

Implications of the EU-UK Trade and Cooperation Agreement on trade in goods

INTRODUCTION

On 24 December 2020, the European Union and the United Kingdom announced the conclusion of their negotiations of a [Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part](#) (“EU-UK Trade and Cooperation Agreement” or “the TCA”) intended to settle their future relationship. The United Kingdom left the European Union at the end of 31 January 2020 but a *status quo* was maintained as a result of the [Withdrawal Agreement](#). That agreement provided for a transition period due to end on 31 December 2020.

On 1 January 2021, the United Kingdom (“UK”) will no longer form part of the European Union (“EU”) Single Market (comprising the free movement of persons, goods, services and the freedom of capital) and the EU customs union. The TCA does not alter that fact. Instead, it sets separate terms for the relationship between the EU and the UK.

The TCA consists of seven parts and a series of annexes and protocols. The TCA must also be read together with a [series of declarations](#). The main substantive parts of the TCA concern: (i) trade, transport, fisheries and other arrangements (Part Two); (ii) law enforcement and judicial cooperation in criminal matters (Part Three); (iii) health and cyber security (Part Four); and (iv) participation in Union programmes, sound financial management and financial provisions (Part Five). Part Six establishes a dispute settlement system and sets out a series of horizontal provisions. The parties to the TCA might conclude further bilateral agreements, supplementing the TCA (Article COMPROV.2.1).

This client alert offers a general overview of the aspects of the TCA (especially Part Two) affecting generally trade in goods as well as digital trade. This alert does not cover the provisions of the TCA concerning notably services, investment and intellectual property rights. It must be read together with other client alerts on more specific aspects of the TCA that Van Bael & Bellis will prepare.

THE TCA ESTABLISHES A FREE TRADE AREA PROVIDING FOR TARIFF-FREE AND QUOTA-FREE MARKET ACCESS

Main features of the EU-UK free trade area

The TCA establishes a free trade area between the EU and the UK (Article OTH.3).

Subject to any exceptions, the TCA eliminates between both parties customs duties on all goods having the preferential origin of either party (Article GOODS.5). In addition, no export duties and taxes or other charges on, or in connection with, the exportation of a good to the other party may be imposed whether or not such good has preferential origin under the TCA (Article GOODS.6.1). Furthermore, no internal tax or other charge may be imposed on a good exported to the other party in excess of the tax or charge that would be imposed on like goods destined for domestic consumption (Article GOODS.6.1). To determine the customs value, WTO rules apply (Article GOODS.15). Despite the elimination of customs duties on all goods having preferential origin of either party, the TCA does not provide for the elimination of import VAT.

Import and export restrictions are prohibited, which is the same rule as under Article XI:1 of the GATT 1994 (Article GOODS.10). Parties are expressly precluded from adopting or maintaining export and import price requirements (except for enforcement of countervailing and anti-dumping duty orders and undertakings) and import licensing conditioned on the fulfilment of a performance requirement (Article GOODS.10.2). Import and export monopolies (meaning exclusive rights or grants of authority by a Party to an entity for it to import a good from or export a good to the other party) are also prohibited (Article GOODS.12).

Detailed rules apply to the use of import licensing procedures which must be neutral in application and be administered in a fair, equitable, non-discriminatory and transparent manner (Article GOODS.13.1). Although the TCA does not prohibit the use of import licensing, such licences must be seen as a means of last resort.

Unlike what is the case for import licensing (Article GOODS.13), the TCA is more permissive in respect of the use of export licensing procedures (Article GOODS.14). The main obligations relate to transparency and predictability. Each party may use export licences (and refuse to grant them) or take implementing measures under UN Security Council resolutions as well as under multilateral non-proliferation regimes and export control arrangements including the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Australia Group, the Nuclear Suppliers Group, and the Missile Technology Control Regime. Furthermore, neither party is prevented from adopting, maintaining or implementing independent

sanctions regimes (Article GOODS.14.4). This ensures that both parties may apply export control.

Goods which originate in the other party under the importing party's non-preferential origin rules are not eligible for importation under existing WTO tariff rate quotas (Article GOODS.18). This should protect other trading partners' access to the UK's and the EU's tariff rate quotas.

Finally, the WTO standards of national treatment on internal taxation and regulation and of freedom of transit (Article V of the GATT 1994) will also apply (Articles GOODS.4 and 4a of the TCA).

Customs checks and formalities

The Union Customs Code and the equivalent UK customs legislation will apply to imports and exports between the UK and the EU as of 1 January 2021. This will continue to be the case despite the conclusion and application of the TCA.

From the EU perspective, for the purposes of customs checks, formalities and customs decisions, goods traded between the UK and the EU will be subject, as of 1 January 2021, to substantially the same EU customs rules applied by the EU to goods traded with a third country under WTO terms. From the UK perspective, trade between the UK and the EU will similarly be subject to the UK customs legislation applicable to imports from any third country, although transitional provisions unilaterally adopted by the UK will apply between January 2021 and July 2021. Such unilateral measures are described in the UK Border Operating Manual available [here](#) and apply regardless of the TCA.

It should be noted that the special rules contained in the Protocol on Ireland and Northern Ireland to the Withdrawal Agreement will apply to trade between Northern Ireland and the EU, as well as to trade between Northern Ireland and Great Britain, as of 1 January 2021. The rules necessary for implementing this Protocol were endorsed by the Joint Committee on 17 December 2020 and should be consulted for movements of goods with Northern Ireland. Further information is available [here](#) and [here](#). The TCA does not replace the arrangements contained in the Protocol to the Withdrawal Agreement concerning trade with Northern Ireland.

Goods will only benefit from duty free treatment upon importation in the UK and the EU if they have UK or EU origin pursuant to the origin rules laid down in the TCA. As a general rule, a claim for preferential tariff treatment must be included in the customs import declaration (Article ORIG.18a.1). However, subject to certain conditions, the claim may also be made no later than three years after the date of importation or even later if that is possible under the domestic laws of the importing party (Article ORIG.18a.2).

VAN BAEL & BELLIS

The claim for preferential tariff treatment must be based on a proof of origin, either in the form of a statement on origin made out by the exporter, or based on the importer's knowledge. The TCA offers a template of the statement on origin (Annex ORIG-4). It must be made out on an invoice or any other appropriate (commercial) document. It is typically valid for one year for imports into the EU or two years for imports into the UK.

If cumulation of origin applies, exporters are required to obtain a supplier's declaration from their suppliers, or an equivalent document, describing the non-originating materials concerned (Article ORIG.4). The TCA also offers a template of that supplier's declaration (Annex ORIG-3).

The claim for preferential tariff treatment under the TCA may also be based on the importer's knowledge. This knowledge must be based on information demonstrating that the product is originating and meets all other requirements under the TCA (Article ORIG.21). This information must be kept by the importer for at least three years (Article ORIG.22).

The competent authorities in the EU and the UK may verify the correctness and validity of the claim for preferential origin and can cooperate to this effect (Articles ORIG.24 and ORIG.25).

Goods failing to meet the origin rules laid down in the TCA will be subject to the UK or EU external tariff upon importation into the UK and the EU respectively, with special rules applicable to imports into Northern Ireland.

Within that framework, the TCA envisages trade facilitation, mainly for those economic operators being part of trusted trader schemes in either the UK or the EU, and some other measures which build on the WTO Trade Facilitation Agreement. Some examples of such trade facilitation measures are:

- Movement of repaired goods between the UK and the EU is facilitated regardless of the origin of the goods concerned (Article GOODS.8). In particular, subject to some exceptions, if goods re-enter the territory of a party after they were temporarily exported from its territory to the territory of the other party for repair, then no customs duty may be applied to those goods. Equally, goods temporarily imported from the territory of the other party for repair, may not be subject to a customs duty.
- The parties envisage a temporary admission regime which enables certain goods, including means of transport, to be introduced in the customs territory with relief of import duties and taxes on the condition that the goods are imported for specific

- purposes and are intended for re-exportation within a specified period (Article CUSTMS.16).
- The TCA envisages various forms of cooperation in respect of customs matters (Article CUSTMS.2) and that customs procedures be simplified (Articles CUSTMS.4 and 5). Other trade facilitation measures concern, for example, risk management (Article CUSTMS.7), post-clearance audits (Article CUSTMS.8), advance rulings (Article CUSTMS.11), the prohibition to require the use of customs brokers or other agents (Article CUSTOMS 12), the use of a single window (Article CUSTMS.17) and facilitation of roll-on, roll-off traffic (Article CUSTMS.18). The TCA also includes provisions on cooperation in VAT and mutual assistance for the recovery of taxes and duties (Article CUSTOMS.19).
 - Annex CUSTMS-1 sets out the conditions under which both parties shall recognise their respective programmes for Authorised Economic Operators (“AEO”) (Article CUSTMS.9.2).

Rules of origin

While most provisions of the TCA apply to all goods of a party (Article GOODS.2), Article GOODS.5 limits the prohibition of customs duties to goods originating in the other party in accordance with the preferential rules of origin set out in the TCA. According to these rules, goods originate from a party in case (i) products are wholly obtained in that party; (ii) products produced in that party are exclusively made from originating materials in that party; and (iii) goods produced in a party incorporate non-originating materials satisfying the product-specific rules of origin set out in Annex ORIG-2 (Article ORIG.3).

Annex ORIG-2 sets out product-specific rules of origin. These rules typically require that any non-originating materials are classified under a different tariff heading from the final product (“CTH rule”), that the value or weight of non-originating materials (“MaxNOM”) does not exceed a certain percentage of the ex-works value or weight of the product, or that the non-originating materials used undergo certain specific processing operations. For many products alternative origin rules are listed. Where this is the case, the product must be considered as originating if it satisfies one of the alternatives (Annex ORIG-1, Note 2.3). Importantly, the acquisition of originating status must be fulfilled without interruption in the UK or the EU (Article ORIG.3.3). Also, no origin can be obtained in case the non-originating materials only undergo minor processing operations in the UK or the EU even if such operations were to meet the applicable list rule (Article ORIG.7). Finally, the TCA provides for a number of tolerances in case certain limits set out in the specific origin rules listed in Annex ORIG-2 are exceeded (Article ORIG.6).

VAN BAEL & BELLIS

At first sight, the specific origin rules in the TCA mirror those contained in other EU preferential trade agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (“CETA”), and the Convention on Pan-Euro-Mediterranean Preferential Rules of Origin. However, there are a number of exceptions where the rules are significantly less strict than in other agreements or as initially announced. For instance, the CTH rule applicable to products under Heading 8528 no longer excludes the use of non-originating components under Heading 8529.

One of the more contentious issues in the negotiations related to the origin rules applicable to automotive products and, in particular, the rules applicable to electrified vehicles and batteries. While the specific origin rule for vehicles with internal combustion piston engine is the same as the one contained in CETA, the TCA now introduces a stricter rule for electrified vehicles requiring additionally that the battery packs are originating. In view of the difficulty of obtaining a sufficient supply of originating battery packs, Annex ORIG-2B sets out more lenient transitional product-specific rules of origin that apply to electric accumulators and electrified vehicles, starting from the entry into force of the TCA until 31 December 2023 and then another set of transitional rules from 1 January 2024 until 31 December 2026.

Apart from the transitional product-specific rules of origin for electrified vehicles and batteries, Annex ORIG-2A also provides for alternative rules of origin for canned tuna and aluminium products that are available subject to an annual quota listed in that annex.

Another contentious issue related to the possibility of considering the value originating in third countries with which both the EU and the UK have concluded preferential trade agreements, as originating value for the purposes of the origin determination pursuant to the specific origin rules in the TCA. Such “diagonal cumulation” was considered of the utmost importance for the continuing viability of the manufacturing operations by Japanese car producers in the UK. However, the TCA does not authorise diagonal cumulation. Thus, even though both the UK and the EU have concluded a free trade agreement with Japan, Japanese components will be considered as non-originating material value when applying the TCA’s specific origin rules to the products in which they have been incorporated.

As is the case in all preferential trade agreements concluded by the EU, the TCA provides for cumulation between the parties (Article ORIG.4). Subject to the rules that apply in respect of insufficient production (Articles ORIG.4 and ORIG.7), a product originating in a party is to be considered as originating in the other party if that product is used as a material in the production of another product in the other party. However, the TCA goes beyond standard material cumulation and also allows the cumulation of value added through processing in the other party. In other words, in determining whether a product originates in a party, production carried out in the other party on a non-originating material

may be taken into consideration even if such processing is insufficient to confer origin on the non-originating material being processed.

The TCA does not contain a specific prohibition on the use of duty drawback or inward-processing schemes in combination with preferential tariff treatment (“no-drawback rule”). However, Article ORIG.17 envisages that the Trade Specialised Committee on Customs Cooperation and Rules of Origin may review those schemes at a later stage with a view to introducing limitations or restrictions.

REGULATORY BARRIERS AND COOPERATION

The TCA rules on technical barriers to trade go beyond WTO rules but do not exclude conformity assessment requirements

The TCA does not harmonise technical regulations or standards and conformity assessment procedures. Each party remains free to decide on such measures. This means that products exported to the UK will need to comply with UK regulations. Likewise products destined for the EU will need to comply with EU regulations. This also means that, in principle, separate testing or other conformity assessment procedures may need to be completed to access each market.

The starting point is that the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”) applies (Articles TBT.3.1 and TBT.4.5), including its standards of non-discrimination and the requirement that unnecessary obstacles to trade must be avoided.

The TCA imposes certain obligations going beyond the TBT Agreement. Notably, the parties have agreed that international standards developed by the International Organization for Standardization (“ISO”), International Electrotechnical Commission (“IEC”), International Telecommunication Union (“ITU”) and Codex Alimentarius Commission (“Codex”) are relevant international standards for the purposes of the TBT Agreement. Other obligations are process-based. For example, the parties must carry out impact assessments of planned technical regulations (Article TBT 4.1) and offer further explanations of the circumstances in which they, for example, depart from international standards (Article TBT.4.6).

The obligations applying to standards (Article TBT.5) and conformity assessment procedures (Article TBT.6) do not exclude the use of testing or other conformity assessment procedures. Similar to what is the case under the TBT Agreement, subject to certain conditions, either party may require third party conformity assessment or that its own specified government authorities carry out the conformity assessment in respect of specific products (Article TBT.6).

VAN BAEL & BELLIS

Taking into account that, at the end of the transition period, both the UK and the EU will still apply the same technical regulations, the TCA nonetheless seeks to facilitate market access in some respect. Each party must accept a supplier's declaration of conformity (meaning self-certification) as proof of compliance with its technical regulations in those product areas where such declarations are accepted on the date of the entry into force of the TCA (Article TBT.5.6). However, even in those circumstances, mandatory third party testing or certification of the product areas may still be imposed if that is justified because of legitimate objectives and is proportionate to the purpose of giving the importing party adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks that non-conformity would create (Article TBT 6.7).

Each party is free to set its own mandatory marking and labelling requirements (Article TBT.8). However, certain conditions apply. For example, in principle, there may not be any prior approval, registration or certification of labels or markings of products and labelling may take place in customs warehouses or other designated areas in the country of import. Parties may only require information which is relevant for consumers or users of the product or information that indicates that the product conforms to the mandatory technical requirements. As from 1 January 2021, EU product-related rules will no longer apply to the UK market. These rules (which are not in the field of food or agriculture) concern products such as toys, electronics, lifts, PPE, machinery and medical devices. The UKCA ("UK Conformity Assessed") marking will replace the CE marking for those products placed on the UK market, although CE marking which is based on self-declaration of conformity by the manufacturer is still possible until 31 December 2021 for the UK market. Exceptionally, the UK will continue to accept CE marked medical devices until 30 June 2023. The CE marking will only be valid in the UK for areas where the UK and EU rules remain the same. Thus, if the EU changes its rules and a product is CE marked on the basis of those new rules, the CE marking can no longer be used to sell that product in the UK. The new UKCA marking will have to be used immediately as from 1 January 2021 if all of the following apply to the product concerned: it is to be placed on the UK market; it is covered by legislation which requires the UKCA marking; it requires mandatory third-party conformity assessment; and conformity assessment has been carried out by a UK conformity assessment body (and the manufacturer has not transferred its conformity assessment files from the UK body to an EU-recognised body before 1 January 2021). When selling to the EU or the European Economic Area ("EEA"), the CE marking, and full compliance with EU rules, remain mandatory. The UKCA marking will not be recognised on the EU/EEA market.

Several annexes set out more detailed rules in respect of TBT measures affecting specific categories of products. For example, closer integration of TBT measures affecting motor vehicles and equipment and parts thereof is envisaged in Annex TBT-1. That annex sets out the parties' agreement on what is the relevant standardising body for those products

VAN BAEL & BELLIS

and what are the relevant international standards. In principle, the parties agree that they will not introduce or maintain any domestic technical regulation, marking or conformity assessment procedure that diverges from those standards. If divergent regulations are nonetheless adopted, several process-based obligations apply. The parties also agree to accept on their market products covered by a valid UN-type approval certificate as being products compliant with its domestic technical regulations, markings and conformity assessment procedures, without requiring any other testing or marketing.

Likewise, more specific forms of integration are available for medicinal products (Annex TBT-2), chemicals (Annex TBT-3), organic products (Annex TBT-4) and wine (Annex TBT-5). Some of those other annexes go well beyond the type of integration envisaged for motor vehicles and equipment and parts thereof.

For example, in respect of organic products (such as unprocessed plant products or unprocessed animal products), the parties accept, in respect of products listed in separate appendices, the equivalence of their respective regulations. A separate procedure applies in case those regulations are subsequently modified, revoked or replaced, resulting possibly in the suspension of the recognition of equivalence.

Another example relates to chemicals. The TCA promotes cooperation but does not prevent either party from implementing their own levels of protection of the environment and health. As from 1 January 2021, the EU's REACH Regulation, which applies to manufacturers and importers of chemical substances, mixtures, and certain articles which contain substances, will no longer apply to the UK. "UK REACH", meaning the UK's independent chemicals regulatory framework, will start to apply in the UK on that date. This means that anyone manufacturing, selling or distributing chemicals in the UK and the EU will need to comply with the UK and the EU rules separately. However, as things stand, UK REACH virtually mirrors the EU REACH Regulation. Under UK REACH, UK manufacturers and importers must register chemicals that access the UK market. An EU/EEA chemicals manufacturer wishing to import chemicals into the UK, which is subject to UK REACH, must ensure that their importer in the UK is registered, or else appoint an "only representative" in the UK to carry out the registration. UK companies that are still registered under EU REACH will no longer be able to import into the EU/EEA market, unless they have transferred their registrations to an EU/EEA-based organisation or depend on the registrations of their EU/EEA importers. UK manufacturers also have the possibility of appointing an EU/EEA based "only representative". Manufacturers of chemicals from a third country should keep in mind that if their UK-based supplier is an importer of their chemicals (e.g., from China, India or Japan) for distribution into the EU or the EEA, that importer will either have to move its importing activity there to continue with the import, or else those non-EU manufacturers will have to find a new importer or an "only representative" in the EU or the EEA. For companies in the UK that hold EU REACH

registrations, these registrations can be carried across directly into UK REACH, legally “grandfathering” the registrations into the UK REACH regime. This grandfathering process (whereby basic information must be provided to the UK Health and Safety Executive) will continue until 30 April 2021.

The TCA rules on SPS measures go beyond WTO rules but do not exclude authorisation and testing requirements

Similar to what is the case for technical regulations, standards and conformity assessment procedures, the TCA does not harmonise sanitary and phytosanitary (“SPS”) measures. Importantly, trade-related SPS procedures and approvals may apply when trading goods between the UK and the EU.

The starting point is again the WTO Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”) (Article SPS.4).

The main focus is on general principles that SPS procedures and related SPS measures must satisfy (see especially Article SPS.5). In respect of import conditions and procedures, it is the burden of the exporting party to ensure that products exported to the other party meet the SPS requirements of the importing party (Article SPS.7.2). An importing party remains free to require that imports of particular products require an authorisation (Article SPS.7.3). Although no authorisation requirements may be introduced that are additional to those applicable at the end of the transition period, deviations from that stand-still rule are possible in case of a significant risk to human, animal or plant health (Article SPS.7.4).

Each party may collect fees for the costs incurred to conduct specific SPS frontier checks (Article SPS 7.12) and carry out import checks on products from the other party to verify compliance with its SPS import requirements (Article SPS 7.13).

For imports of animal products, an importing party may maintain a list of approved establishments meeting its import requirements (Article SPS.8.1). Those lists may only be required for the products for which they were required at the end of the transition period. However, a party may deviate from that stand-still rule in case this is justified to respond to a significant risk to human or animal health (Article SPS. 8.2). Specific rules apply to the manner in which such lists are composed and communicated (Article SPS 8.3-7).

UNDER THE TCA, THE PARTIES REMAIN FREE TO USE TRADE REMEDIES

Each party maintains the right to apply trade remedies under the WTO agreements (Article GOODS.17). In general, the TCA does not add to the substantive rights already provided in the WTO agreements. Also, the TCA does not contain an obligation to apply a lesser

duty rule. Each party remains free to set the amount of the anti-dumping duty at the full margin of dumping or at a lesser amount (Article GOODS.17.4). As for the public interest test, Article GOODS.17.6 merely obliges each party to consider information provided relating to whether an anti-dumping or countervailing duty would not be in the public interest. Finally, the originating status of good for the application of trade remedies will be determined on the basis of each party's non-preferential origin rules and the TCA expressly provides for the non-application of the specific rules of origin (Article GOODS.17.2).

DATA PROTECTION AND DIGITAL TRADE

Although the TCA aims to facilitate digital trade between the UK and EU, both parties remain free to introduce exceptions for public interest reasons and to adopt rules for, for example, protecting privacy and data protection, or promoting or protecting cultural diversity (Articles DIGIT.3 and DIGIT.4).

Protection of personal data and privacy

The TCA confirms in general terms the right to the protection of personal data and privacy (Article DIGIT.7 and Part Six, Title II).

There is a temporary exemption on cross-border flows of personal data from the EU and EEA to the UK, including between law enforcement agencies. Those transfers will not be considered as data flows to a third country under the terms of the General Data Protection Regulation and Directive 2019/680 for a period of six months (Article FINPROV.10A). During this period, transfers of personal data between the EU (or the EEA) and the UK can continue without requiring additional safeguards (such as Standard Contractual Clauses or Binding Corporate Rules).

That period could end earlier if an adequacy decision is adopted. In a political declaration accompanying the TCA, the EU declares its intention to launch a procedure for the adoption of an adequacy decision with respect to the UK. The effect of an adequacy decision is that personal data can be sent to the UK without any further safeguards. It remains to be seen whether the European Commission will adopt an adequacy decision within this period.

No localisation requirements

Localisation or similar requirements that hamper digital trade are prohibited. In particular, cross-border data flows (flows of any data, not only personal data) may not be restricted by measures requiring data to be kept on the territory of a party (or prohibiting data from

being stored on the territory of the other party) or that require that a local service or network be used (Article DIGIT.6).

The parties must keep the implementation of Article DIGIT.6 under review and assess its functioning within three years of the date of entry into force of the TCA. At any time, a party may propose to the other party to review the list of restrictions.

Data protection for law enforcement and judicial cooperation

The TCA sets out the safeguards, in the area of law enforcement and judicial protection in criminal matters, required in the Parties' respective data protection regimes to permit cooperation (Article LAW.GEN 4).

Those safeguards include some basic principles of EU and UK data protection law: (i) personal data must be processed lawfully and fairly in compliance with the principles of data minimisation, purpose limitation, accuracy and storage limitation; (ii) processing of special categories of personal data is only permitted to the extent necessary and subject to appropriate safeguards adapted to the specific risks of the processing; (iii) the need to adopt adequate technical and organisational security measures; (iv) data subjects should have enforceable rights of access, rectification and erasure, subject to possible restrictions provided for by law which constitute necessary and proportionate measures in a democratic society to protect important objectives of public interest; (v) notifying personal data breaches to the competent supervisory (and in case of a high risk also to the data subjects); (vi) transfers to a third country are allowed only if the level of protection is not undermined; (vii) the supervision by independent authorities; and (viii) effective administrative and judicial redress for data subjects in the event that data protection safeguards have been violated (Article LAW.GEN.4).

THE TCA INTRODUCES NOVEL LEVEL PLAYING FIELD OBLIGATIONS AND REMEDIES

The TCA ties the need to guarantee ensuring the level playing field for open and fair competition with the commitments for sustainable development. In this respect, the TCA does not harmonise standards of the parties (Article 1.1.4). Although there is a general commitment to maintaining and improving high standards in the areas covered by the sustainability part of the TCA (Article 1.1.4), the TCA nonetheless recognises the right of each party to set its own policies and priorities in those areas and to determine the level of protection which it deems appropriate (Article 1.2.1).

Competition law

In ensuring the level playing field for open and fair competition, each party commits to maintaining a competition law which effectively addresses: (i) agreements, decisions and concerted practices that aim to or have the effect of preventing, restricting or distorting competition; (ii) abuse of dominant position; and (iii) mergers and acquisitions (for the UK) and concentrations (for the EU) that may have significant anti-competitive effects (Article 2.2). Each party must take appropriate measures to enforce its competition law in its territory and maintain an operationally independent authority competent for effective enforcement of its competition law (Article 2.3.1 and 2.3.2). Competition laws must be applied in a transparent and non-discriminatory manner (Article 2.3.1). The parties might enter into a separate agreement on cooperation and coordination at a later stage (Article 2.4).

Subsidy control

The TCA provides for a comprehensive set of rules governing the control of subsidies granted by the Parties to “economic actors” (Article 3.1.1(a)). Those rules appear to be largely inspired by the EU State aid rules and the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). The result is a combination of different sets of rules, introducing some novel elements in subsidy control that will lead to important changes in especially how the UK reviews financial assistance granted by public bodies.

The TCA defines a “subsidy” as “financial assistance which: (i) arises from the sources of the Parties ...; (ii) confers an economic advantage on one or more economic actors; (iii) is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and (iv) has, or could have, an effect on trade or investment between the Parties” (Article 3.1.1(b)). The wording of that definition is mostly consistent with the definition of “State aid” under EU law and subsidy under the SCM Agreement.

Not every “subsidy” within the meaning of Article 3.1 is subject to subsidy control under the TCA. First, certain categories of subsidies are exempted, such as subsidies “granted to compensate the damage caused by natural disasters or other exceptional non-economic occurrences” (Article 3.2.1) and “of a social character that are targeted at final consumers” (Article 3.2.2). These grounds of exemption appear to have been inspired by EU State aid law. Second, subsidies related to trade in certain goods or sectors are excluded from subsidy control under the TCA (such as agriculture and fisheries, Article 3.2.5; or the audio-visual sector, Article 3.2.6). Third, a *de minimis* threshold applies. Subsidy control does not apply to subsidies of which the total amount granted to a single economic actor is below 325,000 Special Drawing Rights over a period of three fiscal years (Article 3.2.3) This threshold is also drawn from EU State aid law, which provides for a *de*

minimis exemption exonerating State aid below 200 000 EUR over a period of three years. Fourth, distinct rules, drawing again on EU State aid rules, apply in respect of subsidies granted in respect of services of public economic interest (Article 3.3).

Each party must put in place an effective system of subsidy control, in which an operationally independent authority or body plays a role (Article 3.9), meeting common principles in order to ensure that subsidies are not granted where they have or could have a material effect on trade or investment between the parties (Article 3.4). These provisions especially place a burden on the UK to establish an independent authority responsible for subsidy control.

The common principles to apply include verifying whether subsidies pursue a public policy objective (Article 3.4.1(a)) and are necessary and proportionate to achieving that purpose (Article 3.4.1(b)). Subsidies must also be “designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided” (Article 3.4.1(c)). The parties must also ensure that, after a subsidy has been granted, it is used by the recipient economic actor only for the specific purpose for which it was given (Article 3.6). Additionally, increased transparency obligations apply (Article 3.7).

Certain subsidies are prohibited (such as unlimited State guarantees, export subsidies and subsidies contingent on the use of domestic content, Article 3.5.) or are conditionally allowed (such as subsidies to promote large cross border or international cooperation projects, Article 3.5.13; or related to energy and environment, Article 3.5.14 and Annex ENER-2).

In line with what is required under EU law, judicial review before domestic courts and tribunals (Article 3.10) as well as an effective mechanism of recovery in respect of subsidies (Article 3.11) must be made available. The remedies available before domestic courts must include the “suspension, prohibition or requirement of action by the granting authority, the award of damages, and recovery of subsidy from its beneficiary if and to the extent they are available under the respective laws on the date of entry into force of this Agreement” (Article 3.10.1(c)).

These provisions must be read together with a non-binding joint declaration on subsidy control policies. That declaration recognises the parties’ understanding that subsidies may be granted for the development of disadvantaged or deprived areas or regions, for transport and research and development activities. It also expresses guidance in respect of the conditions under which such subsidies may be granted.

Specific forms of remedies are available in case of a violation of the TCA rules on subsidy control. We discuss these remedies below, in the section of this client alert discussing enforcement and dispute settlement under the TCA.

State-owned enterprises

The TCA imposes specific obligations in respect of State-owned enterprises, enterprises granted special rights or privileges and designated monopolies. In particular, a “State-owned enterprise” is defined as “an enterprise in which a Party: (i) directly owns more than 50% of the share capital; (ii) controls, directly or indirectly, the exercise of more than 50% of the voting rights; (iii) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body; or (iv) has the power to exercise control over the enterprise. For the establishment of control, all relevant legal and factual elements shall be taken into account on a case-by-case basis” (Article 4.1.1(j)).

A *de minimis* threshold applies. The obligations do not apply in case, in any of one of the three previous consecutive fiscal years, the annual revenue derived from the commercial activities of the enterprise or monopoly concerned was less than 100 Special Drawing Rights (Article 4.2.4). Parties must ensure that State-owned enterprises and other types of covered entities, in purchasing or selling goods or services, act in accordance with commercial considerations and the national treatment obligation (Article 4.5).

Labour and social standards

Although each party has the right to set its own policies and priorities in respect of labour and social standards and to determine the labour and social levels of protection it deems appropriate (Article 6.2.1), a non-regression clause applies. Under this clause, each party may not weaken or reduce, in a manner affecting trade or investment between the parties, its labour and social levels of protection “below the levels in place at the end of the transition period, including by failing to effectively enforce its laws and standards” (Article 6.2.2).

Apart from that non-regression clause, the TCA repeats obligations found in other EU preferential trade agreements in respect of the parties’ commitments to multilateral labour standards and agreements (Article 8.3) and multilateral environmental agreements (Article 8.4). Parties also commit to effectively implement the United Nations Framework Convention on Climate Change (“UNFCCC”) and the Paris Agreement, and to cooperate on trade-related aspects of climate change policies (Article 8.5). Other obligations relate to trade and biological diversity (Article 8.6), trade and forests (Article 8.7), trade and sustainable management of marine biological resources and aquaculture (Article 8.8), trade and investment favouring sustainable development (Article 8.9), and trade and responsible supply chain management (Article 8.10).

Environment and climate

Similar to what is the case for labour and social standards, a non-regression clause applies in respect of the environment and climate. Each party has the right to set its own policies and priorities in respect of the environment and climate and to determine the environmental levels of protection and climate level of protection it deems appropriate (Article 7.2.1). However, it may not weaken or reduce, in a manner affecting trade or investment between the parties, its environmental levels of protection and climate level of protection “below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection” (Article 7.2.2).

The TCA also requires each party to have in place an effective system of carbon pricing, covering greenhouse gas emissions from electricity generation, heat generation, industry and aviation, as of 1 January 2021 (Article 7.3.1 and 7.3.2). Those systems must respect the level of protection in place at the end of the transition period (Article 7.3.3 and 7.3.5).

Furthermore, the parties accept to respect the internationally recognised environmental principles to which they have committed, such as those in the Rio Declaration on Environment and Development, and in multilateral environmental agreements, such as the UNFCCC and the Convention on Biological Diversity (Article 7.4.1).

ENFORCEMENT AND DISPUTE SETTLEMENT

The TCA establishes both a generally applicable dispute settlement procedure and specific modes of dispute settlement for certain types of dispute (such as disputes regarding the non-regression from labour and social levels of protection or environmental or climate change protections in place at the end of the transition period, see Article 6.4.2 and 7.7.2, respectively, or disputes regarding trade and sustainable development, Article 8.11.2). Some chapters, parts, or provisions are entirely excluded from dispute settlement (Article INST.10(2)).

The general dispute settlement system

The general dispute settlement system has exclusive jurisdiction regarding disputes about the interpretation or application of the TCA (Article INST.11). A so-called “fork-in-the-road” provision applies in case of a dispute regarding a measure that allegedly breaches the TCA but also a substantially equivalent obligation under another international agreement binding both parties (such as the WTO agreements). After a complaining party has selected a forum, that choice is to the exclusion of any other forum that is available (Article INST.12).

The general dispute settlement procedure is modelled on the WTO dispute settlement procedure, even if no appellate review is available. In the event of a disagreement on compliance with the final ruling, compensation may be offered or the suspension of obligations not exceeding the level equivalent to the nullification or impairment caused by the violation is available (Article INST.24). Detailed rules of procedures are found in Annex INST: Rules of Procedure for Dispute Settlement and Annex INST: Code of conduct for arbitrators.

Article INST.29.4 precludes an arbitral tribunal from ruling on the legality of a measure alleged to constitute a breach of the TCA or any supplementing agreement, under the domestic law of either party. Any ruling can also not bind the domestic courts or tribunals of either party as to the meaning to be given to the domestic law of that party.

The specific dispute settlement system for disputes regarding labour and social standards, environment and climate and other instruments for trade and sustainable development

The specific dispute settlement system for resolving disputes regarding notably labour and social standards, environment and climate and other instruments for trade and sustainable development involves a Panel of Experts examining the matter before it and delivering a report making findings on the conformity of a measure with the relevant provisions. That Panel may also make recommendations but those will not bind the parties. In case of a disagreement on compliance with the final ruling, a party may ask the original Panel of Experts to again consider the matter. Temporary remedies to induce compliance are available in case of disputes regarding labour and social standards and environment and climate, which are the so-called non-regression areas (Article 9.3.2).

The novel procedure for applying (unilateral) rebalancing measures

Apart from the general and specific dispute settlement systems and the remedies for which they provide, Article 9.4 introduces a rebalancing clause. This is a novelty in EU preferential trade agreements.

The premise of the rebalancing clause is that, on the one hand, each party has the right to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control in a manner consistent with their international commitments (including under the TCA), and, on the other hand, that significant divergences in these areas are capable of impacting trade or investment between the parties in a manner that changes the circumstances forming the basis for the conclusion of the TCA.

If such significant divergences have “material impacts on trade and investment between the Parties” as shown by reliable evidence (and not merely based on conjecture or remote possibility), Article 9.4.2 establishes the right of either party to take “appropriate rebalancing measures” to address that situation. Those rebalancing measures must be limited, in terms of scope and duration, to what is strictly necessary and proportionate in order to remedy the situation, with priority to be given to measures that will least disturb the functioning of the TCA.

The procedure for introducing these measures is that (i) the concerned party notifies the other party through the Partnership Council; (ii) following that notification, the parties are to enter into consultations; (iii) in the absence of a mutually acceptable solution, the concerned party may adopt rebalancing measures unless the other party requests the establishment of an arbitral tribunal to decide whether the notified rebalancing measures are consistent with the conditions under which such measures may be applied; (iv) if the establishment of an arbitral tribunal is not requested, the other party may nonetheless initiate an arbitration procedure under the general dispute settlement system at a later stage; and (v) in case of establishment of an arbitral tribunal, rebalancing measures may be adopted and the other party may adopt countermeasures proportionate to the adopted rebalancing measures if that tribunal has not delivered its final ruling within 30 days and until the final ruling is delivered.

If the arbitral tribunal finds that the rebalancing measures are not consistent with Article 9.4.2, the concerned party must notify the complaining party of the measures it intends to adopt to comply with that ruling. At that stage, the generally applicable provisions on disagreements on compliance, temporary remedies and the review of measures taken to comply after the adoption of temporary remedies apply. No party may invoke the WTO Agreement or any other international agreement to preclude the other party from taking rebalancing measures or countermeasures.

Other types of unilateral remedies

Apart from the generally applicable rules governing violations of the TCA and means of redress, certain provisions envisage the temporary suspension of benefits under the TCA (especially preferential treatment guaranteed by the TCA) in case of a breach or other types of remedial measures.

For example, Article GOODS 19 applies in case of breaches or circumvention of customs legislation. In case one party makes a determination of systematic and large-scale breaches or circumventions of customs legislation and the other party has repeatedly and unjustifiably refused or failed to cooperate in acting against breaches or circumventions of

customs legislation, that party may unilateral temporary suspend preferential agreements after consultations have not been successful.

Another example is a procedure according to which a party may unilaterally take remedial measures in case a subsidy of the other party causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment between the parties (Article 3.12). Where a party resorts to that procedure, the other party may not invoke the WTO agreements or any other international agreement to preclude that party from taking those remedial measures (Article 3.12.13). This type of remedial measure may not be applied simultaneously with rebalancing measures under Article 9.4 to remedy the impact on trade or investment caused directly by the same subsidy (Article 3.12.15).

Other alternative bases for suspending the TCA in whole or in part (or for even terminating it) without prior resort to arbitration includes the circumstance where there has been a serious and substantial failure by a party to fulfil any of the obligations described as essential elements in Article COMPROV.12, meaning the provisions relating to democracy, rule of law and human rights (Article COMPROV.4(1)), the fight against climate change (Article COMPROV.5.1), and countering proliferation of weapons of mass destruction (Article COMPROV.6(1) (Article INST.35).

Finally, a party has the right to take appropriate safeguard measures in case of serious economic, societal or environmental difficulties of a sectorial or regional nature that are liable to persist (Article INST.36). If that safeguard measure creates an imbalance between the rights and obligations under the TCA or any future supplementing agreement, the other party may take proportionate and strictly necessary rebalancing measures (Article INST.36.4).

Guarantees against any impact of domestic courts (including the Court of Justice of the European Union)

A strict demand of the UK was that the Court of Justice of the European Union (“CJEU”) be given no role in interpreting and applying the TCA. To that effect, Article COMPROV.13(2) states that neither the TCA nor any future supplementing agreements requires that the provisions of those agreements are interpreted in accordance with the domestic law of either party. Furthermore, Article COMPROV.13(3) provides that if a domestic court of either party interprets the TCA or any future supplementing agreement, that interpretation does not bind the courts of the other party. No provision of the TCA or any future supplementing agreements has direct effect or can be directly invoked before the domestic courts of either party (Article COMPROV.16.1). Article COMPROV.16.2 also precludes either party from establishing, under domestic law, a right of action against the

other party in case that party has allegedly breached the TCA or any future supplementing agreement.

IMPLEMENTATION

The implementation and administration of the agreement is to be supervised by the Partnership Council, comprising representatives of both the EU and the UK (Article INST.1). The Partnership Council is the main body with (binding) decision-making powers under the TCA, though it may delegate some of its powers to the Trade Partnership Committee or Specialised Committees (Articles INST.1.4 and 2.1; see also Article INST.4.1 and Annex INST: Rules of Procedure of the Partnership Council and Committees). Where so provided, the Partnership Council may also amend parts of the TCA (for example, Article CUSTMS.21.1 authorises the Partnership Council to amend Annex CUSTMS-1 on Authorised Economic Operators).

The TCA also creates Working Groups responsible for specific topics, such as organic products or motor vehicles and parts and medicinal products (Article INST.3) and envisages the establishment of a Parliamentary Partnership Assembly (Article INST.5). Through the establishment of domestic advisory groups and a Civil Society Forum, the parties commit to consulting civil society on the implementation of the TCA and any future supplementing agreement (Articles INST.6, 7 and 8).

Finally, various chapters introduce obligations to ensure effective enforcement at the domestic level. For example, enforcement of non-regression from levels of environmental and climate change protection must be supported by domestic enforcement of environmental and climate related laws and regulations and the availability of adequate and effective remedies at the domestic level.

NEXT STEPS

The text that is currently available still requires final legal revision. Some parts of the text also need to be completed. The final legal revision is due to be completed no later than 30 April 2021 or, if earlier, on the date on which the TCA is due to enter into force following notification that each party has completed its ratification procedures (Article FINPROV.9 and FINPROV.11(1)).

Notwithstanding the fact that the final legal revision or domestic ratification processes are unlikely to be completed by 1 January 2021, the TCA will apply on a provisional basis starting from 1 January 2021 provided that the parties have, prior to 1 January 2021, notified each other that their domestic procedures for ensuring provisional application

VAN BAEL & BELLIS

have been completed. That condition appears to be satisfied and the signing of the TCA was completed on 30 December 2020. Although the EU typically ensures obtaining the European Parliament's approval of an international agreement before that agreement can be provisionally applied, the exceptional circumstances merit deviating from that principle. The provisional application of the TCA is due to end on the date of the entry into force of the TCA or on 28 February 2021. However the Partnership Council may also decide on a later date at which the TCA's provisional application will end (Article FINPROV.11).

The Commission [proposes](#) that the TCA be signed as an agreement to which only the EU, and not also the Member States, is a party. According to the European Commission, the legal basis of this agreement is Article 217 of the Treaty on the Functioning of the European Union, allowing the EU to conclude with a third country agreements establishing an association. Proposing that the TCA be concluded as an EU-only agreement entails that the 27 Member States do not need to ratify the agreement and therefore that their national parliaments will not be given a vote on the TCA.

Lawyers to contact

Philippe De Baere	phdebaere@vbb.com
Pablo Muñiz	pmuniz@vbb.com
Alex Stratakis	astratakis@vbb.com
Isabelle Van Damme	ivandamme@vbb.com
Reshad Forbes	rforbes@vbb.com
Thibaut D'hulst	tdhulst@vbb.com
Francesco Pili	fpili@vbb.com