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Beyond the EU-UK Negotiations: Planning for trade with the rest of the world after Brexit

DLA PIPER TRADE TRUTHS

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Whilst clients are rightly focused on the current status of negotiations between the UK and EU, some 12 weeks before the end of the Transition Period, it is easy to lose sight of the impact of Brexit on the UK's trading relationship with the rest of the world and the commercial consequences of this for businesses.

Broadly speaking, the UK Government has three sets of international trade-related priorities beyond the EU-UK negotiations:

- Its "continuity negotiations programme", i.e. efforts to "roll-over" current EU free trade agreements so that the UK continues to benefit from them after the end of the Transition Period.
- Its "future trade agreements programme", i.e. its attempts to negotiate new free trade agreements where the EU does not have an equivalent agreement.
- Establishing its framework for trade with third countries that the UK will not have a free trade agreement with by the end of the Transition Period, i.e. those countries the UK will trade on so-called WTO terms with.

In this edition of Trade Truths, we provide an explanation of what a free trade agreement is, the issues that they cover, provide a report card on the UK Government's progress to date in its trade negotiations and, importantly, detail why all of this matters to your business.

What is an FTA?

A free trade agreement (FTA) is an agreement between two (bilateral) or more (plurilateral) countries, with the principal objective of reducing or removing tariffs and non-tariff barriers imposed on trade in goods and services between the countries.

In last week's Trade Truths we outlined the key principles of WTO law and what trading on WTO terms means for goods and services sectors. The relationship between WTO law and FTAs is often misunderstood. It is important to appreciate that the rules of the WTO underpin and provide the foundations for all FTAs. In other words, WTO rules are the floor for international trade, on top of which preferential FTAs can be built. The WTO Agreements themselves anticipate and allow for the negotiation of bilateral or plurilateral FTAs offering preferential access as an exception to the general principles of non-discrimination between WTO Members, provided that such FTAs meet defined criteria (the most important of which being that the agreement covers "substantially all trade" between the parties).

What do FTAs Cover?

There are over three hundred FTAs currently in force internationally, covering approximately one third of international trade. These agreements vary significantly in their scope and ambition.

Any FTA signed by the UK will cover the following core subject matter:

- Market access and national treatment;
- Technical barriers to trade;
- Trade remedies;
- Intellectual property;
- Customs and trade facilitation; and
- Dispute settlement.

The starting point of any FTA is tackling market barriers. For both goods and services, this means improving where possible on the “most favoured nation” terms that would be available to the parties without such an FTA under the WTO Agreements.

Additional areas that may be covered by a so-called deep and comprehensive FTA include investment protections, regulatory transparency, government procurement, labour rules and corporate governance requirements, together with level playing field commitments to promote fair competition and set limits to state aids, subsidies and other potential forms of trade distortion.

Continuity Negotiations Programme

One of the central pillars of the Leave campaign in the 2016 referendum was that a “Global Britain” would be well positioned to sign preferential trade deals with countries around the world creating new business, investment opportunities and jobs. Lost in this narrative was that the first task would be an essentially defensive one – prevent the UK from losing the benefits of the 41 FTAs that govern the relationship between the EU and 72 countries.

During the Transition Period, the UK has committed to complying with those agreements in the Withdrawal Agreement (i.e. by granting preferential access to those 72 partner countries). Those 72 countries have, in turn, voluntarily agreed to provide equivalent preferential access to the UK during the Transition Period. However, after 31 December 2020, EU FTAs will not apply to the UK. Therefore, the UK Government has been working to replicate the effects of existing EU agreements as closely as possible to prevent cliff-edges for businesses and consumers.

So, 12 weeks before the end of the Transition, how is the Government doing? The UK has signed 20 agreements, covering 50 countries or territories. This includes agreements with Israel, South Korea, the countries of the Southern African Customs Union, Morocco and an agreement-in-principle with Japan. As such, businesses who trade with these countries will continue to benefit from preferential access after 1 January 2021.

It is important to say that even where the UK has rolled over agreements, they are not necessarily identical to the equivalent EU agreements. For example, the UK and Switzerland have only been able to agree on the continuation of a minority of the Mutual Recognition Agreements in place between the EU and Switzerland. This is because Switzerland maintains legislative equivalence with the EU in a number of regulatory areas, and therefore cannot commit to mutual recognition of UK practices unless the UK too conforms to EU standards in these areas. Similar issues arise with respect to Iceland, Norway and Turkey.

Where the UK Government is not successful in agreeing a “roll over” FTA, trade between the UK and that third country will revert to WTO terms at the end of the Transition Period. In September, Trade Secretary Liz Truss confirmed that negotiations with Canada had re-commenced, although it remains to be seen whether these talks can be concluded before the end of the year. In addition to Canada, the Government has yet to agree roll-over FTAs with Mexico, Singapore or Egypt. Reverting to WTO terms with these trading partners will have a significant impact for businesses and sectors for which one or more of these markets is important.

Future Trade Agreements Programme

Now that the UK has left the EU, it is able to negotiate, sign and ratify new trade agreements to come into force after 31 December 2020.

The UK Government identified four priority negotiating partners in addition to the EU: the US, Australia, New Zealand and Japan. Negotiations with the last three will also pave the way for the UK to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

On 11 September, the Trade Secretary announced that the UK had secured an FTA with Japan, the UK-Japan Comprehensive Economic Partnership Agreement. This is the first major deal which will take effect from the end of the Transition Period. In addition to tariff-free trade on 99% of exports to Japan, UK businesses will benefit from more liberal rules of origin for certain goods, new digital and data provisions, strengthened intellectual property protections and improved market access for UK financial services.

The fourth round of the UK-US FTA negotiations took place from 8 – 18 September 2020. Following the conclusion of this round, the Government reported that negotiators were in the process of consolidating texts in the majority of chapter areas. An exchange of tariff offers, in which both sides have presented their proposed tariffs on the import of goods from the other party, has also taken place. However, concluding a comprehensive agreement prior to the US presidential election in November – as was previously the ambition of both sides - will be very challenging. As such, both sides may be aiming for a so-called “mini deal” or “phase 1 deal”, which would consist of tariff cuts in addition to general declarations and commitments to subsequent cooperation. In parallel with the negotiations with the EU and US, the UK is seeking to conclude free trade agreements with Australia and New Zealand.

The UK’s Future Trade Agreements Programme provides the opportunity to negotiate deals which better reflect the realities of modern international trade now and in the future. For example, whilst the text has not yet been published, the UK-Japan FTA is expected to include significant provisions on digital trade and online infringement of intellectual property rights. In addition, on the agenda for the UK-US negotiations are pertinent issues surrounding telecoms, data and technology.

What should you be doing?

As part of Brexit preparations, businesses should begin to consider the wider impact of Brexit on the UK’s trading relationship with third countries. Practical steps that businesses can take are to:

- Monitor the UK’s trade negotiations - under both the Continuity Negotiations and Future Trade Agreements Programmes – and carry out appropriate risk assessments to actively respond to changes in your global supply chain.
- Consider engaging with the UK government to influence the outcome of trade negotiations and assist in the development of a UK domestic trade policy that works in your favour.
- Begin to review the potential tariff and non-tariff barriers in your current/target third country markets, and implement appropriate steps to safeguard your commercial interests and maximise your market access for goods and services.

How we can help you

DLA Piper’s team of lawyers and government affairs professionals in London and Brussels are here to assist you in your preparations for Brexit. Our market-leading Brexit practice has a strong track record of helping clients prepare and engage. We can carry out audits of your contractual agreements to assess their exposure to Brexit and undertake legal, commercial and human resources impact assessments, to identify areas requiring action.

With our full service, global capabilities, we can help you implement flexible Brexit-contingency plans, so that necessary adjustments can easily be made if a deal is reached before the end of the year.

Coming up next in the DLA Piper Trade Truths series

Irrespective of the outcome of the UK-EU negotiations, customs procedures for UK-EU trade will change significantly on 1 January 2020. We provide a snapshot of the key changes and what these will mean for UK, EU and international importers and exporters. It will not be business as usual.

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