The Evolution of UK-EU Relations since Brexit

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Abstract

The Trade and Cooperation Agreement (TCA) between the EU and UK covers a very broad range of areas of cooperation, from the core integration issue of trade to criminal justice, while still leaving numerous matters open for further agreement and negotiation. Since the TCA was adopted in late 2019, the major subsequent agreement has been the Windsor Framework, primarily concerned with further reconciling the exceptional situation of Northern Ireland as being in principle within both the EU and UK internal markets. Amongst the issues publicly identified as having potential for greater agreement between both sides is mutual recognition in trade in goods, a framework for which could not be agreed in the TCA. This has been amongst the most noticeable practical effects of Brexit, at least for traders if not for the general public, as it has required an extensive phased new set of trading arrangements, as well as the pragmatic negotiation of a rolling over of CE recognition. This paper evaluates the longer-term significance of the Windsor Framework as an adjustment to the TCA as well as the matters which could be considered to be obviously outstanding or with an evident potential for further negotiation and agreement in the right political circumstances, including mutual recognition. It seeks to put the development of ongoing cooperation under the TCA in the political context of the future EU-UK political relationship and whether the UK is likely to prefer either a close and cooperative alignment with the EU or a more self-assertive path of differentiation.

Introduction

- The obvious milestones in UK-EU relations are the Withdrawal Agreement and the TCA
- The other major development has been the Windsor Framework
- They moved the UK from being a MS to a third country status
- Third country status represents something quite variable in EU context: spectrum of relationships, culminating in pre-membership Association Agreements
- Two frameworks under TCA: (i) UK and (ii) NI
- Incongruous situation of NI being in both UK and EU single markets
- A major omission from the TCA was mutual recognition?

Outline

- The TCA in context
- Trade and the Protocol on NI
- The Windsor Framework
- The question of mutual recognition
- Windsor Framework and UK Internal Market
- Future EU-UK trade relations

Goods and Taxes under the TCA

- UK-EU trade now governed by Trade & Cooperation Agreement 2021
- Internal taxation

Article 19 TCA provides that each party shall accord national treatment to the goods of the other party in accordance with Article III of GATT 1994. This is similar to Article 110 TFEU - though it does not explicitly distinguish direct discrimination from protective discrimination, but a similar approach applies under Article III GATT (see, e.g. Cottier & Oesch, 2011)

- Customs duties

- Article 21 TCA entitled prohibition of customs duties states that except as otherwise provided for in the TCA, customs duties on all goods originating in the other Party shall be prohibited. Articles 22-24 go on to provide limited exceptions quite similar to those that exist in EU law regarding Article 30 TFEU on customs duties:
- Articles 22-23 – Fees and formalities
- Article 24 – Repaired goods
- No equivalent to inspections imposed as requirement of EU law

Goods and Taxes under the TCA

- In both customs and internal taxation, the TCA it essentially continues most of what applies in EU law under Articles 30 and 110 TFEU

- Protocol on Ireland and Northern Ireland continues to apply Articles 30 and 110 TFEU to Northern Ireland

- Windsor Framework (Feb. 2023): modified TCA and NI Protocol to make it easier for NI to be both within the UK internal market and within the EU internal market, though still need to some extent for 'border in Irish Sea' (current efforts to minimise this): i.e. how to ensure that goods from Republic of Ireland (ROI) are not subject to any border checks going into NI because NI is still within EU internal market (e.g. goods from ROI leaving NI for rest of UK)

- Article 4 TCA requires the TCA to be interpreted in light of international law principles of interpretation, which suggests WTO caselaw more likely to be followed than EU caselaw in interpreting Articles 19-24?

Goods and Taxes under the TCA

- Although the general framework for customs duties is very similar under the TCA compared to EU law, some practical differences exist
- UK no longer falls under EU customs rules, so particular provisions on this included in TCA in Articles 37-65
  - Article 39 – to benefit from preferential treatment under the TCA (i.e. not have to pay customs duties), products must originate in the other party (i.e. UK or EU),meaning:
    - "(a) products wholly obtained in that Party within the meaning of Article 41;
    - (b) products produced in that Party exclusively from originating materials in that Party; and
    - (c) products produced in that Party incorporating non-originating materials provided they satisfy the requirements set out in Annex 3"
  - Article 54 – statement of origin needed
  - Article 55 – statement of origin to be included in customs declaration
  - Annex 2 (on general rules) and Annex 3 (on specific products) of the TCA contain detailed provisions on rules of origin
  - → on paper, these changes do not seem so far-reaching, but much will depend on the ease with which the above rules are actually applied

The TCA and Goods – Non-Tariff

- The TCA largely reflects WTO law on what in EU law are called QRs and MEQRs, though these terms (especially MEQR) not used in WTO law:

  - The key provision on non-tariff barriers and goods is Article 26 TCA entitled 'Import and export restrictions'
  - It provides that the only permissible restrictions on trade between the parties are those compatible with Article XI of GATT
  - Article XI GATT is entitled 'Quantitative restrictions' but it does not just deal with QRs scope overlaps with what are called MEQRs in EU law, because Article XI refers to 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, *import or export licences or other measures*' (emphasis added)

Comparison of Brexit/TCA and Ukraine Association Agreement ('Ukraine AA')

	EU Law	(i) Brexit/TCA, (ii) Ukraine AA
Tariff Customs Duties	- Strictly prohibited under Article 30 TFEU - Save for very narrow exceptions	(i) Brexit/TCA: - Prohibits customs duties (Article 21 TCA) - Quite similar exceptions as in EU (Articles 22-24 TCA) (ii) Ukraine AA: - Aims to reduce and eliminate (Article 29 AA)
Tariff barriers – Internal	- Discrimination and protection in favour of domestic goods prohibited under Article 110 TFEU - Indirect discrimination permitted for legitimate policy reasons	(i) Brexit/TCA: - Very similar to EU law (Article 19 TCA) (ii) Ukraine AA: - Prohibition on discrimination already provided for under Article III GATT - Working towards approximation of tax structure, including as regards VAT (on latter see ANNEX XXVIII TO CHAPTER 4)
Non-tariff barriers – (i) QRs and (ii) MEQRs	- Comprehensive prohibition re imports in Art. 34 TFEU (MEQRs as interpreted by *Dassonville*) - Principle of mutual recognition (*Cassis de Dijon*), selling arrangement exception (*Keck*) - Exceptions under Art. 36 TFEU and more broadly (if no direct discrimination) under *Cassis de Dijon*	(i) Brexit/TCA: - On QRs, reflects Article XI GATT (i.e. incorporates it) - On MEQRs, covered to significant extent under Articles III and XI GATT (ii) Ukraine AA: - Very similar to TCA, on QRs and MEQRs, Articles III & XI GATT incorporated (Articles 34-35, 53-54 AA)

Import and Export Licensing under the TCA

- Article 28 TCA provides that each party shall ensure that all import licensing procedures applicable to trade in goods between are neutral in application, and are administered in a fair, equitable, non-discriminatory and transparent manner and adopt such procedures only if other appropriate procedures to achieve an administrative purpose are not reasonably available

→ i.e. so such procedures to be minimal and necessary only

- Export licensing is less common, but is also regulated by Article 29 TCA, requiring existing and new procedures to be published

- Allowing licensing reflects absence of mutual recognition

The Scope of Mutual Recognition

- Cassis de Dijon principle under EU law: all good marketed in one Member State should be marketable in another MS
- Subject to exceptions:
  - Article 36 TFEU, but these are interpreted narrowly
  - Open-ended category of exception in *Cassis* itself ('mandatory requirements')
- Importance of *Cassis*:
  - it adopts a standardised approach across all sectors of trade
  - It avoids harmonisation of standards

but

  - It interacts with minimum harmonised standards set in EU Regulations, e.g. Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products, e.g. toys
  - Where there are harmonised standards → applied through CE marking system

Mutual Recognition after Brexit

- UK and EU did not agree general MR principle in TCA

- TCA leaves open possibility of further agreement where TCA itself does not include agreed rules
- Important to note the difference between:

    - (i) Mutual recognition (i.e. *Cassis*) = direct acceptance of product standards of the MS from which good originates (no dual burden or second standard imposed by importing MS)
    - (ii) if don't have MR itself, can have MR of procedures for testing standards of goods, i.e. to minimise delays in trade: this is called mutual recognition of conformity assessment

- E.g. EU-Canada Comprehensive and Economic Trade Agreement (CETA) does include provisions on (ii), but the TCA has neither (i) or (ii), but GATT reflects a similar approach to (ii), e.g. Article 5 TBT

Mutual Recognition & Non-Discrimination (contd.)

- Mutual recognition → applies in regulatory space beyond minimum harmonisation of CE system

- UK has decided to develop its own UK certification or CE equivalent, but in the meantime has rolled over acceptance of CE standards in the UK

→ how readily will EU reciprocate for UK standard?

- Context of asserted benefit of Brexit of greater regulatory freedom: but trade-off here of greater regulatory burden, at least in short-term

- How does non-harmonised MR work beyond space occupied by CE?:

→If not regulated by TCA:

- governed now by GATT/WTO
- liable to much more variable application across EU?

Northern Ireland Protocol

Article 5 both retains the power of UK to impose customs duties re NI (these now subject to TCA) and applies EU rules on non-tariff barriers

Other provisions:

- Article 6 on UK internal market
- Article 7 on technical assessments and approvals
- Article 8 on VAT and excise
- Article 9 on the single electricity market
- Article 10 subjects NI to EU state aid rules
- Article 12 addresses implementation, application, supervision and enforcement

Article 16 provides for a general derogation or exception clause, which is quite narrowly drawn in its wording (and unlikely to justify much departure from the normal application of the rules), whereby, if the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the UK may unilaterally take appropriate safeguard measures.

Article 18 provides for democratic consent in NI to the continued application of Articles 5–10 the Protocol

Windsor Framework

 Does not radically change NI Protocol

 It illustrates:

(i) the central place of implementation in the absence of the previous overall EU framework and the absence of a general system of MR +
(ii) potential for UK overall to have more comprehensive trade framework to the extent of agreed trading standards
(iii) The practical significance of UK no longer being part of EU Common Customs Code

→ it reflects current 'a framework of bits and pieces'

 'Stormont Break': a new emergency mechanism that will allow the UK government, at the request of 30 Members of the Legislative Assembly in Northern Ireland (Stormont), in the most exceptional circumstances, as a last resort as set out in a unilateral UK Declaration, to stop the application of amended or replacing provisions of EU law, that may have a significant and lasting impact specific to the everyday lives of communities in Northern Ireland

→ can be seen to supplement Article 18 of the Protocol, but an exceptional/reserve clause

The Future of EU-UK Trade Relations

- Opinion 1/94 [1994] ECR I-5276– Limits to CCP

- Consequence is shared competence by MSs and EU over non-goods aspect of internal market

- External competence and shared competence? Article 4 TEU lists internal market as a shared competence:

  → What does this mean for non-goods aspects of internal market, especially workers?

- Last week's announcement of intended UK-Germany Treaty; possible inclusion of mobility element?

- Implications of Case C-246/07, Commission v. Sweden (PFOS) ECLI:EU:C:2010:203? Impact on internal market?

"…**The duty of sincere cooperation also leads to a general obligation of cooperation on Member States, and an obligation not to frustrate or undermine the effectiveness of EU external actions in any way. Even if Member States are acting in a field where the EU has no competence or has not used its shared competence, therefore, they are under an obligation not to use their own competence in a way that might undermine the effective attainment of EU objectives in another field. This obligation does not amount to a general obligation for Member States to coordinate all national external actions. In some cases, however, the duty of sincere cooperation may lead to a positive obligation on Member States to ensure coherence. Clearly, the extent to which these legal obligations can be enforced in a highly political area is another question, but the main point here is that EU law has developed a set of legal principles and obligations to control the external behaviour of its Member States, even in areas where the EU has only shared or even no external competences**." (references omitted)

Armin Van Cuyvers, 'EU External relations Law', in E. Ugirashebuja (ed.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects*(Brill 2017), p. 201

Conclusions

- Enduring uncertainty over aspects of Brexit is not just due to overall messiness of Brexit, but reflects uncertain scope of some aspects of EU law, mainly EU external powers

- Major absence in TCA was MR

- Details of implementation also need attention: to relate back to general principles, so that implementation does not frustrate overall framework

- Interaction of TCA and GATT/WTO framework also now central: what applies beyond CE arrangement UK can agree with EU