

BREXIT: INITIAL COMMENTARY ON THE NEW TRADE AND COOPERATION AGREEMENT

UK, Europe
Legal Briefings

On Christmas Eve, the UK and EU finalised the [Trade and Cooperation Agreement](#) (TCA) that governs their future trading and security relationship and came into effect when the status quo transition ended at 11pm 31 December 2020.

At 1259 pages, it is a complex deal that will take time for businesses, governments and authorities to understand, implement and make use of. Notwithstanding some exceptions (particularly the extensive unilateral phased transitional mitigations provided by the UK), new requirements and restrictions arising from the end of the status quo transition period will apply immediately.

At its heart is a classic, but not very ambitious free trade agreement – tariff and quota-free trade in goods, but little mutual recognition and very modest commitments on services. This reflects the interplay between the negotiating priorities of the EU and UK and provides a good basis for restoring a greater depth of co-operation between the UK and EU in due course as described in [this](#) initial response from our Chair and Senior Partner, James Palmer.

The nature of the EU/UK relationship, pressure from business and other stakeholders as well as the over-arching framework that the TCA provides with, amongst other things:

- a Joint Partnership Council with over 30 sub-councils;
- automatic reviews of the agreement every 5 years; and
- the ability of either party to terminate the TCA on 12 months' notice,

means that the EU and UK are likely to be in semi-permanent negotiations on the terms of their relationship in the years to come.

The real innovations in the TCA come with the emphasis on preserving the so-called level playing field and with the “special procedures” that it creates for its governance.

THE LEVEL PLAYING FIELD PROVISIONS

The attention paid to the level playing field in the TCA is best explained by the fact that this is uniquely an agreement to manage divergence and not to promote convergence. Other free trade agreements eliminate tariffs and restrictions and try to promote more trade by creating mechanisms to reduce non-tariff barriers – often called technical barriers to trade – arising out of divergent regulations and standards. They therefore set out the conditions under which products conforming to different regulations can be accepted and set up mechanisms to harmonise these regulations and to encourage convergent approaches to future. The situation prevailing at the conclusion of the TCA between the UK and the EU is however fundamentally different. These jurisdictions are starting off with extensively harmonised regulations and deeply integrated markets and the TCA controls the way in which they will diverge in the future.

Our latest [View from Brussels](#) looks in more detail at the TCA’s unprecedented level playing field provisions and their enforcement.

The remainder of this blog post looks briefly at some of the other key aspects of the TCA.

DATA

- Generally, the TCA does not deal with data protection issues, however, provides for a 4 month window (which can be extended to 6 months) during which the UK will still not be treated as a ‘third country’ for GDPR purposes. This provides extra time for the EU to provide its data adequacy decision and avoid a 31 December ‘cliff edge’. See our blog post [here](#) for further details.

GOODS

Tariffs, quotas and rule of origin requirements

- The TCA provides for zero tariffs and no quotas on any goods that qualify. This goes beyond any other EU trade deal, which have all had some exemptions (at least within agricultural goods). There are, however, provisions in the TCA which allow tariffs to be imposed on imports from the other party if certain conditions are met (see our

latest [View from Brussels](#)).

- Qualifying requires meeting % rule of origin (RoO) thresholds on local content value (with both UK and EU contributions counting towards the %). Some goods are exempt from RoO requirements altogether, while for others there are lower thresholds for limited quantities or for transitional periods. For eg, electric cars will be tariff-free if >40% of value is added in the UK and/or the EU until the end of 2023 and at least 45% until the end of 2026 (after which they will not be tariff free if their batteries were imported from outside the UK/EU). See UK guidance [here](#).
- RoO requirements will require business to review supply chains and provide paperwork and will incentivise the adaptation of supply chains to increase UK/EU content % value.

CUSTOMS AND TRADE FACILITATION

- Customs declarations and paperwork for EU/UK trade will now be required. The TCA mitigates this in various ways including by providing for mutual recognition of Trusted Trader Schemes with streamlined procedures for eligible traders and the UK had already [announced](#) a six month phased transition from 1 January in which many new customs requirements will be waived. However, the TCA does not contain such phasing and the EU has not announced any equivalent measures.

SANITARY AND PHYTOSANITARY (SPS) STANDARDS

- Imports will need to comply with the respective UK and EU laws on SPS with checks, specialist paperwork and frequent physical inspections required on products of animal origin. While border controls must be proportionate to identified risks, no mechanism for recognising equivalence for SPS requirements was agreed (therefore falling short of the EU's trade agreements with Canada and Japan).

PRODUCT CONFORMITY ASSESSMENTS

- Similarly, while the TCA streamlines some compliance processes it falls short of the broader mutual recognition of conformity assessment the EU agreed with Canada, which would have allowed UK bodies to certify that products meet EU standards and vice versa. This means many goods will have to pass two sets of conformity assessments rather

than one.

TRANSPORT

Road haulage

- The TCA allows goods lorries to continue operating back and forth between the EU and UK without requiring new permits or certificates. However, some new and complex restrictions will apply, for example, UK and EU hauliers only be able to make up to two additional pickup and drop-offs within the other party's territory once they have crossed the border. See UK guidance [here](#).

Aviation

- The TCA contains a chapter governing the EU/UK aviation relationship. Our blog post [here](#) provides a brief overview.

SERVICES

- For services, the TCA is broadly as good as any of the EU's trade agreements with third parties, although this means very modest commitments compared to EU membership.
- The TCA is structured so as to agree that all services are liberalised, but this is then subject to long lists of exceptions set out in annexes which vary between EU member states. As with country by country exceptions in relation to other parts of the TCA, these exceptions do not mean that the country is applying the restriction, just that under the terms of the TCA it could apply the restriction. Some of the exceptions are very broad. For example, audio visual services are excluded entirely from the TCA (although note that the European Convention on Transfrontier Television will still apply to the UK and 20 EU member states - see [here](#)).
- For financial services there is a broad carve-out for prudential measures, and, as has been expected by financial services firms for a long time, the TCA does not attempt to solve the fundamental business model challenges for the industry arising from the loss of the UK/EU passport mechanism and limits on market access. Many firms with significant

EU business have activated all or some of their 'no deal' contingency plans already and the TCA will not make these redundant. Much of the focus will now turn to whether individual EU member states develop regulatory regimes which facilitate, rather than restrict, UK firms' access to their domestic customers and markets.

- The EU and UK have agreed in a Memorandum of Understanding to establish a framework of financial services regulatory co-operation by March 2021.
- The TCA provides a framework for mutual recognition of professional qualifications, but no new qualifications will be recognised as of 1 January.

MOBILITY

Short term EU/UK business trips are allowed, without visas for specific purposes such as attending meetings, training and conferences, whereas, for example, trips that involved selling goods or services directly to the public would require a visa. Short term visits without a visa are limited to 90 days in any 6 month period. However, different member states have different restrictions and requirements depending on the nature of the business activity.

EU AND UK GUIDANCE

See [here](#) for links to EU and UK guidance on how to get ready for new rules in 2021.

If you would like to discuss any specific points in relation to the agreement, please contact your regular Herbert Smith Freehills relationship contacts, or otherwise any of our experts listed [here](#).

To keep up to date with the latest developments on Brexit, subscribe to our blog [here](#). Our previous two e-bulletins on preparing for 1 January 2021 are available [here](#) and [here](#).

[More on Brexit](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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