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EU-UK Trade and Cooperation Agreement: Understanding the Remodelled Rules

Under 'The Trade and Cooperation Agreement' between the European Union ("**EU**") and the United Kingdom ("**UK**") (the "**TCA**") (effective as of 1 January 2021), the UK will be able to establish its own competition regime and will no longer be part of the EU's regime. The EU and UK will each have the right to set their own competition laws, policies and priorities and to determine the levels of protection each deems appropriate - subject to the broad constraints of the TCA.

In what the Conservative Government will deem a big success, the TCA affords the UK its sovereignty and freedom from the remit of the European Court of Justice. Nonetheless, it is clear from the TCA that the UK will not have an entirely free hand in its competition law policy and enforcement.

(I) Competition Policy

In order to create and protect a level playing field for open and fair competition that has been a vocal priority for the European Commission ("**EC**"), the parties must:

- Maintain high standards of competition law;
- Enforce their competition laws;
- Maintain their own independent competition authorities which are competent for the effective enforcement of the competition laws; and
- Apply their own competition laws on a procedurally fair, transparent and non-discriminatory basis – and irrespective of the nationality or ownership status of the parties involved.

Consistent with the pre-Brexit regime each party will be required to regulate anticompetitive agreements (including cartels), abuse of a dominant position and mergers that have significant anticompetitive effects. There will also be provision for cooperation between these authorities[1] regarding developments in competition policy and enforcement activities. Finally, each party may provide for exemptions from its competition law where that is in pursuit of legitimate public policy objectives and where those exemptions are transparent and proportionate to those objectives.

(II) Subsidy Control

Ever since the UK voted to leave the EU in the 2016 Referendum one of the hottest topics of debate has been State Aid - the critical issue being whether the UK, with its newfound freedom, would operate in such a way as to undercut and thereby outcompete its EU counterparts.

Under the TCA, the parties have reached a compromise whereby each of the EU and the UK (excluding Northern Ireland)[2] will be able to set up their own subsidy control regimes. Of critical importance to the UK, this means it is no longer required to follow the EU's State Aid regime (including the requirement for aid to be notified to the EC before being granted which will now no longer apply).

(a) Operation of the Subsidy Control Regimes

Notwithstanding that each party will be required to have in place and maintain their own effective system of subsidy control, the EU and UK will not be able to act in an entirely unfettered way. This is because in order to ensure subsidies are not granted where they have, or, could have a material effect on trade or investment between the parties, each party must, in the granting of a subsidy, respect a set of '*principles*'[3] prescribed under the TCA. However, it

[1] For the EU this will include both the EC and EU Member State competition authorities.

[2] A parallel EU-linked regime will apply to Northern Ireland by virtue of the *EU Withdrawal Agreement Act 2020* and the *Northern Ireland Protocol 2020* ("**Protocol**") whereby EU State aid rules will continue to apply where UK measures: (i) affect trade between Northern Ireland and the EU, and (ii) fall within areas covered by the Protocol, i.e. movement of goods and wholesale electricity markets.

[3] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 3.4,* TCA.

will be for each party to determine how these principles will be implemented in their own domestic laws.

Broadly, the *principles* require that any subsidies: (i) pursue a public policy objective to remedy an identified market failure or to address an equity rationale (e.g. social difficulties/distributional concerns); (ii) are proportionate, limited and necessary, (iii) and are an appropriate policy instrument.

The TCA also includes a number of prohibited subsidies and subsidies subject to specific conditions.[4] Additionally, each party is under an obligation to be transparent about the subsidies that they have granted. This will include making specific information about that subsidy publicly available within certain timeframes to assist third parties in assessing compliance with the principles and challenging non-compliant subsidies before the courts and tribunals.

(b) Judicial Review & Recovery

The TCA includes provisions on the role of domestic courts in hearing claims on subsidies, reviewing domestic subsidy decisions and powers to impose remedies. In effect, '*interested parties*' (i.e. a party whose interest may be affected by the granting of the subsidy) may apply for a review by a court or tribunal of the grant of a subsidy. Additionally, the TCA provides that each of the EU and UK will be obliged to have an effective mechanism of recovery in respect of subsidies that have been successfully challenged before a relevant court or tribunal (i.e. where subsidies were granted illegally)[5]. The UK will need to make available a new remedy of recovery at the end of a successful judicial review.

(c) Consultation

The TCA provides for consultations between the EU and UK where a party considers that the granting of the subsidy has, or, could have, a negative effect on trade or investment between the parties. The 'Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development' will undertake the consultations[6].

(d) Remedial & Rebalancing Measures

If any dispute cannot be solved by consultation, then the TCA provides for a reciprocal mechanism for the parties that allows either the EU and/or the UK to take rapid action where a subsidy is causing, or, is at serious risk of causing significant harm to one or a number of its industries (i.e. a 'remedial measure').[7] These measures can be challenged using an accelerated arbitration procedure and there is the possibility of compensation if a party has used these measures in an unnecessary or disproportionate manner.

Notwithstanding that the EU and UK will be able to determine their own subsidy control regimes, where material impacts on trade or investment between the parties arise as a result of significant divergences on subsidy control, 'rebalancing measures' may be taken to address this.[8] Specifically, the TCA provides for rebalancing measures that either party may take where one party applies or changes its subsidy rules in an unfair way and that materially affects bilateral trade or investment. While these measures must be restricted in scope and duration to what is necessary and proportionate to remedy the situation, the scope of this new mechanism itself remains wide.

(III) Implications for Business

Merger Control: the 'One-Stop-Shop' principle[9] will no longer apply, so parties will need to consider whether a transaction will require a merger filing to the Competition and Markets Authority ("**CMA**") as well as to the EC, or, individual Member State authorities in the EU. It is important for deal planning to keep in mind also that the CMA's increasingly aggressive and interventionist approach is likely to only be emboldened post-Brexit with its newfound independence.

Anticompetitive agreements & abuse of dominance: the CMA will no longer enforce the EU prohibitions on anticompetitive agreements (horizontal and vertical arrangements) and abuse of dominance. But, if misconduct has an effect on trade in both the UK and EU, the conduct could still be reviewed both by the CMA and the EC. Therefore, businesses will need to ensure that their agreements

[4] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 3.5, TCA.*
[5] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 3.11,* TCA for the circumstances in which a 'material error of law' may lead to subsidy recovery – which list may be supplemented.
[6] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 3.8,* TCA.
[7] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 3.12,* TCA.
[8] See *Title XI: Level Playing Field For Open And Fair Competition And Sustainable Development, Article 9.4,* TCA.
[9] This principle provides that (as part of EU membership) where transactions meet the EU merger control thresholds for notification to the EC, such transactions must be notified to the EC (and not to the various EU Member State competition authorities).

and practices comply with both UK and EU rules. Note, this equally applies to conduct and practices that UK sectoral regulators could review.

Vertical agreements: The EU block exemptions will remain part of the UK competition rules until their various expiry dates.

State Aid: there remains much to be decided over how the UK will establish its regime and the devil will be in the detail (of which there is currently little). Two key features of the new regime which may prove to be a source of conflict are worth noting. First, subsidy consultation under which there is currently no practical threshold to assess whether a subsidy has a serious risk of significantly negatively affecting trade and investment. Second, in providing for the wide rebalancing measures, the TCA appears to have ventured into unchartered waters in that it seems to create a new category of trade remedies with potentially broader scope than is currently in place under global trading rules. By way of illustration, if the UK were to ease its own subsidy control system the EU could respond with imposing import tariffs (one of the rebalancing measures).

Dawn raids: EC officials will no longer have jurisdiction to conduct dawn raids in the UK for breaches of EU law and nor will the EC be able to ask the CMA to conduct a dawn raid on their behalf (except in limited circumstances, e.g. existing investigations involving UK elements over which the EC still has exclusive jurisdiction).

Private damages actions: the CMA and UK courts will no longer be bound to accept as a legal basis EC competition law infringement decisions or case law of the EU issued post-Brexit. As such, claimants will no longer be able to rely on those future EC (or EU Member State) decisions as a binding finding of an infringement. It remains to be seen whether the UK will remain an attractive forum for damages actions for EU-wide breaches of the competition rules going forward.

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