

## **The EU-UK Agreement on Trade and Cooperation: Cliff-edge exit avoided, but negotiations over trade issues will continue for years**

**By: Mark S. Bergman**

On Christmas Eve, the European Commission and the British government reached agreement on the terms of their future cooperation on trade and related matters. The EU-UK trade and cooperation agreement (the “TCA”),<sup>1</sup> running to 1,246 pages, covers trade in goods and services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in EU programmes, and includes provisions addressing the level playing field between the parties. Concurrently with the release of the draft TCA, the parties issued a series of Declarations. The TCA has the force of a treaty and, as such, is governed by principles of international law.

The TCA represents the first free trade agreement entered into by the EU that eliminates all tariffs and quotas. While it is a free trade agreement, Britain and the EU woke up on January 1 to new barriers (not fewer, as one would typically expect) to trade in goods and, particularly, services, and constraints on cross-border mobility and cross-border exchanges, that have not existed for over four decades.

The key takeaways:

- Goods may be exported free of tariffs and quotas, subject to rules of origin. Non-tariff barriers have not been addressed, and while trusted trader arrangements have been introduced, customs checks and border formalities will likely add to delays and costs of exports, as well as the need to modify supply chains.
- The UK retains the freedom to diverge in respect of labor, social and environmental standards, but if either side feels that divergence creates unfair competition, a rebalancing mechanism, underpinned by arbitration, applies, failing which tariffs can be imposed.
- The TCA provides for a level playing field in respect of state aid, and the UK is not forced to align with the EU on state aid.
- Financial services are not covered by the TCA and will be addressed in a separate assessment of equivalence by the European Commission.
- The flow of personal data is to be addressed by a separate “adequacy decision” outside the TCA.
- Free movement of people is severely constrained and largely subject to local immigration laws.
- There is no automatic recognition of professional qualifications.

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<sup>1</sup> The text of the Agreement is available [here](#). The text of the Joint Declarations is available [here](#). The UK government summary of the Agreement is available [here](#) and the Summary Explainer is available [here](#). The European Commission summary of the Agreement is available [here](#) and its Q&A is available [here](#).

- The TCA does not cover foreign policy, external security or defense cooperation.

The TCA was the product of nine months of negotiation, that followed, but did not necessarily build upon, two years of prior negotiations (from June 2017 to October 2019) between EU and UK negotiators, directed largely by then Prime Minister Theresa May, on the terms of withdrawal that ultimately were set forth in the Withdrawal Agreement and the Political Declaration (agreed in October 2019). Prime Minister Boris Johnson and his chief negotiator were highly critical of the previous efforts, and the Prime Minister set out his own red line by rejecting any intention of seeking an extension to the transition period beyond December 31, 2020.

The Withdrawal Agreement and the Protocol on Ireland/Northern Ireland (the “Protocol”) remain in place, and were implemented on January 1, 2021. Among other things, this means that there is no hard border between Northern Ireland and the Republic of Ireland. On December 17, the UK had agreed to withdraw the clauses in the UK Internal Markets Bill that would have enabled the UK to unilaterally suspend parts of the Withdrawal Agreement and the Protocol (notably in respect of the Irish border), in violation of international law.

### **Trade in Goods**

The deal provides, from day one, tariff-free and quota-free access to the EU for goods.<sup>2</sup> However, the goal of frictionless trade has not been achieved, as exporting to the EU will require compliance with rules of origin, be subject to customs formalities and compliance with EU standards (including the applicability of regulatory checks and controls for health and safety purposes).<sup>3</sup> Tariff-free and quota-free access was of particular importance to the British auto industry and British agriculture. Trade in goods between Northern Ireland and the EU will be governed by the Protocol, rather than by the TCA.

While trade in goods will be subject to border checks, the TCA provides for mutual recognition of trusted trader arrangements, which will simplify (though not eliminate) customs controls and formalities. Goods exported from the EU to the UK will have to comply with UK technical regulations and will be subject to any applicable regulatory compliance checks and controls. Similarly, goods imported from the UK to the EU will need to comply with EU technical regulations and will be subject to applicable regulatory compliance obligations, checks and controls for safety, health and other public policy purposes. The TCA does contain a number of provisions aimed at preventing and addressing unnecessary technical barriers and requirements, including through bilateral cooperation, and simplifying procedures used to demonstrate compliance with them (conformity assessment procedures). The TCA provides for specific arrangements to facilitate trade, as well as regulatory cooperation, in the automotive, pharmaceutical, chemical, wine and organic product sectors.

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<sup>2</sup> According to the House of Commons Library, Statistics on UK-EU Trade (November 2020)(available [here](#)) in 2019, the EU accounted for 46% of UK goods exports and 39% of services exports; 53% of the UK’s imported goods and 49% of imported services were imported from the EU.

<sup>3</sup> The chief executive of HM Revenue & Customs is reported to have advised Members of Parliament in January 2021 that British businesses will spend £7.5 billion annually to complete 215 million customs declarations. This burden is not materially different from the burden that would have followed a no-deal exit.

As noted above, access to EU markets will depend on compliance with rules of origin. The TCA provides that tariffs will be imposed only if more than 40% of the pre-finished value of goods is neither of British origin nor of other non-EU country origin. The EU had wanted the value to be British only, but agreed to count EU materials and processing as part of British input. So-called diagonal accumulation (countries with which the UK or the EU has a trade agreement) was rejected by the EU. These provisions preclude the UK from continuing to be a global manufacturing hub.

### **Fisheries**

On the highly emotional issue of protecting domestic fishing sectors, the TCA provides that the EU fishing quota will be cut by 25% (down from the 80% the UK had initially proposed, although higher than the 15-18% proposed by the EU) effective over a five and a half-year transition period (down from the 14 years, then 10 years, the EU had proposed, and up from the three years proposed by the UK). The reaction of the British fishing industry has been overwhelmingly negative, though the emotion obscures the fact that, by volume, a significant proportion of fish caught by UK vessels is exported to the EU, and a significant portion of fish consumed in the UK is imported from the EU.

### **Recognition of Professional Qualifications**

There is no automatic recognition of professional qualifications, and access to the EU is to be determined by each EU Member State. The TCA establishes a process by which Mutual Recognition of Professional Qualifications (MRPQs) can be agreed in the future. To date, a similar MPQR regime under the Canada-EU agreement has not resulted in any such mutual recognition. The TCA provides a mechanism whereby the EU and the UK may later agree, on a case-by-case basis and for specific professions, on additional arrangements for the mutual recognition of certain professional qualifications. The EU and its Member States, and the UK will allow lawyers to provide legal services relating specifically to the practice of international law and the law of the country where they are authorized under their “home” title. EU law is not considered to be international law, but instead the law of the Member State in which EU lawyers are established or hold their “home title.”

### **Services and Investment**

With the loss on December 31 of the benefits of free movement of persons, free provision of services and freedom of establishment, UK service suppliers lose the unfettered right to offer their services in (and throughout) the EU. Service providers have, and will continue to have, the right to establish themselves in the EU, but passporting rights (also known as the country-of-origin regime) are terminated. The non-discrimination obligations of the TCA ensure that service suppliers or investors from the EU will be treated no less favorably than UK operators in the UK, and vice-versa. This entitles them to receive more favorable treatment than that granted to service suppliers or investors of third countries without similar provisions in place.

Services can be provided in a variety of ways: from the home country (e.g., via the internet); supplied to a tourist travelling to the supplier’s country; supplied by a physical presence in the host territory or through the temporary presence in the host territory of a natural person. Services will also be subject to specific “reservations” set out in the TCA. Access, in the absence of an overarching agreement, invariably will lead to

fragmentation due to the imperative of complying with local host Member State rules and regulations. A forward-looking most favored nation clause and a review clause are provided for, except in the area of financial services.

The first of the Political Declarations covers financial services, a sector that is a significant contributor to the British economy and where the British have a long-recognized and fundamental advantage over the EU. Since the referendum, EU Member States have sought to entice personnel and operations from the City of London. In the absence of passporting rights, access for financial services will be determined by decisions on “equivalence,” which can be withdrawn by the EU at any time and on short (as short as 30 days’) notice; this does not bode well for market participants that rely on certainty and stability.

Prime Minister Johnson noted in a media interview that with respect to financial services, “perhaps the [TCA] does not go as far as we would like.” Specifically, the TCA does not address equivalence, and the European Commission specifically has reserved its position on equivalence and notes its assessment will continue as it awaits clarifications from the British on how the UK intends to diverge from EU frameworks after December 31, how it will use its supervisory discretion regarding EU firms and how the UK’s temporary regimes will affect EU firms. The European Commission made a point of noting that the EU will consider equivalence “when they are in the EU’s interest,” and the EU is reported to have rejected UK demands for consultation and notice before equivalence is withdrawn. The 2019 Political Declaration contemplated that equivalence determinations would be concluded by mid-2020. That did not happen, and there are 28 areas of equivalence under consideration by the European Commission. The UK and the EU now have agreed to reach a memorandum of understanding by March 2021 on financial services; any such memorandum would not have the same legal force as the TCA.

### **Freedom of Movement; Travel for Work**

Beginning January 1, 2021, free movement of people ends and movement instead will be governed by UK or EU immigration legislation applicable to third country nationals. Those grandfathered by the Withdrawal Agreement will continue to be afforded the protections thereunder.

The UK declined to address mobility in the TCA other than for temporary movement of natural persons for business purposes. With respect to the latter, the TCA contains reciprocal commitments facilitating the ability of companies to transfer certain employees, as intra-corporate transferees, to work in an associated company. The maximum duration of such transfers is capped at three years. With respect to UK nationals transferred to the EU, this duration includes periods of mobility between Member States.

The rights of UK nationals to enter (with or without a visa), reside, work or stay in the EU and the reciprocal rights of EU nationals in the UK are not covered by the TCA. In practical terms this means that UK nationals may visit the EU, and EU nationals may visit the UK, for up to 90 days in any 180-day period. The European Commission notes that these rules are conditional on the UK continuing to provide equal visa-free travel for short-term visits for EU nationals of all EU Member States, without discrimination between EU nationals. If restrictions are imposed on citizens of any EU Member State, reciprocity measures would be introduced by the EU. UK nationals intending to stay in

an EU Member State for periods exceeding 90 days for any purpose (e.g. work, research, study, training) will be able to do so under the conditions for entry and stay for third country nationals set under EU law and the national laws of the Member States, and EU citizens intending to move to the UK will need to comply with the applicable immigration conditions set by the UK government.

### **Level Playing Field**

Due to the geographic proximity of the UK and the EU, concerns over level playing fields in the areas of competition and sustainable development remained a contentious issue up to the last minute. The need for a “level playing field” was a significant issue for the EU, reflecting concerns that the UK would take advantage of tariff-free access by subsidizing UK businesses or reducing costs to such businesses through reduced labor or environmental standards. On the other hand, the UK wishes to retain the freedom to diverge from EU rules.

### ***Minimum Standards***

The TCA sets forth minimum standards for environmental, social and labor standards, and one of the Political Declarations addresses tax transparency. The TCA provides a binding and enforceable commitment of non-regression on labor and social standards as well as environment and climate standards. Each side also has committed to seek to increase over time its levels of protection in these areas.

Labor and social levels of protection cover:

- fundamental rights at work;
- occupational health and safety standards;
- fair working conditions and employment standards;
- information and consultation rights at company level; and
- restructuring of undertakings.

Environmental levels of protection include:

- industrial emissions;
- air emissions and air quality;
- nature and biodiversity conservation;
- waste management;
- protection and preservation of the aquatic environment;
- protection and preservation of the marine environment;
- prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances; and
- management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants.

The climate level of protection applies to emissions and removal of greenhouse gases covering the EU’s and the UK’s respective 2030 economy-wide targets, including their systems of carbon pricing, and the phasing-out of ozone depleting substances.

The TCA provides for cooperation between the European Commission and the relevant UK bodies in preserving a level playing field with respect to the environment. The European Commission noted that the UK intends, as part of its domestic law, to put in place an independent body or bodies that will seek to preserve non-regression.

As for climate change (which is treated separately from the environment), both sides have agreed that the fight against climate change and, in particular, meeting the goals of the Paris Agreement is an essential element of their partnership. Any violation of this essential element by one side gives the other the right to terminate or suspend all or parts of the TCA. The European Commission notes that the fight against climate change is for the first time on par with other essential elements, namely democracy, human rights and the rule of law, and non-proliferation of weapons of mass destruction. Both sides reaffirm their ambition of achieving economy-wide climate neutrality by 2050. The UK has committed to implement a system of carbon pricing as of January 1, 2021. The EU and UK have committed to ensure that their carbon pricing systems cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation.

The UK and the EU have agreed to promote the implementation of the UN 2030 Agenda and the Sustainable Development Goals, and to adhere to the implementation of relevant internationally agreed principles, rules and agreements, such as the Conventions of the International Labor Organization (ILO) and the European Social Charter of the Council of Europe ratified by the EU and the UK; multilateral environmental agreements, including climate change mitigation-related multilateral initiatives, such as the UN Framework Conventions on Climate Change, and the Paris Agreement; combating illegal wildlife trade, illegal logging and illegal, unreported and unregulated (IUU) fishing and related trade. The UK and the EU also have agreed to promote trade and investment in green goods, to cooperate bilaterally and at the international level on the sustainability agenda and to encourage responsible business practices.

### ***State Aid***

On state aid, the TCA appears to allow different systems to operate side-by-side, constrained by a common set of binding principles (both general as well as sector-specific and specific to types of aid), to avoid either side using trade-distorting subsidies. The UK and the EU also agreed to a Joint Declaration on non-binding principles as to subsidies on research and development, regional subsidies and transport sector subsidies. The UK is to establish its own domestic enforcement body, which will have to follow key principles set out in the TCA, failing which remedial measures can be imposed (including the re-imposition of tariffs or quotas, or other market access barriers). Commentators note that this body should be established as quickly as possible.

### ***Rebalancing Regime***

The UK succeeded in watering down EU proposals to thwart divergence by the UK, notwithstanding commitments to the principle of non-regression, through what the UK referred to as a “ratchet clause” and the EU an “evolution clause.” This would have been a proactive mechanism to toughen standards. In its place, the TCA provides for a reactive “rebalancing mechanism” if there is significant divergence in areas of labor and social, environment or climate protection or subsidy control. The mechanism allows either side to adopt measures to rebalance the perceived competitive advantage of the other side. Each side could also, at regular intervals and if rebalancing measures have been taken frequently or for more than 12 months, seek a review of the trade and other economic parts of the TCA to ensure an appropriate balance between the commitments in the TCA. In this case, the parties could negotiate and amend relevant parts of the TCA. Any trade or economic part of the TCA, including aviation, that would remain in place or be

renegotiated would retain appropriate level playing field commitments. Disputes arising under the rebalancing mechanism would be subject to arbitration (see below).

Ultimately, the UK succeeded in rebuffing EU calls for dynamic alignment, which would have imposed automatic and immediate (“lightening”) tariffs if the UK had diverged, which means that the UK can diverge from the EU, but in doing so it could imperil the benefits of the TCA (including tariff-free and quota-free access).

### **Air, Road, Rail and Maritime Connectivity**

The European Commission notes that each year 210 million passengers and 230 million tons of cargo are transported between the EU and the UK via air, sea, road and rail. The TCA provides for continued and sustainable air, road, rail and maritime connectivity, although market access falls below what the single market offered. All transport operators will now need to comply with separate UK and EU certification requirements. UK air carriers will no longer be able to transport passengers between two points in the EU or to carry passengers from the UK, stopping in the EU and then flying onward to a third country. The TCA includes provisions to ensure that competition between EU and UK operators takes place on a level playing field, so that passengers’ rights, workers’ rights and transport safety are not undermined.

### **Governance**

The UK and the EU have agreed to create a joint body, called the Partnership Council, to manage the TCA. The Partnership Council is co-chaired by a member of the European Commission and a representative of the UK at ministerial level. It will meet at least once a year, but can meet more often at the request of either the EU or the UK. Any decision is taken by mutual consent between the UK and the EU. The UK and the EU can refer to the Partnership Council any issue relating to the implementation, application and interpretation of the TCA. The Partnership Council is assisted in its work by Specialized Committees and in some areas by technical working groups.

Disputes that cannot be resolved in good faith by the two sides are to be submitted to an independent arbitration panel for binding arbitration. Neither the European Court of Justice nor domestic courts in the EU or the UK are competent to adjudicate disputes under the TCA. If compliance is not achieved immediately or within a reasonable period of time, the complaining side may suspend its own obligations in a proportionate way until the other side complies with the ruling of the tribunal. This includes the suspension of obligations across all economic areas, for instance by imposing tariffs on goods if the other side breaches its obligations on social security, transport or fisheries. The European Commission notes that such “cross-suspension” mechanisms are an essential tool to ensure that both sides ultimately comply with all of their commitments under the TCA. The use of cross-suspension mechanisms must be proportionate and appropriate; it can be challenged before an arbitration tribunal.

The TCA provides that it is to be reviewed five years after entry into force and every five years thereafter.

### **Concluding Thoughts**

On December 31 Britain left the single market and the customs union, and the TCA frames, both by what it covers and what it does not cover, the consequences inherent in that departure.

- From the perspective of the EU, as set out in an infographic published by the European Commission, as a consequence of the departure, the UK loses the rights and obligations of EU membership, which means that UK nationals and businesses no longer benefit from the free movement of people, goods, services and capital in the EU and the UK no longer contributes to the EU budget or benefits from EU funding programs, policies or international agreements (including trade agreements). Importantly, UK-based financial services (which employ more than one million people in Britain and account for an estimated 7% of UK GDP) lose their regulatory “passports” to offer services throughout the EU based on home country rules.
- From the perspective of the UK, as set out in Prime Minister Johnson’s statement on the outcome of the negotiations with the EU, the British government has fulfilled the promise that the British would take back control of their laws (by ending jurisdiction of the European Court of Justice and EU law), their money (by ending payments to the EU), their borders (by controlling immigration from the EU) and their waters (specifically, fisheries). It is, as the Prime Minister set out in January 2020, about recapturing sovereignty, and it appears that the primacy of regaining sovereignty goes a long way to explain what is in, and more importantly what is not in, the TCA.

Regardless of one’s perspective, the fact remains that, the TCA notwithstanding, both sides likely will be worse off – non-tariff barriers will now be in place, leading to increased costs and modifications to supply chains. It has been reported that small UK exporters are being advised by the UK Department of International Trade that the best way to avoid the crush of customs declarations, new regulations, rules-of-origin certifications and VAT issues is to set up subsidiaries in the EU. The ability to travel and work abroad will be curtailed; students will lose access to exchange programs. Services are yet to be addressed, and professional qualifications will no longer enjoy automatic recognition. There are differing estimates on the adverse economic impact of Brexit on Britain, although the economic impact clearly would have been worse had there been an exit without a deal.

The complex, multi-faceted relationship between the UK and the EU will of necessity evolve over time. The “skinny” nature of the TCA, and the importance that the EU and the UK represent to the other in terms of trade, not to mention the proximity of one to the other, can be expected to compel negotiations for years to come. In the meantime, decisions in the short-term will need to be made in such areas as equivalence for purposes of financial service access and transfers of personal data between the EU and the UK (which will require an “adequacy decision” by the EU, including as to GDPR; the TCA provides for a four-month transition period for transfers of personal data, which can be extended two additional months, if neither side objects). In the coming weeks and months, the UK government will set out how it will exercise its newfound freedom to diverge.

Both sides claimed victory, and Europe, in the words of European Commission President Ursula von der Leyen, would now be “moving on.” It is unlikely though that December 31 will “settle the European question in British politics,” as then Prime Minister David Cameron urged in January 2013 when he first publicly broached the idea of what became the June 2016 referendum. For decades, Brussels has been the convenient whipping boy.

The British government in theory will no longer have Brussels to blame, though there are any number of elements of the future relationship that could become flash points. Yes, Britain can diverge from the EU on labor, environmental and social regulatory standards, but runs the risk of the imposition of tariffs if it does so.

The broader implications of the UK's withdrawal from the single market and customs union remain to be seen. From an EU perspective, while the bloc will likely be worse off in terms of the economic impact on trade, the departure of the UK paves the way for easier decision-making in Brussels. Brexit ran counter to the centuries-old policy goal of Britain of dividing continental Europe. The European Union 27 remained remarkably on message as among themselves and in delivering on key red lines – as Chancellor Merkel noted in June 2016 immediately following the UK referendum, there can be no “cherry-picking,” there must be a noticeable difference between an EU Member State and a third-country and no exiting Member State can expect obligations to be dropped and privileges to remain.

From the perspective of Whitehall, the UK is now able to negotiate free trade agreements with other trading partners, including with the United States. Government expectations for a quick US-UK agreement have been dashed; this, however, should have come as no surprise. In political terms, the impact of Brexit on devolution is highly uncertain; the issue of Scottish independence is back on the table and Northern Ireland, under the terms of the Withdrawal Agreement, will vote in four years on whether to remain in the single market. And what all this means for the UK from a geopolitical perspective, with the change in the U.S. administration and the myriad of challenges that need to be addressed on a multilateral basis, is far from certain. Boris Johnson and his fellow hard Brexit adherents have achieved the sovereignty that drove the Conservative electoral victory in 2019 and drove the tactics of his negotiators from the election up to Christmas Eve, but at what price?

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