

LEGAL ALERT

THE NEW EU-UK RELATIONSHIP

A FIRST GLANCE AT THE TRADE AND COOPERATION AGREEMENT

The definitive withdrawal of the United Kingdom after the end of the transition period

At 11 p.m. in Lisbon on 31 December 2020 (midnight CET), the [transition period established in the agreement on the withdrawal of the United Kingdom \(UK\) from the European Union \(EU\)](#) ended. From that moment on, the UK (which, although it formally ceased to be a Member State as of 1 February 2020, continued to be subject to most EU law provisions until the end of the transition period), became, for all purposes, a third country.

Once again, despite fears of withdrawal without an agreement, the EU and the British Government finally managed to reach an agreement, just before Christmas, on the terms of their future relationship after Brexit. The **Trade and Cooperation Agreement**, as well as two other supplementary agreements (relating to security procedures for the protection of classified information and cooperation in the field of nuclear energy) and various policy declarations, were signed by both parties on 30 December, [published the following day](#), and began to be applied provisionally on 1 January 2021.

In fact, due to the extremely late close of negotiations, it was not possible for the European Parliament and the Council, which convenes the governments of the Member States, to examine the text of the agreements in order to give their consent (the [Trade and Cooperation Agreement alone is over 1,300 pages long](#)). The parties have agreed to apply the agreements provisionally until the completion of the formalities necessary for their entry into force, which is expected in the coming months, in order to avoid the huge disruption that would result from the inexistence of an agreement at the end of the transition period.

The Trade and Cooperation Agreement (“Agreement”), although more comprehensive than other trade agreements in force between the EU and other third countries (such as Canada) and allowing the difficult Brexit process to be concluded in an orderly manner, falls far short of the level of integration that the UK enjoyed as a Member State. This would always be inevitable, given the British [decision to “regain control of its borders” and to restrict the entry and stay of EU citizens in its territory](#) which, since the outset of negotiations, prevented its continuity within the European single market. It is also an omen of many years of continued and complex negotiations in the future, given the numerous matters left unresolved. In any event the Agreement is, despite its limitations, and in contrast to what many said, certainly better than the UK leaving *without* an agreement.

Goods: free trade, but with barriers

The Agreement creates an “ambitious” free trade area, without customs duties or tariff quotas, applying to all goods. Companies will, however, face new (non-tariff) barriers to trade, which had not existed until now. These barriers will result in additional costs, in particular the application of rules of origin procedures, customs controls and formalities and sanitary and phytosanitary checks and controls.

The Agreement establishes several mechanisms that seek to facilitate compliance with the new rules and mitigate the impact of the resulting barriers. In particular, exporters are able to self-certify the origin of their products, and products that were processed in the territory of one of the parties (under a provision on “full accumulation”) are also included; the programmes for European and British “trusted traders” are recognised by the other party, allowing traders who benefit from this status to use simplified procedures; the Agreement also contains common definitions of international standards that identify the relevant international standardisation bodies and the possibility for companies to resort to self-certification of compliance for lower risk products; and specific mechanisms are also created in order to facilitate bilateral trade in wine, organic products, medicines, motor vehicles and chemical products.

The Agreement does not affect the provisions of the Withdrawal Agreement, which remain in force. It does not, in particular, affect the Northern Ireland Protocol, according to which this UK territory remains within the European single market. Accordingly, a customs border between Northern

Ireland and the rest of the UK came into existence from 1 January. This border means additional costs and barriers to trade within the UK (in addition to a political problem that will be difficult to solve).

Regulatory divergences in the future may result in remedial measures

One of the last issues to be agreed on during the negotiations between the EU and the UK was that of the so-called “level playing field” between the parties. This issue concerned, on the one hand, the tension arising from the UK’s aim to no longer be subject to EU law and, on the other hand, the EU’s concern to ensure that the European single market would not be jeopardised by subsidies, lower standards or lower quality products from the UK.

The deal reached establishes that both parties retain the right to define their policies and priorities at legislative and regulatory level. They also make the commitment to respect high standards in terms of competition, state subsidies, tax transparency, labour and social rights, environment and climate change and, in certain cases, not to reduce the current levels of protection if such regression might impact on trade or investment between the EU and the UK.

The UK is bound, in particular, to respect the main principles of EU law in the field of State aid, which are detailed in the Agreement. It undertakes to approve a specific domestic legal regime regarding this matter and to establish an independent authority to exercise control over the compatibility of State subsidies.

This chapter establishes specific provisions on dispute resolution, which add to the horizontal provisions of the Agreement (see below). In regard to labour rights and social, environmental or climate protection and control of state subsidies, the possibility is included of either party unilaterally taking corrective or rebalancing measures (such as the imposition of customs duties or the suspension of partial application of the Agreement), subject to the control of an arbitration tribunal.

Services not included, in particular financial services

The UK ceased to have access to the European single market from 1 January. This is particularly serious for services, which represent about 80% of the British economy and almost half of its exports.

The Agreement establishes non-discrimination obligations, which seek to ensure that EU service providers and investors are not treated less favourably than British operators in the UK and vice versa. In any case, British service providers no longer benefit from the country of origin principle and passporting rights, according to which authorisations issued by a national authority of a Member State are valid throughout the EU. They will now be required, for that reason, to comply with the rules in force in each Member State, which often vary considerably.

The loss of the passport will particularly affect the financial services sector, which is viewed as one of the main comparative advantages of the British economy. The EU and the UK have declared that they intend to negotiate a memorandum of understanding in the coming months that will establish a framework for cooperation in the field of financial services (although such negotiations are expected to be complex and will require difficult commitments from the UK). In the meantime, each party retains full regulatory autonomy under the Agreement, in particular for prudential reasons. No provisions on equivalence are envisaged, which is essential for British financial operators to be able to provide services in the European Union. Since the declaration of equivalence is a unilateral decision taken by each party, which is not subject to negotiation, the European Commission has only recognised to date equivalence in specific areas, such as [clearing derivatives, which the EU considers to be in its interest, as the vast majority of European derivatives are cleared in London.](#)

Some sectors are excluded from the Agreement, such as public services, services of general interest, some transport services and audiovisual services (which has led, for example, to [British subscription television channels no longer being available outside the UK](#)).

Temporary stays facilitated, professional services less so

The Agreement contains provisions that facilitate temporary stays for business reasons, whether within the scope of transferring workers within the same company or also, under certain circumstances, with regard to contractual service suppliers, self-employed professionals and business trips that do not involve the provision of services (for example, taking part in trade fairs).

However, the European rules for mutual recognition of professional qualifications, which establish a simplified (and in some cases automatic) scheme for the recognition of professionals such as doctors, nurses, dentists, architects, engineers or lawyers, does no longer apply to the UK. British professionals will now have to obtain recognition of their qualifications according to the domestic rules in force in each Member State, which may certainly hinder their provision of services in the EU.

Movement of people: visas and social security

The Agreement does not regulate the right of EU citizens to enter, work, study or reside in the UK, nor that of British citizens in the EU, since the UK chose not to include provisions on the movement of persons in the Agreement (except for temporary travel for business reasons, already mentioned).

In any case, the parties have decided to reciprocally allow visa-free short-term visits by their respective citizens from 1 January 2021, as long as they do not exceed 90 days over a period of 180 days (note that the EU decision depends on the UK's observance of the commitment not to discriminate between the citizens of different EU Member States).

The Agreement also establishes coordination rules in the field of social security, which seek to protect the rights to certain social benefits of persons legally residing in a Member State or in the UK and who are in a transnational situation after 1 January 2021 (in particular, because they work or will work in more than one country, reside in one party and work in another, travel between the EU and the UK for a temporary stay, etc.).

Fisheries

Surprisingly, given the relatively limited impact of the sector on the economy of the contracting parties and the trade flows between them, it was the discussion of fishing rights that **threatened to jeopardise the negotiations, and the Agreement itself, up to the very final few days**. The agreement finally reached establishes that 25% of the fishing quotas currently held by the EU in British waters will be gradually transferred to the UK over a five and a half year adjustment period, during which existing rules on reciprocal access to the waters of each party remain in force. The gradual change in the allocation of fishing quotas also includes those managed at trilateral level (for example, with Norway) or in a multilateral context, and takes into account the need to ensure the sustainable management of marine resources and the continuity of the fishing communities.

After the adjustment period, the parties will annually agree on the level and conditions of reciprocal access to each party's respective exclusive economic zones and territorial waters. In the absence of an agreement, if one of the parties reduces or withdraws the access of the other to its waters, that other party may impose compensatory measures, namely customs duties, the total or partial suspension of access to its waters, and even the suspension of other commercial provisions of the Agreement.

Other areas of cooperation

- **Transport and energy.** Although the UK no longer enjoys the benefits arising from the single European airspace, the single transport market and the single energy market, the Agreement ensures the continuity of air, sea and land connections and the continuity of energy flows, essential for the operation of the British and European economies and for security of supply (in particular with regard to Ireland, which will remain isolated from the rest of the EU). In both cases, the Agreement provides that effective level playing field conditions must be maintained. The safe and peaceful use of nuclear energy is regulated by a cooperation agreement between the UK and the European Atomic Energy Community (EURATOM).
- **Security:** a new security partnership provides for information sharing and police and judicial cooperation with Europol, Eurojust and the judicial authorities of the UK and EU

Member States, but with reduced access to EU databases. A new surrender agreement replaces the European arrest warrant. This area is subject to specific provisions regarding dispute resolution. Cooperation may be suspended by either party in the absence of agreement, as well as if the UK or an EU Member State ceases to be a member of the European Convention on Human Rights.

- **EU programmes:** the parties agreed that the UK will continue to participate, now as a third country, and with an appropriate financial contribution, in some EU programmes: Horizon Europe (research and development), Euratom Research and Development, ITER (thermonuclear fusion tests) and Copernicus (EU satellite system for Earth monitoring), while continuing to have access also to the Space Surveillance and Object Tracking system (SST).

Governance and dispute resolution via arbitration

The Agreement will be supervised by a Partnership Council, co-chaired by a member of the European Commission and a cabinet-level member of the UK government, which will make decisions by mutual consent. The Partnership Council will be assisted in its work by more than twenty specialised committees and technical working groups, in areas ranging from sanitary and phytosanitary measures to aviation security and public procurement. The parties will be able to review the implementation of the Agreement every five years.

Finally, the Agreement provides for a horizontal dispute resolution mechanism, applicable to any area of the new partnership. If the dispute persists, after mutual consultation in good faith, the complaining party can turn to an independent arbitration tribunal, which will hand down a final decision within a specified period. Both parties may suspend the application of parts of the Agreement, across the several chapters of commercial cooperation (including through the imposition of customs duties), in the event of non-compliance with a decision of the arbitration tribunal. There are also specific rules for certain areas of cooperation of the Agreement, which establish the suspension of the obligations of the other Party in the event of non-compliance, in particular in terms of the level playing field or fisheries.

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