

January 2021

# A tale of winners and losers: an overview of the UK/EU free trade agreement

## Introduction

As the days and weeks ticked down to the end of the Brexit transition period - 11pm GMT on 31 December 2020 - and negotiation on their future trading arrangements appeared to stall on a number of occasions, many wondered whether the UK and the EU would ever succeed in doing a deal. Although the consensus of opinion among commentators was that the parties would manage to hammer out a deal - for the simple reason that tariff-free trade would be a very valuable prize for both sides, and because agreeing a trade deal, albeit a "skinny" one, would create a platform from which to negotiate additional deals in other areas - negotiations, particularly on fishing rights and the "level playing field"<sup>1</sup> dragged on through October, November and into December.

Unlike the issue of fisheries - which was effectively high-stakes haggling around fishing quotas - the "level playing field" issue was an existential issue which could well have derailed the entire negotiation. Therefore, although the chances of the parties ultimately doing a deal were always pretty high, this was by no means a foregone conclusion.

In the event, on the afternoon of Christmas Eve, white smoke finally emerged from London and Brussels, with the parties announcing that they had reached agreement on the two outstanding issues, fisheries and the "level playing field", and would be putting forward an agreed deal - a "Trade & Cooperation Agreement"<sup>2</sup> (TCA) running to some 1,250 pages - for ratification by their respective parliaments.

Because of the short time remaining before the end of the transition period, the EU agreed to provisionally apply the TCA until 28 February 2021, subject to ratification by the European Parliament.<sup>3</sup> In terms of the UK ratification, the UK parliament was urgently recalled to ratify the domestic legislation implementing the TCA: on 29 December 2020 the European Union (Future Relationship) Bill<sup>4</sup> was published, and on 30 December it was rushed through parliament, with the House of Commons backing the Bill by 521 to 73 votes. The bill received royal assent late on 30 December, as the European Union (Future Relationships) Act 2020,<sup>5</sup> becoming law a few short hours before the end of the transition period.<sup>6</sup>

## Architecture of future relationship

Shortly after the parties had agreed terms, a copy of the TCA (as agreed in principle) was published<sup>7</sup>, along with a number of associated declarations and agreements, including an Agreement on Nuclear Cooperation and an Agreement on Security Procedures for Exchanging and Protecting Classified

---

<sup>3</sup> Note that the European Parliament has proposed extending the provisional application period beyond 28 February 2021 to allow it to hold its consent vote during its March plenary session. A decision to extend the deadline for the provisional application of the TCA beyond 28 February 2021 can be made by the Partnership Council, the joint UK-EU body established to oversee the TCA.

<sup>4</sup> [EU \(Future Relationship\) Bill - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/bills/2020/1/eu-future-relationship-bill)

<sup>5</sup> <https://www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm>

<sup>6</sup> Primary legislation was required because the UK is a dualist state, meaning that international treaties do not automatically become part of domestic law. Passing the legislation was a "necessary precondition" for the UK to be able to ratify the TCA and for it to enter fully into force.

<sup>7</sup> See also this useful summary document entitled "Questions & Answers: EU-UK Trade and Cooperation Agreement" produced by the European Commission: [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532)

---

<sup>1</sup> See further below: creating a level playing field involves agreeing the rules and standards which would apply to prevent UK business from gaining a competitive advantage over businesses operating in the EU, and vice versa.

<sup>2</sup> [https://ec.europa.eu/info/sites/info/files/draft\\_eu-uk\\_trade\\_and\\_cooperation\\_agreement.pdf#page770](https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf#page770).

Information. The associated declarations<sup>8</sup> included, for example, a declaration on the adoption of adequacy decisions by the EU with respect to the UK under the General Data Protection Regulation (GDPR), and a declaration by the parties on agreeing to establish "*structured regulatory cooperation on financial services*", including signing a Memorandum of Understanding "*by March 2021*" to establish the framework for this cooperation.<sup>9</sup> Both of these issues are discussed in more detail below.

The TCA also sits alongside the treaty<sup>10</sup> signed by the UK and the EU on 24 January 2020 (the "Withdrawal Agreement"), which set out the terms of the UK's departure from the EU, which took place on 31 January 2020, including the terms of the Protocol on Ireland/Northern Ireland (*see further below*).

## Structure of the TCA

Before "wading in" to the TCA, it is useful to have an understanding of its structure. Details are set out in the Table at the end of this briefing.

## Trade in goods

The Withdrawal Agreement signed by the UK and the EU in January 2020 provided that the UK would leave the EU's single market and customs union at the end of the transition period, on 31 December 2020. In the absence of a free trade agreement, the parties would have fallen back on World Trade Organisation (WTO) terms to regulate their cross-border trade after this date – which would have had particularly significant implications for the cross-border movement of goods. The fact that the TCA waives all customs duties, quotas and quantitative restrictions on the cross-border movement of goods between the UK and the EU - provided goods comply with the relevant "rules of origin" (*see further below*) - is probably the single most important outcome of the trade deal. Even so, the arrangement falls far short of the frictionless trade arrangements which applied previously, with those involved in the cross-border trade of goods being required to comply with bureaucratic customs formalities, including the submission of entry and exit declarations, the

<sup>8</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948105/EU-UK\\_Declarations\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948105/EU-UK_Declarations_24.12.2020.pdf)

<sup>9</sup> The declaration on financial services concludes as follows: "*The Parties will discuss, inter alia, how to move forward on both sides with equivalence determinations between the Union and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side.*"

<sup>10</sup> <https://www.gov.uk/government/publications/agreement-on-the-withdrawal-of-the-united-kingdom-of-great-britain-and-northern-ireland-from-the-european-union-and-the-european-atomic-energy-communi>

completion of security and safety declarations, and mandatory inspections in the case of food products, animals and plants. This means that traders need to have UK and EU EORI<sup>11</sup> numbers and to know the Commodity Codes of their products and their customs valuation.

The TCA includes a mechanism to foster cooperation in relation to each other's Authorised Economic Operator ("trusted trader") programmes, as well as including a Protocol on mutual administrative assistance in customs matters, and another on the administrative co-operation between governments on VAT. In relation to VAT, exports become zero-rated (subject to proof of export) whereas imports become subject to import VAT. For further details on the VAT and other tax implications of the TCA, refer to our client briefing: [Brexit, the FTA and Tax: a Snapshot](#).

In order for a product to qualify for a zero tariff it must comply with the "rules of origin" set out in the TCA, which determine how much of its content must be derived from EU or UK processing or materials – i.e. only "originating" goods from the relevant jurisdiction are able to benefit from the liberalised market access arrangements agreed in the TCA. The TCA also provides for full bilateral cumulation (i.e. cumulation of both materials and processing) between the UK and the EU, thereby allowing EU inputs and processing to be counted as UK input in UK products exported to the EU, and vice versa. Although the arrangements include "facilitations" on average pricing, accounting segregation for certain products, as well as for all materials, and tolerance by value, it will undoubtedly place an additional administrative burden on producers wishing to export their goods to the EU (or vice versa) as well as, in some cases, necessitating changes to supply chains in order to satisfy the relevant rules of origin and thereby benefit from tariff-free trade.

For further details on customs issues which need to be considered, refer to our client briefing: [Brexit is here: what does it mean for the rail industry?](#)

The TCA also includes a chapter addressing regulatory barriers to trade between the UK and the EU while also allowing both parties the freedom to regulate goods in the way most appropriate for their own market. It builds on the WTO's Technical Barriers to Trade (TBT) agreement<sup>12</sup> and includes provisions on technical regulation, conformity assessment, standardisation, accreditation, market surveillance and marking and labelling. It also

<sup>11</sup> Economic Operators Registration and Identification number.

<sup>12</sup> [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm)

includes a number of sector-specific Annexes which seek to promote cooperation and tackle barriers to trade in the automotive, chemical, pharmaceutical, organic products and wine sectors.

### Trade in services

Although the terms of the TCA means that the UK has "got its sovereignty back", this has come at a price, the main casualty being the services sector. This is very significant because the services sector makes up around 80% of the UK's economy, and the EU is its largest export market.

At first blush, the deal looks fairly promising on the services front, in that it includes a number of general provisions which support cross border trade, such as a "most-favoured nation" clause. This provides that, if the UK or the EU were to agree more favourable trade terms with another country at some future date, then the UK/EU trade deal would automatically be amended to include equivalent provisions – other than in the area of financial services. It also includes a review clause encouraging the parties to consider whether there are possibilities to improve trade in services and investment relations between the EU and the UK in the future – although, again, there is an exception in relation to financial services.

However, once you start to delve into the detail, issues begin to emerge. For example, although short term business travel is permitted this is subject to a number of restrictions: e.g. "independent professionals" must hold a degree (or equivalent qualification) and have six years' relevant experience in order to qualify, and "contractual service suppliers" need to have a degree (or equivalent qualification) and at least three years of relevant experience. On top of such general restrictions which apply "across the board", there are further derogations at member state level, depending on the type of service being provided. These wide-ranging exceptions (termed "reservations" and "non-conforming measures") are set out in exhaustive detail in Annexes SERVIN-1 and SERVIN-2, which extend to over 200 pages.

In addition, one of the most significant absences from the TCA is any agreement on the mutual recognition of professional qualifications. Previously, qualifications gained in the UK in areas such as legal services, medicine, veterinary medicine, architecture and engineering were recognised across the EU with very little additional regulatory oversight. Now, individuals holding such qualifications will typically need to have these qualifications recognised on a state-by-state basis in the EU. This imposes considerable additional barriers to cross-border service provision because the rules on such

recognition vary by state and sector. Although the TCA sets out a framework for the future mutual recognition of such professional qualifications, by creating a mechanism for professional organisations and representative bodies to draw up mutual recognition agreements (MRAs), this is a time-consuming and onerous process which will need to be done on a sector-by-sector basis, and is likely to take years to implement. For example, no MRAs have yet been agreed under the EU–Canada free trade agreement (CETA) despite CETA having been in operation for almost three years.

So, for example, despite the summary<sup>13</sup> of the TCA produced by the UK government hailing the TCA as including "ground-breaking provisions on legal services that go beyond what the EU has included in any other FTA to date" the basic position is that the agreement only permits UK-qualified lawyers, within the territory of the EU, to advise on their "home jurisdiction law and public international law, excluding [European] Union law"<sup>14</sup>.

As the Law Society of England & Wales (LSEW) has stated,<sup>15</sup> EU market access for UK lawyers as set out in the TCA is "not even comparable" to the rights which UK lawyers enjoyed when the UK was a member of the EU, but is instead "comparable with the situation of non-EU, third-country lawyers seeking to practice in the EU". The LSEW goes on to say: "An FTA could have achieved preferential treatment for UK lawyers in the EU, compared to other third-country lawyer, and subject to the more recent "forward most-favoured nations" provisions in the new generation of EU FTAs, but that is not the case in the TCA".<sup>16</sup>

And it is not just lawyers who now face restrictions on their rights to operate in the European market. A heated argument has broken out in the past fortnight in relation to the UK's failure to reach agreement on visa-free EU travel for UK musicians touring in Europe. A "blame-game" has begun, with the UK claiming that it had tried to secure visa-free travel for touring musicians as part of an "ambitious

<sup>13</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948093/TCA\\_SUMMARY\\_PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf)

<sup>14</sup> See Article SERVIN 5.49, para 1 of the TCA.

<sup>15</sup> <https://www.lawsociety.org.uk/en/topics/brexit/legal-services-in-the-eu-uk-trade-and-cooperation-agreement-an-initial-analysis>

<sup>16</sup> Article SERVIN 5.13 of the TCA sets out the process for the future recognition of professional qualifications. This must be done on a sector-by-sector basis, with the professional bodies in the UK and the relevant EU member state(s) putting together a joint recommendation on the recognition of professional qualifications to the Partnership Council, the UK/EU body whose task is to "oversee the attainment of the objectives" of the TCA and any supplementing agreements.

*agreement on temporary movement of business travellers*", but that this had been rejected by the EU. According to the Independent<sup>17</sup> newspaper, citing Brussels sources, the UK dismissed the EU's counter-offer of a visa exemption for performers visiting any of its 27 countries for less than 90 days. Cabinet Office minister Nicholas True has said that talks with Brussels over visa-free travel for artists are "unlikely" to resume in the near future, despite an online petition<sup>18</sup> calling for the UK government to renegotiate the TCA to give free travel throughout the EU for bands, musicians, artists, TV and sports celebrities having collected over 250,000 signatures.

## Financial services

The TCA covers financial services in the same way as they are generally covered in the EU's other FTAs with third countries, which is a world away from the full integration of financial services which existed when the UK was part of the EU. For example, it commits both parties to keeping their markets open for operators from the other party seeking to supply services through establishment. Both parties preserve their right to adopt or maintain measures for prudential reasons ('prudential carve-out'), including in order to preserve financial stability and the integrity of financial markets. The parties also aim to agree by March 2021 a Memorandum of Understanding establishing a framework for regulatory cooperation on financial services.

However, the TCA does not include any elements relating to "equivalence" frameworks for financial services, as these are "unilateral" decisions<sup>19</sup> to be taken by each party, and are therefore not subject to negotiation. On 9 November 2020 the UK's Chancellor of the Exchequer announced<sup>20</sup> that the UK would be granting a package of financial services equivalence decisions to the EU. In terms of the EU's decision on whether to grant certain equivalence decisions to the UK, the UK has provided replies to the European Commission's equivalence questionnaires in 28 areas which are still being

<sup>17</sup> <https://www.independent.co.uk/news/uk/politics/uk-visa-free-work-musicians-eu-brex-it-b1784600.html>

<sup>18</sup> <https://petition.parliament.uk/petitions/563294>

<sup>19</sup> Equivalence decisions are based on an assessment of the **results** of regulatory regimes, rather than the similarities between different regulatory regimes, and exist where one state recognises another's legal requirements for regulating a good or service, even though they may not be exactly the same. In practice, this means that a trader need only comply with one set of requirements in both states. Equivalence decisions apply in a very specific area, and is most often used in relation to aspects of financial services regulation.

<sup>20</sup> <https://www.gov.uk/government/publications/hm-treasury-equivalence-decisions-for-the-eea-states-9-november-2020/hm-treasury-equivalence-decisions-for-the-eea-states-9-november-2020>

assessed by the European Commission. According to the European Commission<sup>21</sup>: *"a series of further clarifications will be needed, in particular regarding how the UK will diverge from EU frameworks after 31 December, how it will use its supervisory discretion regarding EU firms and how the UK's temporary regimes will affect EU firms. For these reasons, the Commission cannot finalise its assessment of the UK's equivalence in the 28 areas and therefore will not take decisions at this point in time. The assessments will continue."*

It is still unclear whether the European Commission will unilaterally grant equivalence to the UK in these 28 outstanding areas. The EU has the stronger hand and will only consider equivalence when it is in its own long-term interest to do so.

## Data protection

Under the TCA, from the end of the Brexit transition period, the EU and UK each commit to upholding high standards of data protection, agree not to adopt data localisation rules and agree to share Passenger Name Records, criminal record information, DNA, fingerprint and vehicle registration data.<sup>22</sup>

However, the key question as to whether the European Commission determines that the UK's data protection regime is "adequate" is not covered by the TCA. Adequacy would have permitted free movement of data from the EEA to the UK from the end of the transition period. In the absence of such decision, additional safeguards would ordinarily have been needed from 1 January 2021 onwards in order to transfer personal data from the EEA to the UK. However, the TCA sets out a political deal<sup>23</sup> to allow the continued free flow of personal data from the EEA to the UK for an interim period of up to six months, provided that, in effect, the UK's domestic data protection laws stay in their form as at 31 December 2020, until such decision is reached or the interim period ends. This is intended to allow time for the EU and UK to each unilaterally adopt an adequacy decision, recognising the other as offering adequate protection for transferred personal data. During this interim period, any transmissions of personal data from the EEA to the UK will not constitute a transfer to a third country. This will

<sup>21</sup>

See: [https://ec.europa.eu/commission/presscorner/detail/en/ganda\\_20\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/ganda_20_2532) dated 24 December 2020.

<sup>22</sup> See the Agreement Part Two, Title III, Chapter 2 (Digital Trade), and Part Three, Titles II (DNA, fingerprints and vehicle registration data, Title III (PNR) and Title IX (criminal record data), as summarised in the [eu-uk trade and cooperation agreement - a new relationship with big changes-brochure.pdf \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ganda_20_2532)

<sup>23</sup> See the Agreement Part Seven, Article FINPROV.10A.

mean that no additional safeguards (such as standard contractual clauses) are required in order to make such personal data transfers in this period.

Adequacy status for the UK is by no means guaranteed, however, due to concerns about the UK's bulk retention of data for national security purposes. However, as the GDPR<sup>24</sup> has been brought into UK national law by virtue of the European Union (Withdrawal) Act 2018, and given that the UK Data Protection Act 2018 incorporates the GDPR, there is reason to hope that an adequacy decision may be achievable within this interim period, and the mutual commitments in the TCA to maintain a high level of data protection may indicate that such a decision is likely to be forthcoming.

For UK to EEA transfers, the UK government has already announced its intention to treat each EEA jurisdiction as adequate, along with the other jurisdictions that already hold adequacy decisions under the GDPR. Therefore, transfers from the UK should be unaffected.

For further details on the data protection issues resulting from the trade deal, refer to our client briefing: [Brexit trade deal: what does it mean for data protection law?](#)

### Level playing field

As mentioned above, the level playing field provisions were among the most highly-negotiated terms in the entire TCA, and had the potential to derail the entire negotiation process, on account of the fundamental principles they raised for both sides, and because the choice was a binary one – i.e. for the UK to accept the level playing field commitments, or not. Their significance stemmed from the fact that the entire purpose of the treaty was to manage the divergence of the parties rather than, as is the case with all other free trade agreements, to promote their convergence.

Given the close geographical proximity of the UK to the EU, and the fact that UK businesses had decades of experience of operating in the EU market, the EU was not prepared to sign a free trade agreement with the UK on the same terms as, say, its FTA with Canada. Instead, the EU was insistent that, if it was to allow UK businesses tariff-free access to its markets, the UK would have to sign up to commitments to maintain equivalent levels of regulatory requirements in the areas of workers' rights, environmental protection, taxation and – in particular – restrictions on State aid (i.e.

---

<sup>24</sup> General Data Protection Regulation (EU) 2016/679 – see <https://gdpr-info.eu/>

government subsidies for business – which would mean that businesses based in the UK could potentially be given state support to undercut their rivals elsewhere in Europe).

From the UK perspective, on the other hand, the fundamental rationale for the entire Brexit project was to "regain the UK's sovereignty", and therefore signing up to such long-term commitments was seen as anathema.

In the end, the parties managed to find a way through, retaining the level playing field requirements in the areas of competition law, state-owned enterprises, taxation, subsidy control, labour and social standards, environment and climate protection, and a host of other areas, but introducing certain innovative arrangements should a party fail to comply with its obligations.

The rules in relation to competition law are relatively straightforward, with the focus on domestic enforcement and cooperation by the parties.<sup>25</sup>

However, an entirely different approach has been adopted in the areas of labour and social standards, environment and climate protection, and in relation to subsidy control, with the TCA providing that current standards applicable in these areas cannot be lowered in a manner affecting trade or investment between the parties and, in the event of a breach of this obligation, setting out an innovative enforcement/governance structure including the right for parties to unilaterally "*adopt rebalancing measures*" in the event of "*material impacts on trade or investment between the Parties ... arising as a result of significant divergences between the Parties in the areas of*": "*labour and social, environment or climate protection, or with respect to subsidy control*".<sup>26</sup>

The TCA "Question & Answer" document published by the European Commission<sup>27</sup> explains the rationale behind this approach as follows:

*"... the Agreement provides for the possibility to apply unilateral rebalancing measures in the case of significant divergences in the areas of labour and social, environment or climate protection, or of subsidy control, where such divergences materially impact trade or investment between the Parties. This*

---

<sup>25</sup> See our Competition Briefing, [EU-UK Trade and Cooperation Agreement: Understanding the Remodelled Rules](#), for further details.

<sup>26</sup> See Article 9.4 of Chapter 9 of Title XI of Heading One of Part Two of the TCA.

<sup>27</sup>

[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532)

*might be relevant, for example in a situation where one Party would significantly increase its levels of protection related to labour or social standards, the environment or climate above the levels of the other Party. This may entail an increase in the costs of production and hence a competitive disadvantage. Another example would be a situation where one Party would have a system of subsidy control that would systemically fail to prevent the adoption of trade distorting subsidies, which would provide a competitive advantage for that Party. In such cases, a Party would be able to adopt measures to rebalance the competitive advantage of the other Party. By addressing the possibility of regulatory divergence at any point in time, this mechanism allows for the future-proofing of level playing field provisions to maintain open and fair competition over time."*

Only time will tell whether the innovative governance arrangements contained in the TCA have managed to successfully untangle the seemingly Gordian Knot of the level playing field issue.

### Northern Ireland protocol

Even if a free trade agreement had not been signed, the terms of the Protocol on Ireland/Northern Ireland (contained in the UK/EU Withdrawal Agreement signed last January) would nonetheless have continued to apply from the end of the Brexit transition period. The purpose of the Protocol was to ensure that there would be no physical border infrastructure between Northern Ireland and the Republic of Ireland, irrespective of the outcome of trade talks. Instead, while Northern Ireland remains part of the customs territory of the UK, EU customs checks and controls apply for goods moving from Great Britain to Northern Ireland. The treaty signed in January 2020 required certain outstanding issues to be resolved by a "joint committee" before the end of the Brexit transition period and, on 8 December 2020, the UK and the EU, via the UK/EU Joint Committee on the Northern Ireland Protocol, announced<sup>28</sup> that agreement had been reached in principle on these outstanding points.

However, because the movement of goods from Great Britain to Northern Ireland has needed, from 1 January 2021, to comply with the EU's customs code, this has resulted, in the words of Peter Foster of the Financial Times,<sup>29</sup> in "a huge amount of

*bureaucratic grit [being thrown] into distribution chains that have grown up organically in the hitherto frictionless world of the UK's internal market."* He goes on to say: "*The new rules make staple transport processes, such as picking several loads of animal and plant products from different places in Great Britain and grouping them together on a truck before shipping them to Northern Ireland — "groupage" in the jargon — next to impossible. ... That problem appears structural — and efforts are being made to fix it — but it is one example of what happens when you apply "rest of world" rules designed for trade between continents to high-speed "neighbourhood" trade models."*

Therefore, the jury is still out on whether the painstakingly-crafted provisions of the Northern Ireland Protocol governing the movement of goods across the Irish Sea ultimately turn out to be fit for purpose.

### Governance arrangements

TITLE III of Part One of the TCA sets out the institutional framework for the ongoing operation of the TCA, with a hierarchical structure of bodies responsible for different aspects of the future relationship, each of which is co-chaired by a UK and an EU representative. At the top of the pyramid sits the "Partnership Council", chaired by a UK Government minister and a member of the European Commission, although the identities of such individuals may vary depending on the nature of the discussions. The purpose of the Partnership Council is to "*oversee the attainment of the objectives of the TCA and any supplementing agreement*" and to "*supervise and facilitate the implementation and application of the TCA and of any supplementing agreement*". The Partnership Council also has a role to play in the consultation stage of the dispute resolution process established by the TCA, which is discussed in more detail below.

The Partnership Council has a range of powers, including:

- (a) adopting decisions in respect of all matters where the TCA (or any supplementing agreement) so provides;
- (b) making recommendations to their respective governments regarding the implementation and application of the TCA (or of any supplementing agreement); and

<sup>28</sup> <https://www.gov.uk/government/publications/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement>

<sup>29</sup> See article entitled **Northern Ireland needs pragmatism, not more political rhetoric, as it faces Brexit** (14 January 2021) -

<https://www.ft.com/content/4abb7c9f-ff3e-4674-9bc4-b56274513843>

(c) adopting amendments to the TCA (or to any supplementing agreement) in the cases provided for in the TCA (or in any supplementing agreement).

Sitting directly below the Partnership Council in the hierarchy is the Trade Partnership Committee, whose main role is to assist the Partnership Council in the performance of its tasks. The Trade Partnership Committee is also empowered to supervise the implementation of the TCA (or any supplementing agreement), including supervising the work of the various "Trade Specialised Committees".

There are 10 such committees, covering areas such as intellectual property, regulatory cooperation, public procurement and technical barriers to trade: further details are set out in Article INST.2. The TCA also creates an additional eight "Specialised Committees" covering areas such as road transport, air transport, aviation safety, fisheries, energy and social security coordination.

The Partnership Council is empowered to establish new Trade Specialised Committees and Specialised Committees, dissolve any such committees, or change the tasks assigned to them. In addition, the TCA sets up four working groups, covering the areas of organic products, motor vehicles & parts, medicinal products and social security coordination, the first three under the auspices of the Trade Specialised Committee on technical barriers to trade, and the final one under the remit of the Specialised Committee on social security coordination.

The purpose of these bodies is to ensure that the TCA runs smoothly, and to iron out issues which may arise in its implementation. However, given that decisions must be made jointly by the UK and the EU representatives on each of these bodies, there is a significant risk that they – and particularly the Partnership Council – will become deadlocked when dealing with difficult issues. In addition, it is unclear what supervisory oversight the UK and the EU will have over the activities of these bodies.

## Dispute resolution

The issue of how to resolve disputes between the UK and the EU regarding the implementation of the TCA (and related agreements) was one which caused particular difficulties during the negotiation, on account of the UK's refusal to allow the Court of Justice of the EU to have any role in this process. The EU, on the other hand, was very keen to have watertight dispute resolution processes in place, not least on account of the fallout from the UK's highly controversial proposal (on which it subsequently backtracked) to include provisions in its domestic legislation which were at odds with the obligations

contained in the Protocol on Ireland/Northern Ireland.<sup>30</sup>

The dispute resolution provisions relating to both the interpretation of the TCA, and the application of its provisions, are contained in Part Six of the TCA. However, the general dispute resolution provisions do not apply to certain elements of the TCA, most notably the critical "level playing field" provisions, as referred to above.<sup>31</sup>

The first stage of the Part Six dispute resolution procedure is for the parties to enter into "good faith" consultations with the aim of reaching a mutually-agreed solution. These consultations may be held within the framework of one of the Specialised Committees referred to above, or of the Partnership Council, with the Specialised Committees able to refer the matter at any time to the Partnership Council or, alternatively, the Partnership Council being empowered to "seize itself of the matter". Such consultations must take place within 30 days of a written request from the complaining party for such a consultation process to take place.

In the event of an unsuccessful outcome of the consultation process, the complaining party may take the matter to an arbitration tribunal. Part Six sets out the rules governing the establishment of such a tribunal, including its composition, its functions and its terms of reference. The arbitration tribunal is required to deliver its interim report within 100 days of the date of establishment of the tribunal (this may be extended to 130 days if the arbitration tribunal considers that the 100 day deadline cannot be met) and to deliver its ruling within 130 days (with a similar option for the arbitration panel to extend this deadline by an additional 30 days if it considers that the 130-day deadline cannot be met). In no circumstances is the arbitration panel entitled to take more than 130 days to deliver its interim report, or 160 days to deliver its ruling. There is an option for a party to request the arbitration tribunal to decide that the proceedings are urgent, in which case the timeframes for the panel to deliver its interim judgment and ruling are halved. If immediate compliance with the ruling of the arbitration tribunal is not possible then the TCA sets out a process for the parties to agree what would be a reasonable period of time within which to comply – which may involve the arbitration tribunal being asked to determine what this period should be.

---

<sup>30</sup> For further details, see our Client Briefing: The UK Internal Market Bill: the clash over State aid - [The UK Internal Market Bill: the clash over State aid \(shlegal.com\)](#)

<sup>31</sup> Chapter 5 (Specific arrangements for unilateral measures and rebalancing) of Title 1 of Part Six of the TCA applies in such cases.

The TCA also sets out temporary "self help" remedies which a complaining party may take in the event that the respondent party fails to undertake the necessary remedial measures: this includes suspending its own compliance with certain Parts of the TCA. What constitutes a relevant Part of the TCA in such circumstances will depend on the nature of the initial violation by the respondent party.

Furthermore, the TCA, at Article INST.36, provides a "nuclear" option for dealing with "*serious economic, societal or environmental difficulties of a sectorial or regional nature ... that are liable to persist*", by permitting the party concerned to "*unilaterally take appropriate safeguard measures*" – although the scope of such safeguard measures is not defined. This right appears to have been included to some extent to provide comfort to EU fishing communities, as there is a specific reference to "*fishing activities and their dependent communities*" in the wording of the provision. If such a measure is taken by one of the parties, then the other party may immediately initiate the arbitration procedure referred to above, without having to go through the consultation process.

Finally, in terms of jurisdiction, paragraph 4A of Article INST.29 provides that "*for greater certainty, the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties under this Agreement*". In addition, in relation to applicable law, Article COMPROV.13 provides that the TCA (and any supplementing agreement) are to be "*interpreted ... in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties*".

## Conclusions

So, where do we go from here?

The first point to make is that the TCA, extending as it does to over 1,250 pages in length, covers a vast array of sectors, and the devil is truly in the detail in terms of assessing the implications for different interest groups and individuals – consumers, SMEs, hauliers, car manufacturers, airlines<sup>32</sup>, farmers, wine producers, fishing communities, lawyers, musicians, etc. These implications are still emerging as commentators continue to dig into the detail of the treaty and, in particular, its 57 Annexes. In addition, the future relationship will also be affected by matters which are specifically **excluded** from the TCA – such as the fact that students and young

people from Great Britain will no longer be entitled to take part in the Europe-wide Erasmus exchange programme.<sup>33</sup>

Also, as mentioned above, the TCA does not set out the final position in terms of the UK's future relationship with the EU. The Partnership Council, assisted by its various committees and working groups, is responsible for the TCA's implementation, and many rounds of further negotiations between European and British officials – without the same media spotlight – will undoubtedly take place over the coming months and years as the relationship evolves, and for the various "supplemental agreements" anticipated by the TCA to be agreed by the parties.

Furthermore, given that the deal is "sub-optimal" in terms of access to European markets for British service providers generally, the UK may wish to push for greater liberalisation of trade in services over the coming years. Success in such negotiations is certainly not guaranteed: the EU has driven a hard bargain in relation to the services sector – not least, one imagines, *pour décourager les autres* – and therefore its position is unlikely to move significantly in this area.

As also previously mentioned, the EU has not yet announced its much-anticipated decisions on data adequacy or financial services equivalence, which will have very significant ramifications for data transfers and for the City of London respectively. In addition, in terms of civil dispute resolution issues, although the UK has applied to join the 2007 Lugano Convention, which governs choice of jurisdiction "seat" (i.e. where a case may be tried) this requires the unanimous consent of the EU, which is still outstanding: the deadline for the EU to respond is 9 April 2021<sup>34</sup>.

So, to conclude, although the TCA is a very significant milestone in the trading relationship between the UK and the EU, the situation continues to evolve, and it is likely to take a number of years before some form of equilibrium is reached. Hardly surprising, given that it involves the reworking of a relationship which lasted for almost 50 years.

---

<sup>33</sup> Instead, the Prime Minister announced on Christmas Eve that the UK would be establishing its own scheme with "the best universities in the world", to be named after the British computing pioneer Alan Turing.

<sup>34</sup> For further details on the impact of Brexit on civil dispute resolution issues, see our client briefings [Brexit and dispute resolution issues](#) and [Enforcement of EU judgments post Brexit: an exclusivity conundrum](#).

---

<sup>32</sup> See our client briefing: [The UK/EU trade deal: aviation](#) for the implications for the aviation sector.

## Key contacts



**Marta Isabel Garcia**  
Partner  
T: +44 20 7809 2141  
E: marta.garcia@shlegal.com



**Dan Holland**  
Partner  
T: +44 20 7809 2108  
E: dan.holland@shlegal.com



**Tammy Samuel**  
Partner  
T: +44 20 7809 2227  
E: tammy.samuel@shlegal.com



**Kimia Sepahzad**  
Immigration Consultant  
T: +44 20 7809 2165  
E: kimia.sepahzad@shlegal.com



**Katie Hewson**  
Senior associate  
T: +44 20 7809 2374  
E: katie.hewson@shlegal.com



**Catherine Clarke**  
Professional support lawyer  
T: +44 20 7809 2106  
E: catherine.clarke@shlegal.com

## Structure of the TCA

1. When the parties published details of their negotiation positions on a free trade agreement early last year, the EU proposed<sup>35</sup> a single framework document with a single governance system, its draft agreement expressly providing that future agreements between the EU and the UK would be treated as supplemental agreements governed by the same common framework. The UK, on the other hand, proposed<sup>36</sup> a "suite of agreements" to be negotiated (and enforced) independently of each other. The reason for the EU's position can be understood in the context of its dissatisfaction with its relationship with Switzerland, which consisted of numerous agreements with little overall coordination. In addition, a common framework would increase the scope for trade-offs. The UK's preference for separate agreements would, on the other hand, likely have been motivated by a desire to avoid retaliatory action being applied in one area as a result of a dispute in a completely different area.

2. In terms of "winners and losers" on structure front, the EU has clearly got its way as the document bears a strong structural similarity to its draft proposals. The recitals confirm that the parties "*may supplement this Agreement with other agreements forming an integral part of their overall bilateral relations as governed by this Agreement*" and, in addition, Article COMPROV.2 (Supplementing agreements) of the TCA specifically provides:

*"Where the Union and the United Kingdom conclude other bilateral agreements between them, such agreements shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements. Such supplementing agreements shall be an integral part of the overall bilateral relations as governed by this Agreement and shall form part of the overall framework."*

3. The TCA runs to almost 1,250 pages in length, consisting of over 400 pages of substantive provisions, supplemented by over 800 pages containing various Annexes and Protocols. The substantive part of the document is split into seven Parts: in addition to Part One (Common Provisions) and Part Seven (Final Provisions), the remaining parts cover subjects such as trade relations, judicial cooperation in criminal matters, cyber-security and financial provisions. Part 6 sets out the dispute resolution provisions.

4. With the exception of the relatively short Parts Five (18 pages long) and Seven (8 pages long), each Part of the TCA contains a number of "Titles" or sub-sections, and each Title contains a number of Articles (although lengthy Titles are first sub-divided into "chapters" and, where necessary, further sub-divided into "sections"). Articles, if sufficiently lengthy, are further sub-divided into paragraphs. Part Two of the TCA, entitled "*Trade, transport, fisheries and other arrangements*" is by far the longest Part of the TCA, running to over 260 pages. Therefore, rather than just being split into Titles, it is first divided into six "Headings" (*trade; aviation; road transport; social security coordination and visas for short-term visits; fisheries and "other provisions"*) each of which contains a number of "Titles". For example, Heading One (Trade) of Part Two is split into 12 Titles, covering topics such as trade in goods (Title I), services and investment (Title II) and digital trade (Title III). The highly-negotiated provisions relating to the "level playing field" are set out in Title XI.

All of these divisions and sub-divisions make navigating the TCA something of a reader-unfriendly experience. The reader is reminded that the order of priority of the content is as follows: 1. Part; 2. Heading; 3. Title; 4. Chapter; 5. Section; 6. Article; 7. Paragraph.

<sup>35</sup> <https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>

<sup>36</sup> <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

5. Another point to mention is the nomenclature adopted in the TCA for the articles themselves. Other than the provisions relating to the "level playing field", and those in relation to transport of passengers by land (set out in Title II of Heading Two of Part Two of the TCA)<sup>37</sup> articles are given a name to reflect the element of the TCA (such as the Part or the Chapter) to which they relate. Therefore, the first article in Chapter 1 (chapter entitled "*National treatment and market access for goods*") of Heading One (Trade) of Part II of the TCA is entitled "Article GOODS.1", to reflect the reference to "goods" in the chapter title. Similarly, the first article of Chapter 2 (chapter entitled "Rules of Origin") of Heading One (Trade) of Part II of the TCA is entitled "Article ORIG.1" to reflect the reference to "Rules of Origin" in the chapter title. Furthermore, it is important to note that the numbering of the articles is not consecutive. As an example, Article COMPROV.3 (which is contained in Part 1 (Common and institutional provisions) of the TCA) is immediately followed by Article COMPROV.13. This is because the TCA is based on the draft FTA put forward last March by the EU and the numbering of the articles in the draft FTA has been retained in the final version, despite the intermediate articles (COMPROV.4 to COMPROV.12 inclusive) having been negotiated out of the final document.
6. Finally, a quick mention of the protocols and annexures to the FTA. Although these run to over 800 pages, their structure is very straightforward when compared with the main body of the document. There are 57 annexures and three protocols in total, ranging from the rules of procedure of the Partnership Council and committees, to guidelines for arrangements on the future recognition of professional qualifications. The protocols cover cooperation in the field of VAT fraud, mutual administrative assistance in customs matters and social security coordination.

---

<sup>37</sup> The level playing field provisions are numbered from Article 1.1 to Article 9.4; the transport of passengers by land provisions are numbered from Article X to Article X+14. The reason for the non-standard format of these articles is presumably because they are provisions which did not form part of the original draft version of the TCA put forward by the EU.