



BEG COMMENTARY ON DISPUTE RESOLUTION IN THE TCA¹

Overview

The UK-EU Trade and Cooperation Agreement (“TCA”) was published on Christmas Eve, signed on 31 December 2020 and is expected to be ratified by 28 February 2021. Until then it is under provisional application².

The TCA is over 1245 pages and includes 7 Parts, dealing with (i) Common and Institutional Provisions; (ii) Trade in Goods and Services, Transport Regulatory Cooperation and Level Playing Field; (iii) Law Enforcement and Cooperation in Criminal Matters; (iv) Cooperation on health and cyber security (v) Participation in EU programmes; (vi) Dispute resolution and (viii) Final Provisions. There are approx. 50 Annexes dealing with specific rules applicable to Goods and Services, Energy, Transport, Fish, Criminal Cooperation and Data Exchange and 3 Protocols dealing with Fiscal and Customs Cooperation and Mutual Assistance and social Security Coordination. All the Annexes and Protocols form an integral part of the TCA³

In this paper, BEG focusses on the institutional structure and dispute resolution provisions in the TCA.

Institutional Structure

It is clear from the opening provisions of Part One that the TCA is a starting point for the future EU-UK relationship. At several points throughout, the TCA refers to the parties being able to agree further provisions and supplementary agreements or annexes to the Agreement, which will then form part of the overall framework⁴. The TCA is subject to review every 5 years⁵.

The TCA creates a **Partnership Council** headed by a member of the EU Commission and a UK Minister and comprised by equal numbers of representatives from the EU and UK⁶. The PC is responsible for overseeing the attainment of the objectives of the TCA and supervising its implementation and application. Either the EU or the UK can refer a matter to the PC regarding the application or interpretation of the TCA.

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² FINPROV11.

³ FINPROV 7

⁴ See for example, COMPROV 2 which permits the EU and UK to agree further bilateral agreements, which also include “mixed agreements” involving both the EU and the EU27 States as well as the UK.

⁵ FINPROV 3.

⁶ INST 1.

The Partnership Council, in turn, delegates its trade supervisory powers to the Trade Partnership Committee⁷, which oversees approximately 20 Specialised Committees in specialist sectors⁸. There are also Working Groups established to deal with technical rules for organics, medicinal products, social security and motor vehicles.

Decisions adopted by Partnership Council, TPC and Specialised Committees are binding on the parties and under any delegated bodies including the Arbitration Tribunal.⁹

Dispute Resolution

Part Six sets out the exclusive “Dispute Settlement” regime, with a view to avoiding and settling disputes regarding the application and interpretation of the TCA and reaching mutually agreed solutions.¹⁰

Conciliation

With limited exceptions, if there is a dispute regarding the interpretation or application of the so-called “covered provisions” in the TCA¹¹, the parties are to seek to resolve it first through political consultation, over a period of 30 days, within a framework set up by a Specialised Committee or the Partnership Council.¹²

It is always open to the Parties to reach a mutually agreed solution through consultation or informal procedures, which can be formally adopted by the Partnership Council.¹³

If there is no consensual solution, the aggrieved party may adopt remedial measures or rebalancing measures, but they are limited to measures in respect of the “covered provisions” in INST 10.¹⁴

Arbitration

If consultation is not successful, the complaining Party can request the dispute to be referred to an arbitral tribunal.¹⁵ The Rules of Procedure and Code of Conduct are set out in the Annexes. That process is exclusive and the parties may not have recourse to other forms of dispute resolution or national courts. The tribunal is composed of three arbitrators, agreed between the Parties or selected from the list, who will deliver an

⁷ INST 2(2).

⁸ INST 2(3) - including Goods, Customs Cooperation, RO, SPS, TBT, Services, Investments and Digital Trade; IP, Public Procurement, Regulatory Cooperation, LPF, Tax, Energy, Air Transport, Aviation Safety, Road Transport, Social Security, Fish, Law Enforcement and Judicial Cooperation, Participation in EU programmes.

⁹ INST 4.

¹⁰ INST 9.

¹¹ Covered provisions include most of the provisions concerning Goods and Services and other aspects covered in Parts 1-and 2 of the TCA.

¹² INST 13.

¹³ INST 31.

¹⁴ Article 3.12 of Chapter 3 (Subsidies); Art 9.4 of Title XI (LPF) and equivalent provisions for Road transport and Fish

¹⁵ INST 14.

interim report within 100 days and a final ruling within 130 days. In event of a finding of breach, the respondent will be required to take necessary compliance measures.¹⁶

If compliance is not offered or possible, then the respondent is to offer temporary compensation and the complaining Party may notify its intention to suspend its obligations under the covered provisions. Such suspension, which is subject to review by the arbitral tribunal, must be proportionate to the breach and will normally be sector-symmetric – i.e. in the same Heading or Title under the TCA as the finding of breach, unless the circumstances of breach are sufficiently serious to warrant suspension in another Heading.¹⁷ There are explicit carve outs and limitations for suspension in relation to breaches of the TCA provisions on social security coordination, Union programmes and financial services.¹⁸ Further, breaches of the fundamental parts of the TCA (climate change, human rights, democratic rights and non-proliferation) can trigger the suspension or termination of the entire agreement¹⁹.

LPF Conciliation Panels

For excluded areas (including most importantly, LPF provisions for fair competition and subsidies, fisheries, medicinal products, law enforcement in criminal matters and personal data transmission), the standard Dispute Settlement provisions in Chapter 6 do not apply²⁰. Instead, disputes may be referred directly to the Partnership Council²¹ or to specialist Panels organised by the relevant Specialised Committee.

For example, for issues relating to competition law, environmental law and labour law, Article 9.1 of Title XI to Part Two provides for an initial 30 day consultation process between the Parties, who may involve domestic advisory groups and experts. If that does not address the issue, a Party may request a Panel of three experts to be convened, who will examine the issue (with written submissions from “relevant persons”) and issue an interim report within 100 days and a final report within 175 days. The parties will then agree implementing measure to comply with the findings and recommendations (if any) of the Panel with a referral to the Panel to determine the measures if they cannot be agreed. In the event of a failure to comply with the measures and recommendations, the matter can be referred to the Arbitration Tribunal.

LPF Non-regression Panel

Similar Panels are also set up under Article 9.3 to deal with issues relating to the non-regression of labour and social standards and environmental law. If the Parties do not conform to the Panel’s report and recommended measures, the complaining party will

¹⁶ INST 21 and 22.

¹⁷ INST 24 (6) to (8).

¹⁸ INST 24 93).

¹⁹ Title 3, INST.35

²⁰ Part 6, Title 1, Chapter 1, Article INST.9

²¹ INST 10-11.

have the right to seek temporary remedies and refer the dispute to the Arbitration Tribunal²².

LPF Arbitration

So far as subsidies and LPF provisions are concerned, if there is a dispute about the remedial measures or the breach, the parties can refer the dispute to a “fast-track” arbitral tribunal, established within 2-3 days.²³ There is a truncated timetable for submissions and the arbitral tribunal has to deliver its decision within 30 days. If the respondent does not comply with the arbitral ruling, the complaining party can proceed to request suspension of the obligations under the TCA²⁴. The level of consequential suspension must be strictly necessary and proportionate to the impairment of benefits caused by the remedial measures and the actual (not alleged) effects on the supply of goods, service providers, investors or other economic actors.²⁵

Rebalancing measures

The TCA recognises the Parties’ autonomy to develop their own policies and priorities on LPF matters²⁶. In the event that significant divergences arise between the UK and EU relating to labour and social, environmental or climate protection, or competition law and subsidy control, which affect trade to a material extent, the other party may notify the Partnership Council that it intends to take “rebalancing measures” under Article 9.4(2). The complaining party must provide concrete reasons and evidence (not conjecture) for their imposition and limit their scope and duration to “what is strictly necessary and proportionate in order to remedy the situation”. Proportionality entails an assessment of the least intrusive measure that will “least disturb the functioning of this Agreement”.

The Partnership Council will commence an expedite consultation, lasting 14 days, and if no mutually acceptable solution is found at the end of that process, the complaining Party may adopt rebalancing measures within 5 days. To pre-empt that, the accused Party can request a referral to an Arbitration Tribunal, which is to issue its ruling within 30 days²⁷. If the ruling is not available within that time-scale, the complaining Party may implement the rebalancing measures and the accused Party can adopt so-called proportionate “counter-measures”, following a similar consultation process as before.

If the provisions regarding rebalancing measures are invoked frequently or have a material impact on trade for over 12 months, the parties may request a review and/or amendment of the main headings of the TCA by the Partnership Council.

²² Article 9.3(2) and (3) and 9.2(19).

²³ INST 34B.

²⁴ Art 3.12 (12) of Title XI (LPF)

²⁵ INST 34C(2) – (3).

²⁶ Article 9.4(1)

²⁷ Article 9.4(3)(c).

That review, which is limited to Heading One (Trade) but can be extended to include other Headings on request, can start in January 2025.

WTO

Save for LPF and subsidies, where a matter relates to an international obligation that is covered by both the TCA and the WTO, the complaining party may choose between the WTO Dispute Resolution forum and the TCA mechanism²⁸. A party cannot invoke the WTO Agreement or any other international agreement to preclude remedial or rebalancing measures in respect of LPF or subsidy obligations.²⁹

Role of the CJEU

The Dispute Settlement provisions have no role for the CJEU. The only where the CJEU has ongoing jurisdiction is in relation to disputes and arbitration provisions relating to EU programmes, such as the Horizon 2020 programme³⁰.

Individual Enforcement

With the exception of subsidies, digital services and social security, the state-to state Dispute Resolution provisions do not provide for the direct involvement of, or enforcement by, private entities who may be affected by the state measures in question. However, private parties may be indirectly involved as “relevant persons” or in providing evidence to the Parties as to the impact of the remedial measures on their business activities or investments.

Within the UK, the TCA will be implemented via s.29 of the European Union (Future Relationship) Act 2020, which provides that existing domestic law (including EU Retained Law) is to have effect on and after 1 January 2021 (when the TCA has provisional effect) “with such modifications as are required for the purposes of implementing” the TCA into domestic law or “is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”. That means that, in addition to the specific direct rights of actions conferred under the TCA of state aid, digital services and social security, private parties will be able to challenge national measures that are inconsistent with the obligations in the TCA.

²⁸ INST 12.

²⁹ Art 3.12 (13).

³⁰ Article UNPRO.4.4: Recovery and enforcement s.2.