



EU-UK Trade and Cooperation Agreement (TCA) and Rights

HRC Briefing Paper

After a very protracted process the EU and UK finally agreed to the [Trade and Cooperation Agreement \(TCA\)](#) on Christmas Eve 2020, which was greeted with a collective sigh of relief across the UK, particularly in Northern Ireland.

The Agreement in many ways goes above and beyond a 'normal' trade agreement and in addition to addressing tariffs and quotas, it establishes measures for cooperation on a variety of other issues including social security, justice and security measures (i.e. DNA profiles, fingerprints, vehicle registrations, and passenger name records, etc). It creates a number of new governance structures which should increase the role that civil society plays in future EU-UK relations.

The *European Convention of Human Rights* is recognised as 'essential' to the future of the EU and UK relationship and the implementation of the TCA. Closer scrutiny of the TCA, however, when viewed in light of [recent actions](#) by the UK government, cast doubt as to that strength of that future relationship.

The TCA is over 1200 pages long and very complex. It is not yet ratified and therefore subject to changes. This document summaries the text of the TCA as it relates to human rights and Northern Ireland in particular.

Structure of the TCA document

The document is divided into several parts, beginning with the *Preamble*.

The *Preamble* reiterates the commitments of the UK and the EU 'to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements.

Part one: Common and Institutional Provisions

Part two: Trade, Transport, Fisheries and other arrangements

Part three: Law Enforcement and Judicial Cooperation in Criminal Matters

Part four: Thematic Cooperation

Health Security

Cyber Security

Part five: Participation in Union Programmes, Sound Financial Management and Financial Provisions

Part six: Dispute Settlement and Horizontal Provisions

Part seven: Final Provisions

This is followed by a number of annexes and several protocols.

Northern Ireland

Northern Ireland is not mentioned very much in the 1200+ page EU-UK Trade and Cooperation Agreement, presumably because the finer details are covered in the Protocol. (To better understand the overlap of the TCA and the Protocol see Katy Hayward's article [here](#).) NI is specifically referred in relation to cross-border bus services (**Part two, heading three: road transport, title II: transport of passengers by road, Article X+2**); in relation to the number of permissible pickups in Ireland by NI hauliers (**Part two, heading three: road transport, title I: transport of goods by road, Article ROAD 4, para 5**); and in several annexes to the **Protocol on Social Security Coordination**.

General Provisions of the TCA

Overall Benefits:

- Tariff-free and quota-free trade in goods between the UK and the EU
- Continued social security coordination between the UK and the EU, including healthcare coverage for EU and UK visitors
- Continued UK and EU data-sharing for security purposes, including sharing of information on DNA profiles, fingerprints, vehicle registrations, and passenger name records

New barriers:

- No mutual recognition of professional qualifications
- No financial services passport (the right of firms authorised to sell financial services in the UK to be able to operate in an EU member state without further authorisation)
- Diminished healthcare benefits
- Customs checks and formalities for businesses, including:
 - Non-tariff & technical regulatory barriers (**such as conformity assessment and labelling, will not be eliminated completely and a range of voluntary and self-certification procedures, mutual recognition and equivalence will have to be introduced**); complex 'rules of origin'
 - No equivalence of SPS (sanitary and phytosanitary) measures - animal and plant health requirements for agri-food products

Governance

- Partnership Council with a number of specialised committees (EU and UK representatives, including civil society)
- Parliamentary Partnership Assembly (MPs and MEPs)
- Domestic Advisory Groups & Civil Society Forum (civil society organisations, NGOs, business groups, and trade unions)
- International public law, including those codified in the **Vienna Convention on the Law of Treaties**

Introduction

Negotiations between the EU and the UK carried on for months and it was well known that there were several issues which created obstacles before a final agreement could be reached, particularly around fishing access rights; the 'level playing field' regarding fair competition for businesses and rules around subsidies or state aid; and overall governance and dispute resolution mechanisms, notably around law enforcement and judicial cooperation. But eventually an agreement was reached on Christmas Eve

2020, and the deal is certainly better than a 'no deal' outcome. The TCA has covered a very broad range of issues and includes many aspects that are not typically included in a trade deal. The primary reason for this being the very basis of the agreement: most trade agreements are less complex as they aim for cooperation and to bring two nations closer whereas the TCA seeks to facilitate the means by which the EU and UK disengage.

That the treaty is strong in some areas regarding rights and extremely weak in others suggests that there were fundamentally different views as to what should be included in the scope of a trade treaty as regards human rights? Human rights standards for workers is clearly linked to trade from an EU perspective, as having an underpaid or underregulated work force in the UK might drive down costs in that jurisdiction and likely create unfair competition.

The EU and the UK have agreed that in order to maintain law enforcement and judicial cooperation, the UK must continue to adhere to the ECHR. UK has recently launched a review of the Human Rights Act (the incorporation of the ECHR into domestic UK law) and knowing that this was on the cards may have created cause for concern for the EU. That the law enforcement and judicial elements of the TCA can be suspended or terminated in the case of violations by the UK of its commitment to European Convention of Human Rights and its domestic enforcement suggests that the EU is very serious about holding the UK to this promise, not least in light of the recent attempt by the UK government to incorporate clauses to the UK Internal Market Bill in late 2020, which would have directly violated the Ireland/Northern Ireland Protocol of the EU-UK Withdrawal Agreement.

The following is a breakdown of the TCA and outlines the elements in which human rights and related issues are incorporated or impacted.

Part one: Common and Institutional Provisions, Title III Institutional Frameworks

Participation of civil society will occur through Domestic Advisory Groups (Article INST.7) and a Civil Society Forum (Article INST.8). Each will be comprised of 'non-governmental organisations, business and employers' organisations and trade unions, active in economic, sustainable development, social, human rights, environmental and other matters.' (**Articles INST. 7.1 and 8.3**).

Part two: Trade, Transport, Fisheries and other arrangements

Heading One: Trade

Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development

Chapter 6: Labour and Social Standards

Article 6.1 Definition, para 1, defines 'labour and social levels of protection' as the 'levels of protection' provided in law and standards of the UK and the EU member states with respect to the following areas:

- (a) fundamental rights at work;
- (b) occupational health and safety standards;
- (c) fair working conditions and employment standards;
- (d) information and consultation rights at company level; or
- (e) restructuring of undertakings.

The law and standards referred to in Article 6.1 are disapplied in relation to social security and pensions, which may be why there are further Protocols on these issues.

Article 6.2: Non-regression from levels of protection

Although both the EU and UK preserve ‘the right to exercise reasonable discretion and to make *bona fide* decisions regarding the allocation of labour enforcement resources’ (para 3) and to set policies and priorities, and ‘to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party’s international commitments’ (para 1), they each commit to ‘not weaken or reduce, *in a manner affecting trade or investment between the Parties*, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards’ (para. 2).

This is a disappointing enforcement mechanism to protect the existing level playing field. According to UNISON, ‘It is notoriously difficult to prove that any lowering of protections affects trade or investment [therefore] the deal is unlikely to prevent the UK government from weakening EU-derived labour and environmental policies if it so chooses’.¹

The prospect of the treaty helping to maintain labour and social protections is therefore hampered by the narrow interpretation of how a potential breach or weakening of standards can subsequently impact negatively on trade or investment between the EU and UK. It is therefore unlikely the deal prevents the UK government from potentially lowering labour (or environmental) standards set previously by EU policies.

At the start of 2021 there were reports that the UK Department for Business, Energy & Industrial Strategy (BEIS) had begun to review EU employment law, which includes the EU Working Time Directive (2003/88/EC). While some derogations are permissible, the Working Time Directive guarantees workers protection including a limit to weekly working hours, breaks, a minimum rest period, paid annual leave and extra protections in the case of night work. However, before the end of January these plans were scrapped, perhaps out of fear that opposition political parties and workers unions would strongly resist any suggestion of an erosion of workers’ rights.² Employment law is a devolved matter in Northern Ireland and the Ireland/Northern Ireland Protocol of the EU-UK Withdrawal Agreement obliges Northern Ireland to continue to apply EU equality law. As such the Working Time Directive will continue to be applicable regardless of how GB proceeds with taking back control of laws. The NI Assembly could amend some workers’ rights, but only in order to advance existing standards, as the non-diminution principle outlined in the Ireland/Northern Ireland Protocol is applicable. Of the 300+ Directives that are applicable, some relate to devolved matters and would be the responsibility of the Assembly to monitor and keep up with. For any Directives that concern reserved or excepted matters, responsibility remains with the UK government.

Any disputes between the EU and UK concerning a possible breach of the non-regression article 6.2 is not subject to the standard dispute resolution set out in Part Six: Title III (see below). Rather, if either the EU or UK believe that there has been a breach of the non-regression commitment, **Article 6.4: Dispute Settlement**, states that both the EU and UK ‘shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the application’ of labour and social standards. If unable to agree on a way forward, a ‘panel of experts’ will review and report on the situation; remedies may include temporary sanctions, although subject

¹ UNISON has identified where UK employment rights are most vulnerable to being weakened over time are: Collective Consultation rights in the workplace; TUPE; Paid Annual Leave; 48-hour weeks; Holiday Pay (Overtime and Commissioned pay); Atypical workers’ rights e.g. scrapping Agency Workers rights; and Compensation cap in discrimination claims. UNISON response to the UK -EU Brexit deal, December 2020 (unpublished).

² <https://www.bbc.co.uk/news/business-55842992>

to strict ‘rebalancing’ measures (as outlined in **Chapter 9** of this same **Part Two, Heading One: Title XI**).

Chapter seven: Environment and climate, Article 7.1(1) defines ‘environmental levels of protection’ as the levels of protection provided by EU or UK law which have the ‘purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas:

- (a) industrial emissions;
- (b) air emissions and air quality;
- (c) nature and biodiversity conservation;
- (d) waste management;
- (e) the protection and preservation of the aquatic environment;
- (f) the protection and preservation of the marine environment;
- (g) the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances; or
- (h) the management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants.’

Article 7.2: Non-regression from levels of protection affirms that the EU and UK each have rights and obligations as regards to decisions around environmental policies and practices, but that neither shall ‘weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection’ (para 2).

To be clear, while there is that commitment to not weaken or lower environmental protections, these safeguards are only applicable as far impacting on trade or investment. According to Trade Justice Movement, ‘this gives considerable scope to the UK to weaken its environmental regulations as long as it cannot be proven that this materially impacts trade or investment. Evidence from other trade deals shows that such provisions are rarely used and that the link between regulatory action and trade impact is extremely difficult to prove’.³

As is the case regarding disputes between the EU and UK around a possible breach of the non-regression clause in Chapter 6 (see above), the clause in Chapter 7 regarding non-regression commitments is also not subject to the standard dispute resolution which is set out in Part Six: Title III (see below). Rather, if either the EU or UK believe that there has been a breach of the non-regression commitment, **Article 7.7: Dispute Settlement** states both the EU and UK ‘shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the application’ of labour and social standards. If unable to agree on a way forward, a ‘panel of experts’ will review and report on the situation; remedies may include temporary sanctions, although subject to strict ‘rebalancing’ measures (as outlined in Chapter 9: Title 1 of this same Part Two, Title XI).

Chapter eight: Other instruments for trade and sustainable development

The objective of Chapter Eight is to highlight the integration of ‘sustainable development, notably its labour and environmental dimensions’ with EU and UK trade and investment relationships and bolstering the labour and social standards in Chapter Six and environmental and climate protections in Chapter Seven (Article 8.1(2)).

³ <https://www.tjm.org.uk/documents/briefings/TJM-analysis-EU-UK-trade-agreement-December-2020.pdf>

Article 8.1: Context and objectives reiterates labour and social justice commitments made by both parties in previous international accords, including:

- Agenda 21 and the 1992 Rio Declaration on Environment and Development;
- the Johannesburg Plan of Implementation of the World Summit on Sustainable Development of 2002;
- the International Labour Organization (ILO) Declaration on Social Justice for a Fair Globalization, adopted at Geneva on 10 June 2008 by the International Labour Conference at its 97th Session (the “2008 ILO Declaration on Social Justice for a Fair Globalization”);
- the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want", endorsed by the UN General Assembly Resolution 66/288 adopted on 27 July 2012;
- and the UN 2030 Agenda for Sustainable Development, adopted by the UN General Assembly Resolution 70/1 on 25 September 2015 and its Sustainable Development Goals

Article 8.3: Multilateral labour standards and agreements provides the primary source of labour standards and related social rights. The EU and UK commit to promoting international trade that is ‘conducive to decent work for all’ and in line with the 2008 ILO Declaration on Social Justice for a Fair Globalization. Considering further ILO agreements and guidelines, they both pledge to implement core labour standards, including:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

Noting the relevance of the European Social Charter to the EU and UK, as members of the Council of Europe, and with regard to related international commitments and ILO Conventions, both parties commit to providing workers with decent working conditions, including among other things, wages and earnings, working hours, maternity leave; health and safety at work; and non-discrimination in respect of working conditions, including for migrant workers.⁴

Article 8.9: Trade and investment favouring sustainable development, para 2 (b) states that both the EU and UK will,

‘support the adherence, implementation, follow-up and dissemination of relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights’.

⁴ Each Party maintains its right to determine its priorities, policies and the allocation of resources in the effective implementation of the ILO Conventions and the relevant provisions of the European Social Charter in a manner consistent with its international commitments, including those under this Title. The Council of Europe, established in 1949, adopted the European Social Charter in 1961, which was revised in 1996. All Member States have ratified the European Social Charter in its original or revised version. For the United Kingdom, the reference to the European Social Charter in paragraph 5 refers to the original 1961 version given that the UK has not ratified the 1996 Revised Charter. The Revised Charter offers the right to protection against poverty and social exclusion; right to housing; right to protection in cases of termination of employment; right to protection against sexual harassment in the workplace and other forms of harassment; rights of workers with family responsibilities to equal opportunities and equal treatment; rights of workers’ representatives; and, by way of amendments, further reinforcement of the principle of non-discrimination; improvement of gender equality in all fields covered by the treaty; better protection of maternity and social protection of mothers; better social, legal and economic protection of employed children; better protection of disabled people.

Chapter nine: Horizontal and institutional provision

Although there are a considerable number of exemptions, most all of the TCA is subject to the normal dispute settlement mechanisms set out in Part Six and much of **Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development** is exempt, including Chapters 6, 7 and 9. Instead these chapters are subject to a process of engaging in consultations (Articles 9.1) and, if necessary, with a panel of experts (9.2), including a panel of experts to consider the commitment to non-regression from levels of protection (9.3).⁵

Incredibly, **Article 9.2(9)** states, ‘for greater certainty, the Parties share the understanding that if the Panel makes recommendations in its report, *the responding Party does not need to follow these recommendations in ensuring conformity with the Agreement*’. So really there is no enforcement of the standards and non-regression commitments.⁶

Perhaps significantly Chapter 8, and unlike Chapter 6 and 7, does not provide access to a ‘panel of experts’ specifically concerned with assessing non-regression (article 9.3) if indeed a dispute arises between the EU and the UK in relation to this.

Para 19 of Article 19.2 moreover applies some parts of the dispute settlement rules to these panels, but crucially *not* the parts dealing with remedies.

Heading Four: Social Security Coordination and Short-term Visas

Unlike any other trade agreement, the TCA also addresses entitlements to healthcare although Professor Tamara Hervey says the entitlements in the TCA are a ‘weak equivalent’ of the healthcare provisions in EU social security law, which included healthcare for EU citizens, as well as their families living within the EU (irrespective of family members’ citizenship) and the European Health Insurance Card (EHIC), which provided access to healthcare necessary during visits to other EU states.⁷

The **Preamble** to the TCA recognises ‘the importance of the coordination of social security rights enjoyed by persons moving between the Parties to work, to stay or to reside, as well as the rights enjoyed by their family members and survivors’ which is subsequently affirmed in the above **Heading Four, the Protocol on Social Security** and **two annexes**:

ANNEX SSC-2: RESTRICTION OF RIGHTS TO BENEFITS IN KIND FOR MEMBERS OF THE FAMILY OF A FRONTIER WORKER (referred to in Article SSC.16(2) [Stay in the competent State when residence is in another State – special rules for the members of the families of frontier workers])

ANNEX SSC-3: MORE RIGHTS FOR PENSIONERS RETURNING TO THE COMPETENT STATE (Article SSC.25(2)) [Stay of the pensioner or the members of their family in a State other than the State of residence – stay in the competent State – authorisation for appropriate treatment outside the State of residence]]

⁵ Article 6.4 (2) and Article 7.7(2) both state, ‘By way of derogation from Title I of Part Six [Dispute settlement and horizontal provisions], in the event of a dispute between the Parties regarding the application of this Chapter, the Parties shall have recourse exclusively to the procedures established under Articles 9.1 [Consultations], 9.2 [Panel of experts] and 9.3 [Panel of experts for non-regression areas] of this Title’.

⁶ Prof Steve Peers breaks down the very complex details of Article 9.2 in Analysis 3 of the Brexit deal: Human Rights and EU/UK Trade and Cooperation Agreement, 4 January 2021, <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brex-it-deal-human-rights.html> This blog also outlines Data protection issues and the potential role of the EU courts in the future.

⁷ Analysis 1 of the Brexit deal: Healthcare entitlements in the EU-UK Trade and Cooperation Agreement, Prof Tamara Hervey, <http://eulawanalysis.blogspot.com/2020/12/analysis-1-of-brex-it-deal-healthcare.html>

Part Three: Law Enforcement and Judicial Cooperation in Criminal Matters

The EU has said the TCA ‘builds new operational capabilities, taking account of the fact that the UK, as a non-EU member outside of the Schengen area, will not have the same facilities as before’. Allowances and compromises have been made not least by the fact that human rights commitments, including elaborate rules on personal data protection and the sharing of fingerprints and DNA and vehicle registration, contribute significantly to this section of the TCA. Aspects of data sharing is interspersed throughout the TCA relating to social security agencies, customs cooperation and here in Part Three regarding criminal justice matters. The TCA prohibits data being stored in certain locations and commits both the EU and the UK to ensuring a high degree of privacy for personal data, although the EU is still to determine if the UK provides (and maintains) an adequate or equivalent level of protection of personal data. This leaves an element of ongoing uncertainty as the UK could change its data protection rules which the EU might deem to be inadequate and thus decide to stop sharing data, which may be crucial for judicial cooperation. (**Part Seven: Final Provisions: Article FINPROV.10A Interim provision for transmission of personal data to the United Kingdom** grants a 4-month reprieve until which a more permanent solution will hopefully be found.)

Title I, General Provisions Article Law.Gen.3: Protection of human rights and fundamental freedoms:

1. The cooperation provided for in this Part is based on the Parties’ and Member States’ longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.
2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.

This is the only explicit reference to the ECHR, recognising the foundation of the judicial cooperation between the EU and the UK is the protection of human rights, democracy and the rule of law and noting the ‘importance of giving effect to [these] rights and freedoms’ domestically. Interestingly, para. 1 in this section on judicial cooperation acknowledges the significance of both ECHR *and* the UDHR, whereas the next substantial mention of human rights cites the ‘respect for the Universal Declaration of Human Rights and the international human rights treaties’ to which the EU and UK are each party to.⁸

Steve Peers, states that these provisions in **Article Law.Gen.3** ‘by themselves, do nothing’ and to assess their value, they need to be read in conjunction with the relevant termination clause: **Title XII: Other Provisions, Article LAW.OTHER.136: Termination** (see below).

Article Law.Gen.4: Protection of personal data highlights the pledge to maintain data protection standards, which is necessary for the law enforcement and judicial cooperation provided for in Part Three. This Part is based on the Parties’ long-standing commitment to ensuring a high level of protection of personal data. The EU had previously said that law enforcement and judicial co-operation would be dependent on its equivalent adequacy decision in relation to UK data protection standards. The European Commission Q&A on the TAC explains that for the EU side, this means decisions attesting that UK standards are essentially equivalent to the EU standards set out in the EU’s General Data Protection

⁸ Part six: Dispute Settlements and Horizontal Provisions, Chapter 4: Common procedural provisions, Title II: Basis of Cooperation, Article COMPROV.4

Regulation (GDPR) and Law Enforcement Directive, and that they respect specific additional data protection standards stemming from opinions of the EU Court of Justice.⁹

Title V: Cooperation with Europol, Article LAW.EUROPOL.52: Restrictions on access to and further use of transferred personal data, para 3 also makes explicit reference to human rights obligations and safeguards that both the UK and EU ‘shall ensure that information transferred under this Title was collected, stored and transferred in accordance with its respective legal framework. Each Party shall ensure, as far as possible, that such information has not been obtained in violation of human rights. Nor shall such information be transferred if, to the extent reasonably foreseeable, it could be used to request, hand down or execute a death penalty or any form of cruel or inhuman treatment’.

Title VII: Surrender, Article LAW.SURR.84: Guarantees to be given by the issuing State in particular cases, para c states that, ‘[t]he execution of the arrest warrant by the executing judicial authority may be subject to particular guarantees, including: if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person’s surrender before it decides whether to execute the arrest warrant’. Note that this is not explicitly a ground to refuse extradition as such, but rather a possibility to request additional guarantees.

TITLE XI: Freezing and Confiscation, Article LAW.CONFISC.16 provides that ‘[w]here there are substantial grounds for believing that the execution of a freezing or confiscation order would entail a real risk for the protection of fundamental rights, the requested State shall, before it decides on the execution of the freezing or confiscation order, consult the requesting State and may require any necessary information to be provided.’

Title XII: Other Provisions, Article LAW.OTHER.136: Termination, para 2: However, if this Part is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification.

Protocol 1 contains the protection of property (Article 1); the right to education (Article 2); and the right to free elections (Article 3). Both Protocol 6 and 13 concern the abolition of the death penalty.

Part Three of the TCA may be terminated as a result of one of the signatories having ‘denounced’ the ECHR or specific Protocols. The entire treaty can be terminated as a result of ‘serious and substantial’ failures of the fulfilling ‘essential’ human rights obligations outlined in Part Six.

Interestingly, it seems to be far simpler to terminate the entire treaty as **Part Seven: Final Provisions, Article FINPROV.8: Termination** plainly states, ‘either Party may terminate this Agreement by written notification through diplomatic channels. This Agreement and any supplementing agreement shall cease to be in force on the first day of the twelfth month following the date of notification’. Whereas in order to end Part Three the parties are required to meet and, as Steve Peers says, ‘discuss the process of wrapping up proceedings which are underway, as well as a safeguard for the protection of personal data which was already transferred’.

Title XII Other Provisions, Article LAW.OTHER.136: Termination provides that either Party may at any moment terminate Part Three (as opposed to the entire treaty as is outlined in **Part Seven: Final**

⁹ European Commission. Question and Answers: EU-UK Trade and Cooperation Agreement. https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

Provisions, Article FINPROV.8: Termination) by written notification through diplomatic channels after which Part Three ‘shall cease to be in force on the first day of the ninth month following the date of notification’. The next paragraph (2) states that if Part Three ‘is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification. If **Part Three** is terminated, the Specialised Committee on Law Enforcement and Judicial Cooperation will oversee measures to ensure that the law enforcement and judicial cooperation ‘is concluded in an appropriate manner’ and the personal data protection measures which existed prior to the termination is maintained.

Article LAW.OTHER.137: Suspension: permits either Party to suspend Part 6 (or particular Titles within Part 6) if they believe there to be ‘serious and systemic deficiencies’ by the other Party ‘as regards the protection of fundamental rights or the principle of the rule of law’. The Party must notify the offending Party in writing by way of diplomatic channels. ‘Such notification shall specify the serious and systemic deficiencies on which the suspension is based’.

Part Six: Dispute Settlements and Horizontal Provisions

Chapter 4: Common procedural provisions

Title II: Basis of Cooperation lists 8 articles (Articles COMPROV 4-12):

Article COMPROV.4: Democracy, rule of law and human rights

‘The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.’

Article COMPROV.5: Fight against climate change

Article COMPROV.6: Countering proliferation of weapons of mass destruction

Article COMPROV.7: Small arms and light weapons and other conventional weapons

Article COMPROV.8: The most serious crimes of concern to the international community

Article COMPROV.9: Counter-terrorism Article COMPROV.10: Personal data protection

Article COMPROV.11: Global cooperation on issues of shared economic, environmental and social interest.

Perhaps most significantly, **Article COMPROV.12: Essential elements** states that the ‘essential elements’ of the TCA partnership between the EU and UK are Articles COMPROV.4, 5 and 6 on democracy, rule of law and human rights], the fight against climate change and countering proliferation of weapons of mass destruction. This would appear to make upholding human rights an expressed requirement of the TCA.

However, these ‘essential element’ human rights provisions in **Article COMPROV.12** are excluded from the dispute settlement process by way of **Part Six: Dispute Settlement and Horizontal Provisions, Title I, Chapter 1: General provisions Article INST.10: Scope, para 2(h)**.¹⁰ Disputes concerning human rights

¹⁰ Steve Peers notes that this means “that the *substantive* definitions of ‘essential elements’ of the TCA cannot be subject to dispute settlement. However, there is no exclusion from dispute settlement for *Title III* of Part Six [Title III: Fulfilment of Obligations and Safeguard Measures]— i.e., the provision on the *process* of deciding on suspension or termination of the treaty. This seems like an odd distinction and may possibly be a drafting error; remember that the treaty text may be altered

and the perceived failure to fulfil any of the ‘essential elements’ obligations will be presented the Partnership Council (see below **Article INST.35**).

Title III, Fulfilment of Obligations and Safeguard Measures states (in **Article INST.35: Fulfilment of obligations described as essential elements, para 1**) that failure to fulfil these **essential elements** can lead to the termination or suspension of the TCA:

Article INST.35.1. states: If either Party considers that there has been a *serious and substantial failure* by the other Party to fulfil any of the obligations that are described as essential elements in **Article COMPROV.12: Essential elements**, it *may* decide to *terminate or suspend* the operation of this Agreement or any supplementing agreement in *whole or in part*.

By invoking this article, the matter is sent to the Partnership Council which will within 30 days seek to find a ‘mutually agreeable’ proportionate solution which aims to not ‘disturb’ the functioning of the TCA or other related agreements (**Article INST.35.2 & INST.35.3**).

Article INST.35.4 explains that in order ‘to constitute a serious and substantial failure’ of satisfactorily realising the essential element obligation the ‘gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions.

The next article, **Article INST 36: Safeguard Measures, para 1**, provides almost a get-out clause by way of providing that, ‘if serious economic, societal or environmental difficulties of a sectorial or regional nature, including in relation to fishing activities and their dependent communities, that are liable to persist arise, the Party concerned may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to those measures which will least disturb the functioning of this Agreement’.

This is the equivalent to **Article 16 Safeguards (1) of the Ireland/Northern Ireland Protocol**, which states, ‘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 United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol’.

Part Six: Dispute Settlement and Horizontal Provisions Title I: Dispute Settlement outlines the process to settle disputes, in general. However, there are numerous provision which are not subject to these procedures including:

A - the fundamental human rights ‘essential elements’ provisions which are set out in **Part Six: Dispute Settlement and Horizontal Provisions, Title II: Basis for Cooperation, Article COMPROV. 12** (for the applicable dispute process, see **Part Six: Dispute Settlement and Horizontal Provisions, Title III: Fulfilment of Obligations and Safeguard Measures**); and

B - the ‘labour and social levels of protection’ as defined in **Chapter Six (of Part Two, Heading One Title XI: Level Playing field for Open and Fair Competition and Sustainable Development)**. The relevant dispute settlement process is defined in procedures established

during the ‘scrubbing’ process’ which according to Article FINPROV.9 may not be complete until April 2021”. See <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>

under **Article 9.1: Consultations, Article 9.2: Panel of experts, and Article 9.3: Panel of experts for non-regression areas** of Title XI.

Conclusion

The Trade and Cooperation Agreement is certainly better than a no deal outcome, but this version of Brexit has certainly delivered some significant challenges for people in GB and NI.

While the TCA allows for tariff-free and quota-free trade in goods between the UK and the EU, continued social security coordination between the UK and the EU, including healthcare coverage for EU and UK visitors (the new GHIC), the non-tariff & technical regulatory barriers for trade could continue to cause serious disruption and have wider rights implications.

Regard for the European Convention of Human Rights is identified as an 'essential element' of the TCA and therefore seemingly indispensable to the future of the EU and UK relationship, but the actions and attitude of the UK Government domestically to the HRA and the Convention rights are cause for concern about the veracity of this commitment. Likewise, the 'level playing field' provisions of the TCA to maintain existing work and social standards are built on sand given the relatively weak enforcement mechanisms involved.

These measures have done little to reassure civil society that rights will be advanced in a post-Brexit environment. Indeed, even maintaining the status quo has not been possible with this deal. Despite the existence of the Ireland/NI Protocol providing a form of asymmetric insulation for Northern Ireland from a reduction in rights, the threats to the wider level playing field protections, the future of the ECHR and the wider economic and social impacts of the TCA are clearly a concern for Northern Ireland.

Despite, and perhaps because of this deal, now is not the time for complacency. A Brexit deal may have been reached, but the protection of rights in Northern Ireland has been left in greater uncertainty because of weaknesses in the TCA.

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