SLAUGHTER AND MAY/

REFLECTIONS ON THE EU-UK TRADE AND CO-OPERATION AGREEMENT

Beyond Borders – Part of the Horizon Scanning series

The EU-UK Trade and Co-operation Agreement (the **TCA**) came into provisional effect at 11pm on 31 December 2020. The TCA is the mainstay of the eleventh hour deal concluded between the EU and the UK on Christmas Eve.

The TCA contains provisions (for example, the interim arrangements for data flows and the parties' commitments to combatting climate change) that will be viewed positively by most businesses. However, for those businesses whose primary activities do not involve trading or manufacturing goods, the immediate impact of the TCA (compared to a "no-deal" scenario) may be quite marginal.

The TCA makes much more limited provision for businesses trading in services than those trading in goods. In relation to services, and in a number of other areas, the TCA has been accurately described as "thin", focussed largely on the basis on which the EU-UK relationship could develop over time rather than any substantive concessions. The Joint Declarations published alongside the TCA underline a number of aspects of the deal that remain incomplete.

This briefing highlights some of the key features and implications of the TCA and related Joint Declarations, focussing on the topics likely to be of the widest interest to businesses generally.

Components of the "deal"

The deal reached by the negotiators comprises a number of documents, with the weighty TCA at its centre. The TCA contains the provisions relating to trade in goods and services, both in general terms and as applicable to individual sectors. Specific chapters are devoted to aviation, road transport, social security co-ordination and short term visits, fisheries and UK participation in EU programmes. In addition to the trade-related provisions, the TCA also covers security, documenting the basis of the parties' co-operation in relation to criminal matters.

Two separate agreements cover nuclear co-operation and the exchange and protection of classified information.

The pack of Joint Declarations in essence, comprise a "to do" list for the next phase of talks. These political declarations cover economically important topics such as financial services and data flows (see further below), discussions on which will be progressed during 2021.

The TCA and related documentation, together with a useful summary, are available on the Government's Brexit webpage. The EU's equivalent webpage contains the same documentation, together with the EU's own summary and commentary.

Implementation

The treaties comprising the deal (the TCA and the two separate agreements) are implemented in the UK by the European (Future Relationship) Act 2020 (the **2020 Act**), which received fast-track Royal Assent on 31 December. The 2020 Act provides for the application of the treaties in English law and contains powers to make secondary legislation for the purpose of implementing their detailed provisions.

The implementation of an international treaty typically requires some adjustment to domestic laws. Given the last minute nature of the deal, the required adjustments to UK law will need to be made after the event. To address this, the 2020 Act provides that domestic law shall take effect with such modifications as are required to implement the treaties comprising the deal, pending the relevant legislation being amended. The practical implication is that in areas where amendments have not yet been made to reflect the deal, the provisions of the TCA should be read as the prevailing law in the UK, to the extent they conflict with or supplement existing law.

The EU's implementation process had to be curtailed due to lack of time. This is not a problem as the EU27 member states have authorised the provisional application of the TCA. It is currently anticipated that the final steps, the formal approval of the European

Parliament and the adoption of the decision on the conclusion of the TCA by the European Council, will be completed by the end of February.

Trade in goods

Perhaps the highlight of the TCA is the absence of any import tariffs or other customs duties or quotas on the movement of goods between the EU and the UK. This is subject to detailed rules of origin requirements, which vary by product, to ensure that only goods originating the EU/UK are able to benefit from the liberalised regime.

A key area of focus for traders will be the applicable technical barriers to trade and sanitary and phytosanitary (SPS) measures. The TCA largely reflects the WTO position. There is no general provision for mutual recognition and businesses will need to comply with relevant EU and UK rules. While the parties will set their own rules, they are required to do so in accordance with standards set forth in the TCA (including that they must be proportionate to the risks identified) and international standards. Specific provision has been made to reduce non-tariff barriers in heavily regulated sectors in a series of Annexes. These cover motor vehicles and equipment/parts, medicinal products, chemicals, organic products and wine.

The Customs and Trade Facilitation chapter of the TCA contains a welcome provision for the mutual recognition of "trusted trader" AEO schemes, which simplify customs procedures for those who have obtained that status. As in many areas of the TCA, this chapter also contains a number of potentially useful aspects that are left to be explored, including the possibility that the EU and UK might share import and export declaration data.

While businesses may be frustrated to have been afforded so little time to digest the aspects of the TCA relevant to their trade and sector - as well as having questions about how the detail of the new regime will be implemented - they will no doubt be grateful to have some certainty as to the applicable requirements. The sections of the TCA relating to trade in goods are the fullest sections of the TCA in terms of commitments and market access and have the potential to provide a platform for closer co-operation between the parties in the future.

Trade in services

The sections of the TCA relating to the liberalisation of trade in services, as is generally the case in free trade agreements, are significantly less permissive than those applicable to goods.

The TCA starts on a positive note, prohibiting trade barriers such as economic needs tests, restrictions on corporate form, foreign equity caps, establishment requirements and nationality requirements at board level. However, the liberalisation provisions apply only unless otherwise stated. Annexes to the agreement set out lengthy lists of individual member state requirements applicable to all services sectors and individual sectors, which will need to be combed through by businesses wishing to provide services or to continue to provide services across relevant borders.

The provisions relating to financial services and legal services are discussed further below.

Financial services

The financial services aspects of the deal are limited. The chief point of note is that the TCA does not provide access to the EU single market for UK financial services firms. With no passporting available, UK firms must comply with the local requirements of individual member states to service their EU customers. The majority of UK firms had prepared for this eventuality. (For EU financial services firms, the UK has implemented a Temporary Permissions Regime to support EU-based business formerly operating in the UK with a passport.)

The other significant aspect of the deal for financial services is the non-binding Joint Declaration. In short, the EU and the UK have agreed in principle "to establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions" allowing for, among other things, "transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions". The declaration confirms the parties' intention to establish a Memorandum of Understanding framework by March 2021.

At the time of writing the Commission webpage notes that the TCA: "does not cover any decisions relating to equivalences for financial services…. These are unilateral decisions of the EU and are not subject to negotiation". The accompanying Q&A comments: "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 shortcomings of the existing patchwork of equivalence regimes across the major financial services sectors have been widely documented. There is also a question of whether the "equivalence" concept might be extended or enhanced, though the general assumption so far is that it refers only to equivalence under existing EU legislation.

The direction of travel for financial services therefore remains uncertain. The UK Government has suggested that it will take a different (and more expansive) approach to deference in the field of financial services than the EU, as outlined in HMT's guidance document on equivalence in financial services. Even if structured regulatory cooperation is put in place, the UK's framework for equivalence may not be a mirror image of the EU's framework and equivalence determinations might not be mutual. This asymmetry will perhaps be particularly keenly felt in the context of investment services, in light of the fact that the "overseas persons exclusions" that allow some non-UK persons to provide such services to UK persons without a requirement for UK authorisation, already permit UK market access outside the equivalence regime.

Other noteworthy details on the financial services content can be found in our Beyond Borders blog.

Legal services

The TCA sets out a general principle of market access for lawyers, allowing UK lawyers to provide dedicated legal services in the EU (including legal advisory, arbitration, conciliation and mediation services but not representation before courts or administrative authorities) under their home jurisdiction professional title without the need to requalify or be admitted into the legal profession of the host jurisdiction. There are equivalent provisions for EU lawyers wishing to practise in the UK.

Described by the UK government as "ground breaking" and going "beyond what the EU has included in any other FTA to date", the general principle of market access is nevertheless limited by a number of "non-conforming measures" which effectively allow EU27 member states to impose their own local regulatory requirements on UK lawyers - making access for UK lawyers broadly equivalent to that of any other third country lawyer. In addition, the TCA does not provide for the mutual recognition of professional qualifications, although it does contemplate the possibility for future recognition on a profession-by-profession basis.

Lawyers wishing to practise within the EU27 will therefore still need to be mindful of any local restrictions on the provision of legal services by non-EU lawyers as well as keeping abreast of immigration rules (see further below in relation to business travel).

Digital trade

The objective of the section in the TCA on digital trade is to facilitate digital trade while addressing unjustified barriers and ensuring "an open, secure and trustworthy online environment for businesses and consumers". It is described by the UK Government as containing "some of the most liberalising and modern digital trade provisions in the world" which will promote digital trade in goods and services and ensure co-operation on future digital issues, including emerging technologies.

The TCA covers issues such as prohibiting data localisation, recognising electronic signatures, allowing electronic contracting, regulatory co-operation, preventing parties from requiring the transfer of source code, open government data and direct marketing (although the latter largely restates current rules). While many UK businesses will be already be operating in a manner consistent with these agreed principles, it is a helpful confirmation of the intended alignment between the EU and the UK.

For further views on the reaction of the technology sector to the TCA, please see our Beyond Borders blog.

Data flows

The TCA addresses data flows between the EEA and the UK. Helpfully, transfers of personal data from the EU (and the other EEA states assuming they opt in) to the UK can continue seamlessly for an interim period of four months, with a possible two-month extension. The UK had already separately deemed all EEA member states to be adequate for UK to EEA transfers. It is hoped that this interim period will allow the EU Commission to adopt an adequacy decision in respect of the UK, which will facilitate ongoing EEA-UK data transfers. The pack of Joint Declarations includes a reiteration of the brief 2019 Political Declaration that accompanied the EU-UK Withdrawal Agreement, to the effect that the EU Commission's intends to progress the adequacy decision process. However, the Information Commissioner's Office has recommended that businesses should still put in place alternative transfer mechanisms (such as EU standard contractual clauses for international transfers) to safeguard against any future disruption to data flows.

The interim arrangements for data flows are based on the assumption that the UK's current data privacy legislation will remain in place during the interim period. Amendments to align UK legislation with EU data protection law are permitted but all other changes (including the exercise of certain designated powers) must be made with the EU's consent. Businesses should also be aware that other aspects of Brexit and data privacy compliance are outside the scope of the interim arrangements and therefore will still need to be addressed (for example the need for UK businesses to appoint EU representatives in respect of EU GDPR processing, the potential change to the lead data protection authority and the need for amendments to privacy notices and other documents).

Intellectual property

The TCA sets out the minimum standards required by both the UK and the EU Member States for IP (i.e. registered IP rights such as patents, trademarks and designs, and unregistered rights such as copyright, trade secrets and unregistered designs). Helpfully for UK businesses, the practical arrangements align with the expected position (as outlined in our IP Refresher Newsletter).

The TCA also includes mechanisms for future cooperation and the exchange of information on IP issues of mutual interest. These areas include co-ordination to prevent export of counterfeits, raising public awareness of consumers and rights holders and enhancement of institutional cooperation.

Business travel and social security

The TCA confirms that short term business trips between the UK and the EU can take place on a visa-free basis, for up to 90 days in any six month period. That said, there is a limited list of activities which will be permitted on such trips, such as attending meetings, training seminars and trade fairs, purchasing goods or services and taking orders or negotiating the supply of services or goods. Work trips will also be permitted for establishment purposes (senior business people setting up an enterprise) and intra-company transfers. Business visitors will not however, be permitted to sell goods or supply services to the general public, or to receive remuneration from within the country where they are staying temporarily. There are also some further exceptions and qualifications in the annexes to the TCA.

The effect is that business trips may still continue between the UK and the EU, but on a more limited basis than before. Businesses may also need to check the rules in each member state to see what activities are permitted during business visits.

The TCA makes some provision for employers with staff who work in the UK and another EU country, in terms of social security. Whilst the general rule remains that social security contributions are due in the country in which the employee is working, special rules for detached workers may allow for social security contributions to only be paid in the UK notwithstanding that the employee is temporarily working in an EU country (or vice versa). The detached worker rules are subject to certain conditions, and each country has until 1 February to decide whether they will apply the rules. Businesses will therefore need to check the position in each EU country to ensure that the correct social security contributions are paid.

Level playing field (LPF)

The LPF concept, originating from the Political Declaration that accompanied the EU-UK Withdrawal Agreement, proved one of the most controversial aspects of the negotiation. The EU's insistence that the UK commit to dynamic alignment with EU laws in a range of areas in including competition and state aid, employment and social policy, taxation and climate and environmental policy, clashed directly with the UK's focus on sovereignty. The parties' views on ensuring a LPF in the areas of competition law and state aid (or subsidy) control proved particularly contentious.

Ultimately, the parties agreed on an approach to framing the LPF which is much more in line with international norms. In summary, the TCA allows the UK and the EU "take back control of their own laws" in these areas, within the prescribed parameters. This does not mean there are no constraints on the UK's future policies and legislation in these areas, but they are considerably looser than might originally have been envisaged.

Rather than prescribing alignment, the TCA describes the principles on which the parties will legislate in relevant areas as part of the conditions of market access and the consequences of any failure to comply, which vary according to the area. In the areas of employment and environmental/climate change laws, the LPF includes a commitment not to regress from current protections in a manner that has an effect on trade.

Competition and state aid

The TCA seeks to prevent trade distortions created by anti-competitive practices, discriminatory and abusive conduct and subsidies. This is achieved by commitments from each party to maintain effective antitrust and merger control regimes, and to maintain/establish independent authorities to enforce the rules. The granting of subsidies is governed by a set of common principles in combination with a number of enforcement tools, including recourse through national courts by competitors and unilateral remedial measures for each party. A mechanism to deal with "significant differences" in standards that affect trade between the parties (which allows unilateral rebalancing measures) also applies to the area of subsidy control but not competition policy.

In practice, businesses can expect more parallel investigations (with a risk of inconsistent or conflicting decisions) in the areas of merger control and antitrust enforcement. In the area of state aid, the UK no longer applies EU state aid rules (except as provided for in the Northern Ireland Protocol to the EU-UK Withdrawal Agreement) but is required to set up its own subsidy control regime with "an appropriate role"

for an independent authority and recourse through UK courts by interested parties such as competitors. At the time of writing, no further details are available on how the UK intends to meet these obligations.

Our Beyond Borders blog contains links to further analysis of these aspects of the TCA.

Employment laws

The "non-regression" commitments in the TCA do not permit the parties to reduce protections for workers or to fail to enforce employment rights in a manner that has an effect on trade. While this could inhibit certain changes to UK employment law such as revoking the working time rules in their entirety (which had been suggested as an outcome of Brexit), it appears sufficiently flexible to allow some changes to aspects of EU-derived employment law which have been perceived as problematic in the UK. Examples might include the inclusion of overtime and allowances in holiday pay and the restrictions on transferees changing employees' terms and conditions following a TUPE transfer.

The TCA requires each party to have in place and maintain a system for effective domestic enforcement of its labour and social policy framework, including an effective system of labour inspections. This is another area where further work may be needed; although the UK Government had already published plans to create a single enforcement body for employment rights, these have not yet been implemented, and the employment tribunal system is experiencing significant pressure which has only been exacerbated by the COVID-19 pandemic.

Taxation

There is very little tax content in the TCA generally, but it is significant that in the LPF provisions, the parties have committed to good tax governance and OECD/BEPS standards, rather than EU standards. This is consistent with the general approach taken in the TCA, i.e. both parties mutually committing to global standards (e.g. Codex) rather than the UK having to follow EU rules. The main area of interest therefore, is how the UK's tax rules may now begin to deviate from EU rules – which has already begun.

The TCA has enabled the UK to narrow significantly the scope of DAC6 (the EU's mandatory disclosure of reportable cross border arrangement rules). The UK is now free to follow the OECD's global transparency standards instead of the EU's DAC6 rules. As the UK already has disclosure rules on which a number of the OECD's transparency standards were based, the only parts of DAC6 which are required by the TCA to apply in the UK relate to Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (the **MDRs**). By the time the DAC6 reporting obligations became effective in the UK on 1 January 2021, only hallmarks D1 (arrangements to conceal income or assets) and D2 (to obscure beneficial ownership) were caught. In time these will be replaced with the UK's own model disclosure rules that will implement the MDRs. This was a welcome surprise for UK businesses and their advisers, even if rather late in the day after much preparation had been done for compliance with the full DAC6 rules, although those with an EU presence will still have to contend with DAC6 in the EU.

Climate change and environmental protection

One of the most positive aspects of the TCA is the affirmation made by each party regarding its ambitions to achieve "economy-wide climate neutrality by 2050". In this regard, the TCA is novel in holding climate change as an essential element, seen as a positive step by academics and environmental activists alike. Putting climate change on this standing introduces the possibility of the TCA being suspended or terminated in the event that there is a "serious and substantial failure" by either party to fulfil the commitment to the fight against climate change. Furthermore, the TCA requires each party to respect the Paris Agreement of 12 December 2015 (which has a goal of limiting global warming to well below 2 degrees Celsius compared to pre-industrial levels) and to refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement.

It is particularly important that the TCA is hard-wired such that an act or omission by either party that materially defeats the object and purpose of the Paris Agreement is considered a serious and substantial failure, giving rise to termination rights. The spirit of cooperation on climate change is also reflected in the requirement for both parties to have carbon pricing systems in place (i.e. the EU Emissions Trading System and the UK Emissions Trading Scheme), with a commitment to giving "serious consideration to linking their respective carbon pricing systems" in future.

In contrast, the position taken in the TCA on broader environmental protection falls short of the LPF demanded by environmentalists. The TCA permits each party to set its own policies and priorities in the areas of air emissions and air quality and the protection and preservation of both aquatic and marine environments to determine the environmental levels of protection. While there is a nod towards the non-regression concept, this is concerned with regression that affects trade or investment between the two parties, a high threshold. Similarly a re-balancing mechanism, which allows either party to implement proportionate measures in response to the other party significantly diverging from pre-TCA policies, can only operate where the divergence affects trade or

investment. This threshold, combined with the architecture within the TCA concerned with the level of evidence required, and the scope of the relevant arbitration process, gives rise to concerns about a potential "race to the bottom" on environmental standards.

What's next?

The fact that a deal was reached is welcome in terms both of what has been achieved, and in providing a more cordial basis for future EU-UK relations and co-operation. However, in many respects, the TCA is simply a platform for moving forward. The period of adjustment is not over for many businesses.

The commitments specified in the TCA will require further work on the UK side to be fully implemented. There will be further changes to domestic law as well as the creation/finalisation the required domestic control and enforcement mechanisms for our new standalone regimes.

The parties' future relationship will also develop over time. Milestones to watch out for in 2021 include the completion of the Memorandum of Understanding relating to financial services co-operation (anticipated in Q1) and the EU Commission's progress towards adequacy decisions with respect to the UK's data protection framework. A question on the mind of English lawyers will be whether the EU will consent to the UK's request to accede to the Lugano Convention. As expected, the deal says nothing about judicial co-operation in civil matters, leaving the question to be pursued separately.

Importantly, the UK's laws, regulations and the UK institutional framework will also continue to evolve. The UK's future policy decisions (how it exercises its new "sovereignty") will direct the practical impact of the TCA and any futher agreement, as the EU have emphasised in the context of financial services equivalence decisions. The EU's laws and regulations will evolve too and may similarly have implications for what has been agreed.

The positive news is that industries that wish to be freed from EU-derived "red-tape" should have further opportunities to put forward their priorities as the dust settles and the UK Government fleshes out its agenda for "Global Britain".

Beyond Brexit

Slaughter and May is equipped to help you across the full spectrum of legal issues arising out of the UK's departure from the EU. For further information on the contents of this Briefing or any related questions, please contact your usual adviser or one of the contributors listed below.

Jeff Twentyman (Beyond Brexit)

Partner
T +44 (0)20 7090 3476
E jeff.twentyman@slaughterandmay.com

Kathrine Meloni (Beyond Brexit)

Special Adviser
T +44 (0)20 7090 3491
E kathrine.meloni@slaughterandmay.com

Jan Putnis (Financial Services)

Partner
T +44 (0)20 7090 3211
E jan.putnis@slaughterandmay.com

Selmin Hakki (Financial Services)

Senior PSL
T +44 (0)20 7090 5153
E selmin.hakki@slaughterandmay.com

Rebecca Cousin (Data Privacy)

Partner
T +44 (0)20 7090 3049
E rebecca.cousin@slaughterandmay.com

Cindy Knott (Data Privacy)

Senior PSL
T +44 (0)20 7090 5168
E cindy.knott@slaughterandmay.com

Duncan Blaikie (IP/Digital Trade)

Partner
T +44 (0)20 7090 4275
E duncan.blaikie@slaughterandmay.com

Natalie Donovan (Digital Trade)

PSL Counsel
T +44 (0)20 7090 4058
E natalie.donovan@slaughterandmay.com

Catherine Cotter (IP)

PSL
T +44 (0)20 7090 4783
E catherine.cotter@slaughterandmay.com

Julia Adams (Legal Services)

General Counsel
T +44 (0)20 7090 3117
E julia.adams@slaughterandmay.com

Anna Lyle-Smythe (Competition)

Partner
T +32(0) 2 737 8410
E anna.lyle-smythe@slaughterandmay.com

Nele Dhondt (Competition)

PSL Counsel
T +44 (0)20 7090 4023
E nele.dhondt@slaughterandmay.com

Philip Linnard (Employment)

Partner
T +44 (0)20 7090 3961
E philip.linnard@slaughterandmay.com

Clare Fletcher (Employment)

PSL Counsel
T +44 (0)20 7090 5135
E clare.fletcher@slaughterandmay.com

Zoe Andrews (Tax)

PSL Counsel

T +44 (0)20 7090 5017

E zoe.andrews@slaughterandmay.com

Samantha Brady (Environment and Climate Change)

Senior Counsel

T +44 (0)20 7090 4279

E samantha.brady@slaughterandmay.com

This briefing is part of the Slaughter and May Horizon Scanning series

Click here for more details or to receive updates as part of this series. Themes include Beyond Borders, Governance, Sustainability & Society, Digital, Navigating the Storm and Focus on Financial Institutions. Beyond Borders explores while crossing physical borders became challenging for most citizens during 2020, investment flows and operations continued on a global basis. This theme looks at some key aspects of managing risk and maximising the value or opportunities in a regulatory and transactional context, and considers what is on the horizon for working beyond borders in 2021.