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THE FUTURE OF RELATIONS BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM - BASIC GUIDELINES ON TRADE AND INVESTMENT

After a great deal of uncertainty up until the very last minute, a compromise was ultimately found with the signature on 24 December 2020 of a "Brexit" Agreement (the "**TCA**") that purports to respect the red lines of both parties. The EU maintains the integrity of the single market and a robust enforcement mechanism. The UK achieves a free trade agreement for zero-tariff, zero-quota in trade in goods and avoids any role for the European Court of Justice in settling disputes (other than in Northern Ireland). On the other hand, it does not cover areas which were essential for the UK when it was part of the Union. In particular, services, which represent the vast majority of the UK economy, are by and large absent from the TCA.

FAMILIAR PROVISIONS, A BESPOKE MODEL

The TCA was inspired by trade agreements already concluded by the EU with third countries, whose terms are familiar to international trade and investment specialists. However, the level of economic integration achieved between the EU and the UK over almost 50 years makes this agreement unlike any other. Thus, while the TCA makes extensive reference to the provisions of WTO law, governing relations between the European Union and third countries, it also relies on additional provisions that reveal the proximity of the UK to the EU.

Although the TCA preserves a UK alignment with the EU in a number of respects, the UK has chosen to leave the customs union in favour of a free-trade area relationship with the EU. As a result, the degree of UK's legal integration with the EU is substantially reduced and does not match the closer integration, at least from a trade and customs point of view, of certain agreements with other third countries in the region , namely:

Norway, Iceland and Liechtenstein, whose trade relationship with the EU is governed by the deeply integrative European Economic Area (EEA) agreement. For instance, under the EEA agreement, no anti-dumping or countervailing duties may be imposed by any party on industrial goods originating in the EEA. The same will not apply in EU-UK relationship;

Switzerland, which did not join the EEA but signed numerous wide-ranging sector-specific agreements with the EU. Even with other agreements in prospect, the TCA does not suggest a similar direction of travel to the level of market opening achieved by Switzerland; in this respect, Switzerland may also be viewed as enjoying closer links with the EU compared to post-Brexit UK.

Against this background, from a trade point of view, the UK's relationship with the EU, although of a rather particular nature to the UK's lengthy past EU membership, may be more accurately compared to that of a non-European third country like Japan with which the EU has signed an Economic Partnership Agreement including a far-reaching trade component. This may provide the UK with more ability to diverge on trade relationships and create some regulatory arbitrage in a way that other third countries, like Switzerland or Norway, cannot.

TRADE IN GOODS

Trade in goods is not subject to any tariffs or quotas, but customs and conformity checks will be introduced, making flows in goods less fluid and creating more formalities. Although the introduction of trusted trader programmes may alleviate the burden for companies certified in the schemes, becoming certified will be a considerable administrative burden.

As regards “rules of origin”, U.K. firms will have to certify the origin of their exports in order to qualify for tariff-free access to the EU as the proportion of parts made overseas will have to be limited to escape tariffs. For electric vehicles, a lower threshold is applied for the first years but a requirement of 55% local content will apply as from 2027 for these to qualify for tariff free trade between the UK and the EU.

In addition, new certifications will have to be performed as the UK agencies lose the automatic recognition of their standards for products such as chemicals, pharmaceuticals, cars, aircraft, and in fact many manufacturing products subject to EU safety or other standards (e.g. phyto-sanitary rules for agriculture). The experience of the REACH Regulation on the registration of chemicals, which has spawned a compliance industry of itself, may give some indication of the new compliance burdens. In this particular area, there will continue to be an EU REACH, on the island of Ireland, but a UK REACH elsewhere in the UK. The UK will therefore be setting up its own costly system of regulation in parallel for what many UK and third party commentators had viewed as a structural barrier to trade.

For fisheries, which seemed to absorb much of the time of the negotiators before the agreement was reached, 25% of the EU’s fisheries quota in UK waters will be transferred to the UK over a period of five years. After this, there will be annual discussions on fisheries opportunities. In this area, as in others, the TCA is the end of the beginning, rather than a final arrival point.

Northern Ireland will remain part of the EU single market in goods as part of a Protocol on Northern Irish status within the single market in goods. This imposes a de facto customs border in the Irish Sea between the province and the rest of the UK, which is leaving the single market. This means that, although the UK will be responsible for implementation, Northern Ireland will remain part of the EU law on VAT. It will also be the one area of the UK in which the EU Commission and the European Court of Justice will have jurisdiction to enforce EU rules. Further, four years after the transition period, the TCA provides that the UK must give Northern Ireland the opportunity to give consent to the trade elements of the Protocol, giving it a potential exit from the Protocol.

TRADE IN SERVICES

On financial services, the agreement does not include any commitments on market access, only the plan to discuss specific equivalence decisions (but without any commitment on the possible outcome). A Declaration, which accompanied the TCA, provides for the EU and UK to establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship. A Memorandum of Understanding is to be agreed by March 2021 covering, amongst other things, the approach to equivalence. In the absence of this, the UK FCA has put in place temporary measures to preserve the operation of the UK-based euro-denominated derivatives market, for example. The absence of a detailed financial services chapter in the TCA, combined with a patchwork of third country regimes in the EU financial services regulatory framework and recent or forthcoming legislative changes, creates some

risks and uncertainty, partly alleviated however by transitory EU measures regarding notably central clearing counterparties and central securities depositaries. For example, some Euro-denominated trade carried out in London may just stay there and switch to USD rather than moving to EU centres to stay in Euro. This is one of the many issues that should be dealt with in further negotiations by March 2021 and beyond.

On professional services, service providers (doctors, engineers, architects, lawyers etc.) will lose their ability to automatically work in the EU as mutual recognition of professional qualifications is ended.

On transport, the single market rights are removed. For road transport, the validity of drivers' permits and transit rights are maintained, but the right of cabotage is removed, limiting UK and EU road hauliers to two journeys within the other's territory before having to return to their own territory. For a UK operator, this means a single journey in a particular country in the EU before they would need to move to another EU member state to achieve their maximum of two journeys.

On air transport, flying rights between the EU and UK are maintained, but British carriers will not be able to fly between two points within the EU. Although code sharing and blocked-share agreements will be maintained, "5th freedom" routes with an intermediary stop in the EU or UK will only be negotiable (as new bilateral deals) for all-cargo flights.

On energy, the UK is losing access to the EU’s internal energy market but arrangements will be developed to guarantee supply of the energy between the UK and Ireland and continental Europe. This may mean a slight divergence in pricing signals between the UK and north-west European energy markets as some UK-traded gas will now be traded at the Netherlands' TTF hub. More LNG may be traded between the UK and the EU, which has been rare to date. Ireland becomes a single electricity market and UK/EU power trade is possible on only a day-ahead transitional mechanism. In addition, the UK is no longer part of the EU emissions trading system and UK/EU energy traders will need to apply to re-register in the relevant jurisdictions. Even though the EU keeps most of what it needs to trade with the UK and the UK faces substantial red tape to trade with the EU, it appears that, in some areas, such as potentially "new energies" (e.g. hydrogen) which are not covered by the power/gas provisions, it may become harder for EU companies to access UK markets.

On digital services, a bridge of 6 months has been agreed to maintain data flows until an EU adequacy decision is made (equivalent to the one existing for Japan) to recognise the equivalence of data protection rules. The agreement also bans data localisation, allows electronic signatures for digital services and maintains existing consumer protection obligations for electronic commerce. But it ends free roaming and excludes audio visual services from the agreement, meaning that UK audio visual companies lose the rights to offer pan European services.

LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION AND SUSTAINABLE DEVELOPMENT

The UK and the EU are free to set their own standards in areas such as environment and labour law but with the risk of counter measures and cross-sector retaliation in case substantial divergence is distorting trade as established by a system of independent arbitration rulings.

Regarding subsidies/state aid, the UK committed to establish a system of subsidy control with independent oversight, essentially reflecting the EU system (e.g. transparency, no unlimited state guarantees, need for restructuring plans for failing companies receiving aid).
In cases of trade distortions either party will be able to impose measures that could take various forms, including remedial measures and the so-called “trade defense” measures (e.g. countervailing, anti-dumping measures).

FREEDOM OF MOVEMENT

Although this document does not pretend to be exhaustive, it may be helpful to draw attention to the provision made in relation to the movement of persons. Freedom of movement between the UK and the EU is ended and temporary visas for work-related purposes are re-introduced. Staff seconded to the EU on business can stay for up to three years if they are managers and specialists and up to one year for trainee employees. Those on short-term business will need a work permit and may stay for a period of up to 90 days in any 6-month period.

GOVERNANCE

With regard to Governance, the Agreement is overseen by a UK-EU Partnership Council supported by other committees, a structure typical of most traditional trade agreements.

As mentioned above, there are binding enforcement and dispute settlement mechanisms covering the different sectors of the partnership: this goes beyond traditional trade agreements enabling effective counter-measures in case of non-compliance.

The TCA will be reviewed every five years. It can be terminated by either side with 12 months’ notice, and more swiftly on human rights and rule of law grounds.

FINAL REMARKS

While there is debate on how balanced the TCA is for each side, it is undeniable that a compromise that seems to be satisfactory – at least at this stage – for both the EU and the UK has ultimately been reached. In reality, only the concrete implementation of the TCA in each relevant sector will reveal whether the deal meets all parties' goals in the long-term.

An interesting aspect is that the concrete implementation of the EU-UK Trade and Cooperation agreement in the coming months and years could also give a "boost" to the application of the many other agreements recently negotiated by the EU. While each agreement is of course specific, there are many commonalities between them and the attention the TCA will certainly get at all levels may have a positive cascading effect on the implementation of those other agreements, which is unfortunately still deficient due to a lack of stimulus from businesses, Member States and the European Commission.

A better enforcement of European trade agreements offers the necessary tools for a more effective discipline of globalisation, something that multilateralism has failed to fully achieve over the last twenty years.

Some useful basic points of reference as far as trade and investment is concerned:

Table 1 : Border Measures - General

Freedom of transit	• Article V GATT 1994 (including energy goods via inter alia pipelines or electricity grids)
Customs duties	• Prohibited for *originating* products (based on EU/UK preferential origin, as described in Table 2); Prohibition also apply to *repaired*[1] goods temporarily imported/exported *regardless of their origin*; Prohibition does not apply to fees and formalities linked to services • Exception of Article XX of GATT 1994 and of security exceptions
Customs classification	• Respective (UE and UK) tariff nomenclature in conformity with the Harmonised System. Likely to be the same for some time or forever
Customs valuation	• Article VII of GATT 1994 and the Customs Valuation Agreement
Customs origin	• Preferential Rules of origin (see specific table below) • Non-Preferential Rules of origin (e. g. applicable for implementing Trade Defence measures): may be found: - for UK at: https://www.gov.uk/government/publications/reference-document-for-the-customs-origin-of-chargeable-goods-eu-exit-regulations-2020 - for the EU cf. relevant provision of the Union Customs Code Both sets of rules are based on the WTO Agreement on Rules of Origin and are endorsing the existing agreed outcome of the WTO "harmonisation work programme"
Export duties and charges	• Prohibition, including discriminatory duties or charges (except fees and formalities linked to services)
Import / Export restrictions	• Prohibited, except when necessary under Article XI GATT 1994, when permitted in enforcement of countervailing and anti-dumping duty orders and undertakings and in the context of import licensing conditioned on the fulfilment of a performance requirement
Import and export monopolies	• Prohibited
Import licensing procedure[2]	• Possible under certain conditions, including those of Articles 1 to 3 of the WTO Agreement on Import Licensing Procedures (including import control)

[1] "Repair" means any processing operation undertaken on a good to remedy operating defects or material damage and entailing the re-establishment of the good to its original function or to ensure compliance with technical requirements for its use. Repair of a good includes restoration and maintenance, with a possible increase in the value of the good from restoring the original functionality of that good, but does not include an operation or process that: (i) destroys the essential characteristics of a good, or creates a new or commercially different good; (ii) transforms an unfinished good into a finished good; or (iii) is used to improve or upgrade the technical performance of a good.

[2] means an administrative procedure, whether or not referred to as licensing, used by a Party for the operation of import licensing regimes, requiring the submission of an application or other documentation, other than that generally required for customs clearance purposes, to the relevant administrative body or bodies as a prior condition for importation into the territory of the importing Party

Export licensing procedure[3]	• Possible under certain conditions (including export control and sanctions)
WTO tariff rate quotas	• Relevant EU WTO TRQs are not eligible to imports originating (non-preferential rules) in the UK and vice versa
Antidumping measures	• Article VI of GATT 1994, the Anti-Dumping Agreement. • The EU has a well-established antidumping rules and practice. The UK adopted recently new antidumping rules
Antisubsidy measures	• SCM Agreement. The EU has a well-established anti-subsidy rules and practice. The UK recently adopted new anti-subsidy rules *https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments-from-1-january-2021*
Safeguard measures	• Article XIX of GATT 1994, the Safeguards Agreement
Agricultural safeguard	• Article 5 of the Agreement on Agriculture
Breaches or circumvention of customs legislation	• Possible temporary suspension of preferential treatment, subject to consultations with the Trade Partnership Committee unless the importer is not able to satisfy the importing customs authority that its products are fully compliant with the importing Party's customs legislation
Management of administrative errors	• In case of systematic errors by the competent authorities or issues concerning the proper management of the preferential system at export, concerning notably the application of the origin provisions, the Trade Partnership Committee to examine the possibility of adopting decisions, as appropriate, to resolve the situation

Table 2 : Border Measures - Rules of origin

Border measures: Fight against counterfeit goods	• In this field, a close cooperation is set up between the EU and UK: See Article IP.53, part two, heading one, title V of the TCA
Preferential rules of origin: Definition and General Requirements	• In line with provisions of most existing EU preferential agreements, notably EU-Japan
Cumulation	• "Classical" **bilateral cumulation** is foreseen. Compared to other EU FTA like EU-Japan, an additional flexibility is available, allowing the use, instead of a standard supplier's declaration, of "an equivalent document" containing the same information
Definition of Wholly obtained products	• In line with provisions of most existing EU preferential agreements, notably EU-Japan

[3] means an administrative procedure, whether or not referred to as licensing, used by a Party for the operation of export licensing regimes, requiring the submission of an application or other documentation, other than that generally required for customs clearance purposes, to the relevant administrative body as a prior condition for exportation from that Party.

Tolerances	• In line with provisions of most existing EU preferential agreements, notably EU-PEM (Pan-Euro-Med) or EU-Japan
Insufficient Production, Unit of qualification, Accessories, spare parts and tools, Sets and Neutral elements	• In line with provisions of most existing EU preferential agreements, notably EU-Japan
Accounting segregation	• In line with provisions of most existing EU preferential agreements, notably EU-Japan and EU-PEM. Paragraph 4 of Article ORIG.14 provides for an additional flexibility allowing common storage in a Party of certain originating and non-originating fungible *products* before exportation to the other Party
Returned products	• In line with provisions of EU-PEM
Non-alteration principle	• In line with provisions of EU-Japan
Drawback of, or exemption from, customs duties	• Article ORIG.17 provides for a "rendez-vous" close for reviewing the Parties' respective duty drawback and inward-processing schemes
Origin procedures	• In line with provisions of EU-Japan with some additional elements: - additional flexibility concerning post-clearance claims for preferential tariff treatment - Paragraph 4 of Article ORIG.26 (Denial of preferential tariff treatment) put the stress on the principle that "in all cases, the settlement of differences between the importer and the customs authority of the Party of import shall be under the law of the Party of import"

Table 3 : Domestic regulations

National treatment	• No discriminatory internal tax or regulation
Remanufactured goods[4]	• A Party shall not accord to remanufactured goods of the other Party treatment that is less favourable than that which it accords to equivalent goods in new condition. • Import and export restrictions applies to import and export prohibitions or restrictions on remanufactured goods. • If a Party adopts or maintains import and export prohibitions or restrictions on used goods, it shall not apply those measures to remanufactured goods.
Sanitary and Phytosanitary measures (SPS)	• Inspired by the WTO SPS Agreement, but with its owns specificities and setting up bilateral decision-making process mechanisms concerning SPS measures that would negatively affect EU/UK trade

[4] "remanufactured good" means a good classified in HS Chapters 32, 40, 84 to 90, 94 or 95 that: (i) is entirely or partially composed of parts obtained from used goods; (ii) has similar life expectancy and performance compared with such goods, when new; and (iii) is given an equivalent warranty to as that applicable to such goods when new.

Technical Barrier to Trade (TBT)	• Inspired by the WTO TBT Agreement, but with its owns specificities and setting up bilateral decision-making process mechanisms concerning TBT measures that would negatively affect EU/UK trade

Table 4 : Investment

Market access	• Subject to exceptions, a Party shall not adopt or maintain, with regard to establishment of an enterprise by an investor of the other Party or by a covered enterprise, or operation of a covered enterprise, either on the basis of its entire territory or on the basis of a territorial sub-division, measures that: (a) impose limitations on: (i) the number of enterprises that may carry out a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirement of an economic needs test; (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (iii) the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of an economic activity, in the form of numerical quotas or the requirement of an economic needs test; or (b) restrict or require specific types of legal entity or joint venture through which an investor of the other Party may perform an economic activity
National treatment	• Subject to exceptions, each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory
Most favoured nation treatment	• Subject to exceptions, each Party shall accord to investors of the other Party and to covered enterprises

	treatment no less favourable than that it accords, in like situations, to investors of a third country and to their enterprises, with respect to establishment and operations in its territory

Table 5 : Level playing field

Competition Policy	• Respective EU and UK competition law and enforcement regarding a) concerted practices which have as their object or effect the prevention, restriction or distortion of competition; b) abuse of a dominant position and c) merger. • Competition policy is not subject to the specific bilateral dispute settlement provided for by the TCA (part six)
Subsidy	• Respective domestic (EU and UK) State aid control: o each Party shall establish or maintain an operationally independent authority or body with appropriate role in its subsidy control regime, courts or tribunals competent to deal with State aid issues and an effective mechanism of recovery in respect of subsidies. o Prohibited subsidies and subsidies subject to conditions under this national control covers in particular: Unlimited state guarantees, Rescue and restructuring, Banks, credit institutions and insurance companies, Export subsidies, Subsidies contingent upon the use of domestic content, Large cross border or international cooperation projects, Energy and environment and Subsidies to air carriers for the operation of routes. • Bilateral mechanism o For subsidy having a negative effect on trade or investment, possible *consultations* within the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable. o This Committee shall make every attempt to arrive at a mutually satisfactory resolution of the matter. • Remedial measures o A Party may unilaterally take appropriate ***remedial*** measures if there is evidence that a subsidy of the requested Party causes, or there is a serious risk that it will cause a significant negative effect on trade or investment between the Parties. o The remedial measures shall be restricted to what is strictly necessary and proportionate in order to remedy the significant negative

	effect caused or to address the serious risk of such an effect[5]. ◦ The notified Party may request the establishment of an ***arbitration tribunal*** with no suspensive effect on the remedial measures. The arbitration tribunal shall conduct its proceedings in accordance a special and expeditious proceeding (INST.34B) and deliver its final ruling within 30 days from its establishment. • Future policies ◦ The Parties recognise the right of each Party to determine its future policies and priorities with respect to subsidy control. At the same time, the Parties acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of the TCA. ◦ If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate ***rebalancing measures*** to address the situation. ◦ Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Specific ***arbitration*** system is also provided
State-owned enterprises, enterprises granted special rights or privileges and designated monopolies	• Subject to given exceptions, each Party shall ensure that each of its covered entities, when engaging in commercial activities: (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with points (b) or (c); (b) in its purchase of a good or service: i.e accords to a good or service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and ii. accords to a good or service supplied by a covered entity in the Party's territory treatment no less favourable than it

[5] When the same product is restricted to what is strictly necessary or proportionate for the purposes of this Article, a Party: (a) *shall* take into account countervailing measures applied or maintained and (b) *may* take into account anti-dumping measures applied or maintained

	accords to a like good or a like service supplied by enterprises of the Party in the relevant market in the Party's territory; and (c) in its sale of a good or service: i. accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and ii. accords to a covered entity in the Party's territory, treatment no less favourable than it accords to enterprises of the Party in the relevant market in the Party's territory
Antidumping and anti-subsidy measures	• Article VI of GATT 1994, the Anti-Dumping Agreement and the SCM Agreement • Fair competition between the European Union and the United Kingdom on State aid could be one of the most sensitive areas in the coming years. It is likely that the instruments provided for in the agreement will be largely insufficient and that recourse to more traditional instruments, such as the anti-subsidy instrument, or, when available, the EU tool on foreign aid, will be necessary to pave the way toward a real level playing field
Taxation	• No compulsory obligations (other than (i) not to regress from certain OECD agreed standards, and (ii) to cooperate in relation to VAT administration and enforcement) and no provision for dispute settlement
Labour and social standards	• Non-regression from level of protection. Horizontal dispute settlement not available. One specific dispute settlement available
Environment and climate	• Non regression from the level of protection. Horizontal dispute settlement not available. One specific dispute settlement available
Other multilateral instruments for trade and sustainable development	• Various commitments including on trade and responsible supply chain management
Horizontal Dispute settlement provisions	• Consultations and panel of experts
General exceptions	• Public security, public morals (Article XX GATT) • Taxation exception: measures aiming at ensuring the equitable or effective imposition or collection of direct taxes; or distinguishes between taxpayers, who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested. • Security exceptions (Article XXI GATT)

Table 6 - Horizontal State to State Dispute resolution

State to State DSU	• Consultations • Arbitration Procedure • Arbitration Tribunal • Ruling • Compliance • Temporary remedies
Scope	• This DSU shall apply (rule), except when specific procedural rules are provided for (specific fields)

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