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Working with Europe and the EU – A New Context

2.5

Practitioner training for UK civil servants
organised by the European Institute of Public Administration
(EIPA), Maastricht on behalf of
the Foreign, Commonwealth and Development Office (FCDO)

London, 18 - 20 September 2023



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Working with Europe and the EU – A New Context 18 – 20 September 2023

Day 2

How will the new framework of UK-EU relations work?

- **governance**

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Governance

Context

- Compliance matters to the EU
- Rule of law discussions
- Market access depends on compliance
- WTO difficulties

Risks

- Some mechanisms are untested
- Escalation and conflict

Governance: Negotiations

- **Overall structure**

3 agreements (with single trade agreement; fragmented dispute settlement provisions)

UK: 10 separate agreements with separate governance

EU: one single agreement with single governance structure

- **No role for CJEU** (except for EU programmes)

- **Arbitration tribunal** measures

Compliance mechanism; no financial penalties; cross-suspension (with some limits)

UK: compliance measures; limits to cross-suspension

EU: compliance and financial penalties; broad cross-suspension

- **Horizontal clauses** (human rights)

Included; linked to termination, but high threshold criteria

UK: no desire to include

EU: wanted it included (as is its general approach to FTAs); and linked to termination

Governance: TCA Overview

- **Part 1: Common and Institutional Provisions**
- Part 2: Trade
- Part 3: Law Enforcement and Judicial Cooperation in Criminal Matters
- Part 4: Thematic Cooperation
- Part 5: Participation in Union Programmes
- Part 6: Dispute Settlement and Horizontal Provisions
- Part 7: Final Provisions

+ Annexes

Basis for Cooperation

- **Basic shared values** (*Articles 763-771*)
 - Includes essential elements of the partnership
 - Democracy, rule of law, and human rights (*Article 763(1)*)
 - Fight against climate change (*Article 764(1)*)
 - Countering proliferation of weapons of mass destruction (*Article 765(1)*)
- **Remedies** against breach of essential elements (*Article 772*)
 - In case of 'serious and substantial' failure, one party can terminate or suspend the operation of the TCA
- **Safeguard measures** (*Article 773*)
 - In case of serious economic, societal, or environmental difficulties of sectorial or regional nature

Termination Clauses

- Termination of the entire agreement
 - General with 12 months' notice: *Article 779*
 - Fast track: *Article 772*

- Termination of parts (at least 8 specific clauses)
 - Trade (*Article 521*): 9 months' notice (except Social Security Coordination)
 - Fisheries (*Article 509*): 9 months' notice; this automatically terminates headings on trade (Heading One), aviation (Heading Two), and road transport (Heading Three)
 - Law Enforcement (*Article 692*): 9 months' notice
 - See also: *Article 331* (energy), *Article 441* (air transport), *Article 458* (aviation safety), *Article 472* (haulage), *Articles 719-720* (Union programmes)

Institutional Architecture: TCA

- **Partnership Council** (Ministerial level): with Civil Society Forum and Parliamentary Partnership Committee
 - Assisted by **Trade Partnership Committee**; with 10 Trade Specialised Committees
 - Assisted by 8 Specialised Committees

Institutional Architecture: Withdrawal Agreement

- Joint Committee
 - with 6 Specialised Committees
- New Structures for UK-EU cooperation under the Windsor Framework Agreement
 - New mechanisms for stakeholder engagement
 - New structured expert groups
 - First and deputy First Minister will be part of UK delegation in the Joint Committee

Institutional Architecture: Issues

- Largely untested
- No arrangement for summit-level meetings
- For EU: no direct involvement of Member States
- For UK
 - Resources
 - Reinforcement of UK diplomatic presence in Brussels and Member States
 - Reinforcement of resources in Whitehall
 - Need for effective coordination within FCDO and cross-government

Dispute Settlement: Case Study 1

- Case Study 1: The EU adopts a regulation restricting the number of flights from the UK to airports in the EU to prevent the spread of the omicron variant of Covid-19. Would it make a difference if similar restrictions are not imposed on EU air carriers?

Dispute Settlement: Case Study

Article 419(2) "The United Kingdom shall enjoy the right for its air carriers to make stops in the territory of the Union to provide scheduled and non-scheduled air transport services between any points situated in the territory of the United Kingdom and any points situated in the territory of the Union (third and fourth freedom traffic rights)."

Article 419(6) "Neither Party shall unilaterally limit the volume of traffic, capacity, frequency, regularity, routing, origin or destination of the air transport services operated in accordance with paragraphs 2, 3 and 4, or the aircraft type or types operated for that purpose by the air carriers of the other Party, except as may be required for customs, technical, operational, air traffic management, safety, environmental or health protection reasons, in a non-discriminatory manner, or unless otherwise provided for in this Title."

427(2) "A Party (the "initiating Party") may proceed in accordance with paragraphs 3 to 6 where it considers that its air carriers' fair and equal opportunities to compete in the exercise of the rights provided for in this Title are adversely affected by discrimination prohibited by paragraph 1."

Dispute Settlement: Overview

- Part 1: Common and Institutional Provisions
- Part 2: Trade
- Part 3: Law Enforcement and Judicial Cooperation in Criminal Matters
- Part 4: Thematic Cooperation
- Part 5: Participation in Union Programmes
- **Part 6: Dispute Settlement and Horizontal Provisions**
- Part 7: Final Provisions

Dispute Settlement: TCA (Part Six, Title I)

- **Single legal framework**
 - But exceptions and special procedures
 - Level playing field (panel of experts instead of arbitration panel)
 - Law enforcement section
 - Fisheries
- **Phases for dispute settlement**
 - Consultation in Partnership Council
 - Arbitration Tribunal
 - Decentralised enforcement: unilateral measures by the parties (suspension of obligations)

Dispute Settlement: TCA-Scope

- General: DSM applies to disputes about the interpretation and application of the TCA and supplementing agreements (*Article 735(1)*)
- Limits
 - Exceptions listed in *Article 735(2)*
 - DSM does not apply to disputes about the Protocol on Social Security Coordination or its annexes in individual cases
 - In some cases, the provisions fall within the scope of DSM but are excluded from suspension (*Article 749(3)*)
 - Financial services
 - Social security coordination (*Heading Four of Part Two*)
 - Union Programmes (*Part Five*)

Dispute Settlement: TCA

Changes to EU membership

- From legal to political DSM
 - TCA precludes direct enforcement by individuals (eg in national courts); instead, state enforcement (UK v EU)
 - TCA precludes penalty payments; instead, unilateral measures (suspension of obligations)
 - Use of DSM will depend on political factors

Dispute Settlement: TCA- Process

- Phase 1: Consultations (Partnership Council or expert panels) (*Article 738*)
- Phase 2: Arbitration
- Phase 3: Tribunal Ruling
- Phase 4: Remedies for Non-compliance

Dispute Settlement: TCA- Phase 4 (Remedies for non- compliance)

- Complaining party can request compensation or suspend obligations under the TCA
- Request of complaining party for temporary compensation (*Article 749(1)*)
- Suspension of obligations
 - Notification (*Article 749(2)*) and conditions (*Article 749(3)*)
 - Suspension after 10 days of notification unless there is an appeal (*Article 749(10)*)
 - Respondent party can appeal to the arbitration panel (*Article 749(11)*)

Additional Dispute Resolution Mechanisms

- **Fisheries**

Compensatory measures in case of withdrawal or reduction of access (*Article 501*)

Remedial measures and dispute resolution (*Article 506*): failure to comply with Heading Five of Part Two

- **Level playing field and 'rebalancing measures'**

LPF (*Article 374*): subsidies that cause or risks causing significant negative effect on trade

LPF (*Article 411*): in case of significant regulatory divergence; this can trigger review (and possible termination) of trade and road transport provisions

- **Road transport (*Article 469*)**

New regulatory measure in breach of *Annex 31*

Remedial measures can be imposed

- Different arrangements for Part Three (law enforcement)

With possible suspension of Title (or cross-retaliation across other Part Three Titles)

Level Playing Field: Case Study

- *Case Study 2: Steel*, one of the largest UK steel companies, has announced that it will not be able to continue production at its plants in the UK without a significant bailout by the UK government. It has submitted a restructuring plan that which relies to a large extent on government support with a smaller contribution of its own funds or assets. In light of the large number of jobs at risk, the UK government has agreed to provide a rescue package that includes a mix of short terms loans, loan guarantees and cash payments.

Level Playing Field: Case Study

Article 367 Prohibited subsidies subject to conditions

3. Subsidies for restructuring an ailing or insolvent economic actor without the economic actor having prepared a credible restructuring plan shall be prohibited. The restructuring plan shall be based on realistic assumptions with a view to ensuring the return to long-term viability of the ailing or insolvent economic actor within a reasonable time period. During the preparation of the restructuring plan, the economic actor may receive temporary liquidity support in the form of loans or loan guarantees. Except for small and medium-sized enterprises, an economic actor or its owners, creditors or new investors shall contribute significant funds or assets to the cost of restructuring. For the purposes of this paragraph, an ailing or insolvent economic actor is one that would almost certainly go out of business in the short to medium term without the subsidy.

4. Other than in exceptional circumstances, subsidies for the rescue and restructuring of insolvent or ailing economic actors should only be allowed if they contribute to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate. Except in the case of unforeseeable circumstances not caused by the beneficiary, they should not be granted more than once in any five year period.

Level Playing Field

- LPF as price for market access (to prevent distortion of competition)
- Market access depends on
 - Host state regulation
 - Regulatory autonomy
- LPF compensate for regulatory divergence
 - UK or EU separate regulation and enforcement
 - Regulatory autonomy
 - Rebalancing mechanism

Level Playing Field

- **Regulatory areas**
 - Subsidy control
 - Competition
 - State-owned enterprises
 - Taxation
 - Labour and Social Policy
 - Environment and Climate
 - Other rules on trade and sustainability

Level Playing Field: Enforcement

- **Domestic enforcement mechanisms**
 - National authorities and national courts (CJEU is excluded)
 - Parties agree to create rights of action for private parties in their jurisdiction (except taxation and state-owned enterprises)
- **Dispute settlement under TCA** (except competition) and special procedures in LPF
- **Unilateral responses**
 - Remedial action
 - Rebalancing measures (potentially far-reaching); for labour and social protection; environment and climate protection; subsidy control
 - Review of trade and other economic parts of the TCA

Level Playing Field: Constraints

- **General procedural constraints**
 - Transparency for all LPF measures
 - Obligation to give notice and allow for comments on drafts of major regulatory measures
 - Impact assessment
 - Regulatory register
- **Specific constraints** for each area
 - Subsidy, competition, state-owned enterprises
 - Labour and social policy
 - Environment and climate
 - Taxation
 - Rules on trade and sustainability

Level Playing Field: Subsidy regime

- **Substantive constraints**
 - Prohibition of certain subsidies, justification, proportionality
 - No need for ex-ante control
 - Impact on trade and investment between EU and UK
- **Enforcement**
 - Domestic
 - independent bodies (Article 371)
 - national courts (Article 372)
 - Dispute settlement under TCA (Article 374)
 - Significant negative effect on trade or investment
 - Consultations after request
 - Unilateral remedial measures
 - Other party can initiate accelerated arbitration procedure (assesses only effect on trade)

Dispute Settlement: WA/WF

- **Withdrawal Agreement**

- Joint Committee Consultations (*Article 169*) and Arbitration Panel (*Article 170*)
- But also jurisdiction of the CJEU- binding decision on interpretation of EU law concepts (*Article 174*)
- But also cross-suspension

In case of non-compliance with arbitration ruling under the WA, suspension of obligation under the TCA possible (*Article 749(4) TCA and 178(2)(b) WA*)

- **Windsor Framework (*Article 12(4)*)**

- Infringement proceedings before CJEU (*Articles 258, 260 TFEU*)
- National courts can request preliminary ruling from CJEU

Dispute Settlement: Cross-suspension

Suspension of TCA in case of breach of WA

- **Article 749(4)**

In case of persistent non-compliance with a ruling of an arbitration panel under an earlier agreement (eg the WA)

Complaining party can suspend obligation of the provisions that are within the scope of *Article 735*

- **Article 178(2) WA**

Refers to 'any other agreement between the Union and the United Kingdom' (eg the TCA)

Review provisions

- General review clause: Article 776 TCA
 - Joint review in five-year intervals
 - But no specifics about process or timing (e.g. duration of review)
- Review clauses for committees
 - E.g. Article 8(3)(a): Trade Specialised Committees can review the implementation of the TCA
- Specific review clauses
 - Article 126: services and investment (Title II of Heading One); follows Article 776
 - Article 201(section 2): cross-border data flows review (after three years)
 - Article 275: review of geographical indications
 - Article 411 (section 4): rebalancing review (with specific time-frames)
 - Article 510: fisheries
 - Article 691: Part Three (Law Enforcement and Judicial Co-operation in Criminal Matters); follows Article 776
 - Article 732: review of participation of UK in Union programmes
 - Annex 4 (section 2): aluminium quota review
 - Annex 5 (section 3): review of PSR for batteries of electric cars

Reviews-relevant dates

- Relevant dates for upcoming measures, reviews and sunset clauses
 - Equivalence decisions for organics terminate 31 December 2023
 - Data flows review concludes 1 January 2024
 - Wine review concludes 1 January 2024
 - Rules of Origin for electric vehicles and batteries change 1 January 2024
 - Review of electric vehicles and batteries (product specific rules) available 1 January 2025
 - Rebalancing review available 1 January 2025
 - Horizontal review - 1 January 2026
 - Aluminium quota review available 1 January 2026
 - 30 June 2026: Energy title sunset clause
 - 30 June 2026: Adjustment period for access to waters ends
 - 2027: Rules of Origin for electric vehicles and batteries change again
 - 2030: Fisheries review, including access to waters
 - 2036: Social Security Coordination protocol terminates

