

December 29, 2020

UK and EU Reach Agreement on Trade: Key Takeaways

On Christmas Eve, after nine months of negotiations, the European Commission and the UK government reached agreement on the terms of a EU-UK Trade and Cooperation Agreement (the “Trade Agreement”), which will govern most aspects of the trading relationship between the UK and the EU for the foreseeable future. The Trade Agreement is built, in part, upon the previously agreed Withdrawal Agreement and Political Declaration between the parties, as well as the Protocol on Ireland/Northern Ireland.¹

The Trade Agreement, which is likely to be ratified relatively quickly by both sides,² ends months of concern that the UK might, upon termination of the transition period at year-end, find itself without any trade agreement with the EU, trading on what was called “WTO terms” or “Australian terms,” both of which were euphemisms for a “no deal” exit. The Trade Agreement averts the economically and legally disruptive impact of a “no deal Brexit,” and instead provides for tariff-free and quota-free trade between the UK and the EU for all goods that comply with the relevant rules of origin. The Trade Agreement also provides, *inter alia*, for

- mutual recognition of trusted trader arrangements, which will simplify (but not eliminate) customs controls and formalities;
- specific arrangements to facilitate trade and regulatory cooperation in several critical sectors, including automotive, pharmaceuticals, chemicals, wine and organic products;
- the maintenance of an open border, and largely frictionless trade, between the Republic of Ireland and Northern Ireland, in line with the Northern Ireland Protocol and earlier commitments made in the Withdrawal Agreement;

¹ The text of the Trade Agreement is available [here](#). The text of the Joint Declarations is available [here](#). The UK government summary of the Trade Agreement is available [here](#) and the Summary Explainer is available [here](#). The European Commission summary of the Trade Agreement is available [here](#) and its Q&A is available [here](#). The Withdrawal Agreement dated November 12, 2019 is available [here](#). The revised text of the Political Declaration is available [here](#). The Protocol on Ireland/Northern Ireland is available [here](#).

² The UK Parliament is scheduled to debate the Trade Agreement on December 30, and is expected to approve it with both Conservative and Labour support. The EU approval process is more complicated, and will not be completed by year-end, and thus the Trade Agreement will have to be implemented on a “provisional” basis pending receipt of those approvals.

- a mechanism intended to maintain a level playing field in the areas of competition and sustainable development, as well as minimum standards for environmental, social and labor standards; and
- a dispute settlement mechanism based on binding arbitration by an independent arbitration panel.

The Trade Agreement is also notable for what it does not address. These omissions include:

- *Non-tariff barriers.* While the Trade Agreement contains many provisions designed to reduce the burdens of customs procedures and paperwork, including but not limited to the trusted trader arrangements noted above, the Trade Agreement does not eliminate the need for goods to clear customs and be subject to border checks. These will impose significant operational costs on importers and exporters, and affect just-in-time supply chain arrangements. Notably, border checks will be required between Northern Ireland and Great Britain, as the maintenance of an open border between the Republic of Ireland and Northern Ireland – so critical to the stability facilitated by the Good Friday Agreement – necessitated the imposition of a soft border across the Irish Sea.
- *Services.* The Trade Agreement devotes a total of only 42 of its 1,246 pages to trade in services, and while the agreement does establish broad principles of “national treatment” and “most favored nation treatment,” it also includes numerous carve-outs and limitations that mean that the Trade Agreement will do little to protect trade in services. This is remarkable, given the high proportion of UK-EU trade represented by services; services are estimated to account for 80% of the UK economy and close to 50% of its exports.
- *Financial services.* Financial services, in particular, are expressly excluded from the scope of the Trade Agreement. The parties have agreed to reach a memorandum of understanding by March 2021 on financial services but, in the absence of further agreement, access is determined by decisions on “equivalence,” which can be withdrawn by the EU at any time and on short notice. The Trade Agreement does not address equivalence, and the European Commission specifically has reserved its position on equivalence and notes its assessment will continue.
- *Personal data flows.* On January 1, 2021, the UK becomes a third country for purposes of the GDPR. The Trade Agreement did not provide for the free flow of data between the UK and the EU. There is, in effect, a six-month transition period (four months, plus an additional two months unless either side objects) during which the European Commission can make its “adequacy decision” – its assessment of the UK’s regime for the protection of personal data. In the absence of the adequacy decision, transfers of data from the EU to the UK would need to rely on standard contractual clauses, binding corporate rules, codes of conduct and certification mechanisms or a derogation available under the GDPR.
- *Freedom of movement.* The Trade Agreement does not address the rights of UK citizens to enter, work or remain in the EU, or vice versa, except in relation to short-term business travel, short-term visits

permitted on a reciprocal basis and intercompany transfers of limited duration. Thus, except for individuals whose rights were “grandfathered” by the terms of the Withdrawal Agreement and these limited exceptions, the movement of people between the UK and the EU will be governed by national legislation applicable to third-country nationals. The right to work is important for the UK service sector (particularly financial, consulting and legal services) but also for a range of others, including sports, and culture and arts.

- *Capital and taxes.* EU directives that promoted the free movement of capital among EU states, including those that largely eliminated withholding taxes on dividends, interest and royalties between companies organized and operating in the EU, are no longer applicable to UK companies, and the Trade Agreement does not address this. Thus payments of this nature between companies in the UK and in the EU may be subject to withholding, depending on the combination of local taxes laws and the existence (or absence) of bilateral tax treaties between the UK and individual EU member states. Similarly, the directive permitting cross-border mergers within the EU, which allowed companies to move from one jurisdiction to another via such merger, is no longer in effect in relation to UK companies.
- *Competition.* As of January 1, 2021, the UK will no longer be part of the European Commission’s review of business combinations under the EU Merger Regulation (EUMR). The Trade Agreement includes general provisions requiring the parties to “maintain a competition law which effectively addresses . . . mergers and acquisitions . . . which may have significant anticompetitive effects,” and calls for their respective competition authorities to “endeavour to cooperate and coordinate, with respect to their enforcement activities concerning the same or related conduct or transactions, where doing so is possible and appropriate.” But UK turnover will no longer be relevant when assessing whether a business combination is caught by the EUMR, and business combinations with significant impact on competition in the UK will instead need to be reviewed by the UK Competition and Markets Authority (CMA).³
- *Prospectus “passporting.”* Beginning January 1, 2021, the UK will be a third country for purposes of EU regulations, including the Prospectus Regulation, and EU member state national laws that transposed EU directives. As a consequence, passporting of prospectuses that are approved by the UK Financial Conduct Authority, as well as any supplements thereto, will no longer be permitted. In November, the European Securities and Markets Authority updated its Questions and Answers on the Prospectus Regulation to address prospectus issues and selection of home member states, and also its

³ Generally speaking, the CMA has jurisdiction to scrutinize business combinations where the target has annual UK turnover of over £70 million or the combination will create or increase a share of supply of 25% or more due to overlap between the acquiring and target companies.

Questions and Answers on the Transparency Directive to address home member state selection issues, in each case following the end of the implementation period.⁴

The Trade Agreement maintains a trade relationship between the UK and the EU that is far superior to what would have been the case under the cliff-edge scenario of a “no deal Brexit,” but one that has more, not fewer, barriers to trade than was the case while the UK remained within the EU single market and customs union. As of January 1, 2021, the UK will no longer be part of the single market or customs union and, as a result, trade will no longer be largely frictionless. To export to the EU, UK exporters will still be required to meet all EU health and safety, labeling and other product requirements, and EU exporters to the UK will need to meet similar UK requirements.

The UK and EU, which today have relatively similar regulatory regimes and generally consistent labor, social and environmental standards, will theoretically be free to diverge. This aspect of Brexit – the UK’s ability to “take back control” over its laws and borders – was critically important to Boris Johnson’s Conservative Party base, and has allowed the Prime Minister to declare victory, but reality may prove more complicated.

The Trade Agreement includes a binding and enforceable commitment of non-regression – “in a manner affecting trade or investment” – in respect of labor and social levels of protection,⁵ environmental levels of protection⁶ and climate level of protection,⁷ and each side committed to increase over time its level of

⁴ See European Securities and Markets Authority, Questions and Answers on the Prospectus Regulation, updated November 9, 2020, available [here](#), and the European Securities and Markets Authority, Questions and Answers on the Transparency Directive, updated November 9, 2020, available [here](#).

⁵ These include laws and standards in relation to (a) fundamental rights at work, (b) occupational health and safety standards, (c) fair working conditions and employment standards, (d) information and consultation rights at company level and (e) restructuring of undertakings.

⁶ These include laws and standards in relation to (a) industrial emissions; (b) air emissions and air quality; (c) nature and biodiversity conservation; (d) waste management; (e) the protection and preservation of the aquatic environment; (f) the protection and preservation of the marine environment; (g) the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances; and (h) the management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants.

⁷ This is defined to mean the level of protection with respect to emissions and removals of greenhouse gases and the phase-out of ozone-depleting substances. With regard to greenhouse gases, this means: (a) for the EU, the 40% economy-wide 2030 target, including the EU’s system of carbon pricing; and (b) for the UK, the UK’s economy-wide share of this 2030 target, including the UK’s system of carbon pricing. Both parties committed to have in place an effective system of carbon pricing as of January 1, 2021.

protection in these areas. The Trade Agreement also contains mutual commitments in relation to the implementation of various UN and ILO standards and agreements⁸ and, in relation to each of these areas of mutual commitment, procedures for dispute resolution. If these procedures fail to resolve the matter, and “[i]f material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the[se] areas . . . , either Party may take appropriate rebalancing measures to address the situation”

Only time will tell whether, and to what extent, the Trade Agreement in fact allows the UK to “take back control” over its laws and policies, as the range of issues covered by the extensive provisions in the agreement to prevent regression in these areas and protect against divergence that has an impact on trade or investment is broad.

One area where the UK is now clearly free to chart its own course is in the negotiation of free trade agreements with other countries. This is important because, after December 31, 2020, the UK will no longer benefit from the many trade agreements that exist between the EU and third countries. The UK has been working hard to replace these existing EU agreements with bilateral arrangements to come into effect in 2021. As a result of these efforts, agreements with 22 countries and six trading blocs are expected to take effect from January 1, 2021.⁹

These agreements do not, however, cover all countries that have trade agreements with the EU. The UK is in continuing discussions with the following additional countries where there are existing EU trade agreements in place: Albania, Algeria, Bosnia and Herzegovina, Cameroon, Ghana, Moldova, Montenegro and Serbia. Agreements with many of these countries will not be in place as of January 1, and as a result trade between the UK and these countries will – unless and until such agreements are reached – be on so-called WTO terms. The UK has also entered into a free trade agreement with Japan, and has signed trade agreements with Canada and Mexico that are expected to enter into effect during 2021.

The UK’s largest export markets – excluding the EU – are the United States, China, Switzerland, Hong Kong, the UAE, Japan, Turkey, Singapore, Canada, India, Australia, South Korea and Norway. With the

⁸ These require, among other things, (a) decent working conditions for all, with regard to, *inter alia*, wages and earnings, working hours, maternity leave and other conditions of work; (b) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; and (c) nondiscrimination in respect of working conditions, including for migrant workers.

⁹ Andean countries (Covering Columbia, Ecuador and Peru), CARIFORUM trade bloc (covering 12 countries), Central America (covering 6 countries), Chile, Côte d’Ivoire, Eastern and Southern Africa (ESA) trade bloc (3 countries), Egypt, Faroe Islands, Georgia, Iceland and Norway, Israel, Jordan, Kenya, Kosovo, Lebanon, Liechtenstein, Morocco, North Macedonia, Pacific states (Fiji and PNG), Palestinian Authority, Singapore, South Korea, Southern Africa Customs Union and Mozambique (SACUM) trade bloc (6 countries), Switzerland, Tunisia, Ukraine and Vietnam (agreement in principle).

Trade Agreement and other UK trade agreements referred to above in place, the key export markets with which the UK will lack trade agreements will include the U.S. (15.7% of 2019 exports), China (6.9%), Hong Kong (2.5%), the UAE (2.2%), India (1.3%) and Australia (1.2%). As none of these countries has a trade agreement with the EU, there will be no significant change in trade agreement status with these countries on January 1, 2021.

The Trade Agreement avoids a “no deal” Brexit, which the UK’s Office for Budget Responsibility had estimated would reduce Britain’s economic output by £40 billion in 2021 alone, and result in the loss of over 300,00 jobs in the UK. But Brexit will still come with a significant economic cost. The same Office for Budget Responsibility projects that Britain’s GDP, in the long run, will be 4% lower over a 15-year time period than if the UK had remained in the EU.

The negotiations are also not over. In many areas they have just begun. In addition to the Trade Agreement, the UK and the EU entered into 15 “declarations”¹⁰ and a number of other nonbinding instruments. The most important of these, from the perspective of international business, are probably those that relate to financial services, governmental subsidies and taxation. Each of these calls for further negotiations, in an effort to address issues left unaddressed in the Trade Agreement. Many aspects of the Trade Agreement, moreover, provide general frameworks but not details, as the agreement calls for further work to fill in the details and implement the general concepts. There is much work left to be done.

The political consequences of Brexit and the Trade Agreement are also hard to predict. Boris Johnson has claimed that the Trade Agreement has put the “European question” to rest, but he leads a country that is still deeply divided over the issue. In terms of trade, Northern Ireland will now be treated differently than Great Britain. Scotland was never supportive of Brexit, and views the entire exercise as an English imposition. While Nicola Sturgeon, the leader of the Scottish Nationalist Party, has said she will delay campaigning for another Scottish independence referendum until the UK is clear of the coronavirus pandemic, that political maelstrom is clearly on the horizon. Although 52% of those voting in the 2016 referendum supported the UK’s withdrawal from the EU, recent polling suggests that today those who believe that leaving was a mistake outnumber those who support the decision by a significant margin. And 49% would support applying to rejoin.

The Trade Agreement has avoided the foreseeable disruption of leaving without a deal. Whether it has resolved the “European question” remains to be seen.

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¹⁰ Declarations are available [here](#).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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