



Orientation Guide Trade and Cooperation Agreement EU – UK

Dr. Hermann Knott, LL.M. (UPenn), Rechtsanwalt and Attorney-at-Law (New York), Partner, KUNZ Lawyers

1. Introduction

Since January 1, 2021, the United Kingdom has been an external trading partner of the other 27 EU member states. Since the end of the transition period at the end of the year, the country has left the EU single market and the EU customs union. What was previously intra-EU trade has now become import and export trade. It is the first time in the history of the EU that a member has left the union. This has made the process of separation more difficult than when two unrelated countries enter into a trade agreement. The model for the Trade and Cooperation Agreement (TCA) was CETA, the EU's comprehensive trade agreement with Canada concluded in 2017.

Compared to the length of time it took to negotiate other free trade agreements (e.g., it took five years for CETA) and given the complexity arising from the common past, the time of only ten months to prepare the agreement was very short. As a result, the United Kingdom is now the largest partner of the EU whose economic relations are based on a free trade agreement.

For our clients and business associates, we would therefore like to provide an overview of the most important provisions of the TCA for companies and the action points that need to be taken. We have **highlighted in bold** the points where action is required or where it is necessary to check whether preparatory measures already taken need to be adapted.

Just to give the reader an idea of the wide range of topics covered in the TCA, the main ones are briefly listed: It covers trade in goods and services, digital trade, intellectual property, public procurement, air

and road transport, energy, fisheries, social security coordination, law enforcement and cooperation in criminal matters, cooperation on specific issues, and participation in Union programs.

In the following, we would like to address key aspects that are relevant for a company doing business with the United Kingdom. The key point is that the four fundamental freedoms on which the EU is based (persons, goods, services, capital) no longer apply in the relationship with the United Kingdom. In other respects, too, EU law ceases to apply in relation to the United Kingdom. Insofar as the EU legal norms have been transposed into national English law, they remain effective. However, the European Court of Justice no longer has jurisdiction over the United Kingdom. In the future, therefore, standards that are identical today can not only be amended in the United Kingdom, but also interpreted differently than in Europe.

The TCA does not provide for any obligation on the part of the United Kingdom to adopt future EU standards, but contains declarations of principle in many places. However, there are sanction options, such as punitive tariffs, and dispute resolution mechanisms that intervene in the event of what one party sees as significant deviations. Potential disputes are therefore pre-programmed by possible future deviations from today's common standards.

2. Focus areas

2.1. Trade with Goods

Under the TCA, there are neither customs duties nor quotas in trade between EU member states and the United Kingdom. However, border controls

and **declarations of conformity of goods and for customs purposes, including certificates of origin**, are required under it.

However, goods imported from the UK are only duty-free if they contain a minimum of British products, as evidenced by certificates of origin.

The products must comply with the standards of both partners. Today, they are still harmonized from the immediate common past. The TCA does not oblige the parties to maintain similar standards in the future.

Given the increasing scope of customs-related obligations arising from the UK's withdrawal from the EU, supply chain participants should consider applying for Authorized Economic Operator (AEO) status. It is expected to provide early approval for compliance with the new UK customs regime post-Brexit.

For customs purposes, EU suppliers **must apply for EORI (Economic Operators Registration and Identification) numbers, for imports into/ exports from the UK a GB number, for imports into/exports from the EU a number referring to a country in the EU**. The EORI numbers are used to identify an operator for customs purposes.

Suppliers should familiarize themselves with the appropriate **outbound and inbound customs documentation for shipments on or after 01/01/2021** – otherwise the goods cannot be exported or may get stuck in customs at the point of import.

Suppliers must **choose the correct standardized commodity code (customs number) for all their products**. An incorrect choice may result in the wrong tariff being applied or the goods being blocked by customs.

Suppliers should also **review their trade terms (e.g., Incoterms) to determine if they or their customers are responsible for paying customs duties**.

2.2. Level playing field: standards

If the standards differ significantly, i.e. if the level playing field should not be maintained (the often mentioned „level playing field“), then the aggrieved party can introduce restrictions on the access of the products concerned to the European market (e.g. tariffs). The TCA then provides for a compensation mechanism through arbitration. There is no jurisdiction of the European Court of Justice over the United Kingdom, nor is the United Kingdom subject to EU law.

2.3. Level playing field: state aid

The United Kingdom is no longer bound by EU state aid rules and will therefore have its own system. The granting of state aid on an unfair basis can be challenged in the courts of the country in which the aid is granted. Tariffs can be imposed unilaterally, which can then be challenged before a tribunal of arbitration.

2.4. Unilateral balancing measures

Each bloc is entitled to implement unilateral compensatory measures in the event of significant deviations in the areas of labor and social affairs, environmental or climate protection or subsidy control. Substantial divergences in this sense exist if they substantially affect trade or investment between the contracting parties.

2.5. Rules of origin

The rules of origin ensure that only goods originating in the contracting states to the TCA benefit from, for example, zero tariffs. The TCA provides for cumulation, i.e. material used from the other block fulfills the origin requirement. **The exporter is obliged to present a certificate of origin at the border inspection.**

2.6. Value added and excise taxes

The VAT regime changes fundamentally, as sales within the EU will in future be treated as exports in

the country of dispatch and imports in the country of arrival. Exports from the EU will be subject to import VAT in the UK. Conversely, UK exporters must register for VAT purposes in each country to which they sell goods or services. **EU exporters must register for VAT purposes in the UK.**

For sales to UK customers or customers in the UK, the supplier takes care of customs and import VAT („Delivered Duty Paid - DDP“) themselves, so the price of the goods includes these costs. **With DDP, the supplier would have to register in the customer's country and pay the VAT – or use an agent.**

Alternatively, the seller could opt for Delivered at Place (DAP) – in this case, only the net price and delivery costs would be shown, and the customer would have to pay VAT and customs duties.

With regard to services, in the case of B2B services, it is usually the case that these are provided in the customer's country, whereas services in the B2C context are normally assumed to be provided where the suppliers are located.

Special rules apply to long-distance sales. For sales to the UK from January 1, 2021, simplifications apply to low-value shipments if the net value does not exceed GBP 135 and the goods are located outside the UK before the sale. In this case, no import duty will be charged, so the goods can be cleared quickly. VAT will only be charged at the point of sale. Similar measures are to be introduced in the EU with effect from July 1, 2021.

A special rule applies with respect to Northern Ireland – transactions with this part of the United Kingdom will continue to be treated as intra-EU sales until further notice.

2.7. Provision of services/Professional services

In order to gain access to the Union market, UK service providers and traders established in the UK must demonstrate compliance with all regulations, procedures and/or authorizations applicable to the provision of services in the EU by foreign nationals

and/or non-EU companies. These requirements are often set forth in national regulations. EU service providers and traders established in the Union and operating in the UK must demonstrate compliance with all relevant UK regulations.

From January 1, 2021, EU rules on the recognition of professional qualifications will no longer apply to UK nationals. UK nationals and EU citizens with qualifications obtained in the UK must have them formally recognized in the relevant member state, in accordance with that country's rules for the recognition of qualifications from third countries. In many cases, this recognition process is burdensome. Doctors, nurses, dentists, pharmacists, veterinarians, engineers or architects must have their qualifications obtained in the UNITED KINGDOM recognized in each member state in which they wish to practice.

As far as legal advice is concerned, lawyers from both blocs are allowed to advise on international law in the other (for UK lawyers EU law is not included, but for EU lawyers it is) and on the law of their home state. We will comment on questions relating to residency law below.

2.8. Entry and temporary stay of natural persons for business purposes

The TCA also provides regulations on the entry and temporary stay of natural persons for business purposes. Accordingly, a distinction is made between (1) „business travelers entering for establishment purposes“ and „intra-corporate transferees,“ (2) business travelers entering for a short period of time, and (3) providers of contractual services and independent professionals.

With regard to intra-corporate transferees, the permitted length of stay under the TCA is up to three years for executives and specialists, and up to one year for trainees. For business travelers entering the country for establishment purposes, it is up to 90 days within a period of six months. For business travelers entering for a short period of time, the permitted length of stay is up to 90 days within a six-month period.

Providers of contractual services and independent professionals are granted a permissible period of stay of 12 months cumulatively or a stay for the duration of the concluded contract, whichever is shorter.

For short stays, the parties to the TCA have undertaken to provide for an exemption from the visa requirement. The term „short stay“ is not defined in the TCA. In our understanding, the above-mentioned case constellations of entry and temporary stay of natural persons for business purposes fall under it.

2.9. Right of residence

The free movement of persons no longer applies. As stipulated in many free trade agreements, a visa-free stay of 90 days within a 180-day period is possible. A visa is required for longer stays.

Both UK nationals living in an EU member state and nationals of EU member states living in the UK must apply for a residence permit by June 30, 2021, like any foreign national.

The majority of social benefits are coordinated and protected between the EU and the UK.

2.10. Financial Services

The TCA does not address the financial services industry. Either bloc may grant UNITED KINGDOM- or EU-regulated entities equivalence unilaterally or leave it to financial services providers to apply for a license in each member state. This also applies to UK financial services providers that had already obtained an EU passport in the past.

The consequence for the financial industry is that, in the absence of recognition of their activities in one of the two blocks, service providers will have to establish themselves in the other block. In the process, financial service providers established in the EU can obtain an EU-wide passport. For certain financial services companies the UK Government has promulgated a Temporary Admissions Regime.

2.11. Taxation

There are no provisions in the TCA that restrict a bloc's national tax system. Both parties are committed to maintaining global tax transparency and combating tax avoidance.

2.12. Corporate law, contracts and civil law judgments

Within the EU, foreign companies incorporated in another member state are recognized in all member states. From January 1, 2021, companies with their registered seat in the United Kingdom will be treated as a company from a third country. In this context, a foreign company will be governed by the law of the state in which its administrative seat is located. Therefore, a company incorporated in the United Kingdom will only be recognized in Germany, for example, if its administrative seat is located in the United Kingdom.

With regard to the law applicable to contracts, there will be no change in practice. Within the EU member states, the Rome-I-Regulation (Regulation (EC) 593/2008) applies. The United Kingdom has transposed the Rome-I-Regulation into national law, so the situation will remain the same in the United Kingdom.

The validity of non-exclusive clauses providing for the jurisdiction of English courts is in doubt now that the Brussels Regulation (Regulation (EU) 1215/2012) no longer applies in the UK. As the accession to the 2007 Lugano Convention was not completed in time, as things stand, the 2005 Hague Convention on Choice of Court Agreements will apply to assess the effectiveness of clauses choosing English courts from January 1, 2021. However, this convention only governs clauses on exclusive choice of court and only applies to agreements entered into after its entry into force in relation to the UK (i.e. from January 1, 2021 at the latest).

Parties who had agreed to the jurisdiction of English courts on a non-exclusive basis should consider restating the clause as an exclusive

choice after January 1, 2021. New jurisdiction agreements should be agreed on an exclusive basis, or parties should consider arbitration.

As far as arbitration is concerned, nothing has changed with respect to the effectiveness of the arbitration clause, nor with respect to the enforcement of arbitral awards, which is governed by the 1958 New York Convention.

From January 1, 2021, civil judgments in the United Kingdom will no longer be enforced on the basis of the Brussels Regulation. In the case of an exclusive choice of forum, enforcement will be based on the 2005 Hague Convention on Jurisdiction. For other jurisdiction clauses, the new Hague Convention on the Enforcement of Foreign Judgments of July 2, 2019 – if generally accepted – could become an additional basis for enforcement in the future if the parties do not opt for arbitration.

2.13. Intellectual property rights

Existing EU unitary intellectual property rights (EU trademarks, Community designs, Community plant variety rights and geographical indications) will remain protected also in the UK even beyond December 31, 2020, by an automatic and cost-free cloning into a national British intellectual property right. Protective rights which expire after January 1, 2021, as well as new filings need to be filed separately in the UK.

For inventions filed with the European Patent Office the European Patent Convention grants protection in all contracting states. This treaty is unrelated to the legal framework of the EU. Therefore, inventions may continue to be filed for registration with the European Patent Office granting protection in the UK as well. However, some EU regulations, such as those relating to the extension of the term of protection under patent law for inventions in the field of pharmaceuticals and plant protection products (so-called supplementary protection certificates), will no longer apply in the UK on expiry of December 31, 2020. In this regard, the TCA provides for options to extend the terms of protection.

2.14. Transfer of personal data

Leaving the EU means that the UK is a third country for the purposes of the GDPR. For the flow of personal data to the UK, it is important that the EU-Commission takes an adequacy decision. Given that the UK has transposed the GDPR into national law, such a decision should be expected.

For data transfers from the EU to the UK, the TCA provides for a further transition period of four months from January 1, 2021. During this period, data transfers are not considered to be directed to third countries. With regard to data transfers from the UK to the EU, the UK government has already confirmed that these will be permitted until at least 2024.

2.15. Provisions that apply to certain industries

a) Agricultural goods

There are no duties on agricultural goods unless, for example, there is a significant deviation from the current equal standards in the future. The EU has announced that goods will have to **present health certificates** at the border inspection posts of the member states **and undergo sanitary and phytosanitary inspections.**

b) Automotive industry

Due to the integrated cross-border manufacturing process, the automotive industry and its suppliers will particularly suffer from delays resulting from border controls, whether for customs, normative or origin-related reasons.

These difficulties resulting from the basic structure of the treaty should lead to facilitations in the practice of the exchange of goods in that an approximation of the standards can take place via the recognition by both contracting parties of the international technical standards of the UNECE (United Nations Economic Commission for Europe) and in this way the trade barriers have less of an adverse effect.

c) Chemical industry

From January 1, 2021, chemical companies operating in the UK will lose their registrations under the EU REACH (Registration, Evaluation, Authorization and Restrictions of Chemicals) regulation. To comply with the regulation, companies operating in the UK must identify and appropriately manage the risks associated with the substances they manufacture and market in the EU. They must demonstrate to ECHA (the European Chemicals Agency) how the substance can be used safely, and they must communicate risk management measures to users.

A lack of registration can make it difficult to import chemical substances into the EU.

d) Pharmaceutical industry

The TCA contains regulations to avoid technical barriers to trade with regard to standardization and conformity assessment procedures. The possibilities for recognition of inspection results contained in a separate annex (Annex TBT-2: Pharmaceuticals) have a favorable effect on trade between the two parties. These should make it possible to certify compliance with good manufacturing practice (GMP certificates). In this context, however, it is also important to ensure conformity with safety and quality standards.

e) Road transport

From January 1, 2021, UK companies will no longer hold an EU license and will not be able to provide transport services within the Union as part of the single market. Transport companies will then have to comply with both British and European regulatory requirements.

The TCA provides point-to-point access for companies transporting goods by road between the EU and the UK. This means that UK trucks can enter and return from the EU. The same rights are given to EU haulers traveling from any point in the EU to the UK and back from the UK to any point

in the EU. Carriers of both parties are allowed to make two transports in the territory of the other block (for UK carriers, one transport within a single EU member state).

3. Conclusion

Many of the measures now demanded by entrepreneurs have already been recommended in anticipation of a no-deal Brexit as well. For British companies, trade with EU member states is now considerably more burdensome because access to the market must be secured in each individual member state. Only international standards that also apply outside the EU can provide relief here. However, this does not remove any obstacles of a customs and origin law nature.

The agreement gives the parties a lot of leeway in how they shape their trade policy. Depending on how far standards diverge in the future, sanctions and arbitration proceedings for breach of the TCA may ensue. Alternatively, the parties may have adjusted to the change in competitive conditions in the meantime and are then no longer interested in applying sanction mechanisms. In this respect, a flexible design may not be disadvantageous.