



Boardroom Brexit: What the deal means for trade in services

BOARDROOM BREXIT

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Overview

On the plus side, the TCA has substantial sectoral coverage, including professional and business services (e.g. legal, auditing, architectural services), delivery and telecommunication services, computer-related and digital services, financial services, research and development services, most transport services and environmental services.

The non-discrimination obligations of the TCA ensure that service suppliers or investors from the EU will be treated no less favourably than UK operators in the UK, and vice-versa. This entitles them to receive more favourable treatment than that granted to service suppliers or investors of third countries without similar provisions in place.

On the negative side, more than 40 percent of the U.K.'s exports to the EU are services, and the sector accounts for around 80 percent of the U.K.'s economic activity. The EU stance on services in the negotiations was largely defensive. Whilst Part 2 of the TCA makes eye-catching commitments to liberalising services, they have to be read in the light of the Annexes, which contain many EU Member State restrictions. As an inevitable consequence of leaving the EU Single Market, UK service suppliers will lose automatic rights to offer services across the EU. They will have to comply with a patchwork of host-country rules in each Member State, and may need to establish themselves in the EU to continue operating. Many have already done so.

The actual level of market access will also depend on the way the service is supplied: whether it is supplied on a cross-border basis from the home country of the supplier, e.g. over the internet ('mode 1'); supplied to the consumer in the country of the supplier, for example a tourist travelling abroad and purchasing services ('mode 2'); supplied via a locally-established enterprise owned by the foreign service supplier ('mode 3'), or through the temporary presence in the territory of another country by a service supplier who is a natural person ('mode 4').

All of this means UK-established businesses will need to look at domestic regulations on service access in each EU Member State in which they seek to operate, and vice versa for EU-established businesses seeking market access in the UK.

Financial Services

As anticipated, the TCA between the EU and the UK does not replicate the broad-based passporting arrangements currently available to financial services firms.

From the end of the transitional period on 31 December 2020, these passporting rights will no longer apply. Instead the TCA puts in place fairly light arrangements for financial services firms.

The TCA commits both the UK and EU to maintain their markets as being open on a non-discriminatory basis to firms in the UK and EU provided these firms are appropriately established in the relevant country. The parties to the TCA also commit to ensuring that internationally agreed standards in the financial services sector are implemented and applied in their territories.

Financial services are expressly excluded in the TCA from the most-favoured nation clause in terms of any future trade deal with a third country. Financial services are also excluded for the provisions in the TCA on services more generally and are also excluded from the requirement to review trade in services and investment relations in the future.

The TCA also commits the EU and UK to putting in place a Memorandum of Understanding by March 2021 for establishing a framework of regulatory cooperation on financial services. The TCA's commitment to a Memorandum of Understanding does fall short, however, of the provisions of other such free trade agreements. For example, the free trade agreement between the EU and Japan expressly put in place regulatory cooperation measures in the free trade agreement itself.

Importantly, the TCA does not cover equivalency decisions. It is a unilateral decision of the European Commission and of HM Treasury in terms of making such decisions to grant third country access to their markets.

To date, the European Commission has only granted one equivalency decision for UK central counterparties to continue doing business in the EU beyond the end of the transitional period. HM Treasury has made a range of equivalency decisions for certain intragroup transactions, regulated markets, market-making exemptions from short selling restrictions, the certification for credit rating agencies and under the Benchmarks regulation.

None of these equivalency decisions will provide UK or EU financial services firms the same broad-based rights of market access as provided under passporting.

Whilst the TCA is helpful when it comes to encouraging the adoption of international standards, it all but ensures that there will be further friction beyond 31 December 2020 for UK-EU cross-border financial services.

Mutual recognition of professional qualifications

The TCA does not provide for the recognition of mutual qualifications. As of 1 January, as a general rule, UK nationals, irrespective of where they acquired their qualifications, and EU citizens with qualifications acquired in the UK, will need to have their qualifications recognised in the relevant EU Member State on the basis of that State's domestic rules on recognising third-country qualifications. This is a significant change from the liberalised rules on the recognition of UK-EU professional qualifications under existing Single Market rules.

More optimistically, the TCA allows for the EU and UK to agree, on a case-by-case basis, additional arrangements for the mutual recognition of certain professional qualifications.

Legal services

The UK Government "Explainer" to the Agreement states that the Agreement "will give UK solicitors, barristers and advocates the right to advise their clients across the EU on UK and public international law using their home professional titles, except where EU Member States have placed specific limits on this activity." Note that public international law excludes EU law.

The devil, however, is in the detail. Member State exceptions in the Annexes are key to understanding what the TCA provisions on legal services actually mean in practice. The most important point to understand is that there will be no automatic right for a UK lawyer to advise on UK or public international law in an EU Member State, whether, for example, over the internet ('mode 1'), or through the temporary presence in the UK ('mode 4'). The same applies to a Spanish lawyer seeking to advise on Spanish law in the UK. This is because individual States retain existing rules for how third country lawyers may practise in their jurisdiction under the TCA.

The change from the Single Market liberalised regime for UK-EU legal services on 1 January 2021 will be significant. To date, UK solicitors have been able to establish under “home” title in any EU Member State, and offer advice on UK law or the law of the Host State, including EU law. They were also able to provide temporary cross-border legal services, without the need to register with the host Member State’s authorities.

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