Antitrust and the EU-UK Trade and Cooperation Agreement

Skadden

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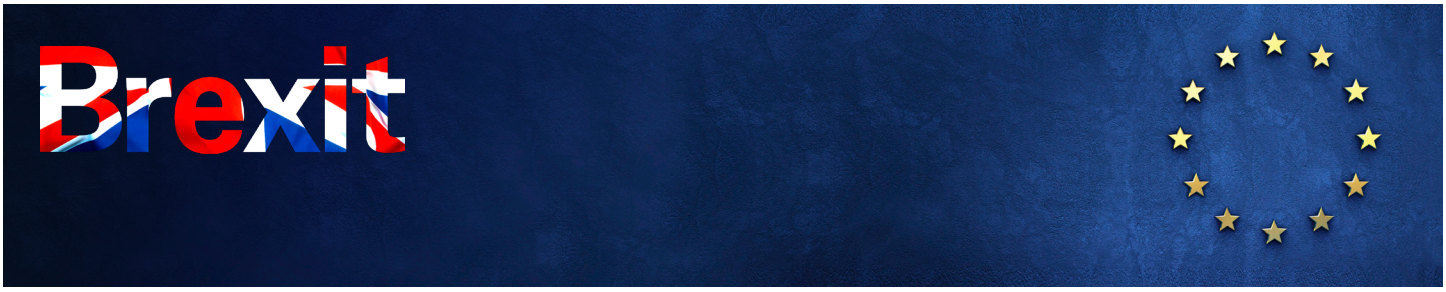

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Summary and Implications

The European Union (EU)-U.K. Trade and Cooperation Agreement (TCA) governing post-Brexit trade relations between the U.K. and the EU includes provisions regulating EU/U.K. antitrust enforcement and cooperation effective January 1, 2021:

Anticompetitive practices and mergers. The TCA provides for a mutual commitment to police restrictive agreements, market power abuses and anticompetitive mergers, and empowers EU and U.K. competition authorities to cooperate and share information. The post-Brexit regime therefore changes little except the likelihood of parallel inquiries in matters impacting both the U.K. and EU. The U.K. Competition and Markets Authority (CMA) will gain jurisdiction over mergers that had previously been exclusively reviewed by the EU, and the CMA will have jurisdiction to investigate anticompetitive behaviour that impacts the U.K. The CMA and the European Commission (EC) will likely continue to coordinate on most of these parallel investigations.

Subsidy control. The TCA requires both the U.K. and EU to control potentially trade-distorting subsidies.

- For the U.K., this requires a new U.K. subsidy control ("state aid") regime. The U.K. will entrust review of subsidies to an independent authority (most likely the CMA). The U.K. system is likely to involve *ex post* review only, rather than subject subsidies to prior notification. Complainants have a right to be informed of the subsidy and to challenge aid within a one-month time limit. A parallel EU-linked regime will apply to Northern Ireland by virtue of the UK-EU Withdrawal Agreement.
- For the EU, rules regulating state aid at the EU member state level will remain unchanged. The principal change under the TCA is that now EU-level aid (commonly granted for EU-wide projects supporting, *inter alia*, regional growth, R&D and environmental goals) may be subject to challenge by the U.K. However, the practical impact of potential challenges is likely to be limited, as the TCA creates significant exceptions for EU-level aid.

Companies should therefore be aware of potential complexity arising in the new U.K. and EU regimes:

- Competitors or other interested parties may be able to challenge before the CMA or U.K. courts subsidies granted in the U.K. leading to competitive distortions between the EU and U.K. Companies may potentially be subject to court-enforceable recovery orders.
- U.K.-granted subsidies affecting Northern Ireland may be subject to further control, potentially requiring notification and approval by the EC. As a result, there may be legal uncertainty as to the applicable legal regime for U.K.-focused subsidies with the potential to also impact Northern Ireland.

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- EU-granted support may also be potentially subject to challenge. Though, as noted, the TCA largely permits EU aid for the types of projects the EU most commonly supports. For EU aid granted via primary legislation, companies would not be at risk of individual recovery orders; instead, recovery will be a matter for TCA dispute resolution between the U.K. and EU.

The TCA "level playing field." The TCA enables one party to impose trade sanctions if the other's legislative standards relating to certain policy areas, including subsidy control, develop in a manner that leads to a significant divergence affecting trade or investment.

Legal services and legal professional privilege. Though nominally seeking to deregulate aspects of cross-border legal services, the freedoms provided by the TCA are limited and confined to the practice by U.K.-qualified lawyers of U.K. and international law to the exclusion of EU law.[1] U.K.-qualified lawyers therefore lose their rights of audience before the EU courts and their legal advice is no longer protected by privilege in respect of EU law matters. For antitrust matters that involve points of EU law, parties will therefore need to involve counsel qualified in an EU member state.

Cartels, Abuses and Mergers

The TCA has made little change to the core antitrust framework. Overall, both the U.K. and the EU commit to maintain competition law regimes addressing anticompetitive agreements, abuse of dominance and mergers.[2] Public policy objectives may provide for exemptions from competition law provided that the exemptions are transparent and proportionate to the objectives.

Cooperation between the CMA, the EC and individual EU member state competition authorities is expected, to be governed by a potential future cooperation agreement, which may include the exchange of confidential information.[3]

Competition law frameworks will undergo limited divergence, therefore, post-Brexit. The principal changes under the new regimes will be the U.K.'s independence as an antitrust regulator and that EU decisions will no longer be binding on the U.K. Regarding mergers, the CMA will gain parallel jurisdiction over transactions that had previously been reviewed exclusively by the EC. Regarding anticompetitive practices, EU action will no longer foreclose separate CMA inquiries. Both the EU and the U.K. take extraterritorial jurisdiction over practices that are implemented locally or have a material local effect. Similarly, both regimes can take jurisdiction in parallel over mergers meeting the required revenue or (in the case of the U.K.) share of supply thresholds. (See our client alert, "Antitrust Planning During the Countdown to Brexit," from October 5, 2020.)

One significant change to the U.K. and EU antitrust rules resulting from the IP consequences of Brexit is that companies can more easily prevent parallel trade from the U.K. to the EU (though not from the EU to the U.K.). The TCA does not align EU and U.K. laws on IP exhaustion.[4] This means that an EU IP rightsholder can prevent U.K. resellers of its trademarked products selling into the European Economic Area without its consent.[5]

In relation to antitrust civil actions, the EU has not withdrawn its veto on the U.K. acceding to the Lugano Convention, which provides greater jurisdictional certainty to sue non-English domiciled defendants within the English courts and for which the U.K. filed accession papers in April 2019. The TCA should now remove political obstacles that stopped the EU from allowing the U.K.'s accession.

State Aid and Subsidy Controls

The TCA requires the parties to regulate potentially distortive state subsidies. For the U.K., this will mean a new post-Brexit subsidy control system, something that has existed only at the EU level (state aid controls) until now. The U.K. will also set up a new independent authority to assess compliance with state aid controls.

The TCA leaves open whether the control regime is one that requires prior notification or only a right for interested parties to challenge potentially illegal state subsidies post-grant. The U.K. is likely to take the latter course. The EU meets this obligation through its existing state aid regime (including *ex ante* review of state aid schemes). Additionally, the EU will need to create a new right to allow EU-granted support to be challenged. The EU offers many programmes to support strategic industries, environmental goals, research and development, and regional growth. How the subsidy control system will be built into these programmes remains to be seen.

[1] Designated legal services covered under the TCA are "legal services in relation to home jurisdiction law and public international law, excluding Union law" (Title II, Section 7, Article SERVIN.5.48(a)).

[2] TCA Title XI, Article 2.2(1)(a)(b)(c).

[3] TCA Title XI, Article 2.4(4).

[4] TCA Title V, Article IP.5: Exhaustion "This Title does not affect the freedom of the parties to determine whether and under what conditions the exhaustion of intellectual property rights applies."

[5] The EU applies regional exhaustion across the bloc, so once placed on the market within the EU, a rightsholder cannot challenge as IP infringement the resale of its trademarked products to any other country within the European Economic Area (EEA). Conversely, consent to resale in a non-EEA country, such as the U.K., does not entail a right to import into the EEA. The U.K. has chosen to apply regional exhaustion across the EEA and the U.K. Once placed on the market in the EEA, a rightsholder cannot challenge the resale of its trademarked products into the U.K. Therefore, an EU rightsholder can prevent resale into the EEA from the U.K. on IP grounds, but a U.K. rightsholder cannot prevent resale from the EEA into the U.K.

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The TCA requires that the subsidy control system applies "with a view to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the Parties" (*i.e.*, the EU and the U.K.).[6] Both the EU and the U.K. are required to maintain an effective system of subsidy control that ensures that the granting of a subsidy complies with common principles (which in many respects draw on principles already applied under existing EU state aid rules). In particular, subsidies should pursue an identified public policy objective or remedy an identified market failure, be proportionate and limited to what is necessary, and there must be no other obvious alternative to a subsidy to achieve the desired policy goal (the public policy objective "cannot be achieved through other less distortive means").[7] The system specifies certain types of subsidies that are not permitted, such as unlimited state guarantees or subsidies for ailing companies where no restructuring plan is in place.

Some notable exceptions weaken U.K. controls over EU-level subsidies; for example "supranational" programmes are not subject to cooperation or independent authority supervision[8] and "large cross-border or international cooperation projects" for transport, energy, the environment, research and development — those that by definition the EU will be most likely to undertake — are presumptively allowed.[9] Further, aid granted to compensate for the damage caused by natural disasters or other exceptional noneconomic occurrences (presumably including a pandemic) and audiovisual aid are excluded. Both the U.K. and the EU subsidise film and TV production, so the latter exception will remove a potential source of friction.

Neither the EU nor the U.K. is obliged to order recovery of aid granted by primary legislation. The U.K. is only subject to EU/U.K. dispute settlement under the arbitration provisions of the TCA. The scope of the provisions exclude subsidies of a social character that are targeted at final consumers. Subsidies where the total amount granted to a single economic actor is below approximately US$470,000 (325,000 Special Drawing Rights)[10] over any period of three fiscal years are also excluded, with a higher threshold where subsidies are granted for services of public economic interest.[11]

[6] TCA Title XI, Article 3.4(1).

[7] TCA Title XI, Article 3.4(1)(a-f).

[8] TCA Title XI, Article 3.2(7).

[9] TCA Title XI, Article 3.5(13).

[10] TCA Title XI, Article 3.2(4). Special Drawing Rights are defined by the International Monetary Fund and calculated based on a basket of international currencies. As of January 4, 2021, 325,000 SDR equalled approximately US$470,000.

[11] TCA Title XI, Article 3.3(3).

Within six months of the granting of a relevant subsidy, officials must make publicly available basic information, including the amount and the recipient, on an official website or a public database. To assist private third parties in challenging a noncompliant subsidy, the TCA provides that relevant information must be made available to enable third parties to assess compliance with the principles. The EU will provide the relevant information through a public website (as is currently the case through the state aid register). The U.K. will provide such information on request, where an interested party communicates to subsidy-granting authorities that it may seek review by a court or tribunal of a granted subsidy (or of any relevant decision by the granting authorities). Interested parties will need to seek review within one month of the public release of the relevant information (in the EU), and in the U.K., within one month of receiving the relevant information, having requested it within one month of the basic information being made available.[12]

The TCA also requires the EU and the U.K. to operate an effective mechanism for recovery in respect of subsidies that have been successfully challenged before a relevant court or a tribunal. The U.K. will need to make available a new remedy of recovery at the end of a successful judicial review.[13]

The TCA also includes provisions for the U.K. and EU to challenge each other on the award of subsidies that, in either the U.K.'s or the EU's opinion, do not comply with the TCA's subsidy-control principles. A new committee, the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development, will adjudicate complaints raised by one side or the other.[14] Where either the EU or the U.K. considers that a subsidy causes, or there is a serious risk that a subsidy will cause, a significant negative effect on trade or investment between the parties, then upon notice, either side may take remedial action, provided such action is strictly necessary and proportionate.[15] An arbitration tribunal may be established to adjudicate the appropriateness of any remedial measure.

Taxation

Title XI of the TCA largely treats tax issues the same way it does other issues relevant to the "Level Playing Field" regime, including dispute resolution and recovery mechanisms. However, three targeted treatments are worth noting:

[12] TCA Title XI, Article 3.11(3).

[13] TCA Title XI, Article 3.11(1).

[14] TCA Title XI, Article 3.8.

[15] TCA Title X, Article 3.12(8).

i. The agreement attempts to codify what financial assistance by way of a subsidy should look like in the field of tax. Article 3.2 sets out qualifications to the general definition of a subsidy in Article 3.1, including what tax measures are not to be considered specific (and therefore not a subsidy). For example, a measure is not specific if it is justified by reference to principles inherent to the design of the general system of taxation for either party, and a special purpose levy is not specific if required by noneconomic public policy objectives. Inclusion of these principles is helpful, although as recent tax state aid cases at the EU-level have shown, interpretation of the principles can be debated.

ii. Publication of subsidies in the form of tax measures have a different time frame than that for other subsidies, and is required within a year of "the tax declaration" becoming due.[16] The TCA does not define what a tax declaration comprises, but the related publication period seems to be longer than that for other measures, which must be publicly disclosed within six months of the grant of the subsidy.

iii. The TCA details a commitment to anti-tax avoidance measures established by the Organisation for Economic Co-operation and Development (OECD) over recent years, particularly as part of the G20 BEPS (base erosion and profit shifting) project. The U.K. and the EU would presumably have been bound by such commitments regardless of their inclusion in the TCA, so the specific TCA incorporation is noteworthy. The EU may be concerned about the U.K.'s ambition to assist its economy in recovering from the pandemic by granting tax-related subsidies, reflected in the reference in Article 5.2(2) to credit institutions and investment firms, a sector where the U.K. is a clear leader in Europe. Irrespective of the motive, both sides have now committed to each other to continue their implementation of rules regarding exchange of information and regulations covering interest deductibility, controlled foreign companies and hybrid mismatches.[17]

Already, as a statement of ambition to help U.K. business with immediate effect, the U.K. tax authority has indicated its desire to follow the TCA to the letter by announcing on December 31, 2020, that it was cutting back its implementation of a flagship tax EU Directive, commonly known as DAC6 or CD (EU) 2018/822, to conform solely to the OECD mandatory disclosure rules, which are more relaxed than DAC6. This may just be the starting gun on a raft of other measures that the U.K. intends to relax where possible while still strictly observing the terms of the TCA. This action would not have gone unnoticed in Brussels and Strasbourg during what is only an interim implementation period for the TCA.

Northern Ireland-Related State Aid

A parallel EU-linked regime will apply to Northern Ireland by virtue of the U.K.-EU Withdrawal Agreement and, in particular, the Protocol on Ireland and Northern Ireland which will remain in place alongside the TCA and was implemented on January 1, 2021.

Article 10 of the protocol sets out that EU state aid rules will continue to apply after the end of the Brexit transition period where U.K. measures (i) affect trade between Northern Ireland and the EU and (ii) fall within areas covered by the protocol, *i.e.*, the movement of goods and wholesale electricity markets.

The concept of affecting trade in the context of EU state aid rules is defined broadly and not subject to any quantitative thresholds. Article 10 could therefore potentially capture a large number of U.K. measures and may even extend to aid granted to U.K. entities not established in Northern Ireland if such measures are relevant to trade between Northern Ireland and the EU in areas covered by the protocol.[18] For example, a subsidy granted to an industry that does business across the U.K., including Northern Ireland, is likely still to be subject to EU state aid rules, even though not targeted at Northern Ireland.

The arrangements concerning Northern Ireland may therefore provide an incentive for the U.K. to maintain an alignment with EU state aid at least in these policy areas, both because the Northern Ireland arrangement may in fact apply to a number of U.K. measures granted to companies outside Northern Ireland and because there may otherwise be a risk of regulatory nonalignment between Northern Ireland and the rest of the U.K.

[16] TCA Title XI, Article 3.7(2).

[17] TCA Title XI, Chapter 5 "Taxation Standards," Articles 5.1 and 5.2.

[18] The U.K.'s concern that EU state aid rules could effectively apply to the entire U.K. via the Northern Ireland protocol was the subject of legislation in the U.K. Parliament, including clauses potentially seeking to override the application of EU state aid rules via Northern Ireland to U.K. measures. These clauses were withdrawn after the Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol of December 17, 2020, stating that "an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure." In practical terms, this language largely restates existing EU law principles and is unlikely to limit the application of the EU state aid rules via the protocol.

Brexit

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Potential for Future Alignment on Stricter Anti-Subsidy Controls

The TCA also contains a detailed "rebalancing" provision[19] recognizing that each party has a right to determine its "future policies and priorities" with respect to labour; social, environmental or climate protection; and subsidy control. If this leads to a significant divergence in these areas that materially impacts trade between the U.K. and the EU, the TCA allows either party to "take appropriate rebalancing measures" restricted to what is strictly necessary and proportionate in terms of scope and duration, requiring the other to meet future higher legislative standards or face trade sanctions.

If either party intends to take any rebalancing measures, the TCA requires the parties to notify each other of any such measures and to enter into consultations. If no mutually acceptable alternate solution to the measures is found, the concerned party may adopt the measures unless the other party requests arbitration to decide whether the measures comply with the TCA. In addition, the provision allows for a review of the trade provisions of the TCA at the request of either party after four years to determine the impact of any such rebalancing measures.

The rebalancing measures are primarily a trade remedy, but as the provision also covers subsidy control, it could also apply to any significant change of direction in the subsidy control policies in the TCA, potentially resulting in arbitration over state aid "rebalancing" measures. For example, the EC considers that a unilateral balancing measure to rebalance a competitive advantage may be appropriate in "a situation where one Party would have a system of subsidy control that would systemically fail to prevent the adoption of trade distorting subsidies, which would provide a competitive advantage for that Party."[20]

On paper, the rebalancing provision is an aggressive one. Sanctions can be applied quickly for divergence, if necessary on a provisional basis, after 14 days of consultations or, in the event that one side requests arbitration, after 30 days if the arbitral tribunal has not ruled within that time period. These timelines are short relative to the months or years it customarily takes to resolve trade disputes. Additionally, the parties agree not to seek World Trade Organisation protection against these trade measures. How commonly they will be used in practice remains to be seen. Frequent use may be tantamount to requiring the EU and the U.K. to move in regulatory lockstep, which would likely be politically unacceptable to the U.K.

[19] TCA Title XI, Article 9.4.

[20] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

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