measures to be adopted in the event of significant divergence where such divergence may materially affect trade or investment as between the parties.

OTHER MATTERS

Existing national security practices are not affected by the TCA and there are other exceptions for UK action in a number of areas. In addition, the TCA has provisions relating to aviation, road transport, visas, fisheries, law enforcement and judicial cooperation in criminal matters, thematic cooperation, Union programmes and other matters.

CONCLUSION

The TCA is unique amongst the EU’s FTAs in that it is the first and only agreement with a former Member State, and accordingly the UK’s starting point was one aligned with the EU’s standards in many areas. The likely issues that will

arise from the TCA will be issues of interpretation (in respect of which there are dispute resolution mechanisms).

Whilst it is clear from the TCA that there are real benefits in comparison with a no-deal situation, it is important to recognise that UK and EU companies and individuals no longer have free access to each other's market on a frictionless basis. Careful assessment therefore needs to be made of the most efficient ways to address business opportunities in this new environment.

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