NOTE

for the ECON, EMPL, ENVI, ITRE and IMCO committees,
FISC subcommittee, AIDA and BECA special committees

European Parliament

First appraisal of the EU-UK Trade and Cooperation Agreement

Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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First appraisal of the EU-UK Trade and Cooperation Agreement

Abstract

This note gives an initial appraisal of the effects of the EU-UK Trade and Cooperation Agreement in the policy areas covered by the ECON, EMPL, ENVI/BECA, IMCO, and ITRE/AIDA committees. It provides an overview of the main provisions of relevance to future EU-UK cooperation in these areas; it describes the governance structures of the Agreement, the powers of the joint bodies established under the Agreement, and examines the role granted to the European Parliament and the UK parliament.

This document was prepared for the European Parliament's committees on ECON, EMPL, ENVI, ITRE and IMCO as well as for the FISC sub-committee and the AIDA and BECA special committees.

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LIST OF ABBREVIATIONS

ACER	Agency for the Cooperation of Energy Regulators
AIDA	Special Committee on Artificial Intelligence in a Digital Age
BECA	Special Committee on Beating Cancer
CJEU	Court of Justice of the European Union
ECHA	European Chemicals Agency
ECON	Committee on Economic and Monetary Affairs
EMPL	Committee on Employment and Social Affairs
ENVI	Committee on the Environment, Public Health and Food Safety
EP	European Parliament
ESMA	European Securities and Markets Authority
EU	European Union
EU ETS	EU Emissions Trading System
FISC	Subcommittee on Tax Matters
GDP	Gross Domestic Product
ILO	International Labour Organization
IMCO	Committee on the Internal Market and Consumer Protection
ITRE	Committee on Industry, Research and Energy
LPF	Level Playing Field
TCA	EU-UK Trade and Cooperation Agreement, "Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part" as reproduced in OJ L444 31.12.2020
TSO	Transmission System Operator
UN	United Nations

1. INTERNATIONAL LAW TAKES PRECEDENCE OVER EU LAW

"Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States." (Article 216(2) TFEU).

According to the Case-law of the Court of Justice of the European Union (CJEU), International law takes precedence over (secondary) EU law: *"It should also be pointed out that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently,* ***they prevail over acts o***

f the European Union *(see, to this effect, Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52; Case C-311/04 Algemene Scheeps Agentuur Dordrecht [2006] ECR I-609, paragraph 25; Case C-308/06 Intertanko and Others [2008] ECR I-4057, paragraph 42; and Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351, paragraph 307)"*[1].

Arguably, acts adopted by bodies established by the EU-UK TCA could also enjoy primacy: *"****7*** *It follows [...] that decisions of the EEC-Turkey Association Council are measures adopted by a body provided for by the Agreement and empowered by the Contracting Parties to adopt such measures.* ***18*** *In so far as they implement the objectives set by the Agreement, such decisions are directly connected with the Agreement and, as a result of the second sentence of Article 22(1) thereof, have the effect of binding the Contracting Parties.* ***19*** *By virtue of the Agreement, the Contracting Parties agreed to be bound by such decisions and if those parties were to withdraw from that commitment, that would constitute a breach of the Agreement itself"*[2].

[1] CJEU Judgment of the Court (Grand Chamber) of 21 December 2011, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Case C-366/10, Paragraph 50
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0366&qid=1614598477604.

[2] Judgment of the Court of 10 September 1996, Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging, Case C-277/94.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0277&qid=1614600199297.

2. ROLE OF THE EUROPEAN PARLIAMENT

This section presents some general aspects and is not specific to any particular committee. In Title III (Institutional framework) of Part one, it is mentioned that in addition to the Partnership Council[3], the specialised committees[4], and the working groups, the EP and the UK Parliament *may* establish, pursuant to Article INST.5 a Parliamentary Partnership Assembly in order to foster parliamentary cooperation. The assembly may request relevant information; shall be informed on decisions and recommendations of the (EU-UK) Partnership Council; and may make *recommendations* to the Partnership Council.

It is probable that neither the EP, nor the UK Parliament will have any power to amend the TCA or influence its working through that assembly.

In essence, the Parliamentary Partnership Assembly reminds of the so-called "Article 13 Conference" from the Treaty on Stability, Coordination and Governance (TSCG), which is well known to ECON. This conference, which has no decisional powers, is constituted by a mix of MEPs and national MPs from euro area Member States. It might be regarded as suffering from a lack of representativeness, as all parliaments involved only send a subset of their Members, and this without giving them a negotiation mandate. This limits its ability to adopt recommendations.

Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information[5] stipulates [emphasis added]:

> *"Article 2*
>
> *1. The **Commission** shall represent the Union within the Partnership Council, Trade Partnership Committee, Trade Specialised Committees and Specialised Committees set up pursuant to Articles INST.1 [Partnership Council] and INST.2 [Committees] of the Trade and Cooperation Agreement, as well as in any additional Trade Specialised Committee or Specialised Committee that is established in accordance with point (g) of paragraph 4 of Article INST.1 [Partnership Council] or point (g) of paragraph 2 of Article INST.2 [Committees] of the Trade and Cooperation Agreement.*
>
> ***Each Member State** shall be allowed to send one representative to accompany the Commission representative, as part of the Union delegation, in meetings of the Partnership Council and of other joint bodies established under the Trade and Cooperation Agreement.*
>
> *2. In order for the Council to be in a position to exercise fully its policy-making, coordinating and decision-making functions in accordance with the Treaties, in particular by establishing the positions to be taken on behalf of the Union within the Partnership Council, Trade Partnership Committee, Trade Specialised Committees and Specialised Committees, the Commission shall ensure **that the Council receives all the information and documents** related to any meeting of those joint bodies*

[3] "The Partnership Council shall be co-chaired by a Member of the European Commission and a representative of the Government of the United Kingdom at ministerial level." Article INST.1(2).

[4] Article INST.2(5) and (6): "5: Committees shall comprise representatives of each Party. Each Party shall ensure that its representatives on the Committees have the appropriate expertise with respect to the issues under discussion. 6. The Trade Partnership Committee shall be co-chaired by a senior representative of the Union and a representative of the United Kingdom with responsibility for trade-related matters, or their designees.".

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.444.01.0002.01.ENG.

or to any acts to be adopted by written procedure sufficiently in advance of that meeting or that usage of written procedure, and in any case not later than eight working days prior to that meeting or that usage of written procedure.

The Council shall also be informed in a timely manner about the discussions and the outcome of the meetings of the Partnership Council, Trade Partnership Committee, Trade Specialised Committees and Specialised Committees and the usage of written procedure, and shall receive draft minutes and all documents relating to such meetings or usage of procedure.

3. ***The European Parliament shall be put in a position to exercise fully its institutional prerogatives throughout the process in accordance with the Treaties****.*

4. For a period of five years from 1 January 2021, ***the Commission shall report annually to the European Parliament*** *and to the Council on the implementation and application of the Trade and Cooperation Agreement".*

Powers relating to the implementation or suspension of certain provisions of the TCA are vested in the **Commission** (cf e.g. Articles 3, 5).

The **Member States** retain the power to conclude bilateral agreements with the UK in areas not covered by the TCA, such as air traffic rights and cooperation in the fields of VAT or Social Security Coordination (Articles 6 - 9).

In this overall context, it is worth reflecting upon the most appropriate role for the standing committees of the European Parliament as regards systematic information by the European Commission and the exercise of a reasonable level of control over the decisions to be taken.

3. PARTS OF DIRECT RELEVANCE FOR ECON AND FISC

Most parts relevant to ECON are in Part two: Trade, Transport, Fisheries and Other Arrangements, Titles II and XI.

3.1. Title II: Services and investment

Title II of Heading I (Trade) of Part two (Trade, Transport, Fisheries and Other Arrangements) of the TCA covers financial services as relevant to ECON.

"The draft EU-UK Trade and Cooperation Agreement covers financial services in the same way as they are generally covered in the EU's other FTAs with third countries"[6].

The fact that financial services are abundantly mentioned also outside Title II is not an indication of the relative importance of that sector in the agreement. Often, financial services are related to financial aspects of trade, i.e. not part of ECON core business. It is also often mentioned in the agreement and even within Title II that specific clauses do not cover financial services, thus further excluding financial services from the scope of the agreement[7].

The scope of financial services covered by Section 5 (Articles SERVIN.5.37 - 5.44) of Title II is very large, ranging amongst others from insurance, to banking, to asset management, to settlement and clearing services[8]. It concerns public and private entities, as well as non-governmental bodies. The parties are not prevented by the agreement from adopting or maintaining measures for prudential reasons[9]. The parties endeavour to ensure that internationally agreed standards for regulation and supervision, for the fight against money laundering and terrorist financing and for the fight against tax evasion and avoidance, are implemented and applied in their territory[10]. This concerns standards agreed amongst others at the G20, the Basel Committee on Banking Supervision, and the Financial Action Task Force.

Each party shall permit a financial service supplier of the other party established in its territory to supply any new financial service that it would permit its own financial service suppliers to supply in accordance with its law in like situation[11]. This does not apply to branches of the other party established in the territory of a party. A party may determine the institutional and legal form through which the service may be supplied and require authorisation for the supply of the service. Each party shall grant to financial services suppliers of the other party established in its territory access to payment and clearing services operated by public entities and to official lending and refinancing facilities[12]. However, access to the party's lender of last resort facilities is not conferred.

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6 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

7 e.g. Articles SERVIN.1.4(3), SERVIN.2.4(3)(b), SERVIN.3.5(2)(b), SERVIN.5.1(1), SERVIN.5.6(1).

8 Cf definitions in Article SERVIN.5.38.

9 "Nothing in this Agreement shall prevent a Party from adopting or maintaining measures for prudential reasons ..." Article SERVIN.5.39: Prudential carve-out.

10 "The Parties shall make their best endeavours to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering and terrorist financing and for the fight against tax evasion and avoidance, are implemented and applied in their territory This does not apply to branches of the other Party established in the territory of a Party." Article SERVIN.5.41.

11 "Each Party shall permit a financial service supplier of the other Party established in its territory to supply any new financial service that it would permit its own financial service suppliers to supply in accordance with its law in like situations, provided that the introduction of the new financial service does not require the adoption of a new law or the amendment of an existing law." Article SERVIN.5.42.

12 "Under terms and conditions that accord national treatment, each Party shall grant to financial service suppliers of the other established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This Article does not confer access to the Party's lender of last resort facilities." Article SERVIN.5.44.

A number of reservations by either the UK, or the EU, or individual EU Member States, are listed in the annexes, setting out which activities or sectors are not covered by the agreement, and which may be settled through equivalence. Many concern financial services[13].

Equivalence will be established by each party not as a single blanket approval, but rather separately on specific activities.

With respect to branches of financial institutions, the TCA stipulates: *"Unlike foreign subsidiaries, branches established directly in a Member State by a non-European Union financial institution are not, with certain limited exceptions, subject to prudential regulations harmonised at Union level which enable such subsidiaries to benefit from enhanced facilities to set up new establishments and to provide crossborder services throughout the Union. Therefore, such branches receive an authorisation to operate in the territory of a Member State under conditions* ***equivalent*** *to those applied to domestic financial institutions of that Member State, and may be required to satisfy a number of specific prudential requirements such as, in the case of banking and securities, separate capitalisation and other solvency requirements and reporting and publication of accounts requirements or, in the case of insurance, specific guarantee and deposit requirements, a separate capitalisation, and the localisation in the Member State concerned of the assets representing the technical reserves and at least one third of the solvency margin"*[14]. (Emphasis added)

Despite the importance of financial services for both the UK and the EU, this sector might be somewhat the stepchild *(parent pauvre)* of the agreement. In practice, most aspects are left open, and will (or will not) be dealt with in separate agreements, e.g. by establishing equivalence. The wording of the section on financial services together with low number of equivalences granted so far by the EU completely redefines the UK's financial services sector perspectives in the EU, where it loses a substantial part of its market[15]. In comparison, the EU is substantially less dependent on the UK as a market for financial services. It should be expected that the EU will leverage on this asymmetry when negotiating with the UK[16].

The European Securities and Markets Authority (ESMA), announced that the three central counterparties (CCPs)[17] established in the United Kingdom (UK) would be recognised as third country CCPs (TC-CCPs) eligible to provide their services in the EU[18], and that Euroclear UK & Ireland Limited (EUI), the central securities depository (CSD) established in the United Kingdom (UK), would be recognised as a third-country CSD (TC-CSD)[19]. Equivalence may also be withdrawn, as was the case in relation to rating agencies and trade repositories[20].

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13 ANNEX SERVIN-1: EXISTING MEASURES, Schedule of the Union, Reservation No. 12; ANNEX SERVIN-2: FUTURE MEASURES, Schedule of the Union, Reservation No. 16; Schedule of the UK, Reservation No. 9.

14 ANNEX SERVIN-1: EXISTING MEASURES, Point 14; ANNEX SERVIN-2: FUTURE MEASURES, Point 13.

15 "According to EY, a professional-services firm, around £1.2trn ($1.6trn) in assets and more than 7,500 jobs were moved from Britain to the EU between 2016 and 2020. In the two weeks since British-based institutions lost their passporting rights, more than £5bn of daily share-trading in European-listed equities has followed them out of London".
https://www.economist.com/the-economist-explains/2021/01/15/why-equivalence-matters-in-brexit-britain.

16 See also https://www.economist.com/britain/2021/01/02/britains-relationship-with-the-eu-will-look-like-switzerlands.

17 "Central counterparties (CCPs) are bodies that operate between the buyer and seller of a derivative contract, becoming the buyer to every seller and the seller to every buyer. Their use was encouraged by the G20 following the financial crisis, to reduce risk in derivatives trading. Derivatives markets are global in nature". See
https://ec.europa.eu/commission/presscorner/detail/en/IP_21_205 on the European Commission equivalence decision of 27 January 2021 determining that the United States Securities and Exchange Commission (SEC) regime for US central counterparties (CCPs) is equivalent to EU rules.

18 https://www.esma.europa.eu/press-news/esma-news/esma-recognise-three-uk-ccps-1-january-2021.

19 https://www.esma.europa.eu/press-news/esma-news/esma-recognise-euroclear-uk-ireland-limited-eui-after-brexit-transition-period.

20 "ESMA withdraws the registrations of six UK-based credit rating agencies and four trade repositories" , see
https://www.esma.europa.eu/sites/default/files/library/press_release_cra_tr_uk_withdrawn_4_january_2021.pdf.

On 9 November 2020, the Chancellor of the Exchequer announced that the UK would be granting a package of equivalence decisions to the European Economic Area States, including the Member States of the European Union[21].

According to the JOINT DECLARATION ON FINANCIAL SERVICES REGULATORY COOPERATION BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM, *"[b]oth Parties will, by March 2021, agree a Memorandum of Understanding establishing the framework for this cooperation. The Parties will discuss, inter alia, how to move forward on both sides with* ***equivalence determinations*** *between the Union and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side"*[22]. (Emphasis added).

3.2. Title XI: Level playing field for open and fair competition and sustainable development

Outside financial services, the majority of articles of relevance to ECON is found in Title XI of Heading I (Trade) of Part two (Trade, Transport, Fisheries and Other Arrangements) of the TCA. It covers competition law, subsidy control, state-owned enterprises and taxation.

A "*level playing field for open and fair competition and sustainable development*" is proclaimed, but not defined[23]. It is meant to ensure that trade and investment take place in a manner conductive to sustainable development. Economic development, social development and environmental protection are considered interdependent and mutually reinforcing. Standards are not meant to be harmonised, but the parties endeavour to maintain and improve their respective high standards. The parties affirm each other's right to set their policies and priorities. *"The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Title, to determine the levels of protection it deems appropriate and to* ***adopt or modify its law and polici****es in a manner consistent with each Party's international commitments, including its commitments under this Title"*[24] (emphasis added). The dispute settlement mechanism[25] shall apply to determine the legitimate use (or abuse) of the **precautionary approach**[26].

The text is peppered with competition issues, but for the most part these are related to trade-specific aspects, thus not directly relevant to ECON. However, a specific part concerns competition law, a core ECON competence.

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21 https://www.gov.uk/government/publications/hm-treasury-equivalence-decisions-for-the-eea-states-9-november-2020/hm-treasury-equivalence-decisions-for-the-eea-states-9-november-2020#:~:text=On%209%20November%202020%20the,Union%20('EU').&text=These%20will%20be%20laid%20before%20Parliament%20on%2010%20November%202020.

22 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

23 "The Parties recognise that trade and investment between the Union and the United Kingdom under the terms set out in this Agreement require conditions that ensure a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development." Article 1.1.

24 Article 1.2(1.).

25 "Title I [Dispute settlement] of Part Six [Dispute settlement and horizontal provisions] does not apply to this Chapter, except for Article 1.2(2) [Right to regulate, precautionary approach and scientific and technical information]." Article 1.3.

26 "The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage." Article 1.2(2).

Concerning **competition policy**[27], the importance of free and undistorted competition in their trade and investment relations is recognised[28].

Each party shall maintain a **competition law** which effectively addresses anticompetitive business practices, such as agreements or concerted practices between economic actors that prevent, restrict or distort competition; abuse of dominant positions; mergers/acquisitions/concentrations which may have significant anticompetitive effects; however, exemptions from competition law are possible in pursuit of legitimate public policy objectives[29].

The enforcement of competition law is carried out by each party in its territory, supervised by their own operationally independent authorities[30]. To ensure the cooperation and coordination between the parties, information may be exchanged[31]. The parties may enter into a separate agreement on cooperation and coordination. There is (explicitly) *no* instrument for dispute settlement[32].

The chapter on **subsidy control** is long[33], often ventures into specific (non-ECON) sectors, and covers a wide range of subsidies, including grants and tax measures. Many exceptions are listed. To ensure transparency, public databases on subsidies will be established[34]. Consultations on granted subsidies which could have negative effects on trade and investment are possible. In case the consultation fails to settle an issue, a Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development shall make every attempt to arrive at a mutually satisfactory resolution of the matter[35]. Each party sets up operationally independent bodies[36] with an appropriate role in its subsidy control regime. These cooperate with each other, and may agree on a separate cooperation framework. In case of litigation, national courts are competent to review subsidy decisions and impose remedies[37].

Each party shall have in place an effective mechanism of recovery in respect of subsidies that were successfully challenged before a court[38].

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27 Articles 2.1 - 2.5.

28 "The Parties recognise the importance of free and undistorted competition in their trade and investment relations. The Parties acknowledge that anticompetitive business practices may distort the proper functioning of markets and undermine the benefits of trade liberalisation." Article 2.1(1).

29 Article 2.2.

30 "Each Party shall take appropriate measures to enforce its competition law in its territory. Each Party shall maintain an operationally independent authority or authorities competent for the effective enforcement of its competition law." Article 2.3(1) - 2.3(2).

31 "To facilitate the cooperation and coordination referred to in paragraphs 1 and 2, the European Commission and the competition authorities of the Member States, on the one side, and the United Kingdom's competition authority or authorities, on the other side, may exchange information to the extent permitted by each Party's law." Article 2.4(3).

32 "This Chapter shall not be subject to dispute settlement under Title I [Dispute settlement] of Part Six [Dispute settlement and horizontal provisions]." Article 2.5.

33 Articles 3.1 - 3.13.

34 "With respect to any subsidy granted or maintained within its territory, each Party shall within six months from the granting of the subsidy make publicly available, on an official website or a public database ..." Article 3.7(1).

35 "The Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development shall make every attempt to arrive at a mutually satisfactory resolution of the matter. It shall hold its first meeting within 30 days of the request for consultation." Article 3.8(5).

36 "Each Party shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime. That independent authority or body shall have the necessary guarantees of independence in exercising its operational functions and shall act impartially. The Parties shall encourage their respective independent authorities or bodies to cooperate with each other on issues of common interest within their respective functions, ..." Article 3.9.

37 "Each Party shall ensure, in accordance with its general and constitutional laws and procedures, that its courts or tribunals are competent ..." Article 3.10.

38 "Each Party shall have in place an effective mechanism of recovery in respect of subsidies ..." Article 3.11.

Parties may raise specific subsidies in a remedial measures procedure[39]; the horizontal dispute settlement provisions of the TCA may be used for the interpretation and application of the TCA's chapter on subsidy control[40].

The JOINT DECLARATION ON SUBSIDY CONTROL POLICIES provides guidance for the application of systems of subsidy control by the Parties[41].

Further, a chapter is devoted to **state-owned enterprises, enterprises granted special privileges, and designated monopolies**[42], when these enterprises are carrying out commercial activities. Reference is made to relevant international standards, including the OECD Guidelines on Corporate Governance of State-Owned Enterprises, which each party shall respect. Each party's own regulatory body needs to be independent and act impartially. Information exchange is foreseen if a party has reason to believe that its interests are being adversely affected.

Taxation[43] is also part of the chapter on a *"level playing field for open and fair competition and sustainable development"*. It is mainly referred to the recognition and commitment to the principles of good governance in the area of taxation, in particular the global standards on tax transparency and exchange of information and fair tax competition. The support for the OECD Base Erosion and Profit Shifting (BEPS) Action Plan is reiterated. It is stipulated that the parties shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD. However, the scope of the non-regression obligation with regard to tax matters remains to be further clarified while noting that tax issues are neither included in the scope of rebalancing measures nor of the dispute settlement mechanism (Article 5.3 states explicitly that the Chapter on taxation shall *not* be subject to dispute settlement under Title I [Dispute settlement] of Part Six [Dispute settlement and horizontal provisions]. The JOINT POLITICAL DECLARATION ON COUNTERING HARMFUL TAX REGIMES sets a number of criteria for the purpose of when assessing whether a business taxation regime is harmful[44]. It specifies that "(*h)armful tax regimes cover business taxation regimes that affect or may affect in a significant way the location of business activity by imposing a significantly lower effective level of taxation than those levels which generally apply in the Participants, including zero taxation*".

Furthermore, the Joint Political Declaration also foresees overarching principles and commitments, especially that:

- *"The Participants, reflecting the global principles of fair tax competition**, affirm their commitment to countering harmful tax regimes**, in particular those that may facilitate base erosion and profit shifting in line with Action 5 of the OECD Base Erosion and Profit Shifting (BEPS) Action Plan. In this context, the Participants **affirm their commitment to applying the principles on countering harmful tax regimes in accordance with this Joint Political Declaration**."* (Paragraph 2 - emphasis added);

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39 Article 3.12.

40 Subject to paragraphs 2 and 3, Title I [Dispute settlement] of Part Six [Dispute settlement and horizontal provisions] applies to disputes between the Parties concerning the interpretation and application of this Chapter, except for Articles 3.9 [Independent authority or body and cooperation] and 3.10 [Courts and tribunals].Article 3.13(1).

41 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

42 Articles 4.1 - 4.7.

43 Articles 5.1 - 5.3.

44 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

- *"The Participants should encourage, within the framework of their constitutional arrangements,* ***the application of these principles in the territories for which they have special responsibilities or taxation prerogatives."*** *(Paragraph 6 - emphasis added) It has to be noted that the TCA does not apply to the Crown Dependencies and Overseas Territories;* and
- *"The Participants should* ***hold an annual dialogue*** *to discuss issues in relation to the application of these principles." (Paragraph 7 - emphasis added).*

A comprehensive Protocol on administrative cooperation and combating fraud in the field of VAT and on mutual assistance for the recovery of claims relating to taxes and duties is part of the annexes. Taxation is also touched upon in the part on subsidy control, and in Title XII: Exceptions, which mainly stipulates that the agreement shall not affect the rights and obligations under any tax convention. Pursuant to Article 7 of Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement45, *"[t]he Member States are empowered to negotiate, sign and conclude bilateral agreements with the United Kingdom in accordance with Article 41 of the Protocol on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties or in the area of social security coordination as regards subject matters* ***not*** *covered by the Protocol on Social Security Coordination"*, [emphasis added] subject to certain conditions.

[45] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.444.01.0002.01.ENG.

4. PARTS OF DIRECT RELEVANCE FOR EMPL

The main sections of relevance for the EMPL committee are found in Part one: Common and Institutional Provisions, Title III Institutional Framework, Part two: Trade, Transport, Fisheries and other arrangements, Heading one (Trade) and Heading four (Social security coordination), and in the Protocol on Social Security Coordination.

4.1. Title III: Institutional Framework

A Specialised Committee on Social Security Coordination, to address matters covered by Heading Four of Part Two and the Protocol on Social Security Coordination, is established[46]. A Working Group on Social Security Coordination is established, under the supervision of the Specialised Committee on Social Security Coordination[47]. The specialised committees may have certain powers delegated to them by the Partnership Council[48]. They are made up of representatives of each Party who have "*appropriate expertise*"[49]. Their powers include monitoring and reviewing the Agreement and any supplementing agreements, assisting and reporting to the Partnership Council, adopting decisions, including amendments, and recommendations (where powers are delegated by the Partnership Council), discussing technical issues, providing a forum for the exchange of information and best practices, establishing working groups, and providing a forum for consultations as part of the dispute settlement system[50].

4.2. Title XI: Level playing field for open and fair competition and sustainable development

4.2.1. Chapter one: General Provisions

As explained previously, Part two, Heading one (Trade), Title XI presents a level playing field for open and fair competition and sustainable development. The notion of sustainable development notably encompasses social development as well as economic development and environmental protection and recognises that all three aspects are "*interdependent and mutually reinforcing*"[51]. The Parties affirm their commitment to promoting sustainable development in international trade and investment[52]. The objective is not to harmonise standards but to "*maintain and improve*" the high standards that are in place on both sides[53].

The Parties have the right to set their policies and priorities and modify their laws but "*in a manner consistent with their international commitments, including this title*"[54].

Measures to protect the environment or labour conditions that may affect trade or investment, should take account of "*relevant, available scientific and technical information, international standards, guidelines and recommendations*"[55].

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46 Article INST.2(1)(p).

47 Article INST.3(1)(d).

48 Article INST.1.4(f).

49 Article INST.2.5.

50 Article INST.13(7).

51 Art 1.1.

52 Art 1.1(2).

53 Art. 1.1(4).

54 Art 1.2(1).

55 Art 1.2(3).

However, the precautionary approach can be used to justify measures to protect the environment or human health, even if full scientific certainty has not been established[56].

In terms of dispute settlement, the mechanism in Part six applies only to the use of the precautionary approach[57] but not to the rest of the chapter.

4.2.2. Chapter six: Labour and social standards

Labour and social levels of protection are defined as overall levels of protection in a series of areas: "*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*"[58]. For the EU it means the "*levels of protection applicable to and in, and common to, all Member States*"[59].

The **non-regression clause** commits the Parties to "*not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period (...)*"[60] and to "*continue to strive to increase their respective labour and social standards*"[61]. Two points are worthy of particular note here. Firstly, under Article 127 of the Withdrawal Agreement, the UK was obliged to transpose the Directive on work-life balance for parents and carers and the Directive on transparent and predictable working conditions during the transition period. However, the UK has not yet taken the necessary steps to do so and has thus deprived UK citizens of new rights created under these directives. Secondly, the non-regression clause is subject to a trade distortion test that uses a high threshold ("*in a manner affecting trade and investment between the Parties*").

Enforcement of non-regression shall be through a "*system for effective domestic enforcement*"[62]. This chapter is not subject to the dispute resolution mechanism in Part six but instead comes under a specific procedure involving a Panel of Experts for non-regression areas[63].

4.2.3. Chapter eight: Other instruments for trade and sustainable development

In chapter eight, the Parties commit to promoting the development of international trade in line with the 2008 ILO Declaration on Social Justice for a Fair Globalization[64] and the ILO Decent Work Agenda set out therein[65]. They also commit to "*respecting, promoting and effectively implementing the internationally recognised core labour standards, as defined in the fundamental ILO Conventions*"[66], and to cooperating within multilateral bodies such as the ILO[67]. Furthermore, they commit to implementing those provisions of the Council of Europe's European Social Charter that they have accepted (for the UK, the 1961 version of the Charter)[68].

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56 Art 1.2(2).
57 Art 1.3.
58 Art 6.1(1).
59 Art 6.1(1).
60 Art 6.2(1).
61 Art 6.2(4).
62 Art 6.3.
63 Art 6.4.
64 Art 8.3(1).
65 Art 8.3(6).
66 Art 8.3(2).
67 Art 8.3(8).
68 Art 8.3(5).

The Parties agree to "*protect and promote social dialogue on labour matters*"[69] and to "*consider any views provided by representatives of workers, employers, and civil society organisations"* relating to their cooperation activities[70]. Chapter eight is not subject to the dispute resolution mechanism in Part six but rather a system of consultations followed in a later stage by a Panel of Experts[71].

4.2.4. Chapter nine: Horizontal and institutional provisions

Chapter nine describes specific dispute settlement mechanisms under Title XI.

To summarize very briefly, the process starts with **consultations** [72] If consultations do not deliver a solution, a **panel of experts** is established to report on the situation[73]. The panel of experts produces an interim report and a final report, which "*shall include a discussion of any written request by the Parties on the interim report and clearly address the comments of the Parties*"[74]. If there still no agreement between the parties on measures to be taken to address the disputed matter, *"the complaining Party may deliver a request, which shall be in writing, to the original panel of experts to decide on the matter*". The Panel of Experts then delivers its findings within a certain deadline[75]. Article 19.2(19) lists further procedures that apply.

There is a **special panel of experts for the non-regression areas** (including the interpretation and application of Labour and Social Standards)[76]. If a Party decides not to follow the report of the panel of experts, the complaining party can use "*any remedies authorised under article INST.24 [Temporary remedies]*"[77]. Under this article, the complaining party may require the respondent party to make an offer for temporary compensation[78] and may, if no offer is made, or no agreement can be reached on the offer, "*suspend the application of obligations under the provisions concerned*"[79]. The TCA stipulates, "*the suspension shall not exceed the level equivalent to the nullification or impairment caused by the violation*"[80].

Article 9.4 deals with **rebalancing measures**, a mechanism that is being used for the first time in a trade agreement concluded by the EU. The aim of this mechanism to ensure the maintenance of a level-playing field over the long term, even as regulations adopted by the both sides diverge. These measures may be taken 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 (...)"*[81].

The Agreement insists that that "*such measures be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation*" and that "*priority be given to measures that least disturb the functioning of the Agreement*".

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69 Art 8.3(7).

70 Art 8.3(9).

71 Art 8.11.

72 Art 9.1(1).

73 Art 9.2(1).

74 Art 9.2(14).

75 Art 9.2(18).

76 Art 9.3.

77 Art. 9.3(3).

78 Art. INST.24(1).

79 Art INST.24(2).

80 Art INST.24(5).

81 Art 9.4(2).

The assessment of impacts "*shall be based on reliable evidence and not merely on conjecture or remote possibility*"[82].

Article 9.4 then describes the procedure for the adoption of rebalancing measures. It should be noted that the agreement does not specify what form rebalancing measures may take nor does it define two other important terms: "*divergence*" and "*material impact*".

4.3 Title I: Social Security Coordination

In Part two, Heading four, Title I, the EU Member States and the UK agree to coordinate their social security systems[83]. This title set out the situations to which this coordination shall apply. Provision is also made for a **health fee**, which a Member State or the UK may charge those entering their respective territories to stay, work or reside[84].

4.4. Protocol on Social Security Coordination

4.4.1. Title III: Special provisions concerning various categories of benefits

The basic structure of the protocol on social security coordination resembles that of the system of social security coordination in force within the EU (Regulation 883/2004 and Regulation 987/2009): wide personal and legal scope, rules on equal treatment, assimilation, aggregation and export of benefits, rules on applicable legislation, and specific provisions for each of the benefits listed. Article SSC.3.1 lists the branches of social security covered: "*sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits*".

However, there are also restrictions in the material scope compared to the EU regulatory framework. **Article SSC.3.4 lists the branches to which the Protocol does <u>not</u> apply, including social and medical assistance, long-term care benefits, family benefits and a series of special non-contributory cash benefits.**

Two further points worthy of note are the fact that is no longer possible to export unemployment and invalidity benefits [85] and that, as regards invalidity benefits, the UK accepted aggregation to assess the right of the individual to an invalidity benefit but not for the determination of the level of the benefit[86].

Regarding "**detached workers**" (i.e. **posted workers**), see Article SSC.11, as well as the notifications made by the EU, which triggered derogations for certain Member States[87].

4.4.2. Title IV: Miscellaneous Provisions

Article SSC.59(7) provides that "*in the event of difficulties in the interpretation or application of this Protocol, the relevant institutions of the States concerned should endeavour to resolve the situation.*

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82 Art. 9.4(2).

83 Ch.SSC.1.

84 Ch.SSC.4.

85 Article SSC.8.

86 Article SSC.39.

87 Notification B.2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1486.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

If a solution cannot be found within a reasonable period, a Party may request to hold consultations in the framework of the Specialised Committee on Social Security"[88].

4.4.3 Title V: Final Provisions

In Article SSC.67, the Parties commit to ensuring that the provisions of the Protocol *"have the force of law, either directly or through domestic legislation giving effect to these provisions*"[89].

Article SSC.68: "*The Specialised Committee on Social Security Coordination may amend the Annexes and Appendices to this Protocol*"[90].

Article SSC.69: "*Each Party may at any moment terminate this Protocol (...)*"[91]. Article SSC.70 contains a **sunset clause, according to which** "***the Protocol shall cease to apply fifteen years after the entry into force of the Agreement***". An updated protocol may be negotiated[92]. Under post-termination arrangements, "*the rights of insured persons regarding entitlements which are based on periods completed or facts or events that occurred before this Protocol ceases to apply shall be retained*". The Partnership Council has the power to decide on additional arrangements[93].

[88] Article SSC.59.

[89] Article SSC.67.

[90] Article SSC.68.

[91] Article SSC.69.

[92] Article SSC.70.

[93] Article SSC.71.

5. PARTS OF DIRECT RELEVANCE FOR ENVI AND BECA

5.1. General

Environmental law constantly permeates into other areas of law, such as corporate governance and transparency, finance, energy, emissions, transport, consumer protection, manufacturing, land use and agriculture. The EU-UK TCA is about maintaining open access to markets, whereas environmental protection and safeguards are often considered to be non-tariff barriers to trade. There is an inherent tension between international trade deals and domestic environmental protection legislation. The UK has already embarked upon its own path for environmental law, and a new Environment Bill is currently before the UK parliament[94]. It is committed to revisiting and changing the laws to better suit the own UK's own policy ambitions, so as to use the new regulatory power to depart from EU practices and objectives. How this can be reconciled in the EU-UK TCA remains to be seen. Looking for example at the Office for Environmental Protection (OEP) in England and Northern Ireland that this bill will establish[95], concerns in respect of the independence of the OEP[96] and its ability to take legal action in cases of breaches of environmental rules[97] were expressed in the public debate[98]. Under the TCA, both parties committed to upholding "*their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation*" (Preamble of the EU-UK TCA paragraph 9). Now, it will be all about how this general commitment is monitored and enforced. The EU is concerned that significant divergence in the UK's approach to environmental law and policy provides with an opportunity to row back on environmental protection. There is also a question of how this is enforced within the TCA: the UK is adamant that environmental protection should not be subject to the TCA's dispute resolution mechanism. In practice, there will be ongoing big issues still to be tackled over the next years.

The UK and the EU will maintain separate **regimes regulating human, plant and animal health**. The agreement places a duty on both sides to ensure that any sanitary and phytosanitary (SPS) border controls are "proportionate to the risks identified" (Article SPS.5: General principles). The agreement recognises "zoning", Article SPS.10: Adaptation to regional conditions, allowing imports from pest and disease-free parts of the UK or the EU to continue, in the event of geographically concentrated outbreaks. The deal also commits to ongoing UK–EU co-operation on animal welfare, antimicrobial resistance and sustainable food systems.

A number of sectoral annexes relevant for ENVI and BECA aiming at facilitating trade were agreed in the TCA in key EU export areas: cars, **chemicals, medicines**, wine and **organics**.

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94 https://www.gov.uk/government/publications/environment-bill-2020.
https://bills.parliament.uk/bills/2593.

95 https://deframedia.blog.gov.uk/2019/10/16/new-office-for-environmental-protection-will-ensure-governments-maintain-green-credentials/.

96 https://publications.parliament.uk/pa/cm5801/cmselect/cmenvfru/1042/104205.htm Points 6-11.

97 https://publications.parliament.uk/pa/cm5801/cmselect/cmenvfru/1042/104205.htm Point 9.

98 European Parliament ENVI committee adopted opinion (paragraph 20), see https://www.europarl.europa.eu/doceo/document/ENVI-AL-663382_EN.pdf.

5.2. Climate change and sustainable development

Part two, Title XI, Chapter One covers also environment and climate: Article 1.1 explicitly commits to **climate neutrality by 2050**.

According to Article 7.3: Carbon pricing, (1) each Party shall have in place an effective system of carbon pricing as of 1 January 2021 and (2) each system shall cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation. The *"climate level of protection"* is set as follows: *"[...] (a) for the Union, the 40 % economy-wide 2030 target, including the Union's system of carbon pricing; (b) for the United Kingdom, the United Kingdom's economy-wide share of this 2030 target, including the United Kingdom's system of carbon pricing."* (Article 7.1(3)) A non-regression clause is established through Article 7.2.

On the EU Emissions Trading System (EU ETS)[99], the EU and the UK have expressed an openness to considering a link between an independent UK ETS and the existing EU ETS in the future. The UK has expressed an interest in doing so on the basis of two (separate, autonomous) regimes. On that basis, the UK would be free to pursue its own carbon reduction incentives and mechanisms, under the commitment of effectively implementing the UNFCCC and the Paris Agreement (Part TWO, Title XI, Article 8.5.2 TCA), and a new UK ETS mechanism, under the commitment of the non-regression principle from the levels of protection reached (Part two, Title XI, Article 7.2 TCA) and opting for a more straight-forward carbon tax. The EU for its part would only consider the option of linking the EU ETS with a UK ETS if the latter does not undermine the integrity and effectiveness of the EU ETS, in particular its balance of rights and obligations[100].

Further obligations in Part two, Title XI **(**LPF for open and fair competition and sustainable Development), Chapter seven, Environment and climate include[101]:

- promote effective implementation of multilateral environmental agreements, including on biodiversity, chemicals and waste, climate and atmosphere;
- facilitating trade and investment in green products and services; and
- fight illegal logging and trade in illegal timber; combating wildlife trade and protecting biodiversity when subject to trade pressures; sustainable fisheries and aquaculture and fighting Illegal, unregulated and unreported fishing and excluding IUU products from trade.

5.3. Goods

The EU-UK TCA stopped tariffs from being imposed on goods exchanged, but **did not prevent the revival of customs procedures, health and safety checks**, value-added taxes on imports, and other time-consuming, commerce-limiting hindrances[102]. The TCA establishes four working groups; three of which (on organic products, motor vehicles and parts, and **medicinal products**), are supervised by the **Special Committee on Technical Barriers to Trade.** Medicinal Products are *not* covered by the dispute-settlement mechanism established in Part six.

99 https://ec.europa.eu/clima/policies/ets_en.

100 See e.g. paragraph 99 of the European Parliament recommendation of 18 June 2020 on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland https://www.europarl.europa.eu/doceo/document/TA-9-2020-0152_EN.html.

101 "The EU-UK trade agreement explained" https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159266.pdf.

102 "53 Tons of Rotting Pork and More" - The New York Times https://www.nytimes.com/2021/02/12/world/europe/brexit-britain-trade.html.

a) Cosmetic products

No explicit regulation of cosmetics within the TCA.

b) Medical devices and medicinal products ("**pharmaceuticals**")

Article IP.33.3 defines a "medicinal product" as:

"(a) any substance or combination of substances presented as having properties for treating or preventing disease in human beings or animals; or

(b) any substance or combination of substances which may be used in or administered to human beings or animals either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis."

Further to this definition ("medicines"), on the other hand, "medical devices" are not defined by the agreement.

The legal regime which will apply to clinical trials (so important in the advancement of care and for direct benefit for patients through their enrolment into trials), is defined in the "clinical trials regulation"[103] (Regulation (EU) No 536/2014). The regulation was in force but not yet applicable at the time of the UK's withdrawal. This new clinical trials regulation is mentioned only in the context of good manufacturing practices (GMP, ANNEX TBT-2: Medicinal products, Article 1 b).

Since 1 January 2021, different rules apply to medical devices placed on the market in Great Britain[104] (e., England, Wales and Scotland) on one hand and those placed on the market in Northern Ireland and elsewhere in the EEA on the other. Manufacturers in Great Britain may continue to use the **CE-mark** and it will be recognised in Great Britain until 30 June 2023[105].

"Manufactures may continue to rely on EEA Notified Body certificates until 30 June 2023 for products placed on the market in Great Britain."[106].

"There will be a new route for conformity assessment of medical devices placed on the market in Great Britain from 1 January 2021. All medical devices and in vitro diagnostic medical devices ("IVDs") placed on the market in the UK have to be registered with the MHRA.[107] There will be certain grace periods for registering existing devices. Manufacturers based outside the UK will need to appoint a UK Responsible Person."[108].

"Any device placed on the EU market from 1 January 2021 must comply with the applicable EU legislation and the CE mark must be affixed to the device. The UKCA mark will not be recognised in the EU (including Northern Ireland), unless the device is also accompanied by the CE mark"[109].

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[103] Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC.

[104] Source: The UK Medicines and Healthcare products Regulatory Agency ("MHRA"), Guidance on the regulation of medical devices from 1 January 2021 https://www.gov.uk/guidance/regulating-medical-devices-in-the-uk.

[105] "Brexit: UK Guidance on Regulation of Medical Devices from 1 January 2021" https://www.insideeulifesciences.com/2020/09/03/brexit-uk-guidance-on-regulation-of-medical-devices-from-1-january-2021/.

[106] https://www.insideeulifesciences.com/2020/09/03/brexit-uk-guidance-on-regulation-of-medical-devices-from-1-january-2021/.

[107] Medicines and Healthcare products Regulatory Agency, see https://www.gov.uk/government/organisations/medicines-and-healthcare-products-regulatory-agency/about.

[108] https://www.insideeulifesciences.com/2020/09/03/brexit-uk-guidance-on-regulation-of-medical-devices-from-1-january-2021/.

[109] https://www.insideeulifesciences.com/2020/09/03/brexit-uk-guidance-on-regulation-of-medical-devices-from-1-january-2021/.

Article IP.33 provides for a **potential extension of a patent for a medicinal and plant protection product** that is subject to a marketing authorisation procedure. As medicinal products and plant protection products protected by a patent may be subject to an administrative authorisation procedure before being put on the respective market, the period that elapses between the filing of the application for a patent and the first authorisation to place the product on the market may shorten the period of effective protection under the patent.

Therefore, the parties shall provide for further protection for a product which is protected by a patent and which has been subject to an administrative authorisation procedure to compensate the holder of a patent for the reduction of effective patent protection. (**Article IP.33, 1**).

As to the EU- UK TCA, **ANNEX TBT-2: Medicinal products** applies to medicinal products as listed in Appendix C:

"Medicinal products for human use and veterinary use:

(a) marketed medicinal products for human or veterinary use, including marketed biological and immunological products for human and veterinary use;
(b) advanced therapy medicinal products;
(c) active pharmaceutical ingredients for human or veterinary use, and investigational medicinal products".

Acceptance of Good Manufacturing Practice (GMP) certificates for medicinal products based on the existing identical GMP standards is maintained in order to avoid duplication of inspections of manufacturing facilities.

There is a possibility to accept third-country inspections. There will be no waiver of batch testing in order to preserve the EU's strategic autonomy in supply of medicines.

Article 12: Working Group on Medicinal Products:

"1. The Working Group on Medicinal Products shall assist the Trade Specialised Committee on Technical Barriers to Trade in monitoring and reviewing the implementation and ensuring the proper functioning of this Annex.

2. The functions of this Working Group shall be the following:

(a) discussing any matter arising under this Annex at the request of a Party;
(b) facilitating cooperation and exchanges of information for the purposes of Articles 8and 10;
(c) functioning as the forum for consultations and discussions for the purposes of Articles 8 (3) and 9(3);
*(d) carrying out technical discussions in accordance with **Article TBT.10** [Technical discussions] of this Agreement on matters falling within the scope of this Annex; and*
(e) maintaining a list of contact points responsible for matters arising under this Annex.".

Article 13 provides that Dispute settlement of Part six of this Agreement does not apply in respect of disputes regarding the interpretation and application of this Annex.

Article IP.32: Patents and public health

"1. The Parties recognise the importance of the Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Ministerial Conference of the WTO at Doha (the "Doha Declaration"). In interpreting and implementing the rights and obligations under this Section, each Party shall ensure consistency with the Doha Declaration.

2. *Each Party shall implement Article 31bis of the TRIPS Agreement, as well as the Annex to the TRIPS Agreement and the Appendix to the Annex to the TRIPS Agreement".*

c) Vaccines against COVID-19

Vaccines against COVID-19 are *not* addressed in the TCA. Nevertheless, it is worth mentioning that the Commission issued the following statement in January 2021: *"To tackle the current lack of transparency of vaccine exports outside the EU, the Commission is putting in place a measure requiring that such exports are subject to an authorisation by Member States. In the process of finalisation of this measure, the Commission will ensure that the Ireland / Northern Ireland Protocol is unaffected. The Commission is not triggering the safeguard clause"*[110]. Pursuant to Article 1(1) of Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation[111], *"[a]n export authorisation [...] shall be required for the export of the following Union goods [...]: vaccines against SARS-related coronaviruses (SARS-CoV species) falling under CN code 3002 20 10, irrespective of their packaging. It will also cover active substances including master and working cell banks used for the manufacture of such vaccines"*. The aforementioned Implementing Regulation is based on Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports[112]. Pursuant to Article 5(4) of Protocol (Nr 15) of the Withdrawal Agreement on Ireland/Northern Ireland[113], *"[t]he provisions of Union law listed in Annex 2 to this Protocol [where Regulation (EU) 2015/479 is listed] shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."* On the other hand, *"Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland. Quantitative restrictions on exports and imports shall be prohibited between the Union and Northern Ireland."* (Article 5(5) of the Protocol on Ireland/Northern Ireland).

Article 16 of the Protocol on Ireland/Northern Ireland stipulates:

"Article 16 / Safeguards

1. *If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.*

2. *If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.*

3. *Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 7 to this Protocol".*

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110 https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_314.

111 https://eur-lex.europa.eu/eli/reg_impl/2021/111/oj.

112 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32015R0479.

113 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.029.01.0007.01.ENG&toc=OJ%3AL%3A2020%3A029%3ATOC.

Annex 7 of the Protocol on Ireland/Northern Ireland reads:

"PROCEDURES REFERRED TO IN ARTICLE 16(3)

1. *Where the Union or the United Kingdom is considering taking safeguard measures under Article 16(1) of this Protocol, it shall, without delay, notify the Union or the United, as the case may be, through the Joint Committee and shall provide all relevant information.*
2. *The Union and the United Kingdom shall immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution.*
3. *The Union or the United Kingdom, as the case may be, may not take safeguard measures until 1 month has elapsed after the date of notification under point 1, unless the consultation procedure under point 2 has been concluded before the expiration of the state limit. When exceptional circumstances requiring immediate action exclude prior examination, the Union or the United Kingdom, as the case may be, may apply forthwith the protective measures strictly necessary to remedy the situation.*
4. *The Union or the United Kingdom, as the case may be, shall, without delay, notify the measures taken to the Joint Committee and shall provide all relevant information.*
5. *The safeguard measures taken shall be the subject of consultations in the Joint Committee every 3 months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application. The Union or the United Kingdom, as the case may be, may at any time request the Joint Committee to review such measures.*
6. *Points 1 to 5 shall apply, mutatis mutandis, to rebalancing measures referred to in Article 16(2) of this Protocol".*

d) Chemicals

As a non-EEA country, the UK is neither a member of the European Chemicals Agency (ECHA) nor is it bound by the EU regulatory framework for chemicals (in particular, REACH)[114].

Pursuant to Article 3(2) of '**Annex TBT-3: Chemicals**', *"[t]he Parties acknowledge that the commitments made under this Annex* ***do not prevent either Party from setting its own priorities on chemicals regulation****, including establishing its own levels of protection in respect of the environment, and human and animal health."* (Emphasis added).

The EU and UK agreed on (mainly voluntary, cf Article 7 Annex TBT-2) regulatory cooperation in the ambit of international organisations.

"Each Party ***shall implement any guidelines*** *issued by the international organisations and bodies referred to in Article 4 [in particular the OECD and the Sub-Committee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals (SCEGHS) of the United Nations Economic and Social Council (ECOSOC)],* ***unless*** *those guidelines would be ineffective or inappropriate for the achievement of that Party's legitimate objectives."* (Article 5(2) of Annex TBT-3; emphasis added).

Both Parties committed to implementing the United Nations Globally Harmonized System of Classification and Labelling of Chemicals" *[...]* ***as comprehensively as it considers feasible*** *within its respective system [...]".* (Article 6(1) of ANNEX TBT-3: CHEMICALS, emphasis added).

[114] https://echa.europa.eu/regulations/reach/understanding-reach.

The parties also agreed on transparent procedures for the classification of substances (Article 6 of Annex TBT-3) and the possibility of the exchange of non-confidential information (Articles 7 and 8 of Annex TBT-3).

e) Labelling and safety of foodstuffs

Article 3 of ANNEX TBT-4: ORGANIC PRODUCTS provides that *"1. With respect to products listed in Appendix A, the Union shall recognise the laws and regulations of the United Kingdom listed in Appendix C as equivalent to the Union's laws and regulations listed in Appendix D. 2. With respect to products listed in Appendix B, the United Kingdom shall recognise the laws and regulations of the Union listed in Appendix D as equivalent to the United Kingdom's laws and regulations listed in Appendix C".*

Article 3(3) of Annex TBT-4 stipulates: *"In view of the date of application of 1 January 2022 of* ***Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products*** *and repealing Council Regulation (EC) No 834/2007, the recognition of equivalence referred to in paragraphs 1 and 2 shall be* ***reassessed by each Party by 31 December 2023****. If, as a result of that reassessment, equivalence is not confirmed by a Party, recognition of equivalence shall be suspended".*

Article 5 of Annex TBT-4: Labelling:

"1. Products imported into the territory of a Party in accordance with this Annex shall meet the requirements for labelling set out in the laws and regulations of the importing Party listed in Appendices C and D. Those products may bear ***the Union's organic logo, any United Kingdom organic logo or both logos,*** *as set out in the relevant laws and regulations, provided that those products comply with the labelling requirements for the respective logo or both logos.*

2. The Parties undertake to avoid any misuse of the terms referring to organic production in relation to organic products that are covered by the recognition of equivalence under this Annex.

3. The Parties undertake to protect the Union's organic logo and any United Kingdom organic logo set out in the relevant laws and regulations against any misuse or imitation. The Parties shall ensure that the Union's organic logo and any United Kingdom organic logo are used only for the labelling, advertising or commercial documents of organic products that comply with the laws and regulations listed in Appendices C and -D". (Emphasis added).

5.4. Food safety, Animal health. Plant health issues

a) General remarks

Checks will also be required on goods moving GB–Northern Ireland. In general, and as reported in the media, the EU is not likely to lower its level of protection according to DG SANTE, although, during the negotiations, the UK wanted to be able to deviate from EU rules. In the end, there are no provisions in the TCA that would allow for negotiations to take place on the level of control of food entering the EU. The situation at the borders concerning SPS checks remains a source of tension, notably with respect with the customs control that should take place between Great Britain and Northern Ireland as provided for by the Protocol on Ireland/Northern Ireland.[115] As mutual recognition is unlikely, it could

[115] "The European Commission has sent [on 15 March 2021] a letter of formal notice to the United Kingdom for breaching the substantive provisions of the Protocol on Ireland and Northern Ireland, as well as the good faith obligation under the Withdrawal Agreement. This marks the beginning of a formal infringement process against the United Kingdom". https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132.

be an option to have factories approved for export on both sides to avoid/limit SPS checks at the borders. Companies would then have the possibility to have the SPS checks at their EU premises.

As regards **pesticides and GMOs**, **all commodities coming from the UK will be checked**. Products that do not comply with EU requirements (including maximum residue limit) will not be allowed to enter the EU.

b) Sanitary and phytosanitary measures

Their purpose is to maintain the regulatory autonomy of the EU[116], protect the life and health of humans, animals and plants, while facilitating trade, promote avoidance of unnecessary barriers to trade in goods with predictable, transparent and efficient procedures, reaffirm and go beyond the WTO obligations of the parties: **Part two, Title I, Chapter 3: Sanitary and phytosanitary measures**.

UK and the EU will build up separate regimes regulating human, plant and animal health. The EU -UK TCA places a duty on both sides to ensure that any sanitary and phytosanitary (SPS) border controls are "proportionate to the risks identified". These will be regularly reviewed by a new Trade Specialised Committee on Sanitary and Phytosanitary Measures to see if further facilitations are available without compromising biosecurity[117]. The agreement recognises "zoning", allowing imports from pest and disease-free parts of the UK or the EU to continue, in the event of geographically concentrated outbreaks. It also commits to ongoing UK–EU co-operation on animal welfare, antimicrobial resistance and sustainable food systems.

The UK has not achieved its ambition of agreeing an equivalence mechanism for SPS measures, or agreeing a reduced level of checks or fees similar to the EU–New Zealand veterinary agreement where only 1% of goods are subject to SPS checks. This would likely have required the UK to sign up to greater regulatory alignment with the EU in this area. The "EU is considered as a single entity", i.e. UK treating the union as a whole as regards import authorisation, and only EU member state by member state if requested by the EU.

Article SPS.8 provides for a "Pre-listing" of all EU establishments approved to export to the UK.

The TCA proclaims the "**precautionary *approach***". According to Footnote 52 *"[...] in relation to the implementation of this Agreement **in the territory of the Union**, the precautionary approach refers to the **precautionary principle**."*(Emphasis added).

Article SPS.10 includes *"commitments on regionalisation, which enables UK and EU trade to continue from disease or pest-free areas. Together with provisions on rapid notification and emergency measures, this will help both Parties to move quickly to protect their consumers, animals and plants during disease and pest outbreaks and food and feed safety incidents, while minimising the impacts on trade"*[118].

In case of a serious risk to human, animal or plant life and health, emergency measures may be taken without prior notification **(Article SPS.13)**.

Article SPS.17: Cooperation on the fight against antimicrobial resistance, promotion of sustainable food systems, protecting animal welfare, and on electronic certification.

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116 "The EU-UK trade agreement explained " https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159266.pdf.

117 "The UK/EU Trade & Cooperation Agreement - Trading food: 4 key areas to know about" https://www.food-law-blog.co.uk/2021/01/the-ukeu-trade-cooperation-agreement-trading-food-4-key-areas-to-know-about.html.

118 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf - Point 28.

Article SPS.18: Sustainable food systems; *"Each Party shall encourage its food safety, animal and plant health services to cooperate with their counterparts in the other Party with the aim of promoting sustainable food production methods and food systems".*

According to **Article SPS.19**, the Trade Specialised Committee on Sanitary and Phytosanitary Measures shall supervise the implementation and operation.

5.5. Level Playing Field (LPF) issues

LPF provisions were a major hurdle in the negotiations, especially with respect to State aid, social, labour, and **environmental standards**[119]. The TCA includes level playing field (LPF) provisions, which promote the "convergence" of standards. To avoid divergence with adverse effects on fair competition, the *Political Declaration*[120] stated that the parties should uphold common EU and UK standards prevailing at the end of the transition, making specific reference to environment and climate change matters, Chapter XIII, point 75 and 76:

> ***XIII. Global cooperation***
>
> *75. The Parties recognise the importance of global cooperation to address issues of shared economic, environmental and social interest. As such, while preserving their decision-making autonomy, the Parties should cooperate in international fora, such as the G7 and the G20, where it is in their mutual interest, including in the areas of:* ***a) climate change; b) sustainable development; c) cross-border pollution; d) public health and consumer protection;*** *e) financial stability; and f) the fight against trade protectionism.*
>
> *76. The future relationship should reaffirm the Parties' commitments to international agreements to tackle climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the* ***Paris Agreement****.*

This commitment is motivated by the context of "economic interdependence" and "geographic proximity" between the EU and the UK.

LPF provisions in the TCA are set out under **Title XI of Part one and cover six fields**: competition, subsidy control (State aid), state-owned enterprises and designated monopolies, taxation, labour and social standards, **environment and climate**.

Initial general provisions recognise the "common understanding" of mutual benefits of the LPF that prevents distortion of "trade or investment", and stress that the objective is **not to** "**harmonise**" **standards**.

The first chapter explicitly declares the "right [of parties] to regulate" and acknowledges the "precautionary approach" principle for the **environment and human health**. Moreover, parties explicitly commit to **climate neutrality by 2050**.

Chapter three on subsidy control (State aid) includes general principles but also provisions on specific sectors such as air carriers and energy. Exceptions to state subsidies prohibition include "national or global economic emergency" and **subsidies in relation to energy and environment aimed at promoting sustainability of the energy system** or increasing the **level of environmental**

[119] EU-UK Trade and Cooperation Agreement - An analytical overview, European Parliament, February 2021, p. 14.

[120] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of January 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12020W/DCL&from=EN#page=9.

protection. The "non-regression" principle applies in the two chapters regarding labour and social standards, and **environment and climate**.

Chapter eight declares that parties commit to "other instruments for trade and sustainable development", as the Rio Agenda, as well as acknowledgement of the importance of taking **urgent action against climate change and to conserve biological diversity**. The parties also recognise the importance of United Nations (UN) multilateral environmental governance and agreements, committing to effective implementation of these agreements, and to work together on trade aspects of environmental policies.

The LPF title introduces specific institutional provisions under Chapter nine, which include dispute settlement procedures applicable to the chapters on social and labour standards and **environment and climate**. The title envisages that, should parties be unable to address disagreements through consultation and dialogue, a party may request that a panel of experts be created to examine the case.

Such panels are to be composed of three experts drawn from a list of 15 experts, to be established by the Trade Specialised Committee on the LPF at its first meeting.

The list of 15 experts is to be composed of two sub-lists of five experts, each designated by one party, plus a sub-list of five non-nationals of the EU or the UK. Those on the lists are to be experts in the field of labour or environmental law.

Article 9.4 makes provision for rebalancing measures in cases where "significant divergences" arise in the areas of labour and social, environmental or climate protection, or with respect to subsidy control, and which result in "material impacts on trade and investment".

LPF provisions therefore not only provide for a rebalancing mechanism against divergences due to decisions "lowering" standards, but also allow a party to increase their own standards and adopt measures that rebalance the material impact and preserve fair competition.

5.6. Health Security

Part four, Title I: Health Security, Article HS.1

"Taking geographic proximity into consideration, the EU and the UK agreed on dedicated provisions for cooperation in the field of health security, providing in particular for the possibility for the UK to be invited to participate on a temporary basis in a set of EU structures"[121] The cooperation applies to any "serious cross-border threat to health" , which means *"[...] a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the borders of at least one Member State and the United Kingdom"*. (**Article HS.1(1)**).

"The EU and the UK agreed on the possible participation of the UK in the Early Warning and Response System (EWRS) and in the EU Health Security Committee, whenever a joint health threat makes it necessary or advisable"[122].

"The decision on UK participation will be taken unilaterally by the EU on a case-by-case basis and will always remain limited in time and scope. The Agreement provides that the UK shall abide, for the time of its participation in these structures, by the rules and regulations governing the EWRS and the EU Health Security Committee. These are the same obligations that also apply to EU Member States"[123].

[121] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

[122] Ibid.

[123] Ibid.

"The EU and the UK have agreed that the European Centre for Disease Prevention and Control and the relevant UK body responsible for surveillance, epidemic intelligence and scientific advice on infectious diseases, shall cooperate on issues of mutual interest and may conclude to this end a Memorandum of Understanding"[124].

[124] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

6. PARTS OF DIRECT RELEVANCE FOR ITRE AND AIDA

6.1. Title VII: Small and Medium-Sized Enterprises

Title VII of Heading I (Trade) of Part two (Trade, Transport, Fisheries and Other Arrangements) of the TCA covers small and medium enterprises (SMEs) is relevant to ITRE.

The TCA for SMEs includes *"typical commitments to provide SMEs with clear and accessible online information about the Agreement, helping them to trade and do business in each party's jurisdiction. This includes customs procedures, intellectual property rights, and public procurement"*[125].

The Agreement commits each party to provide for a publicly accessible website[126], with internet links to: a searchable by tariff nomenclature code online database[127], measures such as customs duties, taxes and rules of origin. It also establishes "a framework that will allow the Parties to work together to increase opportunities for SMEs and to report on their activities"[128].

Additional customs documentation is likely to create higher costs for SMEs: for some of them, the complexity of tariff classification and valuation issues may likely have a slowdown effect, as firms and companies will opt out of trade opportunities across the new trade border; they might overcome the barriers in part via a combination of automation and expert partnerships.

While the SME agreement is minimal, the digital dimension of its mutual commitments is evident. The possibility of a regulatory divergence in both implementation and privacy standards (automatic price tracking and adjustments, etc.) should be taken into consideration.

The fact that Title I on Dispute settlement of Part six does not apply to Title VIII allows to conclude that SMEs EU/UK trade issues are not considered per-se relevant areas in need of a robust, joint regulatory dispute settlement mechanism.

6.2. Title VIII: Energy

Title VIII of Heading I (Trade) of Part two (Trade, Transport, Fisheries and Other Arrangements) of the TCA covers energy as relevant to ITRE.

As of 1 January 2021, the UK shall be treated as a third country in relation to the Internal Energy Market[129]. The UK will no longer be part of the EU climate change joint action, benefit from the EU financial support for low-carbon measures, participate to the EU Emissions Trading Scheme (ETS), and trade power in the EU Energy Market as a Member State.

The TCA defines a framework of close EU-UK energy relations, guarantees a high degree of mutual access and invites on cooperation in certain areas.
More specifically, the TCA covers: free market-based trading of gas and electricity over interconnectors, capacity mechanisms and electricity and gas security of supply, regulatory and Transmission System Operator (TSO) cooperation, third-party access and unbundling of transmission and distribution networks, provisions on interconnectors, congestion management and transmission costs, integration

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125 See the UK-EU Trade And Cooperation Agreement Summary available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf - Point 72.

126 Article SME.2.1.

127 Article SME.2.4.

128 See the UK-EU Trade And Cooperation Agreement Summary available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf - Point 73.

129 Only Northern Ireland will maintain the Single Electricity Market (SEM) with Ireland, as provided by the Withdrawal Agreement.

of renewables into energy markets, climate change and energy goals, carbon pricing, cooperation as regards the North Sea including renewable energy opportunities, Single Electricity Market in Ireland.

Strong provisions in the TCA ensure a broad commitment to maintain current free market and fair competition principles, including a robust level playing field in the EU/UK energy relations, and support security and sustainability of electricity and gas supply. The principles of price transparency, unbundling and freedom for consumers to switch suppliers, are all mentioned. The Specialised Committee on Energy, under the framework of the Partnership Council, is created to deal with matters related to Title VIII[130].

However, the TCA includes the possibility of a regulatory UK divergence from EU by legitimate public policy objectives. In accordance to it, each party "*preserves the right to adopt, maintain and enforce measures necessary to pursue legitimate public policy objectives, such as securing the supply of energy goods and raw materials, protecting society, the environment, including fighting against climate change, public health and consumers and promoting security and safety*"[131].

"*The energy provisions of the TCA are valid until 30 June 2026, but can be extended by the Partnership Council until 31 March 2027 and annually thereafter. As a result, the energy chapter is more or less linked in time to maintaining access to UK waters in fisheries*"[132].

Free market trading of gas and electricity

With the decoupling from the EU energy market, the UK will have to trade energy[133] with the EU on third-country terms[134]. This means that EU single market tools, such as market coupling, will no longer manage trades over electricity interconnectors between the EU and the UK. The UK will have to allocate interconnector capacity explicitly before performing energy transfers over interconnectors. This implicit trade unbundling will necessarily lead to increased costs of energy for both parties. The TCA commits both parties to develop and implement new, efficient trading arrangements by April 2022[135] to ensure capacity maximisation on the interconnectors and implicit trading in capacity allocation in a single transaction.

The participation of UK in EU gas trading mechanisms is not envisaged. "The TCA supports trade and investment in energy goods and raw materials between the UK and EU"[136].

These will help facilitate open and competitive markets, removing unnecessary barriers to trade. There remain substantial new aspects to be agreed by 30 June 2026[137], such as "new arrangements for electricity trading aimed at maximising capacity on electricity interconnectors by April 2022, and arrangements for extensive technical cooperation between respective EU and UK transmission system

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130 Article INST.2.1.i.

131 ENER.4.

132 See the EU-UK Trade and Cooperation Agreement - An analytical overview, EU Parliament, February 2021.

133 In the TCA, electricity and gas have been classified as goods, avoiding customs or tariffs.

134 The EU and UK energy markets were deeply interlinked, thanks to electricity and gas interconnectors (electricity cables and gas pipelines) running between the UK, France, the Netherlands, Belgium, Ireland and Northern Ireland. Today, the UK is a net importer of energy, with the EU currently providing some 5-10% of its electricity supply and 12% of its gas needs.

135 The possibility of a "multi-region loose volume coupling" arrangement, in which flows over EU-UK interconnectors "will not anymore be simultaneously determined with the rest of the EU flows" but would instead be determined in "an iterative process using a relevant set of UK and EU market and network data", was explicitly mentioned by the EU Commission.

136 See the UK-EU Trade and Cooperation Agreement Summary available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf - Point 78.

137 Article ENER.33.1.

operators and between regulatory authorities in order to facilitate the agreement"[138]. The TCA on energy is therefore only a high-level agreement on principles, with much to be discussed and agreed upon[139].

Security of supply

The TCA requires energy regulators of both parties to develop appropriate frameworks for cooperation with respect to the security of supply of electricity and natural gas[140], to establish and regularly update risk preparedness and emergency, under the condition of not endangering the security of supply of electricity or natural gas of the other party[141]. Despite these cooperation efforts, security of supply is not guaranteed by the TCA.

Regulatory and TSO cooperation

The TCA ensures the development of contacts and working arrangements[142] between the UK regulatory authority (Ofgem)[143] and the Agency for the Cooperation of Energy Regulators (ACER)[144] covering, among others, electricity and gas markets, access to networks, offshore energy, the efficient use of electricity and gas interconnectors, and gas quality and decarbonisation. The TCA excludes UK membership of ACER.

In relation to energy Transmission System Operators (TSOs), the UK and the EU commit to the establishing of administrative arrangements, technical procedures for transmission, and frameworks for cooperation between the European Network of Transmission System Operators for Electricity[145] and Gas[146], respectively ENTSO-E and ENTSO-G, and the UK TSOs. The TCA clearly states that these frameworks for cooperation will not involve, or confer a status comparable to, membership in ENTSO-E or ENTSO-G by GB TSOs[147], excluding UK membership of ENTSO-E and ENTSO-G[148].

Third-party access and unbundling

The TCA commits the parties to safeguarding the principles of third-party access and unbundling, without specifying the details of such a commitment. However, the TCA includes an exemption regime allowing the UK or the EU not to apply third-party access, or unbundling provisions to a new infrastructure or to a significant expansion of an existing infrastructure under certain specific conditions[149].

On unbundling, each party has the obligation to implement arrangements for TSOs which are effective in removing any conflicts of interest arising as a result of the same person exercising control over a transmission system operator and a producer or supplier[150].

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138 See the post of 12 January 2021, Allen & Overy, available at https://www.allenovery.com/en-gb/global/news-and-insights/publications/brexit-certainty-at-last-an-overview-of-the-new-eu-uk-trading-relationship.

139 Ibid.

140 Article ENER.17.7.

141 Article ENER.18.3.c.

142 Article ENER.19.1.

143 See the Ofgem website available at : https://www.ofgem.gov.uk/.

144 See the EU Agency for the Cooperation of Energy Regulators (ACER)'s website available at: https://wp.acer.europa.eu/Pages/home.aspx.

145 Articles ENER.13 and ENER.14.

146 Article ENER.15.

147 Article ENER.19.1.

148 The UK wanted to remain a full member of ENTSO-EU and an observer in ENTSO-G and ACER. For an overview of both negotiation positions, see the EU-UK Trade and Cooperation Agreement - An Analytical Overview, EU Parliament, February 2021.

149 Annex ENER-3: non-application of third-party access and ownership unbundling to infrastructure.

150 Article ENER.9.2.

No specific unbundling model is referenced in the TCA, which leaves open the possibility of alternative unbundling models in the UK in the future.[151]

Interconnectors

The TCA includes *"provisions guaranteeing non-discriminatory access to energy transport infrastructure and a predictable and efficient use of electricity and gas interconnectors, [...] a new framework for cooperation between EU and UK Transmission System Operators (TSOs) and energy regulators (the European Network of Transmission System Operators for Electricity and Gas), provisions regulating subsidies to the energy sector to ensure they will not be used to distort competition; provisions committing the parties to ensuring the security of supply, particularly relevant for Ireland, which will remain isolated from the EU internal energy market until new interconnections become operational"*[152].

Ireland

Ireland (IE) is currently dependent on a single cross-border interconnector with the UK. The TCA does not apply to the UK/IE interconnector[153], which is covered by the Single Electricity Market in Ireland and Northern Ireland bilateral cooperation agreement. In practice, is not clear how IE will not be able to avoid losing the benefits of the EU energy market and how it will guarantee its security of electricity supply without the cooperation of the UK[154]. In Northern Ireland, Article 9 of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement provides the basis for the continued operation of the Single Electricity Market after 1 January 2021.

Congestion management and transmission costs

The TCA requires the coordination of capacity allocation and congestion management between EU and UK TSOs, involving the development of arrangements for all relevant timeframes (forward, day-ahead, intraday and balancing)[155]. The parties are to ensure the conclusion between relevant TSOs of a multi-party agreement[156] relating to the compensation for the costs of hosting cross-border flows of electricity, which will aim to ensure that UK TSOs are treated on an equivalent basis to a TSO in a country participating in the inter-transmission system operator compensation mechanism[157].

Energy efficiency and renewable energy

The UK and EU agreed to promote energy efficiency and enhance their cooperation on renewable energy, including offshore energy in the North Sea. The TCA ensures the market-based approach of integration of electricity from renewable sources[158] and the non-discriminatory and reasonable treatment of their producers by national TSOs[159]. The TCA includes key agreed principles relating to environmental and energy subsidies.

Energy and climate aspects

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[151] See Article ENER.9: System operation and unbundling of transmission network operators, Article ENER.10: Public policy objectives for third-party access and ownership unbundling, Article ENER.12(1)(b), Annex Ener-3: Non-Application of third-party access and ownership unbundling to infrastructure.

[152] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

[153] Article ENER.2.1.f.ii.

[154] See the study The impact of Brexit on the EU Energy System, Gustav FREDRIKSSON et al., November 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614181/IPOL_STU(2017)614181_EN.pdf.

[155] Article ENERG.13.1.f.

[156] Article ENER.13.3.

[157] Article ENER.13.4.

[158] Article ENER.6.1.e.

[159] Article ENER.6.2.d.

In relation to climate change targets, a mild risk of EU/UK regulatory divergence exists. As of 1st January 2021, the UK committed to effectively implementing the UNFCCC and the Paris Agreement[160], but is free to set its own climate and renewable targets independently from the EU. It also left the EU Emissions Trading System, committing to a non-regression principle from the levels of protection reached[161], covering greenhouse gas emissions from electricity generation, heat generation, industry and aviation[162].

North Sea

Given the renewable energy potential in the North Sea, the parties will set up a forum, *"building on the North Sea Energy Cooperation, a platform developed by the EU, a number of its Member States and Norway to develop the use of renewables in this region"*[163] and the development of an offshore grid. "*This will facilitate the development of hybrid projects that combine interconnectors and offshore windfarms, and opens up the potential for a North Sea grid"*[164].

Nuclear energy

The TCA does not cover nuclear energy. A separate agreement exists between Euratom and the UK, which *"provides for wide-ranging cooperation on safe and peaceful uses of nuclear energy, underpinned by commitments by both sides to comply with international non-proliferation obligations and uphold a high level of nuclear safety standards"*[165].

6.3. Part five: Participation in Union Programmes

The TCA sets out conditions for UK participation in future[166] EU research programmes and accompany financial arrangements for participation as associated member in its Part V.

The TCA enables the UK participation in a number of programmes specified outside the TCA, based on the existing legal framework for the participation of third countries, subject to a financial contribution by the UK to the EU budget. Associated Members can participate to the programs and have access to the EU funds, but do not participate in the programmes' definition. However, the Protocols establishing a possible association of the UK to the EU programmes have not been finalised yet[167].

The list of EU programmes open and closed to the UK participation is given respectively in Draft Protocol I - Programmes and activities in which the UK participates[168], and Draft Protocol II on

[160] Article 8.5.2.

[161] Article 7.2.

[162] Article 7.3.2.

[163] See the European Commission's Questions & Answers: EU-UK Trade and Cooperation Agreement, posted on 24 December 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

[164] See the UK-EU Trade And Cooperation Agreement Summary, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf.

[165] See the European Commission's Questions & Answers: EU-UK Trade and Cooperation Agreement posted on 24 December 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

[166] The Withdrawal Agreement foresees that the UK will continue to take part in 2014-2020 Union programmes until their closure and defines principles for the financial settlement of due payments.

[167] According to the Commission FAQ on the TCA, the Protocol can only be finalised when the basic acts establishing the relevant Union programmes have been adopted, to ensure that it is aligned with those legal instruments. When those basic acts are adopted, the Specialised Committee on Participation in Union Programmes, made up of representatives of the EU and UK, will discuss and adopt the Protocol. A Joint Declaration attached to the Agreement indicates the expected content of the Protocol.

[168] Article UNPRO.1.3.

programmes and activities in which the United Kingdom does not participate, included in the Joint Declaration on Participation in Union Programmes and Access to Programme Services [169].

Draft Protocol I, still to be agreed and adopted between the parties, could be amended by the Specialised Committee on Participation in Union Programmes. Article 1 of the Protocol I[170] included in the draft Joint Declaration explicitly foresees the participation of the UK in the programmes: Copernicus, Horizon Europe, Euratom and in the European Joint Undertaking ITER[171].

Draft Protocol II excludes the participation of the UK from the Space Surveillance and Tracking (SST) Services Programme, including only a provision for the access to some specific SST services [172].

Horizon Europe

Horizon Europe is the European Union's seven-year research and innovation programme, with a budget of **EUR 95.5 billion** for 2021-2027[173]. As future associated Member, the UK will be able to join the forthcoming Horizon Europe research programme (subject to the UK paying a financial contribution). *"The UK is associating to the full Horizon Europe programme with the only exception of the EIC Fund (which is the loan/equity instrument of the EIC, see below). The scope of association includes the European Research Council (ERC), the Marie Curie-Skłodowska Actions, the six 'Global Challenges' clusters and Missions, the partnerships, the European Institute of Innovation and Technology, etc. UK entities are not eligible to participate in the EIC Fund part of the EIC Accelerator, since the UK decided not to take part in financial instruments of the EU. This means UK entities can apply for grants under the Accelerator but they will not be eligible for loans or equity. They can also participate on an equal footing with entities from EU Member States and other associated countries in the EIC's Pathfinder component"*[174].

Euratom Research and Training programme

The Euratom Research and Training programme *"covers research and training activities to improve nuclear safety, security, radioactive waste management and radiation protection and carries out research in the medical uses of radiation"*[175]. The UK will participate in nuclear research under the Euratom treaty, despite having withdrawn from the treaty itself.

International Thermonuclear Experimental Reactor (ITER)

"The fusion test facility ITER, the world's largest magnetic confinement plasma physics experiment, is currently under construction in [Cadarache,] France, and will, once completed, aim to prove the feasibility of fusion as a large-scale and carbon-free source of energy based on the same principle that powers the sun and stars.

169 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

170 Protocol I, Article 1: Scope of the United Kingdom's participation.

171 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

172 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.1475.01.ENG&toc=OJ%3AL%3A2020%3A444%3AFULL.

173 https://ec.europa.eu/info/horizon-europe_en.

174 https://ec.europa.eu/info/sites/info/files/research_and_innovation/strategy_on_research_and_innovation/documents/ec_rtd_uk-participation-in-horizon-europe.pdf.

175 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

The project was so far funded and run by seven member entities (EU, India, Japan, China, Russia, South Korea and the United States). The EU is the host party and with 45% of the budget share, the main contributor. The UK will participate in the programme through its association with Euratom"[176].

Copernicus, ESST, Galileo

Copernicus is the EU's satellite system for monitoring the Earth, collecting data from multiple sources: satellites, ground stations, airborne sensors, and sea-borne sensors[177]. The EU and the UK also agreed that the UK would have continued **access to the services** provided by EU Satellite Surveillance & Tracking (SST), a part of the Union Space programme to detect, catalogue and predict the movements of space objects orbiting the Earth to mitigate the risk of collisions[178]. However, the UK will not get access to special military-only signals from the Galileo GPS satellite navigation system[179].

Erasmus+

Erasmus+ is the EU's programme to support education, training, youth and sport in Europe, with a budget of **EUR 26 billion** for 2021-2027[180]. The UK requested partial participation in the programme, which was not foreseen in the basic act establishing Erasmus; subsequently, it decided[181] that it did not want to participate in Erasmus.

Cybersecurity

The TCA foresees a regular dialogue for exchange of information on cybersecurity[182] and an endeavour[183] to establish a cooperation on cybersecurity issues. Both parties might request an invitation to cooperate in certain activities carried out at the EU Agency for Cybersecurity (ENISA), including capacity building[184].

The conditions for the participation of the UK in ENISA's activities will be set out in working arrangements adopted by the Management Board of ENISA subject to prior approval by the Commission and agreed with the United Kingdom; exchange of information, experiences and best practices will be on a voluntary and where appropriate, reciprocal basis[185].

176 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

177 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

178 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

179 The United Kingdom has contributed about EUR 1.4 billion to Galileo's creation, more than 10% of its budget.

180 https://www.europarl.europa.eu/news/en/press-room/20201207IPR93204/ep-and-eu-ministers-agree-on-erasmus-programme-for-2021-2027.

181 According to press reports, the reason for the withdrawal from Erasmus+ was UK being a net contributor to it. Under the current 2014-20 Erasmus+ program, the UK directly contributed with around EUR 1.8 billion and received EUR 1 billion, funding 49,000 students (17,000 British outgoing, 32,000 coming in) and over 7,000 staff. However, it should be noted that the argument does not take into account indirect contributions. As incoming students are consumers, they contribute to local economies and UK GDP through consumption.

182 Article CYB.1.

183 Article CYB.2.

184 Article CYB.5.1.

185 Article CYB.5.3.

7. PARTS OF DIRECT RELEVANCE FOR IMCO

In general, it can be affirmed that under the Trade and Cooperation Agreement (TCA), the **integrity of the Internal Market is guaranteed**. It is an ambitious trade agreement that is very much based on the text proposed by the EU (and the rules are similar to other recent EU trade agreements with third countries such as Japan).

7.1. Title I: Trade in Goods

The TCA *"sets out a waiver of all customs duties, quotas and quantitative restrictions on the cross-border movement of goods and thus represents a novelty in the history of EU free trade agreements. Nevertheless, the effectiveness and ease of movement of goods falls short in various respects of the advantages of the existing EU membership or a membership in the customs union. Despite the waiver of customs duties, the import of goods into the customs territory of the other contracting party is now subject to bureaucratic customs formalities, as well as checks and audits by border authorities. [...] as in the case of trade with other non-EU countries, traders will have to submit entry and exit declarations and imported goods may be checked for conformity with EU or UK regulatory requirements"*[186].

MARKET ACCESS

Part 2, Heading 1, Title I, Chapter 1: National treatment and market access for goods (including trade remedies).

There are no tariffs or quotas for UK goods in order to facilitate trade in goods between the Parties and to maintain liberalised trade in goods. Stability is one of the main objectives. *"Furthermore, the [TCA] contains special simplifications for the movement of certain goods, including cars, chemicals, wine or medical devices (see Annex TBT.1, 3, 5, 2)"*[187].

Harmonisation is also essential in the TCA and the same references from international standards have been used to promote convergence (*Article TBT.4: Technical regulations*).

With regard to compliance with regulatory requirements, in the field of conformity assessments, the objective is to limit the red tape for low risk products with the use of self-declarations of conformity by the manufacturer (*Article TBT.6: Conformity assessment*).

RULES OF ORIGIN

Part 2, Heading 1, Title I, Chapter 2: Rules of Origin.

The measures are based on already applied EU rules, as those provided for in the Union Customs Code, including self-declaration of origin by exporters and verification by customs authorities. The TCA is very much based on the text proposed by the EU and includes three annexes on product-specific rules of origin (Annex ORIG-1, Annex ORIG-2, Annex ORIG-2a, Annex ORIG-2b, Annex ORIG-3, Annex ORIG-4, Annex ORIG-5, Annex ORIG-6 EU-UK-FTA-E).

"As a basic rule, only those goods that have either been wholly obtained or manufactured or substantially processed in the exporter's respective customs territory benefit from duty-free import into the EU or the UK

[186] See the post of January 8, 2021, Blomstein, EU-UK Trade and Cooperation Agreement (TCA): Trade in Goods. Available at https://www.blomstein.com/en/news.php?n=eu-uk-trade-and-cooperation-agreement-tca-trade-in-goods.

[187] See the post of January 8, 2021, Blomstein, EU-UK Trade and Cooperation Agreement (TCA): Trade in Goods. Available at https://www.blomstein.com/en/news.php?n=eu-uk-trade-and-cooperation-agreement-tca-trade-in-goods.

(Article ORIG.3). Whether substantial processing results in the product acquiring originating status depends on product-specific specifications, which can be found in the respective annex.

The TCA also contains a tolerance clause according to which the use of up to 10% or 15% (depending on the product, based on the weight or value of the goods) of non-originating materials does not negatively affect the acquisition of origin (Article ORIG.6). In practice, this primarily affects goods that originate to a significant extent in third countries"[188].

"An advantage in this context is the agreement reached on rules on cumulation, which allows individual processing stages in the territory of the other contracting party to be considered as establishing origin (Article ORIG.4). It should be noted, however, that the TCA excludes diagonal cumulation, which would have allowed individual processing stages in countries with which both parties have concluded comparable free trade agreements to be taken into account [...]"[189].

"The provisions in the TCA that allow economic operators to self-certify the origin of exported goods also have a facilitating effect (Article ORIG.19), although economic operators will have to take into account that they are personally responsible for the accuracy of the certificate and the information contained therein"[190].

BARRIERS TO TRADE

Part 2, Heading 1, Title I, Chapter 4: Technical Barriers to Trade.

The main objective is to prevent, identify and eliminate unnecessary technical barriers to trade. The TCA establishes contact points and a Trade Specialised Committee on Technical Barriers to Trade.

Specifically with regards to *Article TBT.9: Cooperation on market surveillance and non-food product safety and compliance*, the EU rules on Product Safety will apply entirely - compliance with EU standards will have to be certified upon entry (checks undertaken by customs' authorities).

Information exchange for market surveillance activities is a priority as both the EU and the UK "*recognise the importance of cooperation on market surveillance, compliance and the safety of non-food products for the facilitation of trade and for the protection of consumers and other users, and the importance of building mutual trust based on shared information*".

CUSTOMS

Part 2, Heading 1, Title I, Chapter 5: Customs and trade facilitation.

The TCA provides for both the UK and the EU to cooperate on customs matters (*Articles CUSTMS 1 and 2*). Customs and trade facilitation are fully aligned with other trade agreements the EU has concluded with third countries. There is no longer seamless trade, yet the intention is to minimise the impact of border controls.

Among other things, the TCA includes provisions requiring the parties to:

- allow "trusted traders" with either UK or EU Authorised Economic Operator (AEO) status to benefit from simplified customs procedures (*Article CUSTMS.2, 2 (g) and (h), Article CUSTMS.9* as well as *Annex CUSTMS-1*);

188 See the post of January 8, 2021, Blomstein, EU-UK Trade and Cooperation Agreement (TCA): Trade in Goods. Available at https://www.blomstein.com/en/news.php?n=eu-uk-trade-and-cooperation-agreement-tca-trade-in-goods.

189 Ibid.

190 Ibid.

- endeavour to establish a single window to enable traders to submit documentation (*Article CUSTMS.17*), which could, in time, simplify relevant paperwork requirements;
- cooperate to facilitate high volume roll-on, roll-off ferry traffic and other similar services (e.g. Eurotunnel) (*Article CUSTMS.18*); and
- cooperate on VAT issues: VAT protocol provides for mutual administrative assistance and cooperation in the fight against fraud.

Others points worth mentioning are that there is no mutual recognition of security standards (UK did not want to align with EU legislation) and the specificities of the Protocol on Ireland/Northern Ireland of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.[191] The Protocol seeks to avoid a hard border in Ireland (Article 1(3)), protect the UK internal market (Article 6) and ensure Northern Ireland's place in the EU internal market to the extent foreseen in particular by Article 5(4) ("The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland") and Article 7. The UK will collect in Northern Ireland EU VAT and EU excise duties (Article 8).

Both the EU and the UK should periodically review their legislation and customs procedures, whilst improving working methods and ensuring non-discrimination, transparency, efficiency, integrity and the accountability of operations (*Article CUSTMS.3*).

7.2. Title II: Services and Investment

All modes of supply of services are covered, including commitments on the movement of natural persons across borders (Mode 4)[192] and provisions, linked to EU rules and the respect for equal treatment of workers and recognition of professional qualifications. The arrangements include provisions on market access and national treatment[193] under host state rules to ensure that EU service providers are treated in a non-discriminatory manner, including with regard to establishment.[194] The temporary entry and stay of natural persons[195]and of business visitors for establishment purposes[196] is also allowed.

CROSS-BORDER TRADE IN SERVICES

Part 2, Heading 1, Title II, Chapter 3: Cross-border trade in services.

Chapter 3 includes articles on "market access", "local presence", "national treatment" and the "most favoured nation treatment".

[191] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.029.01.0007.01.ENG&toc=OJ%3AL%3A2020%3A029%3ATOC.

[192] See ANNEX SERVIN-3: BUSINESS VISITORS FOR ESTABLISHMENT PURPOSES, INTRA-CORPORATE TRANSFEREES AND SHORT-TERM BUSINESS VISITORS, Points 10 (Contractual Service Suppliers) and 11 (Independent Professionals).

[193] Article SERVIN.2.3.

[194] Article SERVIN.1.2(h) (definition), Article SERVIN.2.2: Market access, Article SERVIN.2.3(1) (national treatment).

[195] ANNEX SERVIN-5: MOVEMENT OF NATURAL PERSONS.

[196] ANNEX SERVIN-3: BUSINESS VISITORS FOR ESTABLISHMENT PURPOSES, INTRA-CORPORATE TRANSFEREES AND SHORT-TERM BUSINESS VISITORS.

There is a general commitment that no new 'behind the border' trade barriers will be applied to service suppliers, including numerical quotas, economic needs tests, joint venture requirements, restrictions on corporate form, nationality requirements for senior managers or boards of directors[197].

Under Article SERVIN.3.3 there shall be no requirement to establish or maintain a local presence, or to be a resident in either territory, in order to supply a service.

A 'national treatment' of service suppliers is provided for in Article SERVIN.3.4 to ensure non-discrimination between UK and EU businesses, and 'most favoured nation' provisions are designed to ensure the treatment of service suppliers keeps pace with either party's future FTAs [198].

"While the general commitments in the main text are broad, in practice there are several Member States´ reservations in the annexes across a range of sectors which take precedence and derogate to the above principles. For instance, despite the generic provisions, the supply of insurance in Germany, Hungary and Lithuania requires the establishment of a local entity; maritime freight handling services in Italy are subject to an economic needs test; suppliers of construction services in Cyprus must be of Cypriot nationality; and architects in France have limitations on the type of legal entity under which they can establish" [199].

RECOGNITION OF PROFESSIONAL QUALIFICATIONS

Part 2, Heading 1, Title II, Chapter 5, Section 1: Domestic Regulation

Article SERVIN.5.13: Professional qualifications

"The TCA does not contain any provisions requiring mutual recognition of professional qualifications. Instead, it envisages that professional bodies/authorities in the UK and EU (or in individual Member States of the EU) may submit joint recommendations to the TCA Partnership Council to develop legally binding arrangements on the recognition of professional qualifications, which the parties may then decide to adopt"[200].

This is the standard procedure under trade agreements with other third-countries. "However, such arrangements are likely to take some time to put in place. For example, the EU's trade agreement with Canada contains similar provisions and has been in operation now for over 3 years but, so far, it has not led to any arrangements of this type. The upshot is that there is currently no mutual recognition of professional qualifications between the UK and the EU"[201].

It should be noted that only seven professions are automatically and mutually recognised in the EU. Currently, the automatic and mutual recognition is applied for the so-called sectoral professions: architects, dentists, doctors, midwives, nurses, pharmacists and veterinary surgeons[202].

(Also see: *ANNEX SERVIN-6: GUIDELINES FOR ARRANGEMENTS ON THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS*).

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197 See Deloitte, Cross-border trade in services. Brexit deal analysis. Available at https://www2.deloitte.com/uk/en/pages/about-deloitte-uk/articles/fta-cross-border-trade-in-services.html.

198 See Deloitte, Cross-border trade in services. Brexit deal analysis. Available at https://www2.deloitte.com/uk/en/pages/about-deloitte-uk/articles/fta-cross-border-trade-in-services.html.

199 See Deloitte, Cross-border trade in services. Brexit deal analysis. Available at https://www2.deloitte.com/uk/en/pages/about-deloitte-uk/articles/fta-cross-border-trade-in-services.html.

200 See post of January 21, 2021, Travers Smith, A business-friendly guide to the UK-EU Brexit trade deal. Available at https://www.traverssmith.com/knowledge/knowledge-container/a-business-friendly-guide-to-the-uk-eu-brexit-trade-deal/.

201 See post of January 21, 2021, Travers Smith, A business-friendly guide to the UK-EU Brexit trade deal. Available at https://www.traverssmith.com/knowledge/knowledge-container/a-business-friendly-guide-to-the-uk-eu-brexit-trade-deal/

202 https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_11_923.

7.3. Title III: Digital Trade

Part 2, Heading 1, Title III: Digital trade.

The digital trade chapter applies to trade enabled by electronic means, but does not apply to audiovisual services. Its main objective is to "*facilitate digital trade, to address unjustified barriers to trade enabled by electronic means and to ensure an open, secure and trustworthy online environment for businesses and consumers.*" (Article DIGIT.1)

The parties agree to ban customs duties on electronic transmissions, prior authorisation requirements for services provided by electronic means, as well as requirements on the transfer of source code, except when, for instance, required by a court or competition authorities. Specific provisions facilitate the use of e-contracts[203], e-authentication and electronic trust services[204], as well as protection against spam[205].

The parties agree to apply measures to enhance online consumer protection and trust (*Article DIGIT.13*) "*including but not limited to measures that:*

(a) proscribe fraudulent and deceptive commercial practices;

(b) require suppliers of goods and services to act in good faith and abide by fair commercial practices, including through the prohibition of charging consumers for unsolicited goods and services;

(c) require suppliers of goods or services to provide consumers with clear and thorough information, including when they act through intermediary service suppliers, regarding their identity and contact details, the transaction concerned, including the main characteristics of the goods or services and the full price inclusive of all applicable charges, and the applicable consumer rights (in the case of intermediary service suppliers, this includes enabling the provision of such information by the supplier of goods or services); and

(d) grant consumers access to redress for breaches of their rights, including a right to remedies if goods or services are paid for and are not delivered or provided as agreed".

The consumer protection agencies or other relevant bodies should be entrusted with adequate enforcement powers. Regulatory cooperation (*Article DIGIT.16*) is envisaged to tackle the evolving policy space of digital trade.

7.4. Title VI: Public Procurement

Part two, Heading 1, Title VI: Public Procurement.

Under this TCA, both the UK and the EU are committed to offering increased access to each other's procurement markets and to enhancing the transparency of public procurement procedures. The public procurement provisions of the TCA incorporate and confirm the application of the World Trade Organisation Government Procurement Agreement ("GPA"), which the UK acceded to on 1 January 2021.[206] Building on the foundations set by the GPA, the TCA extends the types of public procurement to which EU and UK businesses will have access in each other's respective markets, including in *"the gas*

[203] Article DIGIT.10: Conclusion of contracts by electronic means.

[204] Article DIGIT.11 Electronic authentication and electronic trust services.

[205] Article DIGIT.14 Unsolicited direct marketing communications.

[206] See post of January 21, 2021, Travers Smith, A business-friendly guide to the UK-EU Brexit trade deal. Available at https://www.traverssmith.com/knowledge/knowledge-container/a-business-friendly-guide-to-the-uk-eu-brexit-trade-deal/.

and heat distribution sectors, contracts awarded by private-sector utilities that act as monopolies, as well as services contracts for hospitality, telecommunications, real estate and education"[207].

However, the scope of the GPA and TCA is somewhat narrower than the EU procurement regime as it does not include public contracts that relate to health and social services, healthcare and cultural services, to services concessions and to "below threshold"[208] contracts. "Under the EU procurement regime, tenders for contracts which fall below the thresholds in the relevant Directives but are of cross border interest are still required to be advertised and any competition must be conducted in a transparent, non-discriminatory manner, while these general principles will not apply under the GPA and TCA to below threshold contracts [...]"[209].

Additionally, beyond the requirements in the GPA, the TCA rules that must be applied to all covered procurements in the UK and the EU include:

(a) *"ensuring that procuring entities conduct covered procurement by electronic means to the widest extent practicable [Article PPROC.3];*

(b) *ensuring that where procuring entities require a supplier to demonstrate prior experience, they do not require that the supplier has such experience in the territory of the procuring entity, be it either the UK or the EU [Article PPROC.6];*

(c) *ensuring that procuring entities are permitted to take into account environmental, labour and social considerations throughout a procurement procedure [Article PPROC.10]; and*

(d) *ensuring that there will be an effective domestic review procedure for dealing with disputes [Article PPROC.11]"*[210].

The TCA confirms that, with regards to any procurement, EU suppliers established in the UK must be treated no less favourably than domestic suppliers, and vice versa for UK suppliers established in the EU (*Article PPROC.13*)[211].

7.5 Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development

Part 2, Heading 1, Title XI: Level playing field for open and fair competition and sustainable development

The level playing field mechanism ensures fair competition and secure market access (mutually agreed commitments), whilst preventing distortions of trade or investment.

Specifically, non-discrimination on grounds of nationality are detailed in *Article 4.5: Non-discriminatory treatment and commercial considerations*.

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[207] See post of January 22, 2021, Pinsent Masons, Public procurement in post-Brexit UK. Available at https://www.pinsentmasons.com/out-law/guides/a-short-guide-public-procurement-post-brexit-uk.

[208] See post of January 14, 2021, Travers Smith, Brexit: what does it mean for public procurement? - updated January 2021. Available at https://www.traverssmith.com/knowledge/knowledge-container/brexit-what-does-it-mean-for-public-procurement/.

[209] See post of January 14, 2021, Travers Smith, Brexit: what does it mean for public procurement? - updated January 2021 l. Available at https://www.traverssmith.com/knowledge/knowledge-container/brexit-what-does-it-mean-for-public-procurement/.

[210] See post of January 22, 2021, Pinsent Masons, Public procurement in post-Brexit UK. Available at https://www.pinsentmasons.com/out-law/guides/a-short-guide-public-procurement-post-brexit-uk.

[211] See post of January 22, 2021, Pinsent Masons, Public procurement in post-Brexit UK. Available at https://www.pinsentmasons.com/out-law/guides/a-short-guide-public-procurement-post-brexit-uk.

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This note gives an initial appraisal of the effects of the EU-UK Trade and Cooperation Agreement in the policy areas covered by the ECON, EMPL, ENVI/BECA, IMCO, and ITRE/AIDA committees. It provides an overview of the main provisions of relevance to future EU-UK cooperation in these areas; it describes the governance structures of the Agreement, the powers of the joint bodies established under the Agreement, and examines the role granted to the European Parliament and the UK parliament.

This document was prepared for the European Parliament's committees on ECON, EMPL, ENVI, ITRE and IMCO as well as for the FISC sub-committee and the AIDA and BECA special committees.

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