Trade & Cooperation Agreement between the EU and UK

pwc

Contents

Summary

The Trade & Cooperation Agreement ('TCA') came into provisional effect at 11pm GMT on 31 December 2020 and establishes the commercial and regulatory arrangements between the EU and the UK. The agreement is provisional upon ratification by the European Parliament which is expected by the end of February/early March.

The TCA sets out preferential arrangements in a number of areas. The most relevant from a tax perspective being trade in goods, trade in services, the digital economy, intellectual property, social security. It also contains arrangements to ensure a level playing field and maintain minimum standards in key areas of tax policy.

Set out below are summaries of the TCA's provisions in these key areas.

1. Customs and VAT

Headline takeaways

- The deal provides for movement of goods between the UK and EU to be tariff and quota free.
- The devil is in the detail, as the rules of origin will determine whether zero tariffs apply.
- Much more documentation will now be required so it is essential to understand what is required and to be able to provide it prior to moving goods.
- Facilitation schemes such as Authorised Economic Operators ('AEO') may become more valuable to traders in order to avoid the increased administrative burdens.
- As previously known, the UK will be treated as a third country by the EU for VAT purposes (and vice versa) and additional VAT registrations may be required.

More detail

- The UK left the Single Market and Customs Union at 11pm on 31 December 2020.
- At that point a Customs border ('Hard Border') was established between the UK and the EU, excepting Northern Ireland whose arrangements between the EU and Great Britain are dealt with in the Northern Ireland protocol.
- A Hard Border means, regardless of the tariff position, border control procedures will be in place and therefore traders will now need to make customs declarations, ensuring that they have classified and valued their goods, evidenced whether they have EU/UK origin and have prepared all the consequent paperwork to document their procedures.
- There are set out and agreed rules for the classification and valuation of goods under World Trade Organisation rules – GATT 1994 Art VII Customs valuation Agreement for valuation of imports.
- Movement of goods between the EU and the UK will be tariff and quota free if those goods are of EU/UK origin.
- Therefore, a key factor will be what constitutes EU/UK origin, this is governed by the Rules of Origin.
- There will be no duty on temporary imports for repair or repaired goods between the UK and the EU, regardless of origin, provided they are in free circulation in the country of export.
- Small consignments will not have to prove origin, origin can be declared.
  - A small consignment (per guidance 29 December) for imports into the EU are goods valued at less than €500, if sent in small packages between private individuals and, less than €1,200 if in travellers' personal luggage, for personal use (not B2B transactions).
  - For the UK, the definition includes all goods valued under £1,000.
  - These rules do not apply to goods which form a series of imports being made to avoid the normal rules.
- There is mutual recognition of AEOs and these will benefit from fewer safety and security controls at borders and therefore should enjoy speedier clearance times, particularly when trading in heavily safety and security controlled industries/products. In the future it is expected that the parties will agree on how to respect each other's AEO traders and simplify procedures, that each are likely to undertake post clearance audits and issue advance rulings valid for at least 3 years.
- The position on VAT remains as it has been understood for some time (primarily as a result of the almost certain involvement of the CJEU on VAT matters were any additional agreements to be made):
  - The UK (other than goods in NI) will be treated as a third country by the EU for goods and services, just as the EU countries will be third countries to the UK.
  - Additional VAT registration requirements will exist as a consequence of, for example, trading in goods on EU soil, or providing electronically supplied services to EU recipients.
  - Simplifications (e.g. triangulation and call of stock) are no longer available.
- There will be Mutual Assistance on customs and VAT matters including assistance with collecting each other's VAT and duties debts from traders established in their territories and information exchange to combat fraud.

2. Direct tax and tax policy

Rules of Origin ('RoO')

- To claim preferential origin and therefore, application of the zero tariff for movements between EU and UK, an exporter is required to obtain (from its supplier) a declaration as per the form in the Annexes to the TCA or, the importer can make a declaration based on its knowledge.
  - The declaration can be on an invoice or in a separate statement, is valid for 12 months or, for a longer time period if stated, up to 24 months.
  - A claim of preference is the responsibility of the importer and documentation should be retained by the importer for 3 years to evidence the claim.
  - Exporters should retain evidence to document statements of origin for 4 years.
- The UK, in guidance on RoO published 29 December, announced a 6-month temporary easement for imports into the UK (but not vice versa). Traders have until 30 June 2021 to submit full proof of origin with their import declarations. If evidence cannot be obtained, then the import declarations would need to be amended and any duties paid.
- Exporters have until 31 December 2021 before they need to produce evidence of origin at the point of export but may be asked to provide evidence retrospectively to cover exports for 2021.
- To be considered goods of EU or UK origin and qualify for the zero-duty preferential tariff products must either be:
  - Wholly obtained in either EU/UK (i.e. grown, reared, mined or caught); or
  - Substantially transformed by production or manufacture in either, in line with the relevant Product Specific Rules (PSRs).
  - Materials originating from the UK or EU may be considered as originating in the UK or EU when used in production in the other territory. For example, EU goods used in production of goods in the UK will be considered to have UK origin. Therefore, if the finished goods are exported to the EU, they qualify for UK preferential origin without the need to consider the PSR's (providing they have no non originating material content e.g. parts or materials from a third country).
  - The above applies to movements between the UK and the EU only. This rule does not apply for exports from the UK or EU to a third country. In the example above, the EU goods incorporated in the goods produced in the UK would be considered as non originating material if the goods were exported from the UK to a third country (e.g. the US). In order to establish whether such goods would qualify for preferential origin at import into a third country export market, the Free Trade Agreement origin rules between the UK and the export market would need to be reviewed and met.
  - PSRs, tolerances and 'insufficient production' lists are included in the Annexes to the TCA.

Headline takeaways

- The minimum standards for key tax policy measures will be those set by OECD as at 31 December 2020.
- There is a requirement to bring in a system of subsidy control to avoid distortion in the market – e.g. measures like EU State Aid rules.

More detail

- The agreement is binding on the two parties but is stated not to have direct effect so it appears that a company cannot rely on the provisions unless and until implemented into domestic law.
- EU directives no longer apply to payments to the UK, meaning WHT may now be suffered on some payments of dividends, interest and royalties to the UK. However, the UK has incorporated the Interest and Royalties Directive (IRD) into UK law in a way that doesn't rely on the UK being a member of the EU for it to continue to be effective, so UK companies will therefore continue to be able to make payments of interest or royalties without deducting WHT in circumstances where the IRD would have applied by UK companies.
- There is a commitment not to go below OECD standards (as they stood at the end of transitional period) in the areas of exchange of information, CFC rules, hybrids rules and interest limitations. An immediate practical consequence of this was the HMRC announcement on 31 December 2020 that Regulations had been issued in relation to the UK's Mandatory Reporting Rules ('MDR') which removed the reporting obligation for all hallmarks other than the D hallmarks. This is on the basis that OECD BEPS Action 12 Final Report only recommended MDR rules equivalent to the D hallmarks.
- There is a commitment to countering harmful tax regimes in a joint political declaration. The definition of harmful tax regimes draws on the OECD (and code of conduct) principles. Given the UK is already committed to abide by OECD rules, this is really just enunciating current UK policy.
- There is a requirement to introduce subsidy controls, subsidies can include beneficial tax treatments. The proposed subsidy controls draw heavily from state aid principles, whether they provide a bit more leeway remains to be seen. This should not affect the current proceedings before the Court of Justice of the European Union in respect of the UK CFC provisions as that relates to pre-Brexit rules.
- The dispute resolution procedure in relation to breaches of subsidy controls is independent arbitration with the ultimate remedy available to an aggrieved party being suspension of the relevant provisions of the agreement sufficient to nullify any breach.
- There are provisions that require cross border investments to be treated no less favourably than domestic investments. In this regard it will be necessary to consider further the extent to which these provisions apply to tax treatment e.g. would they provide a basis to argue that states cannot impose cross border dividend WHT?
- Most favoured nation provisions in relation to investment specifically do not apply to Double Tax Treaties.

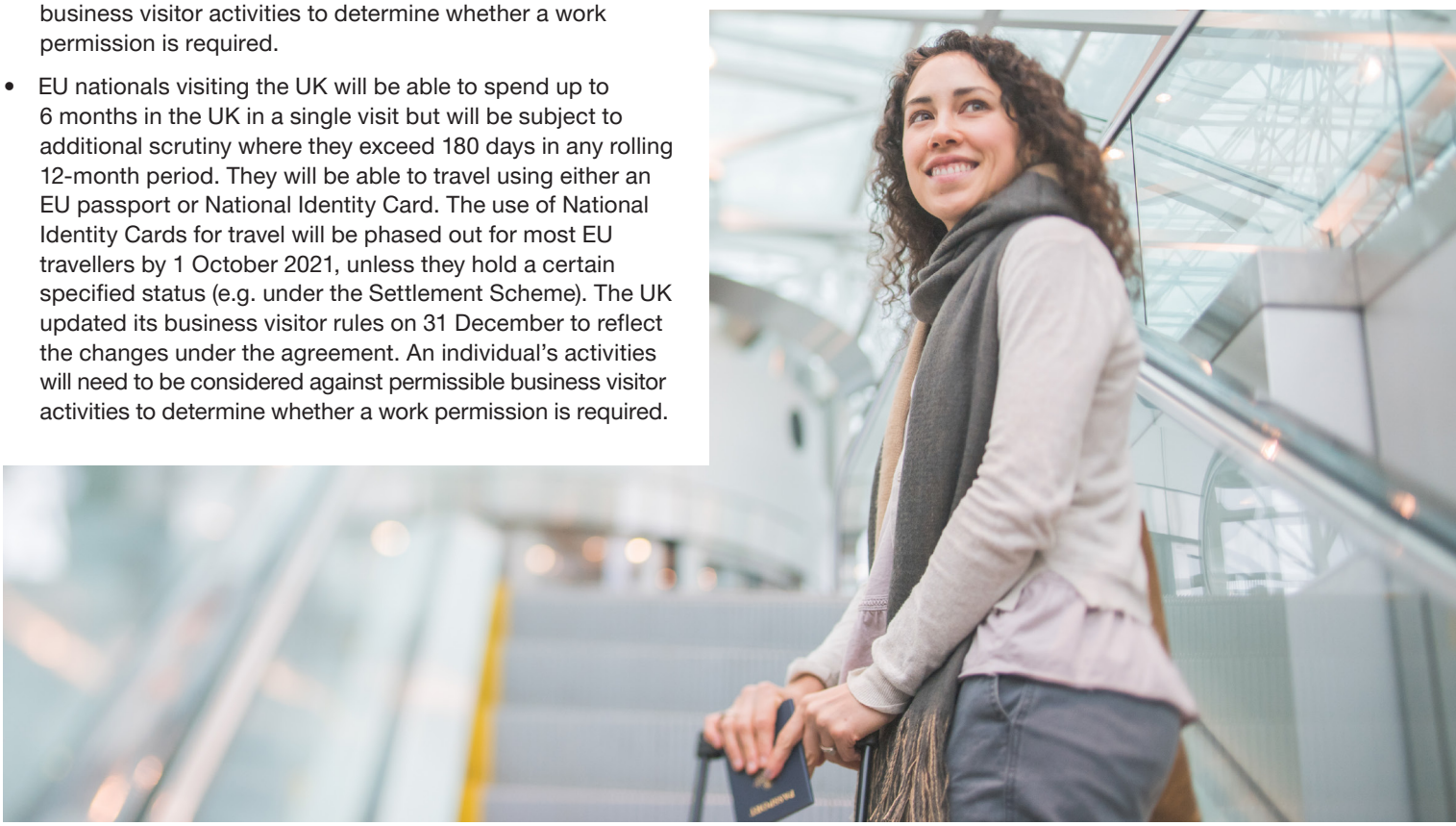
3. Immigration and social security

Headline takeaways

- The TCA contains no significant detail in relation to immigration as that is dealt with and agreed at a Member State level.
- The TCA does contain provisions covering social security arrangements and elements in relation to short-term business visitors, intra-corporate transferees, contractual service suppliers and independent professionals.

More detail

- The UK's new immigration system applies to all EU nationals moving to the UK from 1 January 2021 (who are not covered by the Withdrawal Agreement). Individuals who do not qualify in a personal capacity (for example as a spouse/partner of a UK national) will require visa sponsorship from a registered employer. The individual will need to meet the relevant skills and salary thresholds for the particular visa category and/or role they are undertaking. The new system has already been in place for non-EU nationals since 1 December 2020. Individuals covered by the Withdrawal Agreement will have until 30 June 2021 to submit an application under the Settlement Scheme.
- UK nationals travelling to the EU will need a valid passport with at least 6 months remaining until expiry. UK nationals will be able to travel to the Schengen Area for 90 days in a 180-day period (business visitor and personal travel) and there will be additional border checks. An individual's activities will need to be considered against the permissible business visitor activities to determine whether a work permission is required.
- EU nationals visiting the UK will be able to spend up to 6 months in the UK in a single visit but will be subject to additional scrutiny where they exceed 180 days in any rolling 12-month period. They will be able to travel using either an EU passport or National Identity Card. The use of National Identity Cards for travel will be phased out for most EU travellers by 1 October 2021, unless they hold a certain specified status (e.g. under the Settlement Scheme). The UK updated its business visitor rules on 31 December to reflect the changes under the agreement. An individual's activities will need to be considered against permissible business visitor activities to determine whether a work permission is required.
- A non-discrimination clause will ensure 'equal treatment of EU citizens for short-term visas'. In practice, this appears to mean that where the UK introduces new rules for business travellers from one Member State, these will apply equally to nationals of all Member States (this is in line with existing EU rules).
- The agreement contains a number of social security coordination measures aimed at protecting the entitlements of EU citizens temporarily staying in, working in or moving to the UK after 1 January 2021. This applies equally to UK nationals working in EU member States.
- From 1 January 2021, the current EU coordination rules on social security have been replaced by the Protocol on Social Security Coordination. This will ensure that individuals who move between the UK and the EU after 1 January will have access to reciprocal healthcare cover.
- The Protocol also ensures that cross border workers and their employers are only liable to pay social security contributions in one state at a time. Generally, this will be in the country where the work is undertaken, however there are also provisions governing multi-state workers and detached workers posted for up to 24 months. It should be possible to obtain a certificate confirming the country of liability for multi-state workers and detached workers, although in the latter case this is normally only possible where the EU Member State has agreed to apply the 'detached worker' rules.



4. Data protection

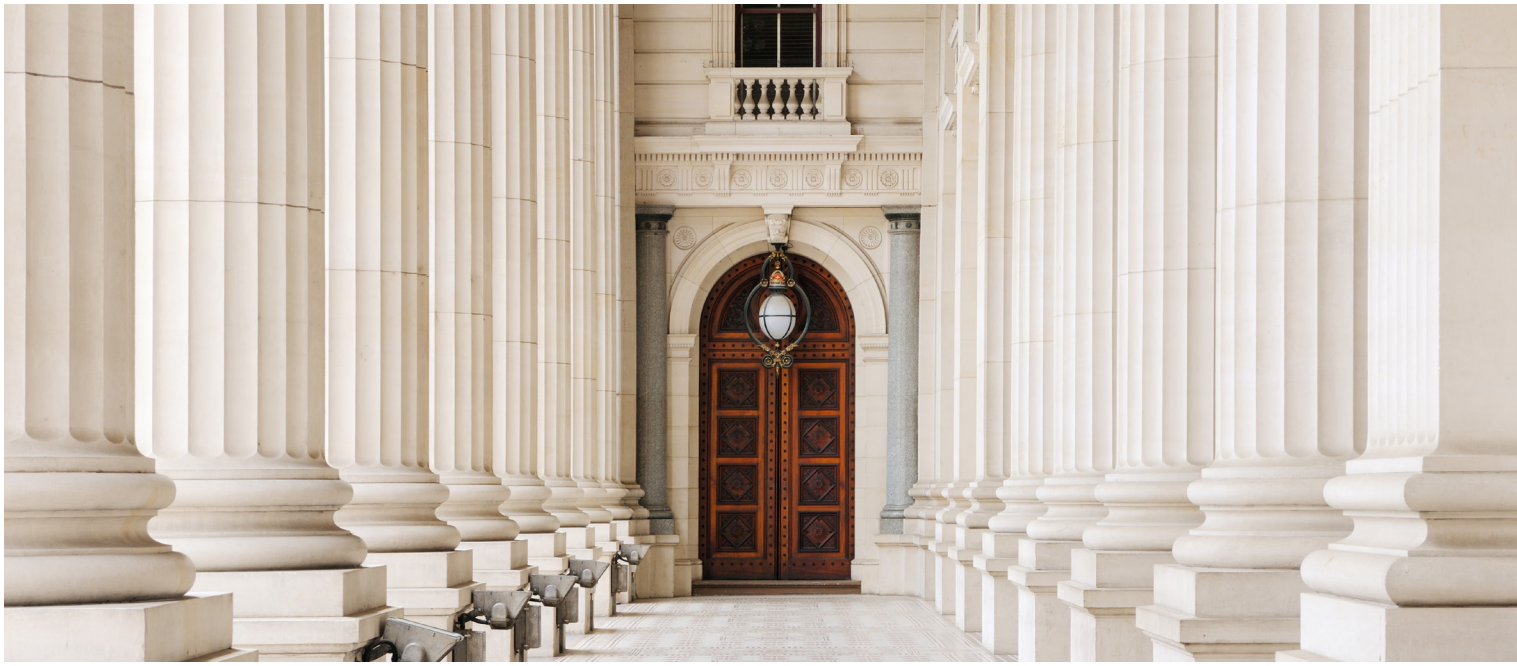
Headline takeaways

- The EU's assessment of the UK's data protection regime (the adequacy assessment) has not yet been concluded.
- The TCA grants an extension for personal data to continue to flow from the EU & EEA to the UK for an initial period of 4 months (extendable to 6 months) or until the adequacy assessment is completed, whichever is sooner.
- This extension does not necessarily mean that the UK will be granted adequacy status and therefore businesses should ensure they have undertaken a risk assessment of the consequences of adequacy status not being granted.
- For flows of data from the UK to the EU, the UK treats all EEA jurisdictions as adequate.

More detail

- The TCA includes provision for personal data to continue to flow from the EU & EEA to the UK for an initial period of 4 months (which can be extended to 6 months) or until the adequacy assessment is completed, whichever is sooner.
- This provision is conditional on the UK keeping its data protection laws as they currently stand. It also imposes other restrictions on the UK's activities including for example, not approving any new Binding Corporate Rules or drafting any new standard contractual clauses, without the approval of the EU.
- This extension does not necessarily mean that the UK will be granted adequacy status so organisations should make sure that they have a clear understanding of the flows of personal data both into and out of their organisation. They should undertake a risk-based assessment to identify any data flows from the EU to the UK which would negatively impact their business if halted following a negative adequacy decision and they should take immediate steps to protect these flows.
- The TCA does not refer to data transfers from the UK to the EU, however the UK Information Commissioner's Office ('ICO') regards all EEA members states as adequate and therefore the status of such transfers should not alter.
- Whether or not adequacy status is granted to the UK, businesses need to undertake certain key actions, including:
  - assessing whether an EU supervisory authority should become your lead supervisory authority if you are a UK-based controller or processor carrying out processing of personal data across EU borders, and your current lead supervisory authority is the ICO,
  - appointing a representative in the EEA if you are a UK-based organisation targeting goods or services to, or monitoring, individuals in the EU, or
  - the appointment of a representative in the UK if you are an EU based organisation targeting goods or services to, or monitoring, individuals in the UK.

5. Governance framework and dispute resolution



- TCA establishes a series of bodies to undertake the governance of its terms, each of which are co-chaired by representatives of the EU and UK.
- The main bodies are;
  - The Partnership Council co-chaired by the UK and EU at ministerial level will oversee the TCA, including any issues relating to its implementation, application and interpretation;
  - The Trade Partnership Committee which will assist the Partnership Council and supervise the Trade Specialised Committees (see below);
  - The Trade Specialised Committees – there will be ab initio 10 Trade Specialised Committees and 8 Specialised Committee which will focus on specific areas.
- Decisions will be made by mutual agreement in each of these bodies.
- There will be no role for the CJEU in dispute resolution.
- The main process for enforcement and dispute resolution will be two-step (i) consultation phase to be conducted via a Specialised Committee or the Partnership Council and if no resolution found, (ii) referral of the issue to an arbitration tribunal.
- The UK or EU may also, under certain circumstances, take safeguarding measures including the re-imposition of tariffs.
- Separate enforcement and resolution procedures apply for the level playing field provisions, including the rules on subsidy control. These permit suspension of obligations within the TCA and also the use of rebalancing measures, although the latter need to be both proportionate and time limited.

6. Other areas

Northern Ireland

- Northern Ireland remains subject to the provisions in the Northern Ireland Protocol agreed between the UK and the EU.
- On this basis Northern Ireland remains within the EU Single Market and a customs and regulatory border is in place between Northern Ireland and Great Britain.
- Consequently, the provisions of the TCA do not impact the trade of goods between Northern Ireland and the EU.
- As far as the trade of services is concerned, the position of Northern Ireland will be identical to that of the rest of the UK.

Services

- The TCA does not contain provisions replicating the single market's freedom of movement, establishment and provision of services.
- Financial services are not covered in any detail by the TCA. There are no equivalence decisions or the mechanics by which such are to be made within the TCA. However in the separate joint declaration both sides agree to seek to reach an agreement on a way forward in respect of equivalence decisions in future.
- UK financial businesses can no longer exercise EU passporting rights to provide services in the EU (and vice versa).
- There are non-discrimination provisions which mean that inbound investors and businesses cannot be treated less favourably than local investors and businesses.
- There can be no requirements that a service provider is established in the country where the services are provided.
- There is a most favoured nation provision which requires that if the UK or EU offer investors or businesses from another country more favourable terms with respect of establishment, such terms must be offered to investors or businesses from the UK/EU.

Mutual recognition of professional qualifications

- The TCA does not offer EU-wide mutual recognition of professional qualifications.
- There are provisions that permit for the future recognition of such qualifications on a profession by profession basis.
- In the absence of such measures, individual Member State requirements will need to be met.

Product conformity

- The TCA does not include any mutual conformity recognition standards for products. This will mean that for most products they will need to conform to separate UK and EU standards if they are to be sold in both markets.
- There are simplified rules for certain sectors – e.g. chemicals, motor vehicles and parts, organic products, wine.
- Simplification measures such as self-certification, are available in certain circumstances.

Intellectual property

- The TCA provides for high standards of protection for, and enforcement of, IP rights.
- There are non-discrimination provisions to ensure no less favourable treatment given to the nationals of the UK by the EU than it gives its own nationals and vice-versa.
- There are detailed provisions covering registration, and protection of (i) copyright and related rights; (ii) trademarks; (iii) design; (iv) patents; (v) undisclosed information; and (vi) plant varieties.

2021-01-11_RITM4422628