ALLEN & OVERY

Brexit certainty at last?

An overview of the new EU-UK trading relationship

Following months of protracted negotiations and coming four and a half years after the UK voted to leave the EU, 24 December 2020 saw the EU and UK finally agree the shape of their future relationship. While the **Trade and Cooperation Agreement** (**TCA**) runs over 1,200 pages, in many key areas it is essentially a framework for the substantial agreements and arrangements still to be put in place, and a number of its provisions simply mirror the position agreed under other recent EU trade agreements, for example with Japan. The primary focus is on trade in goods where zero tariffs or quotas will be imposed on goods traded between the UK and the EU, provided that they meet the applicable rules of origin.

The end of the EU-UK transition period saw the cessation of Single Market access rights and participation in the Customs Union for the UK. The TCA represents a fundamental change in the trading relationship from 1 January 2021 with substantially reduced market access – particularly in relation to financial and other services. This is principally as a result of the UK being treated as a third country by the EU (and vice versa). Further, while the TCA has largely brought clarity (although not simplicity) in relation to trade in goods, uncertainty remains in a number of key areas.

In this publication, we consider the structure of the TCA, the key provisions most relevant for our clients and the process for ratification.

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The overarching structure of the TCA, governance of the relationship and dispute resolution mechanism

Overarching structure

The TCA consists of seven parts which cover:

- Part 1: general and institutional provisions (including governance)
- Part 2: trade in goods and services, and level playing field guarantees
- Part 3: cooperation on law enforcement and criminal justice
- Part 4: "thematic" issues, notably health collaboration
- Part 5: participation in EU Programmes, principally scientific collaboration through Horizon
- Part 6: dispute settlement, basic values and safeguard measures
- Part 7: final provisions including a review mechanism whereby the TCA will be reviewed five years after implementation and every five years thereafter

In addition to the TCA, the future relationship agreements comprise:

- a series of Joint **Declarations** on a range of issues where further cooperation is foreseen, for example in relation to financial services regulatory cooperation and the declaration of adequacy decisions (the **Declarations**)
- an Agreement on Security Procedures for Exchanging and Protecting Classified Information
- a Nuclear Cooperation Agreement

The texts of the agreements were published in the Official Journal on 31 December 2020, subject to final legal-linguistic revision. The definitive texts of the agreements will be published in the Official Journal by 30 April 2021.

Governance of the relationship

Under the institutional framework provisions of the TCA, the EU and the UK have agreed to create a joint body, called the Partnership Council, to oversee the attainment of the TCA's objectives and facilitate its implementation. 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 taken by the Partnership Council is to be by mutual consent between the parties, which may lead to tensions and delay in relation to any future amendments to the TCA.

The EU and the UK will each be able to refer any issue to the Partnership Council which relates to the implementation, application and interpretation of the TCA. The Partnership Council will be assisted by a Trade Partnership Committee and Specialised Committees (18, with powers to create more) and, in some areas such as medicinal products, by technical working groups. The TCA also envisages the possible establishment of a Parliamentary Partnership Assembly, which would consist of members of the European Parliament and the UK Parliament and provide a forum to exchange views on the partnership. The need for this number of bodies reflects that the TCA only constitutes a framework in many key areas and that it is likely to be many years before envisaged arrangements are fully in place (although there are also provisions for termination of the whole or parts of the TCA and some elements of the TCA have specified end dates).

Dispute resolution mechanism

Disputes arising under the TCA are to be resolved exclusively according to the dispute resolution procedures set out in the TCA. Neither national courts nor the European Court of Justice (**CJEU**) has any role in interpreting the TCA or resolving disputes thereunder. There is no investor-state dispute settlement procedure. Only the EU and the UK are able to bring claims under the TCA. The participation of natural or legal persons in the dispute resolution process is limited to the provision of *amicus curiae* submissions.

Part 6 of the TCA sets out the general dispute resolution procedure applicable to disputes under the agreement except for specified carved-out

sections, such as Part 3 on law enforcement and judicial cooperation in criminal matters. Disputes relating to carved-out sections of the TCA are to be resolved by the Partnership Council referenced above. There are also areas of the TCA to which the general dispute resolution mechanism applies but with modifications. For example, certain aspects of the provisions on competition and sustainable development have a modified dispute resolution procedure.

Before invoking the general dispute resolution procedure, unless they agree otherwise, the EU and the UK are required to engage in consultations in an effort to reach an agreed solution. If consultations fail, arbitration can be commenced. The TCA envisages the swift resolution of arbitrations, requiring a final ruling from the arbitral tribunal within a maximum of 160 days from the arbitral tribunal's constitution (although this deadline can be extended by agreement between the parties).

If the arbitral tribunal finds a breach of the TCA, the party responsible for the breach must take the necessary measures to comply with the ruling and bring itself into compliance with the TCA. This must be done immediately, or within a reasonable time if that is not possible.

In the event of non-compliance with an arbitral ruling, and subject to certain pre-conditions, the aggrieved party may request temporary compensation from the defaulting party. If the amount of the temporary compensation cannot be agreed between the EU and the UK, or the aggrieved party decides not to request compensation, the aggrieved party may instead temporarily suspend its performance of certain obligations towards the defaulting party (subject to a number of conditions).

The suspension of obligations or the payment of compensation shall not be applied after: (a) the EU and the UK agree that measures taken by the defaulting party bring it into compliance with the TCA; (b) the measure taken that was found to be a breach of the TCA has been withdrawn or amended; or (c) the EU and the UK have reached a mutually agreed solution. **Back to contents**

The process for ratification

The European Commission deemed the TCA an EU-only agreement (ie that all aspects of the agreement are within EU competence), under Article 217 of the Treaty on the Functioning of the European Union. This means that ratification by the European Parliament will be sufficient and that individual ratification by each Member State will not be required.

Given the TCA was agreed only days before the transition period was due to end, there was insufficient time for the European Parliament to ratify the agreement. As a result, the TCA was signed by the EU on 30 December 2020 on the basis that it applies provisionally from 1 January 2021 pending the consent of the European Parliament and conclusion by the Council of the EU by 28 February 2021.

In relation to ratification by the UK, the European Union (Future Relationship) Bill, which implements the TCA, was introduced to Parliament on 30 December 2020 and passed all stages in the House of Commons. The Bill also passed the final stages in the House of Lords and, in the early hours of 31 December 2020, the **European Union (Future Relationship) Act 2020** received Royal Assent. Following its approval by the House of Commons, the TCA was signed by the UK.
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Trade in goods

As set out in the introduction above, until the end of the transitional period, the UK was part of the EU's Single Market and Customs Union. The freedom of movement for goods as between the UK and the EU provided under those arrangements has now been replaced by the terms of the TCA.

The key points in relation to the trade in goods under the TCA are as follows:

- **Tariffs and quotas:** zero tariffs or quotas will be imposed on goods traded between the UK and the EU, provided that they meet the applicable rules of origin.
- **Rules of origin:** the rules of origin are complex and, in some respects, differ from those provided for in similar agreements such as the EU-Canada Comprehensive Economic and Trade Agreement (**CETA**). In broad terms:
  - Goods originate from a party if they are: (a) wholly obtained in that party; (b) exclusively made from originating materials in that party; or (c) produced in a party and incorporate non-originating materials satisfying specific rules of origin. Specific rules of origin are provided for in the case of many products and a number of novel requirements are introduced. For example, in relation to electrified vehicles and batteries, there are more lenient transitional rules that apply until the end of 2026.
  - Production carried out in a party on non-originating material may be taken into account for the purpose of determining whether a product is originating in the other party (subject to the rules that apply in relation to insufficient production). However, importantly, while bilateral cumulation is allowed under the agreement, the EU has successfully resisted the inclusion of diagonal cumulation. This may cause some products assembled in the UK or the EU to fall outside of the TCA's preferential tariff treatment. For example, even though the EU and the UK have both concluded preferential trade agreements with Japan, Japanese components will be considered to be non-originating material for the purposes of applying the TCA's specific rules of origin.
  - Helpfully, companies will be able to "self-certify" the origin of goods and, until 31 December 2021, supplier declarations will not be required by the UK Government, though businesses may be required to retrospectively provide a supplier's declaration after that date. Together, these measures should relieve some of the administrative burden associated with complying with the rules of origin under the agreement.
- **Customs formalities:** the agreement provides for customs cooperation mechanisms and, in particular, allows for the mutual recognition of the parties' respective Authorised Economic Operator (AEO) schemes. This will enable trusted traders to enjoy a more simplified approach to their customs operations. However, as of 1 January 2021, in general terms, customs formalities will apply to trade between the EU and the UK.
- **Sanitary and phytosanitary (SPS) requirements:** UK agri-exporters will be required to meet all EU SPS import requirements and vice versa. However, the UK was granted "national listed status" separately from the conclusion of the TCA, which means that UK exports to the EU of live animals and products of animal origin can continue, albeit with greater customs formalities needing to be satisfied. The EU has also lifted a number of plant health prohibitions and granted equivalence for certain products (such as some seeds and propagating material), so exports of relevant products from the UK to the EU can continue.
- **Technical barriers to trade and product conformity assessments:** from 1 January 2021 all products exported from the EU to the UK will need to meet the UK's technical product regulations (and vice versa). However, to prevent and reduce unnecessary technical

barriers and requirements, the TCA includes a number of provisions related to technical barriers to trade. In particular, the parties have agreed to a definition of international standards which identifies the relevant international standard-setting bodies. This should maximise the extent to which the parties' domestic product standards and technical regulations are compatible. Furthermore, in relation to product conformity assessments, the parties have agreed to maintain self-certification of conformity by the manufacturer where this was applied in both the EU and the UK on the date that the TCA came into force. Finally, sector-specific provisions are included to promote cooperation and reduce barriers to trade in the automotive, chemicals, pharmaceutical, organic products and wine sectors.

- **Trade remedies:** as is provided for in the World Trade Organization's (**WTO**) rules, the agreement allows for the parties to impose trade remedies against one another where, for example, there are unfair practices such as dumping or prohibited subsidies.

The provisions in the TCA discussed above do not apply to the trade in goods between the EU and Northern Ireland, where the Protocol on Ireland and Northern Ireland included in the **Withdrawal Agreement** will apply. Likewise, goods entering Northern Ireland from Great Britain will constitute imports from 1 January 2021. The treatment of Northern Ireland under the TCA is further discussed below. **Back to contents**

Trade in financial services

For financial services, the TCA is the thinnest of deals. As expected, it makes no attempt to reproduce the freedoms of movement, and establishment and provision of services, that UK businesses benefited from when the UK was a member of the EU. With the end of the passporting regime, UK market participants will now be treated in the same manner as other third country participants, with access rights being limited accordingly. While the TCA sets out provisions that are similar to those seen in other recent EU free trade agreements, the terms covering financial services are comparably slimmer, and marginally less favourable, than those set out in the CETA which the UK Government had suggested, at certain intervals during the negotiation process, it was seeking to achieve.

While the European Commission states that the TCA provides for a significant level of openness for trade in services and investment, going beyond the baseline provisions of the WTO's General Agreement on Trade in Services (**GATS**), the TCA only has a small number of provisions governing financial services regulation. This is due in part to the fact that the provisions on non-discrimination and market access are incorporated in the section covering general services provisions as opposed to the specific section on financial services.

Such commitments as are provided are subject to the so-called "prudential carve-out". This is a reservation of each party's right to adopt or maintain measures for prudential reasons, including in order to protect the interests of consumers of financial services and to preserve financial stability and the integrity of financial markets. This overrides all other provisions of the TCA, albeit that the TCA provides that such measures under the prudential carve-out should not be used as a means of avoiding commitments under the TCA. In practice the prudential carve-out largely guts the TCA's commitments relating to market access as they apply to financial services. Subject to the prudential carve-out, the TCA commits each party to maintain its markets open for financial services operators from the other party seeking to supply services either through a commercial establishment or on a cross-border basis. In relation to subsidiaries, the TCA confirms existing third country access to, and treatment in, both jurisdictions with respect to legal form and equal treatment with domestic and other foreign firms. As regards branches of third country firms, the ability to regulate on a national basis is

reserved. Two key general exceptions apply to financial services – namely, that such services are exempted from the general Most Favoured Nation provision and that subsidiaries are exempt from the right of the relevant state to impose a specific legal form.

For cross-border trade in financial services, the TCA ensures that national treatment provisions apply and that the ability to provide those services cannot be made conditional upon commercial establishment (again, subject to the prudential carve-out). Although it should be noted that, similar to CETA, the EU and UK both have a right to adopt measures to limit cross-border trade except in limited circumstances, for example reinsurance.

The financial services section confirms that the EU and UK commit to ensuring that internationally agreed standards (for example prudential, AML and tax-avoidance measures) in the financial services sector are implemented and applied in their territories. In addition to confirming that any new service that could be supplied under existing regulation is covered by the agreement (and therefore subject to the same local licensing regime as local firms), the TCA guarantees access for EU and UK firms (as applicable) to any self-regulatory bodies required for the conduct of their business and to public clearing and payments systems.

The position regarding the transfer of data is discussed further below but the financial services section states that confidential information relating to consumers (but not clients or counterparties that are not consumers) and their affairs and accounts which is in the possession of public entities cannot be disclosed between EU and UK authorities. That is unless required under the provisions on law enforcement and judicial cooperation in criminal matters. Facilitations for short-term business trips, temporary secondments and intra-group transfer of highly skilled employees are envisaged by the TCA, and these provisions extend to financial services.

Regulatory cooperation on financial services

Unlike other recent EU trade agreements, there are no detailed provisions regarding regulatory cooperation set out within the TCA (beyond the provision on international standards). Instead, the non-binding Declarations confirm that the EU and the UK have agreed to "establish structured regulatory cooperation, with the aim of establishing a durable and stable relationship between autonomous jurisdictions". Such cooperation will be based on a shared commitment to preserve financial stability, market integrity, and the protection of investors and consumers. The arrangements will allow for:

- bilateral exchanges of views and analysis on regulatory initiatives and other issues of interest
- transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions
- enhanced cooperation and coordination including in international bodies as appropriate

The EU and the UK intend to agree a memorandum of understanding by March 2021 to establish the framework for this cooperation.

Equivalence decisions

The TCA does not include any provisions regarding the equivalence frameworks for financial services on the basis that these are unilateral decisions of each party and are not subject to negotiation. The Declarations include a statement that, as part of the proposed regulatory cooperation framework, the "Parties will discuss, among other things, how to move forward on both sides with equivalence determinations between the EU and the UK, without prejudice to the unilateral and autonomous decision-making process of each side."

When the TCA was agreed, the European Commission **confirmed** that it had assessed the UK's replies to the Commission's equivalence questionnaires in 28 areas. The Commission states that a series of further clarifications will be needed, in particular regarding how the UK will diverge from EU frameworks after 31 December 2020, 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 stated that it 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 assessments are therefore expected to continue. The Commission has confirmed that it has taken note of the UK’s equivalence decisions announced in November 2020 (and notes that these were adopted in the UK’s interest) and concludes by stating that the “EU will consider equivalence [decisions] when they are in the EU’s interest”.

In this **table**, we summarise existing third country provisions within EU financial services legislation and outline whether the European Commission has taken an equivalence decision for each provision in relation to both the UK and other third countries. We also highlight whether relief is available under the UK regulators’ temporary transitional powers or because of a UK equivalence decision.

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Data protection and cybersecurity

The EU Commission’s consideration of the UK’s adequacy in the context of the protection of personal data and cross-border transfers was never due to be part of the TCA. However, the agreement and ancillary documents do include provisions that address some aspects of personal data protection, at least in the short term.

International data transfers

Under UK data protection law, although each EEA state is now considered to be a “third country”, personal data may continue to be transferred from the UK to those EEA states without need for further appropriate safeguards on the basis of their inclusion in adequacy regulations under the UK Data Protection Act 2018 (Schedule 21). The approach to transfers of personal data from the EEA to the UK remains more complex but perhaps, reassuringly, a Joint Declaration of the EU and the UK specifically notes the European Commission’s intention to launch the procedure for adoption of adequacy decisions for the UK (under both the GDPR and Law Enforcement Directive) as well as its intention to work closely with others involved in the process.

The adoption of adequacy decisions would allow personal data to continue to flow cross-border from the EEA to the UK, without the need for appropriate safeguards. However, the process first requires a proposal from the European Commission, an opinion from the European Data Protection Board (and EU Member State approval) and is therefore not a quick procedure.

In the interim, the TCA provides for a bridging mechanism that enables personal data to continue to flow cross-border from the EEA to the UK, without the need for appropriate safeguards, until the earlier of adopted adequacy decisions and with an initial period of up to four months from 1 January 2021, automatically extendable to 1 July 2021. This grace period is intended to provide sufficient time to allow for the completion of the adequacy assessment process and should avoid significant business disruption that would arise from restrictions on personal data transfers.

It is worth noting that the arrangement will only continue to apply to the extent the UK does not change its data protection laws (away from those in place on 1 January 2021), nor exercise certain “designated powers” regarding data transfers during this period without Partnership Council approval (including, for example, granting adequacy decisions to new third countries, issuing UK standard contractual clauses, approving certain new certification mechanisms and draft codes of conduct, approving new binding corporate rules, authorising new contractual clauses and administrative arrangements).

Therefore, despite the UK now being subject to a separate (if near identical) data protection regime (replacing the GDPR with the UK GDPR, supplemented by the amended Data Protection Act 2018, and accounting for Article 71 of the Withdrawal Agreement regarding “stock” personal data), it will not be able to exercise all of its powers fully without consequence for a number of months or until adequacy has been obtained. However, given the relatively short-term nature of the restrictions, the inclusion of exceptions to enable the UK to make changes to ensure alignment with

EU rules (perhaps useful to enable adoption of equivalent new standard contractual clauses or to re-approve existing binding corporate rules) and the clear advantages to business, this is perhaps a small price to pay.

Sounding a note of caution, although these provisions may imply an EU desire to grant adequacy, a decision is not certain and so the UK ICO prudently calls for organisations to consider and implement other appropriate safeguards to enable EEA to UK data transfers in preparation for a July 2021 cut-off.

Data localisation

More generally, the TCA preamble calls out the need to balance facilitating opportunities for business and consumers through digital trade and the protection of personal data. This is further reflected in the agreement as a way of not restricting cross-border data flows, for example through data localisation requirements or use of particular approved/certified or sited computing facilities (to be reviewed within three years, with scope for earlier amendment). That said, the TCA does acknowledge that nothing shall prevent the EU or the UK from adopting or maintaining measures to protect personal data (including regarding cross-border transfers) so long as there are instruments enabling transfers where conditions to transfer apply generally.

Future cooperation and development of standards

In any event, while the EU and the UK reaffirm the right to regulate to achieve privacy and data protection policy objectives, they also confirm that they will ensure a high level of data protection and shall endeavour to work together to promote high international standards, cooperating, among other things, on enforcement of personal data protection. It remains to be seen how this cooperation will work in practice.

Law enforcement cooperation

Finally, the TCA addresses personal data in the context of law enforcement and criminal record exchange, with provisions regarding the sharing of passenger name record data, vehicle registration details, DNA, fingerprint data and sharing of personal data with EUROPOL and EUROJUST. The EU and the UK are committed to ensuring that personal data is processed in compliance with data protection regimes and specific account is made, amongst other things, for the potential onward transfers to third countries, requiring consent of the authority that provided the information and appropriate safeguards regarding the protection of personal data. More significantly, it is possible for the EU or the UK to suspend law enforcement cooperation where it considers that there are serious or systemic deficiencies in the way the other is protecting personal data and those deficiencies have led to a relevant adequacy decision ceasing to apply.

Cybersecurity

With regard to cybersecurity, the TCA makes provision for cooperation between the EU and the UK with a view to exchanging information, sharing best practice and taking cooperative action to promote and protect cyberspace. This cooperation is envisaged to occur through international bodies and forums as well as between the CERT-EU and UK computer emergency response teams; the EU Cooperation Group and UK national authorities (on invitation and voluntarily); and ENISA and the UK (on invitation and voluntarily, with financial contribution). **Back to contents**

Digital trade

The TCA aims to facilitate digital trade between the UK and the EU. Most significantly, the agreement provides that the parties shall not impose customs duties on electronic transmissions and, subject to certain exceptions, must ensure that contracts can be concluded by electronic means. Provisions are also included in the agreement covering online consumer trust, unsolicited direct marketing communications (so-called “spam”) and open government data. The **UK Government** has stated

its belief that the agreement "will promote trade in digital services and facilitate new forms of trade in goods and services". **Back to contents**

Telecommunications Regulation

Authorisation, use, access and interconnection

There was little change to the UK telecommunications regulatory framework after the end of the Transition Period. The TCA's requirements in respect of authorisation, use, access, allocation of spectrum and numbering, number portability and interconnection of networks and services, as well as the TCA's measures to protect competition, have been largely grandfathered in from the previous EU electronic communications framework, and the new European Electronic Communications Code, that UK government had already announced that it would implement at the end of 2020.

The TCA ensures the continued rights and obligations of suppliers of telecommunication networks and services to negotiate the interconnection of those networks and services, including in relation to the confidentiality of information revealed at such negotiations. However, the TCA diverges from the previous regime in obliging the UK and the EU to require major suppliers of telecommunications networks or services to provide interconnection at any technically feasible point in the network in a non-discriminatory and timely manner upon request. This approach, which derives from the WTO Basic Telecommunications Agreement and can be found in many other free trade agreements, is considerably broader than the provisions of the EECC, which the UK is implementing. The UK had in any case previously announced that it did not intend to implement interconnection requirements of the EECC for number-independent services (eg OTT messaging).

International mobile roaming

The TCA requires EU-UK cooperation to promote transparent and reasonable roaming rates (to benefit trade and enhance consumer welfare) and to encourage suppliers of public telecommunications services to make information on international roaming rates publicly available. The establishment of the "Roam like at Home" international mobile roaming regime was intensely political and following the end of the Transition Period, the legal basis to require UK mobile operators to allow their customers to roam in the EEA without roaming surcharges, and vice-versa, has ended. It has been replaced with transparency and consumer protection requirements, which (in the UK at least) have already been in place since the anti-bill-shock regulations made in 2019. It will be interesting to see whether operators in the UK and EEA begin to increase charges for cross-border roaming, which would likely start with a change in the underlying wholesale roaming rates.

Investment restrictions

The TCA also limits the ability of the UK to impose joint venture requirements or certain foreign capital restrictions on investments from the EU, or vice-versa, with regards to the provision of telecommunications networks or services. This clearly is expressed in different terms from the Maastricht Treaty's requirement for free movement of capital, and does not have the history of interpretation of the free movement of capital. It will be interesting to see whether governments on either side seek to introduce restrictions which will be challenged under this aspect of the TCA.

Net neutrality

Following the end of the Transition Period, the Open Internet Regulation (EU) 2015/2120 is no longer directly applicable in the UK. However, under the TCA both the EU and UK must continue to require that suppliers of internet access services manage network access in a non-discriminatory, reasonable, transparent and proportionate way and enable

users to use devices of their choice (subject to security requirements).

UK law retained net neutrality requirements in the Open Internet Access (Amendment) (EU Exit) Regulations 2018. Whilst these remain generally aligned with EU law, Ofcom is no longer required to take utmost account of BEREC recommendations in this context, UK courts' interpretation of these retained requirements may diverge from the position as interpreted in the EU. **Back to contents**

Civil jurisdiction and judgments

The TCA does not provide for continued cooperation between the UK and the EU on civil jurisdiction and judgments. This is unsurprising. The UK Government has made it clear that, rather than seeking to agree bespoke arrangements on civil justice as part of the TCA, it would instead seek to re-accede to the Lugano Convention 2007 as an "off the shelf" solution for continued civil judicial cooperation following the end of the transition period. The Lugano Convention provides for the allocation of jurisdiction and the enforcement of judgments in civil and commercial matters as between Contracting States and is broadly similar to the Recast Brussels Regulation (the primary jurisdictional regime applied between the UK and EU Member States prior to the end of the transition period). However, the Lugano Convention applies more broadly than the Recast Brussels Regulation, covering Switzerland, Iceland and Norway as well as all EU Member States.

The UK was a Lugano Convention Contracting State until the end of the transition period. In April 2020, in anticipation of its participation coming to an end on 31 December 2020, it deposited an application to re-accede to the Lugano Convention. The UK's re-accession requires the consent of all current Contracting States. Switzerland, Iceland and Norway have all indicated their willingness to consent, but the EU has not yet clarified its position. It has been suggested that the EU has delayed making a decision because the European Commission has seen the issue as bound up with the wider negotiations on the future relationship. Now that an agreement has been reached, we anticipate that the EU will confirm its position shortly and in any event by April 2021, as the Contracting States are required to endeavour to give their consent at the latest within one year after they were notified of an application to re-accede.

It is unclear at this stage what position the EU will take on the UK's re-accession. The likelihood of consent is certainly greater than it would have been had no agreement been reached on the future relationship, but the fact that the TCA has been agreed does not make consent inevitable, not least because the UK-EU relationship is no longer based on the UK's participation in the Single Market.

If the EU does consent to the UK's re-accession to the Lugano Convention, the Convention will come into force on the first day of the third month following the deposit of the instrument of accession. In that scenario, the position on civil justice as between the UK, the EU and Switzerland, Iceland and Norway will be almost exactly as it was when the UK was an EU Member State. In particular, English jurisdiction clauses will be respected and English judgments enforced in all Lugano Convention Contracting States on essentially the same basis as before the transition period came to an end. Any concerns that commercial parties may have had in this area should therefore fall away.

Until that point, we are effectively in a "no deal" scenario on civil jurisdiction and judgments. Currently, therefore, the only applicable multi-lateral regime on jurisdiction and judgments between the UK and the EU is the Hague Convention on Choice of Court Agreements 2005. The UK had been party to the Hague Convention since 1 October 2015 in its capacity as an EU Member State, meaning its participation in that capacity came to an end at the end of the transition period. However, the UK Government was proactive in re-acceding in its new capacity as an independent Contracting State, and the Hague Convention therefore came into force in

the UK in that new capacity immediately following the end of the transition period. The Hague Convention requires Contracting State courts to respect exclusive jurisdiction clauses in favour of other Contracting State courts and enforce related judgments, but it is more limited in scope than the EU regime or the Lugano Convention, applying only where parties have agreed an exclusive jurisdiction clause and only where that clause was agreed after the Hague Convention came into force in the jurisdiction chosen under the clause. Where exclusive English jurisdiction clauses are concerned, it is unclear whether EU Member State courts will treat the relevant date for these purposes as 1 October 2015 or 1 January 2021 (the European Commission has suggested it is the latter date, although the UK takes the opposite view).

Where the Hague Convention does not apply, the question of whether English jurisdiction clauses will be respected and related judgments enforced in Member State courts will be a question of national law in the relevant State. In many Member States, English jurisdiction clauses and judgments falling outside the scope of the Hague Convention will continue to be respected and enforced as a matter of national law, although the process of enforcement may be more time consuming and costly. However, this is not the case in all Member States.

Parties considering including asymmetric or non-exclusive English jurisdiction clauses in their transaction documents must therefore consider on a case-by-case basis whether a judgment pursuant to such a clause will be enforceable in the Member States in which their counterparty is based or holds assets. In light of this, pending any UK accession to the Lugano Convention, we may see a shift by commercial parties towards including exclusive English jurisdiction clauses in their contracts with a view to ensuring they fall within the scope of the Hague Convention regime. If the UK is not permitted to accede to the Lugano Convention, we may see a continuation of that trend in the longer term.

Finally, the TCA has no impact on the position on governing law. Save where there are specific regulatory or political drivers for a change of approach, this means there continues to be no reason to move away from English governing law clauses in commercial contracts. **Back to contents**

The level playing field

The obligations related to the level playing field for open and free competition and sustainable development were reportedly subject to intense negotiation between the EU and the UK in light of concerns that the UK may seek a competitive advantage through subsidies and lower regulatory standards.

The key components of the level playing field under the TCA are as follows:

- **Competition law:** the parties agree to maintain competition law that effectively addresses anti-competitive business practices and which is enforced by an operationally independent authority or authorities in a transparent and non-discriminatory manner. The anti-competitive business practices that are specifically identified are: (a) agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition; (b) abuse of dominant position; and (c) for the UK, mergers and acquisitions, and, for the EU, concentrations, which may have significant anticompetitive effects.
- **Subsidy control:** the parties have agreed to a comprehensive body of rules governing subsidies granted to “economic actors”. The rules are subject to a number of exceptions such as subsidies in response to natural disasters and subsidies related to the audio-visual sector. In broad terms, the parties are obliged to maintain an effective system of subsidy control to ensure that six principles are met. These principles include a requirement for subsidies to be proportionate and appropriate to a public policy objective that cannot be achieved

through other less-distortive means. Certain forms of subsidy are prohibited including unlimited state guarantees and most export subsidies. The TCA provides that the parties must ensure that their courts are competent to review subsidy-related decisions and the available remedies must include recovery of a subsidy from its beneficiary.

- **Labour and social standards:** each party has the right to set and modify its own policies and priorities, determine levels of protection and adopt and amend laws relating to labour and social standards. However, a non-regression clause applies, such that the UK and the EU cannot weaken or reduce their labour and social levels of protection in certain areas (as in place at the end of the transition period) in a way that would affect trade or investment between themselves. This includes enforcement, meaning that, while a party can exercise its reasonable discretion regarding the allocation of enforcement resources, it must not fail to effectively enforce those labour and social laws and standards in a way that impacts trade or investment. In addition to the non-regression clause, the TCA further contains provisions under which the parties commit to respecting, promoting and implementing multilateral labour standards and agreements (eg the fundamental ILO Conventions) and to working together on trade-related aspects of labour policies and measures.
- **Environment and climate:** the TCA contains a non-regression clause in respect of environmental and climate change levels of protection, which follows the same formulation as that relating to labour and social standards. The TCA also requires each party to have in place an effective system of carbon pricing as at 1 January 2021, covering greenhouse gas emissions from electricity and heat generation, industry and aviation (although there is a derogation for aviation, which is able to be brought within the carbon pricing system within two years). These carbon pricing systems must respect the level of protection in place as at the end of the transition period and must be maintained so long as they are an effective tool in the fight against climate change. Importantly, the TCA provides that the UK and the EU will cooperate on carbon pricing and will give "serious consideration" to linking their respective carbon-pricing systems (although there is no obligation to do so). Any link between the EU Emissions Trading System and the UK carbon pricing system would be subject to a separate negotiated agreement.
- **Taxation:** the TCA commits each party to implementing principles of good governance relating to tax, including global standards on tax transparency and exchange of information and fair tax competition. Each party is required to maintain the level of protection agreed in the OECD at the end of the transition period in relation to exchange of information, interest limitations, controlled foreign companies and hybrid mismatches, and to retain their current requirements in respect of public country-by-country reporting by financial institutions.

Perhaps unsurprisingly, the Paris Agreement and greenhouse gas reduction targets are specifically dealt with by the TCA. Under these provisions, each party reaffirms its ambition to achieve climate neutrality by 2050 and commits to effectively implementing the United Nations Framework Convention on Climate Change (UNFCC) and the Paris Agreement. The UK and the EU also agree to promote the mutual supportiveness of trade and climate policies and to facilitate the removal of obstacles to trade and investment in goods and services relevant to climate change mitigation and adaptation. Apart from the carbon and climate-related commitments, the environmental and climate obligations in the level playing field provisions specifically cover trade and biological diversity, forests, marine biological resources and aquaculture.

Finally, each party commits to respecting internationally recognised environmental principles, including the: (a) precautionary principle; (b) polluter pays principle; and (c) principle of preventative action. As part of this, the UK and the EU reaffirm their commitments to procedures for evaluating the likely environmental impact of a proposed activity, including environmental impact assessments where

appropriate. As is the case under the labour and social standards provisions, the parties also commit to implementing the multilateral environmental agreements, protocols and amendments that they have ratified and to working together on trade-related aspects of environmental and climate policies and measures.

- **Trade and sustainable development:** the UK and the EU commit to enhancing the role of trade and investment in achieving (economically, socially and environmentally) sustainable development and recognise the role of trade in promoting the responsible management of supply chains. In this regard, in addition to the measures outlined above, the parties agree to promote trade in goods and services that contribute to better social conditions and sound environmental practices, among other things. They also agree to encourage corporate social responsibility and responsible business conduct, including through putting in place associated policy frameworks and supporting the implementation of relevant international instruments, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

The TCA establishes specific avenues to resolve disputes regarding the application of the level playing field provisions concerning labour and social protections, environmental and climate change protections and trade and sustainable development, as outlined above. These bespoke dispute resolution procedures displace the general dispute settlement system and, in its place, establish procedures for convening a panel of experts. Under these procedures, a panel of experts can be requested to examine a matter and deliver a report making findings on the conformity of the measure in question with the relevant provisions. Where the final report determines that a party has not conformed to its obligations under the relevant provisions, the parties will discuss the measures to be implemented by the respondent party to address the non-conformity. Where there is a disagreement on the measures taken, a party may ask the original panel of experts to consider the matter, after which it will again deliver its findings. Temporary remedies may also be available in disputes regarding certain provisions relating to labour, social standards, the environment and climate, being "non-regression areas".

The TCA also includes a novel unilateral rebalancing procedure in the event that significant divergences emerge as between the parties in relation to labour and social standards, environmental or climate protection, or with respect to subsidy control. If material impacts on trade or investment arise as a result of such significant divergences, either party may take "appropriate rebalancing measures to address the situation". An assessment of such impacts must be based on "reliable evidence and not merely on conjecture or remote possibility" and the measures must be "restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation". A notification and consultation procedure in relation to rebalancing measures involving the Partnership Council has been established with disputes ultimately being settled by an arbitral tribunal. Examples of where rebalancing measures may be used could include where one party significantly increases its levels of protection related to the environment resulting in an increased cost of production and hence a competitive disadvantage. In such a case, the other party could adopt rebalancing measures such as imposing tariffs. **Back to contents**

Sanctions and export controls

The TCA does not substantively cover sanctions cooperation in contrast with the positions set out by the EU and the UK in Article 127(2) of the **Withdrawal Agreement** and the UK's accompanying **Political Declaration**. This position was foreshadowed in the UK Foreign Secretary's **letter** to the EU Security and Justice Sub-Committee of the House of Lords in November 2020 in which

Mr Raab stated that the UK did not "see the need for a Treaty to govern our [sanctions] cooperation". So, as the European Commission has **stated**, "[a]s of 1 January 2021, there will therefore be no framework in place between the UK and the EU to develop and coordinate joint responses to foreign policy challenges, for instance the imposition of sanctions on third country nationals or economies". Indeed, the UK's autonomous imposition of human rights-related sanctions last July heralded its emergence as an independently sanctioning State (see our publication **here**) and, no doubt, considerable further divergences will emerge between the UK and the EU's sanctions regimes. For further details on the UK's post-Brexit sanctions regimes, see our publication **here**.

By way of contrast, the TCA does contain provisions addressing transparency in respect of export control licensing procedures. However, the TCA is not expected to impact directly on either the EU or the UK's export control regimes, since the TCA expressly states that it does not require a party to grant an export licence or prevent a party from implementing its commitments under United Nations Security Council Resolutions and multilateral non-proliferation regimes and export control arrangements. The TCA also does not prevent a party from adopting, maintaining and implementing independent sanctions regimes. **Back to contents**

Intellectual property (IP)

The IP section of the TCA sets out minimum standards for IP protection and enforcement procedures that already exist in UK and EU laws. It also confirms the parties' commitment to comply with international agreements to which they are already a party (eg TRIPS). There is a general recognition that the UK will now have separate systems, eg to register and protect trade marks and designs and to suspend the release by customs of goods suspected of infringing IP rights. The parties are also free to determine their own rules for the exhaustion of IP rights. The TCA does, however, include a general commitment to cooperate and to exchange information on IP issues, such as the enforcement of IP by customs, police and judicial authorities, to coordinate to prevent the export of counterfeits and to educate and promote public awareness of IP policies. Notably, while the TCA recognises that the UK will have a separate scheme for the protection of geographical indications (GIs), there is a specific review clause so the parties can, if it is in their interests, try to agree new rules for the protection and enforcement of their domestic GIs.

The UK had suggested during the TCA negotiations that there should be some reciprocal protection for unregistered designs disclosed in the EU and the UK, but unfortunately this did not make it into the agreement. This is disappointing as it complicates the decision as to where new designs should be first disclosed. First disclosure in the UK will only provide protection in the UK (not the EU) and vice versa, and it is not clear yet whether any online disclosure will be deemed to take place simultaneously in the UK and the EU, thereby providing protection in both territories.

Overall, therefore, the TCA doesn't affect the arrangements that have already been put in place for the future protection and enforcement of IP rights in the EU and the UK. The Withdrawal Agreement, as implemented in the UK, deals with IP rights and civil proceedings that were already in existence on 31 December 2020, the most important of which is the "cloning" of registered EU rights into comparable UK rights. The UK has also introduced new national rights to ensure that there is domestic protection for unregistered designs first disclosed in the UK and databases created by UK-based entities. **Back to contents**

Life sciences

The TCA was never likely to contain many provisions of immediate operational significance to the Life Sciences industry. Even in the event of a "no deal", tariffs on finished medicinal products and most active pharmaceutical ingredients would have remained at 0% by virtue of the Most Favoured Nation application of the WTO Pharmaceutical Tariff Elimination Treaty. There are two welcome pieces of news for the industry, nevertheless.

Annex TBT-2 provides for mutual recognition of Good Manufacturing Practice Inspections carried out by the MHRA and EU competent authorities. Although this falls far short of the industry's original ambition of a comprehensive mutual recognition agreement covering marketing authorisations, batch release and even medical devices, it will avoid at least some duplication of effort, expense and delay in the respective UK and EU pharmaceutical regulatory cycles.

Secondly, at a cost proportional to its GDP, the UK will remain an associate member of Horizon Europe so that UK companies and academic institutions can bid for certain grants to take part in Horizon Europe research projects.

The industry is currently wrestling with immediate effects of the Northern Ireland protocol to the Withdrawal Agreement which, at least until the people of Northern Ireland have their say in four years' time, preserves the application of EU pharmaceutical regulatory law, including the single market for medicines and medical devices, in Northern Ireland. In the meantime the MHRA continues to issue more and more detailed guidance on how its new "GB" pathways for the approval of medicinal products and medical devices in England, Wales and Scotland will operate.

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Energy

As regards energy, the TCA aims to put in place arrangements that will, in due course, facilitate trade and investment between the UK and the EU in respect of energy and raw materials and to support security of supply and environmental sustainability, particularly in respect of climate change. To help fill in some of the gaps (such as for the new electricity trading arrangements), a "Specialised Committee on Energy" has been established.

To this end, the TCA addresses trading of gas and electricity over interconnectors; cooperation on network development, information and other aspects relevant to security of supply; integration of renewables into energy markets; and cooperation as regards the North Sea, including its renewable energy opportunities. Commitments are made in relation to fair competition, transparency, market access and prohibiting market abuse, subject to certain exceptions (for example on public policy grounds).

The key point to note is that there remain substantial new aspects to be agreed by 30 June 2026 (when the energy part of the TCA ceases to apply, unless extended). These include new arrangements for electricity trading aimed at maximising capacity on electricity interconnectors (to be agreed by April 2022) and arrangements for extensive technical cooperation between respective EU and UK transmission system operators and between regulatory authorities in order to facilitate the agreement. Further, there is a requirement for energy regulators in the UK and the EU to cooperate in particular areas including markets, networks, infrastructure planning and offshore energy. Guidance on certain areas is due from the Specialised Committee on Energy as soon as practicable, and this body will have certain ongoing supervisory involvement.

In summary, the high-level principles set out in the TCA still leave much to be discussed and agreed.

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Taxes

By contrast with the extensive provisions on VAT, customs and social security cooperation, the TCA says relatively little about corporate taxes. Tax issues are covered by the parties' wider agreement to cooperate on current and emerging global issues of common interest. While preserving their decision-making autonomy, this includes endeavouring to maintain dialogue and coordinating positions in multilateral organisations, so we can expect to see continued cooperation between the UK and the EU in the tax area within the G-20 and the OECD where it is in the parties' interests to do so.

As widely expected, the TCA does not preserve the withholding tax exemptions for intra-group payments of dividends, interest and royalties contained in the Parent and Subsidiary Directive (2011/96/EU) or the Interest and Royalties Directive (2003/49/EC). It is therefore necessary to look to double tax treaties to eliminate the effect of any withholding on such payments. While the UK has tax treaties with all the EU member states, they do not all provide for zero rates of withholding on dividends, interest or royalties. At the very least, businesses can expect an increased burden of administration in order for intra-group payments of dividends and interest to be paid or received free of withholding.

The level playing field provisions will give the UK some additional flexibility in the tax area. The UK has already taken advantage of this by announcing that it will not implement in full the provisions of DAC 6 (the controversial EU mandatory disclosure rules contained in the Directive on Administrative Cooperation), limiting the rules to those required by the OECD standards. This is a very welcome change and applies retrospectively, although as businesses have invested significant resources in preparing to comply with the higher standards of DAC6, there may be mixed feelings at least about its timing. Another consequence of the agreement is that tax rules will no longer be subject to the European Commission's increasingly activist approach on state aid, but will instead be governed by the provisions on subsidies within the TCA. It is to be hoped that this will increase certainty for businesses in the UK. **Back to contents**

The ongoing effect of the Withdrawal Agreement

It is worth noting that the Withdrawal Agreement will continue to have effect despite the TCA being agreed and following its ratification. This is because it covers a number of issues arising from the UK's withdrawal from the EU that are of continuing relevance – for example, certain rights of UK and EU citizens and the specific arrangements agreed as part of the Protocol on Ireland and Northern Ireland. As mentioned above the TCA will not govern trade in goods between the EU and Northern Ireland and goods entering Northern Ireland from Great Britain will count as imports. This means that such goods will need to comply with EU product rules and be subject to checks and controls for safety, health and other public policy purposes, including all necessary SPS controls applicable between the EU and the UK.

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Next steps

With so much still to be agreed and put in place under the framework of the TCA and through other future relationship agreements, it is clear that negotiations will continue for years. We will monitor the implementation of these agreements and the progress of the arrangements envisaged. Please speak to your usual A&O contacts or the contacts listed below for further information. **Back to contents**

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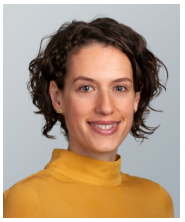

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