

## Future UK-EU relationship: the end of the beginning

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The UK and the EU managed to give their future relationship agreements the green light in the nick of time, just before the Brexit transition period ended on 31 December 2020. The EU still needs to take some steps before formally concluding the agreements, but the agreements now apply provisionally. However, it is important to see the agreements, and the UK-EU trade and co-operation agreement in particular, as a framework, with scope for future negotiation.

The UK and the EU managed to give their future relationship agreements (the agreements) the green light in the nick of time, just before the Brexit transition period ended on 31 December 2020. The agreements have been signed, and the UK Parliament passed implementing legislation on 30 December 2020. The EU still needs to take some steps before formally concluding the agreements, but the agreements now apply provisionally.

It is important to see the agreements, and the UK-EU trade and co-operation agreement (TCA) in particular, as a framework, with scope for future negotiation. "The TCA is not the end of the road," says Jenny Revis, Head of EMEA Customs Practice at Baker McKenzie. "It includes provisions that allow the UK and the EU to use the deal as a platform in order to develop their relationship further. In terms of what will materialise, in the short term we expect supplemental arrangements in areas such as financial services and free flow of personal data and in the longer term we might see greater liberalisation of trade in services (at least the UK will push for that) and maybe even a joint framework on foreign policy and external security."

### Three agreements

The framework for the agreements is broadly along the lines envisaged in the 2019 UK-EU political declaration, and comprises the following:

- The TCA, which is the main agreement and covers trade, economic and security co-operation (see box "Trade aspects of the TCA"). It has a single overarching governance framework.
- The UK-EU security of information agreement, which supplements the TCA. It addresses security procedures for exchanging and protecting classified information.

The European Commission (the Commission) has explained that this was drafted as a separate agreement because a security of information agreement is one of the standard security agreements concluded by the EU with other countries.

- The UK-Euratom nuclear co-operation agreement, which provides a framework for co-operation between Euratom and the UK in the peaceful uses of nuclear energy, and has its own governance and dispute settlement mechanism. It was negotiated in parallel with the above agreements, but under the separate legal basis of Article 101 of the Euratom Treaty.

### Framework for future co-operation

The TCA is divided into seven parts dealing with: common and institutional provisions; trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy and fisheries; law enforcement and judicial co-operation in criminal matters; co-operation between the UK and the EU on health security and cyber security; the UK's participation in EU and Euratom programmes; dispute resolution and horizontal provisions; and final provisions covering entry into force, review and termination. It also has a number of annexes with further detail, and protocols relating to taxes, customs and social security.

The general provisions include a requirement for supplementing agreements (unless they provide otherwise) to form an integral part of the overall relationship governed by the trade and co-operation agreement, and part of the overall framework. Supplementing agreements could comprise: other bilateral UK-EU agreements; agreements between the EU and EU member states, and the UK; and agreements between the UK and Euratom.

As was expected, the TCA does not address the EU's unilateral equivalence determination in respect of the UK's financial services regulatory regime, although it has provisions on cross-border trade in financial services and investment. The Commission has explained that this is because these are unilateral decisions of each party and are not subject to negotiation, but that it will continue its assessment of the UK's equivalence. There is therefore clear scope for divergence.

James Palmer, a partner at Herbert Smith Freehills LLP, thinks that: "We will see divergence in regulation by both the UK and the EU, but we will not see the UK go "low regulation": it will focus on effective regulation. The UK has tended to be a first or early mover on introducing high standards in services sector regulation anyway, and we expect that to continue, but with the ability to focus on rules appropriate for the UK's markets".

Data adequacy decisions are also unilateral matters for the EU, although the TCA includes a bridging provision on the transmission of personal data (see *Briefing "UK data protection and the EU-UK trade agreement: where does the UK go from here?"*, *this issue*).

### Enforcement and level playing field

Businesses will need to be up to speed with the enforcement and safeguard mechanisms to ensure that parties continue to comply with their obligations. "Under the TCA, both parties can engage in cross-sector retaliation in case of non-compliance (by introducing tariffs or quotas or by suspending the application of parts of the TCA or even the whole TCA)," says Sunny Mann, Head of EMEA Trade Practice at Baker McKenzie. "Although this makes adherence with the TCA more likely, it also increases uncertainty for businesses as it means that favourable access to EU or UK markets under the TCA cannot be taken as a given."

The level playing field provisions were one of the more contentious areas in the negotiations. "The EU vehemently battled to prevent the UK from undermining EU labour and environmental standards and granting subsidies that would distort trade with the introduction of the level playing field provisions," says Lourdes Catrain, a partner at Hogan Lovells in Brussels. "These rules are now subject to innovative enforcement teeth. If a party undermines the existing standards or provides illegal subsidies that create a "significant" distortion, the other party can impose unilateral "rebalancing" measures."

Catrain comments that the EU and countries such as the US with multiple free trade agreements (FTAs) have very rarely enforced these types of retaliatory provisions,

since there is a high burden of proof that a significant distortion that would affect trade has taken place.

"This is an area where both parties can claim victory," says Mann. "The TCA has stricter level playing field conditions than those included in other recent EU FTAs. However, the UK has (under certain circumstances) the right to break away from EU rules if it chooses to do so, but with the risk of having access to the European market restricted if it strays too far."

### UK implementation

The terms of the TCA are implemented into UK law by the European Union (Future Relationship) Act 2020 (2020 Act), related legislation, and statutory instruments (SIs) made by the government under powers conferred by the 2020 Act.

Section 29(1) of the 2020 Act (section 29) provides for the general implementation, through a glossing mechanism, of provisions of the trade and co-operation agreement and the security of classified information agreement which are not implemented by any other mechanism. The glossing mechanism provides that existing domestic law has effect with such modifications as are required for the purposes of implementing these agreements. Glossing requires the modifications to be read across to domestic law, in contrast to text amendments to the law. So, if a particular provision required implementation at the end of the transition period to give effect to the UK's international obligations under the agreement, and there is no other implementing mechanism, it is implemented through this glossing mechanism.

Section 31 of the 2020 Act empowers the government to make SIs to implement the future relationship agreements, including aspects that have already been implemented by the 2020 Act or under the section 29 glossing mechanism, and including future obligations under the agreements. Lawyers should also check whether UK law already happens to comply with a particular aspect of the future relationship agreements under existing legislation passed for a separate purpose.

### Looking ahead

The big question, given that there is still much to play for, is whether the relationship will become closer as time goes on, or more restrictive, with increasing divergence between the UK and EU legal and regulatory regimes.

Eric White, a consultant at Herbert Smith Freehills, strikes a positive note: "The TCA is an Association Agreement that creates a dynamic relationship between the EU and the UK. There are very many review clauses

and opportunities to co-operate further in the future which lead us to hope that the relationship will become closer once fears over sovereignty on the one side and unfair competition on the other are overcome”.

*Joanna Morris and Anne O'Connor, Practical Law Brexit. With thanks to James Davies, Practical Law Commercial. For more information, see Practical Law's Brexit page.*

### Trade aspects of the TCA

The UK-EU trade and co-operation agreement (TCA) contains the following key areas relating to trade:

**Trade in goods.** The TCA goes further than other comparable EU free trade agreements (FTAs) by prohibiting customs duties and quotas on the other party's goods and sets out detailed rules of origin that must be satisfied in order to qualify for preferential tariff treatment.

**Services and investment.** As is the case in most FTAs, the commitments in these areas are quite limited. The UK and EU have made market access, national treatment and most favoured nation commitments in relation to cross-border trade in services and investment, and have also made provision for the entry and temporary stay of natural persons for business purposes. However, these commitments are subject to very broad exceptions and conditions. There is a mechanism, but no obligation, for the parties to agree on the mutual recognition of professional qualifications in the future. This section also contains sector-specific commitments relating to delivery services, telecommunications services, financial services, international maritime transport services and legal services.

**Digital trade.** The TCA contains relatively extensive provisions on digital trade by comparison to other EU FTAs, including a prohibition on data localisation requirements. However, it does not commit the EU to make a

positive adequacy decision in respect of the UK's data protection regime.

**Intellectual property.** The TCA contains typical FTA provisions addressing intellectual property (IP), which mostly serve to reaffirm existing standards. It contains a national treatment obligation, as well as commitments to provide particular standards of protection concerning different types of IP rights, and to provide for the effective enforcement of those rights. There are no substantive commitments on geographical indications, which are covered in the UK-EU withdrawal agreement.

**Public procurement.** The TCA extends the parties' commitments beyond those under the World Trade Organization's government procurement agreement, for example in relation to telecommunication-related services and procurement by privately owned utilities.

**Energy.** The TCA contains extensive commitments aiming to facilitate trade and investment between the UK and EU in the areas of energy and raw materials, and to support security and environmental sustainability, notably in contributing to the fight against climate change. This section will cease to apply on 30 June 2026 unless extended by the parties.

**Level playing field.** The TCA contains non-regression commitments on labour and environmental standards, and extensive provisions on subsidy control requiring the UK to adhere to agreed principles and to establish an independent authority to oversee its subsidy control regime. The commitments on labour and environmental standards and subsidy control are enforceable through different means, including a novel "rebalancing mechanism" enabling the parties to apply tariffs in response to significant divergences. It also contains commitments in relation to competition policy, taxation and other areas.

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