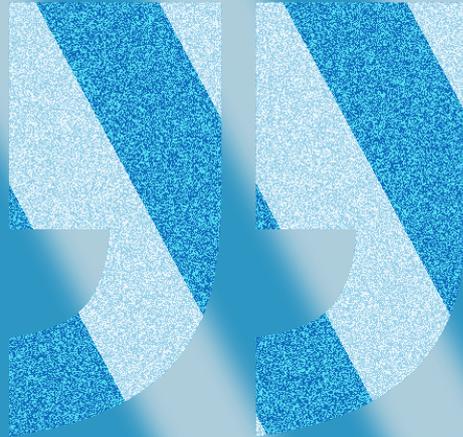


C L I F F O R D
C H A N C E



**RELIEVED? UK
AND EU AGREE
POST-BREXIT DEAL**



— THOUGHT LEADERSHIP

DECEMBER 2020



RELIEVED? UK AND EU AGREE POST-BREXIT DEAL

On 24 December 2020, after roller-coaster negotiations, the United Kingdom and the European Union announced they had agreed a post-Brexit "EU-UK Trade and Cooperation" Agreement.

On 1 January 2021, the transition period ends, and the UK leaves the EU Single Market and the Customs Union. The EU-UK Agreement provides for zero tariffs and quotas. It represents a fundamental shift in the EU-UK relationship with substantially reduced market access but greater UK autonomy. This briefing examines what it covers, what it doesn't, and what happens next.

The Agreement runs to 1,246 pages and the EU plans to bring it into provisional application on 1 January 2021 before being fully ratified. The UK plans to fully ratify the Agreement by the end of 2020.

BACKGROUND

The UK voted to leave the EU on 23 June 2016 and formally left on 31 January 2020 with a Withdrawal Agreement in place providing for a transition period starting on 1 February 2020.

During that time the UK was subject to European law and remained a de facto member of the EU Single Market and Customs Union until 31 December 2020. It also gave time for the UK and EU to negotiate a future relationship.

From 1 January 2021, the UK and EU will form two distinct regulatory, legal and customs territories.

WHAT HAS BEEN AGREED

Overall architecture

The EU-UK "Trade and Cooperation" Agreement is a single instrument which consists of three main pillars: a Free Trade Agreement, a partnership for citizens' security and a horizontal agreement on Governance.

The UK and EU have also agreed a separate Nuclear Cooperation Agreement and an agreement on Security Procedures for Exchanging and Protecting Classified Information.

The Agreement envisages that the EU and UK may enter into additional "supplementing" agreements covering further areas of cooperation, for example, in the area of the mutual recognition of professional qualifications.

The Agreement sets up a "Partnership Council" between the UK and EU which will be the principal forum overseeing the matters covered by the Agreement, meeting at least once per year. It also sets up numerous Specialised Committees and Working Groups including on Trade Partnership, Goods, Customs Cooperation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade and others.

The Agreement also envisages the possibility of the creation of a "Parliamentary Partnership Assembly" consisting of Members of the European Parliament and of Members of the Parliament of the United Kingdom, as a forum to exchange views on the partnership."

From the EU side, the Commission has stated that it will count as an "EU-only" agreement, meaning that it covers only EU legal competencies. That means that member states do not have to go through individual ratification processes (and it means that regional parliaments will not be able to veto it) but it also means that various important matters are

left to the responsibility of individual member states. The EU will conclude the Agreement on the legal basis of Article 217 of the Treaty on the Functioning of the European Union.

Trade in goods

In perhaps the least controversial area of the talks, the UK and EU have agreed a “zero tariff, zero quota” agreement. That is a first for both the EU and UK and indeed sets the tone for what is an unprecedented outcome arising out of an unprecedented set of circumstances. It avoids the introduction of customs duties, export duties, taxes or other charges on goods moving between the EU and UK which are produced in the EU or UK, as long as those goods comply with the appropriate “Rules of Origin” (ROO). There will be no quantitative restrictions either, i.e. there will be no quota limits in terms of the volume of imports or exports between the UK and EU. New customs controls and other requirements will apply from 1 January 2021 however and the situation after that date will ultimately be one of new barriers being created.

Rules of Origin and Cumulation

The Agreement allows traders to self-certify the origin of goods and provides for ‘full bilateral cumulation’ which includes both materials and processing. The Agreement contains specific rules for batteries and electric vehicles that provide for preferential tariff rates in those areas. In relation to goods that do not fully originate in the UK or EU, ROO apply.

Sanitary and Phytosanitary Measures

The Agreement confirms that the UK and EU will be subject to separate Sanitary and Phytosanitary (SPS) measures. It allows either party to unilaterally decide to reduce the frequency of border controls and simplify the process for the approval of imports in relation to SPS.

Technical Barriers to Trade

From 1 January 2021, the UK and EU will form two distinct regulatory, legal and customs territories.

As a result, traders of goods subject to

conformity standards and other specifications will no longer be able to rely on the harmonised EU approach when supplying products in the UK. To simplify market access, the Agreement allows for companies to self-certify conformity assessment. It also contains provisions on market surveillance and marking and labelling such as allowing companies to re-label products in their warehouses to comply with the relevant requirements.

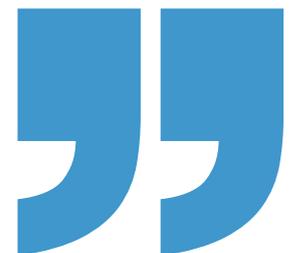
In relation to organic products, the UK and EU have agreed to recognise each other’s certifications. In relation to motor vehicles, the UK and EU will recognise each other’s approvals based on United Nations Economic Commission for Europe (UNECE) level regulations and UN type-approval certificates. In relation to medicines, the UK and EU have agreed to recognise each other’s inspections of manufacturing facilities. There are also annexes on wine and chemicals.

The Agreement sees the establishment of extensive market surveillance cooperation and arrangements to exchange electronic information on non-compliant products. Many of the arrangements will need further work to implement but are designed to be set up quickly after the Agreement comes into force, for example information exchange between the EU Rapid Alert System for non-food products (RAPEX), and the UK database relating to market surveillance and product safety established under the General Product Safety Regulations 2005.

These commitments are in-line with recent FTAs, represent a higher-than-usual level of cooperation in these areas and also represent the creation of a number of new technical barriers to trade.

Customs and trade facilitation

The UK is leaving the EU Customs Union and, as such, goods moving between the UK and the EU will be subject to new customs checks and procedures.





The Agreement does contain some provisions to ease customs and assist with trade facilitation. The EU and the UK have agreed to recognise each other's 'trusted trader' – or Authorised Economic Operators (AEOs) – schemes, allowing AEOs in the UK and EU to continue to benefit from expedited and simplified customs procedures. As above, the deal also provides for facilitations for other products such as motor vehicles, equipment and parts; wine; medical products; organic products and chemicals.

In October, the UK announced that it will take a phased approach to customs enforcement with the EU, with measures coming into force in stages throughout 2021. EU customs with the UK will be enforced in full from 1 January 2021 – the full European Union Customs Code will apply, including the requirement for entry and exit summary declarations.

The overall picture is one of dramatic change, with customs checks and procedures on the UK's border with continental Europe being required for the first time in decades.

Transport

The Agreement avoids dramatic disruption in road haulage, though new restrictions will be imposed. The deal allows UK and EU road haulage operators to continue to move goods to, from and through each other's territories. However, it places limits on the number of additional movements that a road haulier can make once inside of the other's territory. Road hauliers will be permitted to do up to two operations in either the UK or EU respectively. For EU hauliers that means up to two cabotage operations in the UK and for UK hauliers that means either two cross border operations or one cross-border operation and one cabotage operation.

Similarly, the Agreement permits passenger travel by road between the UK and the EU but prohibits road passenger transport operators of either the UK or EU to operate "regular or special regular services with both origin and destination in the territory of the other Party."

In relation to aviation, the Agreement provides for unlimited point-to-point traffic between the EU and the UK. However, airlines operating on a UK licence will no longer be able to operate passenger or cargo flights between EU destinations or onward flights out of the EU, e.g. UK-Amsterdam-New York. On aviation safety, the UK will withdraw from the European Aviation Safety Agency (EASA) system on 1 January 2021. The UK Civil Aviation Authority (CAA) will take full responsibility for regulating UK aviation, including licensing. The Agreement reached leaves scope for cooperation between the parties on safety regulation. This is a significant change from the current, harmonised approach under the EASA system.

Services

In general, the Agreement contains similar provisions to other recent trade agreements that the EU has struck, for example, with Japan. These include so-called "national treatment" obligations where neither party treats incoming establishments any worse than its own, no limitations such as economic needs tests, or foreign equity caps. There is also a forward-looking "most favoured nation" clause ensuring that if either party offers better terms to other partners, those terms apply to the UK and the EU.

The commitments have been made on a "negative list" basis, which means that they apply to all services except those which are explicitly carved out, for example, audio-visual visual services.

Overall, the Agreement represents a very substantial reduction of market access in services between the EU and UK.

Financial services

The financial services provisions of the Agreement are very limited and have fewer commitments even than the EU-Japan Economic Partnership Agreement. For example, the Agreement does not contain the regulatory co-operation provisions which were in the EU-Japan agreement.

UK-incorporated financial services

providers will lose EU passporting rights on 1 January 2021. From the outset of the negotiations, the EU ruled out continuing to extend passporting rights to the UK. Instead, the European Commission stressed the importance of “respecting the Parties’ regulatory and decision-making autonomy” and insisted that financial services would be subject to unilateral equivalence decisions.

Equivalence decisions are unilateral decisions of the parties. They are not covered in the UK-EU agreement.

The EU – and now the UK – can unilaterally recognise a third country regulatory regime as equivalent to their own for market access and other purposes. Financial services in the EU are not governed by a single set of regulations and it is therefore not possible for the EU to issue one equivalence decision that would maintain the parties’ current level of market access.

Overall, there are some 59 areas where equivalence decisions are possible. One has already been taken in relation to recognising the three central counterparties (CCPs) established in the UK as third country Central Counterparties (TC-CCPs). As TC-CCPs, they will continue to be eligible to provide their services in the EU after the end of the transition period on 31 December 2020.

Coming under an EU equivalence regime is very different to benefiting from passporting rights; the existing equivalence regimes under EU law differ significantly in their scope, operation and impact. Only a few enable third-country firms to provide services to EU clients and counterparties without an authorisation in the EU, but even then are subject to conditions that are more restrictive than for EU firms benefiting from a passport. Others merely provide more limited accommodations to ease cross-border activity. All the regimes allow equivalence to be withdrawn unilaterally.

Mutual recognition of professional qualifications

On 1 January 2021, UK professional qualifications will no longer be recognised in the EU, and vice versa.

The Agreement provides for a framework for the possible recognition of professional qualification in the future. It also allows the parties to negotiate separate and improved profession-by-profession measures in the future.

The UK and EU have made new commitments on home title legal services. This means that UK lawyers will have the right to advise their clients across the EU on UK and public international law using their home professional titles, except where EU Member States have placed specific limits on this activity, and vice versa.

Digital services

The Agreement does cover digital trade and contains a series of measures seeking to facilitate it. The UK and EU have agreed that there will be no data localisation provisions; a commitment which represents a first on the EU side. The Agreement also contains provisions on electronic signatures, consumer protection and machine-readable public sector data and guarantees against the mandatory transfer of source code.

The Agreement also contains an "Interim provision" consisting of a "specified period" of four-months, extendable to six months, during which transfers of data from the EU to the UK can continue as long as the UK maintains its current rules.

The UK is currently subject to EU data protection laws including the General Data Protection Regulation (the GDPR). These laws will cease to apply in the UK on 1 January 2021. Whilst the UK data protection rules are currently aligned with GDPR standards (the UK Data Protection Act 2018 essentially implements the GDPR and its standards across all general data processing into UK rules), the provisions on data transfer in the





GDPR will cease to apply to the UK after the UK leaves the EU. Under the GDPR rules the European Commission can deem that non-EU countries provide 'adequate' protection for individuals' rights and freedoms for their personal data, thereby facilitating transfers of personal data to that third country.

In the Revised Political Declaration (October 2019) between the UK and the EU, the EU committed to begin its assessment of the 'adequacy' of the UK data regime with a view to coming to a decision by the end of 2020. However, a decision is still pending and, following two recent CJEU decisions – Schrems II (Case C-311/18) and Privacy International (Case C-623/17), the Commission has said that it will not have a decision in place by 1 January 2021.

The UK government has also signified its intention to reconsider the way that data is regulated in the UK, having commenced the National Data Strategy. To the extent that this departs from EU rules, this may have a bearing on whether the Commission issues an adequacy decision.

The UK government has confirmed that it will permit transfers to the EEA and also that it will recognise the existing adequacy decisions taken by the EU in respect of other third-countries. As a result, data transfers from the UK to the EEA and other non-EEA countries with adequacy decisions will be largely unaffected.

Audio-visual services are not covered by the Agreement and listed as a specific exception from the provisions on services and investment.

Public procurement

The provisions in this part of the Agreement go beyond the WTO Government Procurement Agreement (GPA), to which the UK is in the process of acceding. In particular, the UK and EU agreed to extend market access to the gas and heat distribution sector; private utilities that act as a monopoly; and a range of additional services in the hospitality, telecoms, real estate, education and other business sectors.

Level playing field

The so-called level playing provisions were, apart from fishing, the most hotly contested area of negotiations. The UK's objective was to have the freedom to legislate as it saw fit, and the EU's was to avoid the UK undercutting EU regulatory standards in order to gain an "unfair" advantage.

The outcome of that negotiation is a compromise which reflects both the UK's and EU's objectives to some extent.

In relation to state aid, the UK will have the ability to establish its own state aid system. Neither party is required to "dynamically align" its rules with those of the other party, but the Agreement contains broad constraints on state aid.

The UK and EU have agreed mechanisms whereby either party to the Agreement can initiate a process of redress if it considers that the other party has adopted economic measures which represent "unfair competition" in the field of subsidies and labour and social, environment or climate protection. That mechanism allows the injured party to initiate countervailing measures which may be unilateral in certain circumstances.

It is important to note that the Dispute Settlement provisions of the Agreement do not apply to the part of the Agreement which contains the Level Playing Field provisions. These measures are subject to special arbitration procedures.

In the field of taxation, the Agreement includes a commitment not to weaken tax legislation below OECD standards as at the end of transition on exchange of information regarding financial accounts (i.e. Common Reporting Standards/ Automatic Exchange of Information), tax rulings, cross-border tax planning and Base Erosion and Profit Shifting (BEPS) corporate interest restriction, hybrid mismatch and Controlled Foreign Companies (CFC) rules and public country-by-country reporting rules at the date of transition relating to large financial institutions. Importantly for the UK, there is no forward-looking harmonisation.

Fisheries

Fisheries was perhaps the most controversial area of negotiation. The UK and EU agreed that EU fishing rights to UK waters would be reduced by 25% over a "adjustment period" of 5.5 years. After that the UK and EU will negotiate shares in relation to the UK's waters on an annual basis.

Mobility

As expected, the deal puts an end to free movement between the EU and the UK.

The Agreement permits UK and EU business visitors from the other territory to stay for a period of up to 90 days in any six-month period, and includes non-discrimination provisions.

It also includes provisions encouraging cooperation on social security to protect the entitlements of UK and EU nationals living in the other's territory.

Energy

On 1 January 2021, the UK will leave the Internal Energy Market. However, the Agreement provides for continuity on the flow of energy across gas and electricity interconnectors. The UK and its European neighbours' energy supplies are highly integrated, and it was vital to any deal to ensure continued access to both sides to ensure security of energy supply.

Northern Ireland will remain part of the single electricity market under Article 9 of the Protocol on Ireland/Northern Ireland.

The Agreement provides for cooperation between the UK and the EU on the development and uptake of renewable energy. The parties have also made enforceable commitments to uphold the COP 21 Paris Agreement on climate change.

A separate [Nuclear Cooperation Agreement](#) has also been agreed between the UK and the European Atomic Energy Community for the safe and peaceful use of nuclear energy.

Intellectual Property

On intellectual property, the Agreement effectively enshrines existing multi-lateral principles into treaty form. The parties affirm their existing obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the World Intellectual Property Organization (WIPO) treaties, among others.

Exhaustion of IP rights is left for the UK and EU to determine individually.

The parties further agree to enshrine some of the key provisions of existing EU legislation in respect of copyright and related rights, trade marks, designs and trade secrets. Provisions on customs enforcement of IP infringements (such as the trade in counterfeit goods) are also broadly modelled on the EU Customs Regulation.

UK participation in EU programmes

The UK will not participate in the "Erasmus" student study programme; instead it has opted to create its own "Turing" programme of international student exchange. The UK will participate in Horizon Europe, the Euratom Research and Training programme, the fusion test facility ITER, Copernicus, as well as have access to the EU's Satellite Surveillance & Tracking (SST) services. The UK will have to make financial contributions in relation to these programmes from 2021-2026.

Dispute resolution

The Agreement provides for binding enforcement and dispute settlement mechanisms. The mechanisms are reciprocal and do not directly involve UK or EU judicial functions. The Agreement provides for consultation and independent arbitration. It provides for remedies from rectification of a breach moving to the payment of suitable compensation.

In the event of a dispute, the first port of call is to try and resolve the issue





through good-faith consultations. If that doesn't work, then the complaining party can ask for a independent arbitration tribunal to be set up. The parties pick three independent arbitrators jointly, possibly from pre-agreed lists, to deliver a decision that would be binding in a set time frame.

Once the tribunal has ruled, the Agreement requires the relevant party to comply. If it does not, the complaining party can suspend various obligations.

The Agreement also provides for an overall review after four years.

WHAT DOESN'T THE AGREEMENT COVER?

The Agreement does not cover foreign policy, external security or defence, for example in the area of sanctions policy. It also does not include coverage of irregular migration.

WHAT ABOUT NORTHERN IRELAND?

It is important to note that the Protocol on Ireland/Northern Ireland puts Northern Ireland onto a different footing to the island of Great Britain. The Protocol effectively creates a customs and regulatory border between Great Britain and Northern Ireland. The Agreement will not govern trade in goods between the EU and Northern Ireland and goods entering Northern Ireland from Great Britain will count as imports. There will be facilitations for goods moving between Great Britain and Northern Ireland. In terms of services, Northern Ireland will be subject to the UK's rules including its VAT system.

WHAT HAPPENS NEXT?

The UK and the EU must now ratify and implement the Agreement in advance of 31 December 2020 in order for it to enter into force immediately after the end of the transition period.

On the UK side, ratification will be subject to Parliamentary scrutiny in accordance with the Constitutional Reform and Governance Act 2010, but this only gives Parliament a power to object to

ratification and the government has a power to ratify treaties in any event in exceptional circumstances. The UK will also need to pass legislation implementing the provisions of the deal.

The UK government has said that it intends to ratify the Agreement in an expedited parliamentary process by 30 December.

On the EU side, the text must be translated into all the official EU languages and ultimately approved by the European Parliament and Council.

Given the late stage at which agreement was reached, the Agreement the Commission has proposed that the Agreement will enter "provisional application" on the EU side in line with Article 218(5) of the Treaty on the Functioning of the European Union until 28 February 2021. Provisional application of treaties is provided for in Article 25 of the Vienna Convention on the Law of Treaties.

The European Parliament will consider the Agreement in 2021 and will still have the power to reject it. Rejection by the European Parliament would precipitate a crisis and the possible re-opening of negotiations.

HOW DOES THIS FIT INTO THE UK'S BROADER STRATEGY?

The agreement is the result of a negotiation following the UK's decision to withdraw from the EU. As such, it cannot represent anything but the codification of mechanisms to manage the divergence which inexorably flows from that democratic choice. It avoids a "cliff edge" no deal scenario and should avoid some of the disruption that was foreseen. It leaves the UK with less market access to the EU (and vice versa), but it leaves the UK more control over domestic regulation and its international economic strategy.

The UK is in the process of negotiating trade deals with a number of countries around the world. For many countries, notably the US and countries in the APAC

region, the UK has historically been seen as an entry point into the EU market and the UK's withdrawal from the EU is likely to fundamentally change that dynamic.

For parties negotiating with the UK, lack of certainty about the terms of future EU-UK trade made it difficult to calculate the benefits of any future deal with the UK. Now that the EU and UK have reached an Agreement, it is likely to become easier for negotiations between the UK and its trading partners to come to proceed and for trade deals to be finalised.

HOW DOES THIS FIT INTO THE EU'S BROADER STRATEGY?

The deal struck similarly helps the EU by avoiding the imposition of tariffs and quotas on EU-UK trade and should therefore alleviate some of the short-term disruption to trade, though the shock of a no deal scenario would have been less severe for the EU as a whole, given the relatively smaller size of UK-EU trade as a proportion of total trade on the EU side.

Even though a deal has been agreed, the short-term effects on trade are likely to still be material for the economies which have high levels of trade with the UK: France, Belgium, the Netherlands, and Ireland in particular.

The deal struck could also lead to cooperation in other areas. The very fact of reaching a deal means the two sides have avoided a potentially acrimonious no deal situation, which in turn makes continued cooperation in other areas more likely.

One of the EU's key strategic objectives was to avoid allowing the UK market access whilst allowing it to engage in "unfair competition" on its doorstep. That objective has, to a great extent been achieved. The deal contains far-reaching level playing field provisions. These provisions are more robust than any existing bilateral or plurilateral agreements. Speaking at a press

conference on 24 December 2020, the EU's chief negotiator Michel Barnier described the level playing field provisions as "part of a new generation of free trade agreements", appearing to suggest that the EU will seek to replicate these provisions in future trade provisions.

The potential to attempt to expand level playing field provisions in the EU's free trade negotiations chimes with ongoing work of the Commission. For example, the European Commission is currently running an initiative, the broad objective of which is to "identify new tools to address the potentially negative effects on the single market of subsidies provided by governments outside the EU."

A "no deal" outcome would have been seen as a serious failure of diplomacy and would have resulted in an economic shock on 1 January, and most likely a period of considerable rancour and acrimony in the following months. Having avoided that outcome, it is now up to the UK to make the best of its newly found independence and the most of its new, diminished, relationship with the EU.



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