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The EU–UK Trade and Cooperation Agreement: a new world with new rules

The new world in which UK taxpayers and tax authorities find themselves under the EU–UK Trade and Cooperation Agreement (TCA)[1] operates according to very different rules from those by which the old one was governed. The parties to the TCA, now notified under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the General Agreement on Trade in Services (GATS)[2] will, no doubt, take time to acclimatise to them.

Any assessment of the position of taxpayers and tax authorities in the UK must take account of the general provisions of the TCA as much as of those which directly affect tax and duty. A comparison with elements of the Treaty on the Functioning of the European Union (TFEU)[3] is, at various points, instructive and other agreements are also important. The Withdrawal Agreement (WA)[4] and the legislation which implements it are particularly significant.

Some fundamental changes

Under the TFEU, UK taxpayers and tax authorities were, of course, part of a single market, with free movement of goods, people, services and capital and a customs union. Under the TCA they

[1] 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 [2020] OJ L444/14. It is provisionally in force, pending the approval of the EU Parliament which is expected to be given in March 2021: see TCA art.FINPROV.11 and 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 [2020] OJ L444/2 (the Council Decision) art.12.

[2] For the notification requirements see GATT 1994 art.XXIV.7(a) and GATS art.V.7(a). The notification is recorded at *http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=1137* [Accessed 16 February 2021].

[3] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

[4] 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 [2020] OJ L29/7. The latest consolidated text is available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020W%2FTXT-20201218* [Accessed 8 March 2021].

exist in a free trade area which has much less impact on domestic law and administration.[5] Customs duties on goods originating in the other party are prohibited[6] as are duties, taxes and charges in connection with export.[7] The scope to impose restrictions on imports and exports is limited.[8] Origin is determined not according to the wide cumulation origin provisions which the UK sought,[9] but according to much more restrictive bilateral cumulation provisions.[10]

The TCA's provisions on services are far from generous, as is indicated by the fact that the provisions permitting temporary business visits without work permits[11] and short-term business visitors are deemed worthy of notice, at least in some quarters.[12] Lawyers and accountants may have particular reason to take account of the provisions affecting their activities.[13]

Taxpayers under the TCA

In considering the position of taxpayers generally, EU retained law and the continued role played by the concept of the supremacy of EU law is important.[14] For present purposes, however, the focus is on the way in which some provisions of the TCA are interpreted and the power of taxpayers in relation to them.

UK taxpayers, like those around the EU, were able to make good use of the fundamental freedoms provided under the TFEU in challenging domestic tax provisions as a result of a number of doctrines. Two are worth mentioning here. The first is the doctrine of direct effect. The second is the doctrine of conforming interpretation as applied to domestic statutes including tax statutes. Both doctrines are important in relation to the single market. Neither is necessary for the TCA's free trade area.

In common with many modern trade agreements,[15] the TCA repudiates the concept of direct effect almost entirely. In that respect it may be contrasted with the WA.[16] The TCA, in article COMPROV.16.1, "Private rights", says, subject to certain limited qualifications:

> "1. …nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created

[5] See TCA art.OTH.3, "Establishment of a free trade area".
[6] See TCA art.GOODS.5, "Prohibition of customs duties".
[7] See TCA art.GOODS.6, "Export duties, taxes or other charges".
[8] See TCA art.GOODS.10, "Import and export restrictions".
[9] See the Draft Working Text for a Comprehensive Free Trade Agreement between the United Kingdom and the European Union art.3.3, "Cumulation of origin". The draft is available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf* [Accessed 16 February 2021].
[10] See TCA art.ORIG.4, "Cumulation of origin".
[11] See TCA art.SERVIN.4.2.
[12] See TCA art.SERVIN.4.3.
[13] Lawyers will want to pay attention in particular to the definition of "designated legal services": see TCA arts SERVIN.5.48(a) and 5.48(c) fn.31 and SERVIN.5.49.4 fn.33.
[14] The European Union (Withdrawal) Act 2018 s.5 and s.6(7).
[15] See, for example, the Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3 art.16.16 and the Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership (CS Japan No.1/2020) art.24.5 (not yet in force).
[16] See WA art.4. Some EU trade agreements have been shown to have direct effect such as the EEC–Cyprus Association Agreement in issue in *R. v Ministry of Agriculture, Fisheries and Food Ex p. SP Anastasiou (Pissouri) Ltd* (C-432/92) EU:C:1994:277.

> between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties."

The article continues by providing that one party is not to provide for a right of action under its law against the other party on the ground that the other party has acted in breach of the TCA.

The TCA does not completely exclude action by taxpayers. For example, the provisions governing state aid allow "interested parties" to bring a claim where their interests might be affected by the grant of a subsidy which may, of course, include a tax subsidy.[17] Nevertheless, that is very different from adopting the principle of direct effect.

So far as the interpretation of the TCA is concerned, the terms of article COMPROV.13.1 TCA, are important. They require interpretation in good faith in accordance with a provision's ordinary meaning in its context and in light of the object and purpose of the agreement, in accordance with customary rules of interpretation of public international law including those in the Vienna Convention on the Law of Treaties 1969.[18] As in specifically tax matters, such as good governance and tax standards,[19] it is to international law, not EU law, that recourse is to be had.

The political sensitivity surrounding matters of treaty interpretation is shown by the next two paragraphs of article COMPROV.13.1 which both commence with the phrase: "[f]or greater certainty". Those words may be more politically reassuring than they are legally useful.

Article 13.2 says that neither the TCA nor any supplementing agreement establishes an obligation on either party to interpret their provisions in accordance with the domestic law of either party. Article 13.3 continues by confirming that an interpretation by the courts of one party is not to be binding on the courts of the other party. No doubt both parties will be grateful for that.

These provisions are introduced into UK domestic law by section 30 of the European Union (Future Relationship) Act 2020 (EUFRA). This requires a court or tribunal to "have regard to COMPROV.13" when interpreting the TCA or any supplementing agreement.

In section 29(1) EUFRA, the Act deals with the position of domestic UK law in relation to the TCA. It provides that, subject to certain matters, existing domestic law is to have effect with such modifications as are required for the purposes of implementing the TCA,[20] so far as it is not otherwise implemented, and so far as such implementation is "necessary for the purposes of complying with the international obligations" of the UK. Quite how far that may be will be interesting to see.

If, on the one hand, the TCA reduces the power of taxpayers by conferring limited rights, prohibiting direct effect and tightly controlling interpretation and implementation, there are, on the other hand, gains for the UK state.

[17] See TCA Title XI, Chapter three, art.3.7, "Transparency", 3.7.6.

[18] Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, Vol.1155, p.331.

[19] See TCA art.5.1, "Good governance" and art.5.2, "Taxation standards".

[20] In addition to the TCA, the section also refers to the implementation of the Security of Classified Information Agreement agreed at the same time.

The UK under the TCA

One of the most obvious ways in which the UK benefits from the TCA provisions in relation to tax is from articles protecting its tax system.

Tax exceptions

The extensive fundamental freedoms of the TFEU were not subject to any express exclusions in respect of taxation. In contrast, the much more limited provisions of the TCA are subject to exceptions in respect of tax law. They are contained in Title XII, "Exceptions" and particularly in article EXC.2, "Taxation". They offer some protection to both domestic tax law and double tax conventions and are structured in terms which are familiar from other trade agreements and from article XIV GATS.

The concern of UK negotiators to protect their tax system is apparent not just from the existence but from the scope of the tax exclusions. Although the exclusions show the influence of the GATS, they apply across most of "Heading One Trade" in the TCA which covers trade in goods as well as services. The well-known footnote in GATS which enlarges on the protection available in respect of the equitable or effective imposition or collection of taxes is, therefore, given an increased area of application.[21]

The negotiators' concern is understandable given the capacity for GATT and GATT 1994 to have an impact on tax, for example, in relation to the taxation of dividends, and in view of the experience of the US in relation to its legislation governing Foreign Sales Corporations and subsequent laws,[22] as well as a number of other cases before the WTO. This is an area of law with which UK tax lawyers in both the private and the public sectors must now grapple if the exceptions are to be properly applied.[23]

Sincere co-operation

The principle of sincere co-operation amongst EU Member States is an essential element of the legal context when tax and the fundamental freedoms are considered.[24] Article 4.3 of the Treaty on European Union (TEU),[25] which contains the principle, articulates both positive and negative obligations. The requirement of good faith in article 26 of the Vienna Convention on the Law of Treaties 1969 is somewhat more limited, requiring only that the treaty be performed in good faith.

The good faith provisions of article 5 WA clearly owe a great deal to article 4.3 TEU. It may have been thought that the TCA provisions would be different. In fact, they too follow the

[21] See TCA art.EXC.2, "Taxation" at 2.3(a) fn.69.
[22] For a summary of the legislation in question see WTO, United States – Tax Treatment for "Foreign Sales Corporations", Panel Report, 30 September 2005, WT/DS108/RW2, upheld by the Appellate Body, 13 February 2006, WT/DS108/AB/RW2.
[23] For some of the literature in this area and a preliminary note on the issues see T. Lyons, "Tax and the UK/Japan Comprehensive Economic Partnership Agreement" [2020] B.T.R. 605.
[24] See, e.g. *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* (C-628/15) EU:C:2017:687 at [47] and *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA* (C-310/09) EU:C:2011:581 at [78].
[25] The Consolidated version of the Treaty on European Union [2016] OJ C202/13.

approach of the TEU to a large extent. In particular they require that the parties "refrain from any measures which could jeopardise the attainment of the objectives"[26] of the TCA or any supplementing agreement.

The obligation to refrain can be far-reaching. One example of that, in the context of the WA, appeared during the discussion of the clauses of the Internal Market Bill designed to permit the Protocol on Ireland/Northern Ireland to be overridden.[27] Nevertheless, it may be assumed that, given the limited ambition of the TCA generally, the tax authorities will not be particularly troubled by the principle of sincere co-operation, whether in relation to the provisions on good tax governance, fair tax competition, tax standards[28] or similar areas.

EU and TCA institutions

As an EU Member State, the UK had a well-defined relationship with EU institutions and clear rights and responsibilities under the EU treaties. Under the TCA, the UK is a third country so far as the EU is concerned. Free from the constraints of EU law the UK will consider its power to be increased. Nevertheless, there will be no lack of bureaucratic engagement with the EU.

The European Commission is bound to be involved in many different kinds of decisions affecting the UK ranging from those concerned with various kinds of equivalence to those concerning trade remedies of various kinds. The provisions of the Council Decision under which the Council has approved the TCA also give the European Commission important specific powers, until a specific legislative act is in place, in relation to remedial, rebalancing, compensatory and safeguarding measures and the like.[29]

The Commission may also, at the invitation of a Member State, attend bilateral negotiations between the UK and a Member State over certain matters. One area in which there may be such negotiations concerns VAT and the mutual assistance for the recovery of claims relating to taxes and duties and social security.[30] It seems that the EU is taking steps to limit the capacity of the UK to divide the EU Member States in negotiations after Brexit just as it did before Brexit.

The UK will also engage with the complex institutional framework of the TCA which starts with the Partnership Council and encompasses over 20 committees, working groups, provisions for parliamentary co-operation, civil society involvement and domestic advisory groups.[31] The powerful Partnership Council may amend, for example, the chapter on the rules of origin and the Protocols on mutual administrative assistance in relation to VAT and the recovery of claims relating to taxes and duties.[32]

[26] TCA art.COMPROV.3, "Good faith".
[27] See in particular Internal Market Bill cll.42, 43 and 45 before its passage into law, available at *https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf* [Accessed 16 February 2021].
[28] TCA art.5.1, "Good governance" and art.5.2, "Taxation standards".
[29] The Council Decision art.3. Under art.5 the Commission may take important decisions in relation to equivalence of products.
[30] See the Council Decision arts 7 and 8 and the TCA "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" art.41.
[31] TCA arts INST.2–INST.8
[32] See TCA arts ORIG.31 and CUSTMS.21.

So far as committees are concerned, no doubt some tax and customs advisers will soon become familiar with, for example, the Trade Specialised Committee on Customs Cooperation and Rules of Origin, the Trade Specialised Committee on Social Security Coordination and the Trade Specialised Committee on Administrative Cooperation in VAT and Recovery of Taxes and Duties.

The WA and the Protocol on Ireland/Northern Ireland (the Protocol)[33] will also require continued close relations between the EU and the UK.

The Withdrawal Agreement

The WA and the Protocol remain crucial, not least so far as customs duty, VAT on goods, excise duty and state aid are concerned. The UK has agreed, it seems, to an approach, which already has been tried and tested to near destruction, namely "one country two systems". It may be assumed that not everyone was enthusiastic about that. As Prime Minister, The Rt Hon Theresa May MP, commented:

> "It is something I will never agree to — indeed, in my judgement it is something no British Prime Minister would ever agree to."[34]

A British Prime Minister did, nevertheless, agree to it and as part of the WA that is intended, at least in principle, to last a long time. For example, citizens, and family members yet to be born, are given lifetime rights against governments.[35] The Protocol does not have a fixed term but is subject to periodic democratic approval to be obtained, in the first instance, two months before the end of 2024.[36] At the moment, one may doubt that it will last a lifetime.

Conclusion

Under the TCA the UK will have regard to international, not EU, definitions of policies affecting good tax governance, fair taxation and tax standards.[37] Commitments to avoiding harmful taxation measures will be judged by reference to matters such as the joint political declaration on countering harmful tax regimes which accompanies the TCA.[38] No one need fear the discharge of "a thunderbolt from Luxembourg".[39]

The corollary of this increased legal freedom for the UK, however, is increased legal freedom for the EU. When dealing with the UK, it is no longer subject to the constraints that EU law imposes in procedures affecting Member States. The TCA, and to some extent the Protocol, give

[33] Protocol on Ireland/Northern Ireland [2020] OJ L29/102.
[34] Prime Minister's Office, 10 Downing Street and The Rt Hon Theresa May MP, News story, "PM Brexit negotiations statement: 21 September 2018" (21 September 2018) *gov.uk*, *https://www.gov.uk/government/news/pm-brexit-negotiations-statement-21-september-2018* [Accessed 16 February 2021].
[35] See WA arts 39, 9(a) and 10(e)(iii).
[36] See the Protocol art.18.1 and 18.5.
[37] See TCA arts 5.1 and 5.2.
[38] See Declarations referred to in the Council Decision on the signing on behalf of the Union, and on a provisional application of the Trade and Cooperation Agreement and of the Agreement concerning security procedures for exchanging and protecting classified information [2020] OJ L444/1475.
[39] In the well-known phrase used by Lord Walker of Gestingthorpe in *Pirelli Cable Holding NV v Inland Revenue Commissioners* [2006] UKHL 4; [2006] S.T.C. 548 at [104].

the EU a variety of ways of reacting to UK measures which may affect tax and duty. The willingness of the Commission to act quickly is shown by its conduct in relation to exports of vaccine against SARS-related coronaviruses. At first, it appears to have intended to rely on article 16 of the Protocol.[40] It very quickly withdrew the proposed legislation.[41] and subsequently acknowledged it had been mistaken.[42] The episode may, nevertheless, indicate something about the quality of the new relationship between the EU and the UK.

The way in which both parties to the TCA will use their increased freedoms, and the likely nature of the relationship between them, may be unpredictable at the moment. What is more certain is that, under the TCA, the UK has more direct control over its tax law and policy than it had as a member of the EU. Its taxpayers may have good reason to consider their influence has been reduced.

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[40] The provisions which the Commission originally intended to introduce are available at "What is Article 16 of the Northern Irish Protocol — and what on Earth was the European Commission thinking? (Includes a copy of the now deleted proposed regulation)" (30 January 2021) *The Law and Policy Blog, David Allen Green*, *https://davidallengreen.com/2021/01/what-is-article-16-of-the-northern-irish-protocol-and-what-on-earth-was-the-european-commission-thinking-includes-a-copy-of-the-now-deleted-proposed-regulation/* [Accessed 8 March 2021].

[41] See "What is Article 16 of the Northern Irish Protocol — and what on Earth was the European Commission thinking? (Includes a copy of the now deleted proposed regulation)" (30 January 2021) *The Law and Policy Blog, David Allen Green*, *https://davidallengreen.com/2021/01/what-is-article-16-of-the-northern-irish-protocol-and-what-on-earth-was-the-european-commission-thinking-includes-a-copy-of-the-now-deleted-proposed-regulation/* [Accessed 8 March 2021] and European Commission, *Commission statement on the vaccine export authorisation scheme* (29 January 2021), *https://ec.europa.eu/commission/presscorner/detail/en/statement_21_314* [Accessed 2 March 2021].

[42] See *Speech by President von der Leyen at the European Parliament Plenary on the state of play of the EU's COVID-19 Vaccination Strategy* (10 February 2021), *https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_505* [Accessed 2 March 2021] and Tommy Meskill, "Attempt to trigger Article 16 a mistake - EU's Šefcovic" (16 February 2021) *RTÉ*, *https://www.rte.ie/news/brexit/2021/0216/1197431-sefcovic-oireachtas/* [Accessed 2 March 2021].

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