

## Analysis

# The EU/UK TCA: tax and customs

## Speed read

The seven parts of the UK/EU trade and cooperation agreement create a new world for customs and tax lawyers which will exist alongside the Ireland/Northern Ireland Protocol. The institutional framework necessary to support the TCA is extensive and is likely to be expanded. The tariff and quota free area which is created is buttressed by many complex provisions, including those on origin. Direct tax is affected by good governance, mutual assistance and subsidy provisions. Money laundering rules must also be considered. Both EU/UK and GB/NI relations will continue to be the subject of debate. Future uncertainty is certain.



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The EU wanted a new partnership. The UK wanted a comprehensive free trade agreement. The compromise is a trade and cooperation agreement ('TCA') provisionally in force from 1 January 2021. It creates a new world for everyone, including tax and customs professionals. The TCA text, its annexes and protocols and annexes to protocols as well as joint political declarations all have to be considered. This article must necessarily be selective.

The TCA will not govern everything. The Withdrawal Agreement continues to apply along with the provisions of the Ireland/Northern Ireland Protocol concerning topics which include VAT, customs duty, excise duty and state aid. Decisions of the Joint Committee of 17 December 2020, including for example Decision 4/2020 on the determination of goods not at risk, are crucial (see [bit.ly/3ohtEkg](https://bit.ly/3ohtEkg)).

## A brief overview

The TCA is in seven parts. It has been brought into UK law by the European Union (Future Relationship) Act ('EUFRA') 2020.

Part Two of the TCA, headed 'Trade, transport and other arrangements', is divided into six headings. Heading One is entitled 'Trade'. Separate headings in Part Two cover such matters as aviation, road transport, social security coordination and fisheries.

Title I, the first of 12 titles, in Heading One is headed 'Trade in goods'. As is well known, the TCA creates a free trade area in which there are no tariffs or quotas on goods complying with the origin rules (see Title I, Chapter 2). Other titles of heading one include services, capital movements, intellectual property, public procurement, regulation, competition and subsidy rules.

So far as concerns services, professional qualifications for natural persons may be required (article SERVIN.5.13). Guidelines for arrangements on the recognition of professional qualifications are in Annex SERVIN-6.

There are provisions permitting temporary business visits for certain purposes without work permits (article SERVIN.4.2) and provisions on short term business visitors (article SERVIN.4.3). So far as concerns legal services, 'designated legal services' which UK lawyers can supply in the EU exclude services in relation to EU law (articles SERVIN.5.48(a), 5.48(c) footnote 31 and SERVIN 5.49.4, footnote 33).

The tax exclusions, familiar from the General Agreement on Trade in Services ('GATS') are applied not just to services but across much of heading one: 'Trade' (article EXC.2). There are protections for the operation of tax conventions. The well-known footnote derived from GATS, article XIV, giving examples of permitted measures aimed at the equitable or effective imposition or collection of taxes makes an appearance as footnote 69. The exceptions to GATT 1994 in article XX are given a role (article EXC.1).

Part Three of the TCA covers law enforcement in judicial matters. Its many provisions include a requirement for each party to 'ensure that trustees of express trusts maintain adequate, accurate and up-to-date information about beneficial owners' available to competent authorities (Title X, article LAW.AML.130.2 and LAW.AML.130.3).

Part Four deals with cooperation in health and cyber security. In Part Five, there are provisions on participation in EU programmes and certain financial provisions. Dispute settlement falls under Part Six. Part Seven excludes Gibraltar (article FINPROV.1.3) which is subject to a separate agreement made on 31 December 2020.

## The future relationship

The TCA permits 'rebalancing' of the parties' relationship in a number of situations. For example, four years after the TCA's entry into force, a party may request a review of the contents of 'Heading One: Trade' which includes all the customs provisions (article LPFS. 9.4). The purpose of any such review would be 'to ensure an appropriate balance between the commitments made by the Parties in this Agreement on a more durable basis'. Other headings, including aviation and road transport, may be added to the review (article LPFS. 9.4.4).

Apart from any re-balancing, the TCA is to be reviewed every five years (article FINPROV.3). As a comparison, the UK/Japan agreement allows for general review after ten years (article 24.1) and the UK/Switzerland agreement allows for exploratory discussions after 24 months (article 8).

The five-year review has already been linked with the adjustment period of five and a half years established in the Protocol on Access to Waters dealing with fishing matters (Annex FISH-4: article 1). As fishing and other topics are an integral part of the TCA, negotiation in one area may affect the whole TCA.

Should difficulties arise under the TCA, generally at least, first come consultations, then, if necessary, arbitration (see article INST.13, INST.14 and article LPFS. 9.4.3).

Termination as to parts of the TCA is possible. Certain serious and substantial failures may lead to termination or suspension (article INST.35). The entire agreement is

terminable on 12 months' notice (article FINPROV.8). For the UK agreements with Japan and Korea the period is 6 months.

### Institutional arrangements

The Partnership Council, meeting in different configurations depending on the subject, heads up the institutional framework. Its powers include the making of decisions, recommendations and amendments (article INST.1). It may, for example, amend the chapter on rules of origin (article ORIG.31) and the Protocols on mutual administrative assistance in relation to VAT and the recovery of claims relating to taxes and duties, and on customs (article CUSTMS.21).

After the Council comes more than 20 committees, four working groups and provisions for Parliamentary cooperation, civil society involvement and domestic advisory groups (article INST.2 to INST.8).

In relation to committees, the Trade Partnership Committee is mentioned first followed by specialised committees. 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. There are four working groups to start with but their number may well increase (articles INST.2.2(h), 4(f) and INST.3).

## The TCA creates a new world for everyone, including tax and customs professionals

### Private rights and domestic law

Subject to certain exceptions, the TCA cannot be directly invoked in the UK's legal system. Furthermore, a party is not to provide for a right of action under its law against the other party on the ground that the TCA, or a supplementing agreement, has been breached (article COMPROV.16).

While it does not have direct effect, unlike EU law, the TCA has important implications for domestic UK law, including the need to maintain competition and anti-subsidy law (Title XI: Level playing field for open and fair competition and sustainable development). Article COMPROV.13 governs interpretation of the TCA and provides, among other things, that one party is not bound by another's courts. EUFRA 2020 s 30, requires domestic courts and tribunals to have regard to it.

### Customs duty and origin

The TCA says that: 'Except as otherwise provided for in this Agreement, customs duties on all goods originating in the other Party shall be prohibited' (article GOODS.5). The national treatment rule applies and import/export restrictions are largely prohibited (articles GOODS.4 and GOODS.10). The inclusion of repaired and remanufactured goods is noteworthy (articles GOODS.8 and GOODS. 9).

Instead of the cumulation rules the UK wanted, the TCA provides for full bilateral cumulation (article ORIG.4).

The origin rules cannot be discussed here but they follow a familiar format. There are also specific rules for certain products contained in annexes ORIG-1 and ORIG-2. There is a list of operations which are insufficient to confer origin (article ORIG.7) and a set of tolerances which are applicable (article ORIG.6). Guidance notes on the rules of origin were published 'just in time' by the UK government on 29 December 2020 (see bit.ly/3rOUmTv).

There are origin quotas, treating goods as originating in the parties when they would not otherwise do so (annex ORIG-2A).

The procedural aspects of the origin rules pursuant to which preferential treatment may be claimed are as important as the substantive ones.

### Claiming preferential treatment

Importers have two ways of claiming preferential treatment. One is to rely on their knowledge that a product originates in the exporting party. Alternatively, more securely, they may rely on an exporter's statement of origin which gives the exporter reference number where one has been assigned (article ORIG.18 and ANNEX ORIG-4).

Given the consequences of a wrong claim, the possibilities of verification by the customs authority of the importing party and denial of preferential tariff treatment, traders should keep good records (see ORIG:22 for record-keeping requirements). Traders should also ensure their contracts are reviewed so that they are appropriately protected.

Article GOODS.17 makes clear that the parties can impose anti-dumping and countervailing duties and safeguards. The UK's Trade Remedies Authority will be established as an independent body under the Trade Bill (HL Bill 128, clause 5 and Sch 4). Traders will want to watch the UK and EU authorities with care.

### Customs and trade facilitation

The TCA's customs and trade facilitation provisions are in chapter 5 of the Trade in Goods title (Title I). Their exchange of data articles have led to provisions in the EUFRA 2020.

Other provisions concern matters such as advance rulings (article CUSTMS.11), mutual recognition of programmes for authorised economic operators (article CUSTMS.9 and Annex CUSTMS-1), application of the Common Transit Convention (article CUSTMS.6, with freedom of transit in Chapter 1, article GOODS.4A), risk management (article CUSTMS.7), post-clearance audit (article CUSTMS.8) and the facilitation of roll-on, roll-off traffic (article CUSTMS.18).

### VAT and mutual assistance for claims

There is a protocol on customs mutual assistance and one in relation to administrative cooperation and combating fraud in relation to VAT and mutual assistance for the recovery of claims relating to taxes and duties (see also article CUSTMS.19). The latter protocol is 41 articles long with an annex of over 40 pages.

As in the EU legislation, the exchange of information may be spontaneous (Protocol, article 10), automatic (Protocol, article 11) or on request (Protocol, article 12 onwards). The mutual assistance in recovery of claims is dealt with in article 20 onwards. A joint declaration

of the parties concerns Jersey and Guernsey (see [bit.ly/3rPwxuT](https://bit.ly/3rPwxuT)).

The EU legislation, Council Regulation (EU) No. 904/2010 of 7 October 2010 and Council Directive 2010/24/EU of 16 March 2010 applies by virtue of article 8 and Annex 3 of the Ireland/Northern Ireland Protocol.

## Unsurprisingly, tax forgone is a subsidy

### The level playing field

The level playing field provisions are in Heading One, Trade, Title XI. Chapter 3 contains articles controlling and prohibiting subsidies with exclusions in relation to fishing and agriculture and the audio-visual sector.

Unsurprisingly, tax forgone is a subsidy. Lawyers will need to identify ‘the normal taxation regime’ and the ‘general system’ (article LPFS.3.1.2(a) and (b)). EU lawyers will be reminded of the reference system under EU law.

In chapter 5 (“Taxation”) of Title XI, article LPFS.5.1 addresses tax good governance. This entails, amongst other things, a commitment to global standards on tax transparency, exchange of information and fair tax competition, along with support for the OECD BEPS action plan and other areas of cooperation. It is the global, not the EU, understanding of fair tax competition that is to be adhered to.

Article 5.2 contains a commitment not to weaken or reduce tax standards, as expressed in a party’s legislation at the end of the transition period, below the level agreed in the OECD at that time. This commitment is made in relation to exchange of information on matters such as cross-border tax rulings and planning arrangements and country by country reports between tax administrations, rules on interest limitation, controlled foreign companies and hybrid mismatches.

Also to be noted is the joint declaration on countering harmful tax regimes (see [bit.ly/2LgijSU](https://bit.ly/2LgijSU)).

### Conclusion

In five years, the TCA will be reviewed. After four years, it may be rebalanced. Shortly before then the opportunity for democratic consent arises under the Ireland/Northern Ireland Protocol, article 18. New inter-related debates over the TCA and the Protocol will commence very soon.

The House of Commons’ Committee on the Future Relationship with the European Union has said: ‘The Agreement is necessarily complex. It will take time for people to analyse it fully and understand its implications.’ (*The UK/EU Future Relationship: The Trade and Cooperation Agreement*, HC 1094, 30 December 2020, para 6 (see [bit.ly/2X51vRD](https://bit.ly/2X51vRD))). On that, at least, we can all agree. ■

For the text of the UK/EU Trade and Cooperation Agreement, see [bit.ly/2XazOGR](https://bit.ly/2XazOGR). For the summary, see [bit.ly/3n8dsAB](https://bit.ly/3n8dsAB). For the European Commission’s related questions and answers, see [bit.ly/2X5MRtl](https://bit.ly/2X5MRtl).

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