Navigating the UK-EU Trade and Cooperation Agreement

It will take some time to fully digest the details of the new Trade and Cooperation Agreement between the UK and the EU. We present here our pick of the best analyses of the deal that have been published to-date, together with a summary of its most important elements.

Having spent the past four and a half years since the 2016 referendum in limbo as to what kind of Brexit we would get, we now eventually have some kind of certainty. The UK-EU Trade and Cooperation Agreement (TCA) was agreed on Christmas Eve and is already in operation. Although it is currently only being provisionally applied pending formal approval by the European Parliament and EU27 (it passed the UK Parliament on 30 December), in reality the chance of them rejecting it is slim.

Like everyone else, CIB has been spending the past few weeks trying to get to grips with the details of the TCA. While it is impossible to digest every detail and understand every possible ramification in just a few weeks, some excellent commentaries have been produced by specialists in their fields which enable us to ascertain where we stand on the most important aspects. We recommend reading them in conjunction with the relevant sections of the TCA in order to gain the fullest understanding.

The deal as a whole

Veteran Eurosceptic boffin (and CIB committee member) **Dr Lee Rotherham** has produced a point-by-point analysis of the deal,

which has been published by his think tank The Red Cell here. Rotherham has also published an overview of the deal on Briefings for Britain. He sees serious faults that could lead to future problems, but views future improvements as possible in fisheries. He views the raft of new committees supervising the deal as a cause for concern.

Briefings for Britain economist Harry Western sees the TCA as representing an 'experimental peace' in UK-EU relations. He states that, while the TCA offers future UK governments the possibility to break away from the EU's control, this will require decisive policy action. Policy inertia could well see the UK's independence gradually chipped away again over time.

Trade

Prof. David Collins, Professor of International Economic Law at City, University of London, notes that while the deal eliminates goods tariffs and quotas across the board, for services it grants little beyond WTO terms. Nevertheless, the FTA should be seen as work in progress, laying the foundation for UK trade with the EU as a fully independent state. Collins states:

> *'The UK-EU Trade and Cooperation Agreement (TCA) achieves very much what the Prime Minister promised last year – it is a very good Free Trade Agreement. It goes beyond the EU's FTA with Canada (CETA) while preserving the UK's sovereignty and eliminating any role for the European Court of Justice. Though not quite the "Canada plus plus" that many hoped for, the TCA lays a solid foundation for the UK to trade with the EU as a fully independent state in charge of its own laws.'*

On the issue of the so-called 'level playing field' (LPF) that risked keeping the UK within the EU's regulatory orbit, Collins believes that the LPF has been sufficiently watered

down that, *'It is doubtful that these obligations will have much impact on the UK's regulatory goals.'* Collins warned back in August last year that the EU's LPF demands were a 'con trick', because the legal commitments embodied in the World Trade Organization already provide a level playing field. His seal of approval for the TCA is therefore encouraging.

Northern Ireland

University of Cambridge economist **Dr Graham Gudgin**, who served as Special Adviser to the First Minister in the NI Assembly from 1998 to 2002, notes that the **Irish Protocol** remains in place irrespective of the new agreement, *'although its impact is greatly ameliorated by the new agreement to avoid tariffs and quotas between the UK and the EU.'*

Article 6 of the Protocol states that, 'Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market.' However, this means that, as Gudgin points out, 'Unfettered access is a one-way ticket applying only to West-East [i.e. NI to GB] trade.' Moving goods from GB to NI is much more complicated:

> *'Despite the new agreement avoiding all tariffs, all goods entering the EU from the UK must provide customs declarations showing that they conform with EU regulations, and checks will be undertaken to prevent avoidance.*
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> *'For Northern Ireland this means that all goods entering Northern Ireland from Great Britain require a customs declaration. To avoid cost and disruption to businesses, the Government has set up a £200 million Trader Support Scheme (TSS) under which agents working for HMRC will undertake the paperwork based on information received from the businesses themselves.'*

Businesses in Northern Ireland are already facing major supply problems from GB connected with the Protocol coming into operation, including empty supermarket shelves. Chief executives of Tesco, Sainsbury's, Asda, Iceland, Co-Op and Marks & Spencer have written to Cabinet Office Minister Michael Gove stating that urgent intervention is required to prevent the shortages continuing. How exactly the Protocol will operate in practice is clearly going to be one of the major ongoing Brexit issues of 2021.

Legal and constitutional issues

Prof. Richard Ekins, Professor of Law and Constitutional Government at the University of Oxford, has examined the legal and constitutional aspects of the deal.

On the controversial issues of continued **European Court of Justice (ECJ)** jurisdiction over the UK, he finds that there is no provision in the TCA for the UK to be subject to the ECJ. However, those parts of the Withdrawal Agreement (WA) that left vestiges of ECJ jurisdiction still remain.

Parts of the Withdrawal Agreement, especially the Irish Protocol, made provision for EU law to continue to apply in the UK (or parts of it, notably Northern Ireland). Given that the ECJ is the ultimate arbiter of EU law, the WA obviously left the UK subject to the ECJ in certain areas. '*In adopting the Withdrawal Agreement,*' writes Ekins, '*the UK agreed to legislate to give some of the agreement's terms domestic legal force, including priority over other legislation.*'

On the TCA, Ekins writes:

> '*There is no such requirement in the UK-EU Trade and Cooperation Agreement, and the agreement does not import concepts of EU law or otherwise make provision for the UK to be subject to ECJ rule. The only limited exception*

concerns continuing UK participation in EU programmes, such as Horizon, in relation to which the ECJ obviously has a role. However, this is quite different from the UK agreeing to follow EU law and agreeing to be subject to the ECJ's jurisdiction.'

Another controversial issue during negotiations was whether an agreement would bind the UK to the **European Convention on Human Rights** (a non-EU institution, but one which has been accused of EU-style mission creep in recent years). While the situation is not black and white, Ekins finds that the deal leaves the UK free to leave the ECHR should it wish to do so:

'Leaving the ECHR would not be a breach of the Agreement. It would not justify suspension or termination of agreed terms of trade. It might be a reason for the EU to terminate law enforcement and judicial cooperation, but that would be a choice for the EU to make and the EU, like the UK, is in any case free to terminate the Agreement. If the UK were to leave the ECHR, it would be prudent to provide assurances to the EU that there would be no relevant change in the protection of liberty within domestic law. But whether to leave the ECHR, and how to protect human rights, would remain for the UK freely to decide.'

Dr Lee Rotherham notes that the TCA also leaves future governments free to repeal the Human Rights Act 1998:

'the Human Rights clauses do allow reform. The text recognises the importance of the principles behind the European Convention on Human Rights, but does not require the UK to retain the calamitous Human Rights Act 1998. It merely states that if the HRA is removed there should be some other domestic framework to replace it – which might well be the mooted "Charter of Rights and Obligations".'

Fishing

On fishing, the verdict is somewhat mixed and the situation not entirely clear – suggestive perhaps of a last-minute fudge in order to get a deal wrapped up before Christmas. There is a five and a half year transition period, during which, according to DEFRA,

> *'the UK will see year on year increases in our share of the total allowable catch, moving from just over half of the quota stocks in our own waters now, to two thirds of the stocks in our waters after five and a half years.'*

This is said to repatriate 25 per cent of the value of fish caught in UK waters. However, Dr Lee Rotherham has expressed concerns that the UK gain on fish, 'is being sold as bigger than it actually appears to be':

> *'We still need the cold facts. It's not surprising there was the reported confusion amongst EU27 Governments about what the deal on fish meant, because it's not especially clear from the text. The changes in catch are in percentages, not tonnes and not value. They start from 2021, so any immediate gain is not clear.'*

What happens once the fishing transition period comes to an end in July 2026 is also far from clear from the text of the treaty. It has been suggested that the UK will then become be a fully independent coastal state like any other. However, the quotas listed in the Fish Annexes of the TPA include a column headed '2026 onwards'. A new report by Ireland's Department of Agriculture, Food and the Marine examining the impact of the new quotas on Irish fishermen refers to the 'transition to the new quota share', making it clear that they expect quotas not to change further after 2026.

An initial reading of the TCA suggests that, to regain full sovereignty over its fishing waters, the UK would have to terminate the fisheries agreement under Article FISH.17, which

would thereby collapse arbitrarily linked parts of the TCA – namely, those relating to Trade, Transport and Aviation. Politically, a UK government is highly unlikely to be prepared to do this.

Nevertheless, Rotherham sees five options for catch shares to be renegotiated after 2026, *'three of which are nuclear'*. The two non-nuclear options *'do mean that the UK could seek to improve the fisheries deal in the future without unravelling the entire text [of the TCA]'*. But even then, it is clear that a lot of political pressure will have to be exerted on whatever government is in power in 2026 in order to secure any change.

Education

The UK will no longer be part of the EU's Erasmus+ scheme. As CIB has previously noted in a joint report with Brexit Facts4EU.Org, the main *raison d'être* for Erasmus has always been the propagation of a 'European identity' rather than education, and it has not served the interests of UK students, who overwhelming prefer to study in English-speaking countries.

The Department for Education has already announced the **Turing scheme**, a new £100 million scheme for students to study and work abroad to replace the UK's participation in Erasmus+. While we await further details, the scheme is due to start in September 2021 and *'will also target students from disadvantaged backgrounds and areas which did not previously have many students benefiting from Erasmus+.'*