The EU-UK Trade and Cooperation Agreement: what does it mean for consumer protection and product liability?

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After months of negotiation, the EU-UK Trade and Cooperation Agreement ("TCA"), agreed in principle on 24 December 2020, is to govern trade and services between the UK and EU from 1 January 2021. Whilst the predominant focus is on the continued absence of tariffs or quotas on goods traded between the UK and EU provided those goods meet the rules of origin, for many other key areas it is a framework for more substantial future agreements. In this alerter, we explore the key features of the TCA in relation to product liability and consumer protection.

Introduction

1. On 1 January 2021, the UK left the EU Single Market and Customs Union and all EU policies and international agreements.[1] The UK lost all the rights and benefits as an EU member state, and it ended the free movement of persons, goods, services, and capital with the EU. As a result, the UK is now a 'third country' and the EU and UK will form two separate markets – two distinct regulatory and legal spaces.

2. The TCA, which was agreed in principle on 24 December 2020, now governs the UK's relationship with the EU (subject to formal ratification)[2]. The TCA is strictly

[1] This is subject to the Northern Ireland Protocol, under which there will be no new checks on goods crossing the border between Northern Ireland and the Republic of Ireland. This means that Northern Ireland effectively remains in the EU's single market for goods, and goods can flow from Northern Ireland to the Republic of Ireland (and elsewhere in the EU) without customs checks or tariffs, as they did previously.

[2] As the European Commission deemed the TCA an EU-only agreement (i.e., all aspects of the agreement are within EU competence), ratification by the European Parliament will be sufficient and individual ratification by each Member State is not required. In the UK, the TCA is implemented by the European Union (Future Relationship) Act 2020, which received Royal Assent on 31 December 2020. Section 7A of the Withdrawal Act 2018 also provides for the TCA to have direct effect in the UK without further enactment.

an international agreement meaning the interpretation of it is to be governed only by international law principles and not by the "*domestic law of either party*."[3] There is no role for the European Court of Justice and no requirements for the UK to continue following EU law. The TCA is of indefinite duration, but subject to review every five years.

3. The various provisions of the TCA are categorised by the European Commission as providing four major pillars of cooperation: (i) a free trade agreement; (ii) economic, social, and environmental cooperation in areas of mutual interest; (iii) a close partnership for citizens' security; and (iv) an overarching governance framework. The focus of this alerter will be on the first two of these pillars.

I. A new free trade area – free, fair and sustainable trade

4. Although trade with the EU will no longer be seamless like it was under the Single Market, the TCA is an exceptional agreement in creating a free trade area of "*unprecedented ambition*". This will provide significant benefits to both sides compared to trading under World Trade Organisation ("**WTO**") terms. While cross-border traders will notice more friction and restrictions, the TCA goes quite some way to preserving the flow of trade in goods. This is covered in Part 2, Heading 1, Title I of the TCA.

a. Zero tariffs for goods meeting the rules of origin

5. First, the TCA provides for zero tariffs and zero quotas on trade between the UK and EU where goods meet the relevant rules of origin (to which, see below).[4] This goes beyond recent EU free trade agreements with countries such as Canada and

[3] Part 1, Title II, Article 13 of the TCA.
[4] Part 2, Chapter 1.

Japan and is in fact the first time the EU has agreed a zero tariff deal with any trading partner. It is particularly important for sensitive goods, such as agricultural and fishery products. Without the TCA, exports of some meat and dairy products would have been hit by a tariff of above 40% under WTO rates, and cars would have been hit by a tariff of 10%.

6. To benefit from the no-tariffs provision, a product must originate in the UK or EU.[5] This ensures that trade preferences under the TCA benefit EU and UK operators only. Traders are also permitted to self-certify the origin of the goods which is intended to reduce the administrative burden. As to determining a product's origin, the TCA provides for a number of ways to do this and different methods are applicable to different kinds of product.

    a. The TCA allows for full bilateral cumulation for both materials and processing (i.e., materials originating in the EU which are then incorporated into a UK product are deemed to be UK-origin materials and vice versa).[6]

    b. As to cross or diagonal cumulation (i.e., using material from third countries but maintaining UK or EU origin for the end product), either:

        i. Under Article 3(1)(c),[7] products produced in the UK or EU incorporating non-originating materials are included in the preferential tariff treatment, provided they satisfy specific rules of origin set out in Annex 2; or

        ii. Under Article 3(2),[8] products can acquire "*originating status*" which means the non-originating materials used in the production of that

[5] Chapter 2 under Title 1 of Part 2.
[6] Article 4(1) of Chapter 2, under Title I of Part 2.
[7] Chapter 2, under Title 1 of Part 2.
[8] *Ibid*.

product shall not be considered as non-originating when that product is incorporated as a material in another product; and

iii. Article 4 of Chapter 2[9] provides that production carried out in a party on non-originating material may be taken into account for the purpose of determining whether a product is originating in the other party. However, Article 3 provides that this paragraph is subject to the rules that apply in relation to insufficient production in Article 7. Article 7, titled "Insufficient Production", lists what that includes as, *inter alia*: breaking-up or assembly of packages; simple painting; sharpening, simple grinding, or simple cutting; simple packaging operations like placing in bottles, cans, bags, cases, or boxes; affixing or printing marks, labels, logos on products or their packaging; simple mixing of products whether or not of different kinds; and slaughter of animals. For these purposes, operations are considered "*simple*" if "*neither special skills nor machines, apparatus, or equipment especially produced or installed are needed for carrying out those operations*".

c. The TCA also provides for "*wholly obtained products*" under Article 5[10] which are considered to as wholly obtained in either the UK or EU. These include: mineral products extracted or taken from its soil; plants and vegetable products grown or harvested there; live animals born and raised there; products obtained from live animals raised there; products of sea fishing and products taken from the sea outside any territorial sea by a vessel of a Party.

[9] *Ibid.*
[10] *Ibid*.

d. The importer is responsible for the correctness of a claim for preferential tariff treatment and for compliance with the requirements of the TCA. A claim for preferential treatment can be based on:[11] (a) a statement on origin that the product is originating made out by the exporter;[12] or (b) the importer's knowledge that the product is originating.[13] A claim can be made within three years after the date of importation, and granted by the importer, if the product would have satisfied all other applicable requirements as at the time of importation.[14] For a minimum of three years after the date of importation, an importer making a claim shall keep records of either the statement on origin or records of the importer's knowledge.[15]

e. Finally, there are exceptions to the rules under Articles 18-21 for 'small consignments' including those of a small size, monetary value, and for personal use.[16]

7. These provisions mean that, practically, for example at least 55% of the materials making up a car must originate from the UK or EU for it to be imported tariff-free. These provisions will affect in particular businesses dependent on international supply chains who will need to assess the impact for them of the rules of origin.

b. Simplified customs procedures

[11] Article 18, Section 2 of Chapter 2 under Title I of Part 2.
[12] Article 19, Section 2 of Chapter 2 under Title I of Part 2.. The statement shall be made "*on the basis of information demonstrating that the product is originating, including information on the originating status of materials used in the production of the product*", it shall be made using one of the prescribed language versions, and in an invoice or on any other document that describes the originating product in sufficient detail. A statement of origin can apply to a single shipment of one or more products imported into a Party, or multiple shipments of identical products within the period specified in the statement of origin.
[13] Article 21, Section 2 of Chapter 2 under Title I of Part 2.
[14] Article 18a, Section 2 of Chapter 2 under Title I of Heading 1 of Part 2.
[15] Article 22, Section 2 of Chapter 2 under Title I of Heading 1 of Part 2.
[16] Article 23, Section 2 of Chapter 2 under Title 1 of Heading 1 of Part 2.

8. Second, customs procedures will be simplified. Notwithstanding checks will apply to all goods traded because the UK has left the Customs Union (even if no tariff is payable), and businesses importing or exporting goods will need to register or instruct a customs agent on their behalf, both Parties have agreed to recognise each other's programmes for trusted traders (called "Authorised Economic Operators").[17] This will enable streamlined procedures for registered traders. The AEOs assessed and recognised under either the UK or EU scheme will face fewer controls relating to safety and security when moving their goods between the UK and the EU.

9. It remains to be seen the extent to which these procedures will speed up the delays and assist with costs for supply chains. The UK has provided a transitional period until 1 July 2021 with extended deadlines for paperwork to be filed on imports to the UK. Increased delays may therefore be felt in July 2021 when that period ends.

c. *Reducing technical barriers to trade*

10. Third, as to product conformity standards, there is no cross-recognition of conformity standards and products will have to undergo two separate conformity assessment processes in order to be validly placed on both the EU and UK markets.[18] One result of this, for example, is that the UK has introduced its own product safety mark ('UKCA': UK Conformity Assessed mark) broadly mirroring the EU's CE mark. Subject to a grace period, the UKCA mark will need to be used on products placed on the Great Britain market. Whilst most CE marked products can continue to be lawfully placed on the Great Britain market until 1 January 2022, the UKCA mark will not be recognised in the EU and any products placed on the EU market will require CE marking irrespective of whether they are UKCA marked.

[17] Article 2, Chapter 5 under Title 1 of Heading 1 of Part 2; and Annex Custms-1.
[18] Article 6, Chapter 4 under Title 1 of Heading 1 of Part 2.

11. But the TCA prevents some unnecessary technical barriers to trade ("**TBT**") by simplifying arrangements in Chapter 4 under Title I of Part 2. This Chapter builds on the WTO TBT agreement and provides for:

    a. self-declaration of regulatory compliance for low-risk products;

    b. facilitations for other specific products of mutual interest (e.g., wine, motor vehicles, pharmaceuticals, and organic products) (see below); and

    c. allowing labelling to take place (in most cases) in the country of import rather than the country of origin.

12. However, all UK goods entering the EU will still have to meet the EU's regulatory standards, including in food safety and product safety. The TCA envisages arrangements to share information on dangerous and non-compliant products on both the UK and EU markets. The Parties have also agreed to a definition of international standards which identifies the relevant international standard-setting bodies.

13. The TBT Chapter of the TCA includes a number of sector-specific Annexes which seek to promote cooperation and remove barriers to trade in various sectors.

    a. Annex I on motor vehicles and equipment and parts thereof. The objective of this Annex is to "*eliminate and prevent any unnecessary technical barriers to bilateral trade*". It confirms the Parties will mutually recognise approvals based on UN regulations and "*refrain from introducing or maintaining any domestic technical regulation*". If introduced, the domestic regulations must "*substantially diverge*" from UN regulations and that divergence be justified. A Party cannot refuse or restrict the access to its market of a product with a new technology unless the technology creates a specific risk. The Annex also establishes dedicated cooperation mechanisms to address regulatory barriers including information exchange to support activities.

b. Annex 2 on medicinal products. This Annex has the aim to "*facilitate the availability of medicines*", "*promote public health*" and "*protect high levels of consumer and environmental protection*" between the parties "*by promoting regulatory approaches in line with the relevant international standards*". It provides for mutual recognition of Good Manufacturing Practice ("**GMP**") inspections and certificates, meaning manufacturing facilities do not need to undergo separate UK and EU inspections, as well as ongoing regulatory cooperation. This is however subject to certain safeguard and suspension provisions – each Party has the right to suspend totally or partially the recognition of inspections and acceptance of official GMP documents of the other Party.

c. Annex 3 on chemicals. This Annex seeks again to "*facilitate the trade of chemicals*", "*ensure high levels of protection for the environment and human and animal health*" and provides for cooperation between authorities. It includes joint commitments to a comprehensive implementation of international classification and labelling rules, as well as ongoing cooperation and information exchange. These commitments do not prevent either Party from setting its own priorities on chemicals regulation.

d. Annex 4 on organic products. The objective of this Annex is to set out provisions and procedures for "*fostering trade in organic products*": provision is made for an equivalence agreement between the UK and EU. Products certified as organic in one market will be recognised as organic in another. There are also benefits such as upholding the integrity of our organics production and control systems and working together for the future development of organic standards.

e. Annex 5 on trade in wine. This Annex predominantly provides for streamlined certification, documentation, labelling and packaging

requirements for the import of wine produced in the other Party, which will reduce costs for both exporters and consumers.

II. The 'level playing field' and UK-EU cooperation

14. The UK and EU have agreed a number of principles intended to provide a 'level playing field' in the way that UK and EU businesses are regulated. The more important features (which we will not address in detail) are provisions on the regulation of competition law, state subsidies, employment rights and environmental protection. These are not all treated in the same way: the strictest and most detailed rules are in respect of the latter two. Pursuant to these provisions, if one Party imposes higher standards of protection which materially impact trade or investment in these areas, and the other does not, it can adopt "*appropriate rebalancing measures*" in respect of the other Party. This should mean the other Party does not gain a competitive market advantage if that Party fails to match the other's increasing regulatory standards i.e., the measures offer an economic disadvantage against a divergence of standards and seek to avoid a 'race to the bottom'.

15. Furthermore, the TCA forms "*the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation*" (Article COMPROV.1). It provides for EU and UK authorities to cooperate in a number of other areas, for example facilitating customs arrangements where possible. Interestingly, the European Commission has chosen Article 217 of the TFEU as the legal basis for the conclusion of the Agreement, believing that the TCA only covers areas under EU competence. This EU-only focus distinguishes the TCA from the Canada-style trade agreement and shows that it is perhaps a more unique new association between the EU and UK. The TCA can integrate supplementing agreements where required (Article COMPROV.2) and commits both Parties to acting with "*full mutual respect and good faith*" in "*carrying out the tasks that flow from this Agreement*" (Article COMPROV.3).

16. In addition, the rebalancing measures explained above reinforce an unprecedented dimension to regulatory cooperation by imposing intimate mutual regulatory monitoring. This has been included because the UK's stated aim is to diverge from the EU, whereas most trade agreements usually focus on areas of convergence. The rebalancing measures are intended to help manage this process of divergence by allowing the TCA to be adjusted in response to significant changes. They are, however limited to divergences in the areas listed above. In relation to other areas covered by the agreement, the parties would have to turn to the general dispute resolution mechanisms. These are provided for in Title I of Part 6 of the TCA, under which an arbitration tribunal may be established in order to resolve the dispute.

III. Consumer Protection

17. Under the TCA, the UK and EU commit to adopting certain measures to protect consumers in relation to e-commerce transactions[19] and air transport[20]. Beyond this, the TCA does not impose any specific constraints on the UK's future policy as regards consumer protection and, if a reasonable level of protection is maintained, the TCA is unlikely to constrain either party from pursuing a particular approach to consumer law. Also, the TCA does not seek to preserve UK participation in any of the cross-border enforcement mechanisms of the EU's consumer protection regime such as the European Small Claims court. The Competition and Markets Authority could seek to agree these enforcement mechanisms, but they will be more limited in scope and would not be put in place for some time.

18. The UK cannot deregulate in either of these areas in a radical way or leave consumers with substantially less protection. The aviation provisions, for example, require compensation or reimbursement for denied boarding, cancellations, or

[19] Article DIGIT.12 of Chapter 3 under Title 3 of Heading 1 of Part 2.
[20] Article AIRTRN.20 under Title 1 of Heading 1 of Part 2.

delays. There are also numerous references to consumer law measures in the TCA meaning that both the UK and EU expect a reasonably high level of protection.

19. The Consumer Protection Act 1987 continues to retain the primary framework for the determination of civil liability and regulatory obligations within the UK, and EU jurisprudence will continue to provide relevant guidance on the interpretation of the CPA.[21] This is however subject to the provisions of the Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019, which were originally intended to provide for a UK regulatory regime in respect of non-food products should the UK leave the EU without a deal, with effect from 31 December 2020. This SI remains in force presently and for the moment therefore continues to modify the relevant legislative provisions on product safety.

20. Schedule 3 of the 2019 Regulations contains the amendments to the Consumer Protection Act 1987. This provides that "the United Kingdom" is to be substituted for the references to "a member state" and "member States" in section 2(2)(c) of the Consumer Protection Act 1987 (liability of importers of a defective product).

21. Further, the 2019 Regulations amend the defence provided for in section 4(1)(a) of the CPA (defect attributable to compliance with enactment or EU obligation), which now applies to compliance with a "retained" EU obligation.

22. Schedule 9 of the 2019 Regulations also amend the General Product Safety Regulations 2005, along the same lines as the amendments to the CPA: a relevant importer of a product is now one who is established in the United Kingdom and places a product from a country outside the UK (rather than from outside a Member

[21] Section 6 of the European Union Withdrawal Act 2018 provides that EU case law will remain binding on the UK courts when EU law is litigated; post-Brexit EU case law is not binding but courts may "have regard" to this. The Court of Appeal and the Supreme Court may also overturn binding pre-Brexit case law if they consider it is "right to so".

state) into the UK (rather than into a member State). Similarly, a relevant enactment includes any retained EU law.

23. There are various other provisions of secondary product safety legislation that are amended by other Schedules in the 2019 Regulations. See, for example, Schedule 12 on the Supply of Machinery (Safety) Regulations 2008; Schedule 15 on the Toys (Safety) Regulations 2011; Schedule 23 on the Electrical Equipment (Safety) Regulations 2016.

IV. Conclusion

24. Although there has been a significant focus on the 'prize' in the TCA of zero tariffs and quotas on goods which meet the rule of origin, suppliers will need to prove that their goods "*originate*" in the UK or EU which will not always be straightforward. In the future, this may result in permanent changes to UK supply chains. Further, the TCA contains limited provisions for the UK and EU authorities to cooperate on the regulation of goods and product standards. Save for the exceptions in the sector-specific Annexes (such as medicinal products), businesses for the most part will need to comply with two different regulatory systems if trading in both. Both sides do, however, broadly commit to using international standards as a basis for technical regulations except where these would be ineffective or inappropriate.

25. As to consumer protection, the TCA does not seem hugely ground-breaking.

26. The more ambitious innovations are the commitments to cooperation and the rebalancing procedure under the level playing field provisions. From the starting point of deeply integrated markets, the TCA controls the way they may diverge in future.

27. Ultimately, the TCA recognises that important questions remain unanswered and it mandates that the implementation of the agreement will be reviewed every five

years. The framework is flexible and amenable to review depending on whether the EU and UK will progress to reconverge or diverge in the years ahead.

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