

Post-Brexit EU-UK Trade and Cooperation Agreement – Key considerations for financial services

QuickTake:

- On December 24, 2020, the EU and UK announced the conclusion of a Trade and Cooperation Agreement (**TCA**). The EU-UK Brexit Transition Period ends December 31, 2020. The TCA sets out the future relationship beyond that date and the EU will treat the UK as a third country.
- The TCA will now have to be ratified by the UK (scheduled December 30, 2020) and by the EU on a provisional basis before December 31, 2020, with full ratification required by February 28, 2021.
- The TCA's primary focus is on trade in goods. UK-EU trade in goods will be free from tariffs and quotas but subject to customs declarations and inspections. Special provisions cover trade between the EU and Northern Ireland. A separate negotiation is under way with respect to relations between the EU and Gibraltar.
- The TCA also includes chapters on data protection (six month additional transition), general investment and basic access for citizens and firms.
- There is little to nothing in the TCA on services beyond most favored nation treatment and there is nothing at all on financial services beyond non-discrimination, free movement of capital, cooperation on cyber-security and rules on firms requiring authorization to provide services in respective territories.¹ The TCA's terms on financial services are comparably less than in the EU-Canada Free Trade Agreement (**CETA**). What the TCA does do is confirm that both parties (EU & UK) maintain their markets open for operators from the other party to supply services through establishment i.e. physical presence.
- There are no equivalence decisions/mechanics in the TCA and equally, while the TCA does not prohibit reverse solicitation, the EU's supervisory statements notably through the SPoRs (see below) may limit this as a sustainable means of market access. Both parties (EU & UK) reserve their right to introduce rules on market access.
- Even if the EU and the UK conclude a regulatory cooperation deal, which has been hinted at for by March 2021, this will not equate to an EU equivalence decision. Consequently, this may limit UK firms in their access options to the EU's Single Market unless they set up in the EU-27 or make use of other exemptions.

In light of the above, financial services firms and market participants will need to prepare accordingly.

¹ More than 40% of the UK's exports to the EU-27 are services and the services sector (including financial services) accounts for 80% of the UK's GDP.

Where are we now?

“That’s the good news from Brussels – now for the sprouts”. Following four and a half years since the Brexit referendum, this is how UK Prime Minister Boris Johnson on December 24, 2020 summarized² the conclusion of the EU-UK Trade and Cooperation Agreement (**TCA**)³ and certain Declarations⁴ as well as general EU-27 wide and individual Member State as well as UK-specific “Reservations”.⁵ After 10 months of intense negotiations, multiple missed deadlines and disagreements on fishing quotas to regulatory alignment and everything in between a breakthrough was finally reached.

EU Lead Negotiator, Michel Barnier pointed to the fact that the “clock is no longer ticking” and EU Commission President Ursula von der Leyen reflected in her own statements on “parting with such sweet sorrow” as well as “Finally, we can leave Brexit behind us and look to the future. Europe is now moving on.”⁶

The TCA’s 11th hour announcement is nevertheless certainly welcome in reducing the risk of a No-Deal Brexit and resulting disruption. The TCA provides the necessary clarity but perhaps for now not the full closure needed. This is the case as it creates uncertainty in the areas it does not cover or not as fully as it could notably regarding the investment chapter as well as professional services, financial services, insurance and contractual continuity. Importantly, the TCA is the first modern trade deal to disintegrate an existing partnership, replacing it with a looser relationship with greater defined barriers between markets. More importantly, the TCA may be reviewed after four years and equally either the UK or the EU-27 could walkaway from the TCA altogether – leaving the UK to trade with the EU-27 on World Trade Organization (**WTO**) terms and tariffs.

What does the TCA cover?

The TCA’s new relationship and non-discrimination measures, in what it does cover, will nevertheless mean a marked change for market access. This change will be felt across a number of areas (including well beyond financial services) from January 1, 2021 even though the Irish border will remain open as Northern Ireland remains in the Customs Union and a new trade border between it and the rest of the UK.⁷ The new relationship created by the TCA by no means matches the level of cooperation and market access rights that existed while the UK

² Available [here](#).

³ Also being referred to by some as the Christmas Eve Deal which was published first by the UK Government on December 26, 2020 available [here](#). The European Commission published the TCA on its website available [here](#).

⁴ See Declarations published December, 26, 2020 [here](#)

⁵ These Reservations, in the case of “**EU Reservations**” confirm and apply a number of measures that exist as a matter of EU law and national law (including, but not limited to, companies law and on-shore directors for incoming third country firms) with respect to third country firms and jurisdictions or in respect of accounting, bookkeeping and auditing from page 555 onwards and taxation advisory services from page 559 onwards. EU Reservation No. 12 begins on page 597 and EU Reservation 16 begins on page 680 and applies to what the TCA defines as “financial services”. The UK Reservations number 4 (page 723) and number 9 (page 729) set out measures, include notably a reservation for incoming firms to adopt a specific legal entity type.

⁶ Amongst other notable quotes (including a reference to the Beatles) Von der Leyen stated in response to reporter following the announcement of the TCA that “This whole debate has always been about sovereignty. But we should cut through the soundbites and ask ourselves what sovereignty actually means in the 21st century. For me, it is about being able to seamlessly do work, travel, study and do business in 27 countries. It is about pooling our strength and speaking together in a world full of greater powers. And in a time of crisis, it is about pulling each other up instead of trying to get back to your feet, alone. And the European Union shows how this works in practice.” See remarks available [here](#) and [here](#).

⁷ December 20, marked the 100 year anniversary on the passing of the Government of Ireland Act, which set the ground for the partition of Northern Ireland remaining in the UK and what would become ultimately the Republic of Ireland.

was a Member State of the EU. Talks will continue on Gibraltar as no future relationship has been agreed and Gibraltar is not included in the TCA.⁸

The TCA's non-discrimination measures (subject to specific Reservations) means that service suppliers or investors from the EU will be treated no less favorably than UK operators in the UK, and vice-versa. This entitles them to receive more favorable treatment than that granted to service suppliers or investors of third countries without similar provisions in place. For UK operators this means complying with EU-27 but equally national measures.

While the TCA does go well beyond traditional free trade agreements⁹, the TCA does ***not*** prevent the loss of passporting rights for financial services firms accessing each other's market. Hope remains on the EU granting equivalence rights for UK firms, whereas the UK has and indicated it will grant equivalence rights to EU firms. This is not a reciprocal arrangement nor static and thus dependent on how the EU-27's system and that of the UK each evolve/diverge – including conceptual gaps.¹⁰

The next key dates for financial services are February 28 (possible end of provisional application period – see below), 2021 and March 2021 (potential regulatory cooperation deal concluded). The EU has indicated it is in no rush to grant an equivalence decision beyond those for public sector authorities and the two temporary measures on central counterparty clearing and settlement of Irish securities.

In general it is expected that despite the TCA the UK and EU will continue on talking, notably as the UK will be negotiating with the EU on a constant basis on standards. The TCA's governance framework and its arbitration system will probably be in persistent focus and a cause of tension. Moreover, the agreement with respect to Northern Ireland will be reviewed in four years' time.

Moreover, the TCA does not replace nor repeal various national emergency Brexit laws that were passed by individual EU-27 Member States ahead of the Withdrawal Agreement. These will largely remain unaffected.¹¹ The same applies for the continued application for the EU-level authorities (EBA, ESMA, EIOPA and ECB's) Supervisory Principles on Relocations (SPoRs)¹². When all of this is considered together the TCA does not reduce the need for financial services firms (on both sides) to reevaluate market access mechanics as well as review whether to revisit existing and new contractual relationships, including whether to repaper trading documentation, dispute resolution venue and possibly governing law clauses.

What happens next?

The TCA, which, at the time of writing, is not yet approved nor in force, was nevertheless heralded by both the EU and the UK as a “historic deal”. The UK government has stated that it facilitates the foundations of a “thriving trading and economic relationship between a

⁸ See statement available [here](#).

⁹ The TCA goes beyond recent EU free trade agreements with other third countries such as Canada or Japan, by providing for zero tariffs and zero quotas on all goods.

¹⁰ The TCA also includes a forward-looking “most-favored nation” clause that would allow the EU and the UK to claim any more favorable treatment granted by the UK or the EU respectively in their future agreements on trade in services and investment with other third countries – except in the area of financial services. It also includes a review clause encouraging the parties to consider whether there are possibilities to improve trade in services and investment relations between the EU and the UK in the future – except in the area of financial services.

¹¹ See coverage available [here](#).

¹² See full breadth of coverage available [here](#).

sovereign UK and our European partners and friends”. The EU emphasized¹³ that the UK is now, in EU legal terms, a “third country” but remained a trusted partner.

The UK was quick to publish the “Summary Explainer” document ahead of the final text of the deal, which was not available from the UK nor the EU as December 24 drew to a close.¹⁴ The EU responded to the UK’s Summary Explainer by publishing the following:

- Brochure on “EU-UK Relations: A new relationship, with big changes”;¹⁵
- Brochure on “EU-UK Trade and Cooperation Agreement”;¹⁶
- Infographic on the current and future timeline of the TCA;¹⁷
- Comprehensive visual aid on the benefits of EU Membership versus the TCA – showing the lesser benefits the UK has as a third country.¹⁸

The TCA is comprised of the following pillars:

- (A) an unprecedented free trade agreement¹⁹;
- (B) an ambitious cooperation on economic, social, environmental and fisheries issues;
- (C) a close partnership for citizens’ security; and
- (D) an overarching governance framework that also has an arbitration system in case of disputes.

In terms of trade in (professional) services both in service suppliers or investors from the EU are, under the general aims of the TCA, to be treated no less favorably than UK operators in the UK and vice-versa. Facilitations for short-term business trips and temporary secondments of highly-skilled employees are envisioned but the TCA (subject to Reservations in Annex SERVIN 3 on page 741 onwards and SERVIN 4 on page 747 onwards) does not replicate the EU’s Mutual Recognition of Professional Qualifications mechanism, which allows workers such as doctors, engineers and architects to have their qualifications recognized across member states. Lawyers are granted some mutual access benefits subject to exclusions. The TCA also aims to remove unjustified barriers to digital trade, including prohibition of data localization requirements, while respecting data protection rules (with some parts reserved for the EU – see below).²⁰ Importantly, UK public procurement markets are open to EU bidders established in the UK, on equal footing, and vice versa for small contracts

¹³ See statements available [here](#).

¹⁴ See statements available [here](#).

¹⁵ Available [here](#).

¹⁶ Available [here](#).

¹⁷ Available [here](#).

¹⁸ Available [here](#).

¹⁹ The TCA, as the EU describes it “...is at the cutting edge of modern and sustainable trade policy. It commits both parties to upholding common high standards ensuring the protection of labor and social standards, environmental protection, the fight against climate change, including carbon pricing, and tax transparency. It also contains detailed principles on State aid to prevent either side from granting unfair, trade-distorting subsidies. These standards and principles are associated with domestic enforcement and dispute settlement mechanisms to ensure businesses from the EU and the UK compete on a level playing field. The parties have the right to take unilateral measures to safeguard their economies against unfair competition from the other party.”

²⁰ The TCA states that effective and swift data sharing and analysis are increasingly central to modern law enforcement in the fight against serious international crime, terrorism and cybercrime. However, the UK will no longer have direct, real-time access to sensitive EU databases that support the EU’s area of freedom, security and justice – as this is provided only to Member States and very closely associated countries that accept all accompanying obligations. Nonetheless, the EU-UK Agreement includes ambitious arrangements for timely, effective, efficient and reciprocal exchanges of air passenger data (known as Passenger Name Records or PNR), criminal record information, as well as DNA, fingerprint and vehicle registration data (‘Prüm data’).

At the UK's request, the Agreement does not cover cooperation on foreign policy, external security and defense, even though this was initially foreseen in the Political Declaration as part of the Withdrawal Agreement, which remains in force.

What are the TCA's financial services market access mechanics?

The actual level of market access will depend on the way a 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').

In practice, the actual ability to supply a particular service or invest in a certain sector will also depend on specific Reservations set out in the TCA, which may be imposed on UK service suppliers when supplying services in the EU in some sectors, and vice-versa, as well as each side's financial services regulatory rules.

For financial services firms the TCA becomes truly interesting in the four and a half pages (out of 1,246) running from pages 107 to and including 111. The TCA's provisions on financial services are much less in length and detail when compared to Chapter 13 of the EU-Canada trade deal (**CETA**)²¹. There are no equivalence decisions/mechanics (see discussion below) and equally the TCA does not prohibit reverse solicitation although the EU's supervisory statements notably through the SPoRs (see below) may limit this as a sustainable means of market access.

The TCA's provisions clarify that UK and EU firms may have access to each other's markets on the basis of being permissioned for such access in existence with the applicable rules to "financial services", as such term is used in the TCA. Equally, the TCA states that confidential information relating to consumers (but not clients/counterparties that are not consumers) and their affairs and accounts in possession of public entities will not be disclosed between EU and UK authorities – unless under judicial cooperation channels to the extent these exist.

The crux of market access rights are set out in Art. SERVIN 5.42 (provisional numbering) on page 110 which states (clarifications in square brackets):

- “1. Each Party [i.e. UK and EU-27] shall permit a financial service supplier of the other Party established in its territory to supply any new financial service that it would permit its own financial service suppliers to supply in accordance with its law in like situations, provided that the introduction of the new financial service does not require the adoption of a new law or the amendment of an existing law. This does not apply to branches of the other Party established in the territory of a Party.
2. A Party may determine the institutional and legal form through which the service may be supplied and require authorization for the supply of the service. Where

²¹ Available [here](#).

such authorization is required, a decision shall be made within a reasonable time and the authorization may only be refused for prudential reasons.”

For greater certainty, this shall not prevent the EU-27 or the UK from adopting or maintaining measures for prudential reasons in relation to branches established in its territory by legal persons in the territory of the other.

In terms of clearing and payment systems, Art. SERVIN 5.44 (page 111) introduces similar principles of non-discrimination:

“Under terms and conditions that accord national treatment, each Party shall grant to financial service suppliers of the other Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This Article does not confer access to the Party’s lender of last resort facilities.”

Under the TCA a financial service means “...any service of a financial nature offered by a financial service supplier...” (other than a “public entity”, which may not exempt multilateral development banks)²² in the UK or the EU-27 (as the case may be) and includes the following activities (identical to CETA’s language) – NB excludes some activities generally but also with respect to digital assets. The following activity types below (while they follow CETA) are not defined in the TCA:

- (i) insurance and insurance-related services:
 - a. direct insurance (including co-insurance):
 - aa. life;
 - bb. non-life;
 - b. reinsurance and retrocession;
 - c. insurance intermediation, such as brokerage and agency; and
 - d. services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;
- (ii) banking and other financial services (excluding insurance):
 - a. acceptance of deposits and other repayable funds from the public;
 - b. lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
 - c. financial leasing;
 - d. all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
 - e. guarantees and commitments;
 - f. trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
 - aa. money market instruments (including cheques, bills, certificates of deposits);
 - bb. foreign exchange;
 - cc. derivative products including, but not limited to, futures and options;

²² Public entity is defined in the TCA as: “(i) a government, a central bank or a monetary authority, of the UK or EU-27, or an entity owned or controlled by the UK or the EU-27, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.” Importantly (perhaps rather worryingly, this definition does not seem to exempt multilateral development banks or other similar entities.”

- dd. exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
- ee. transferable securities; and
- ff. other negotiable instruments and financial assets, including bullion;
- g. participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- h. money broking;
- i. asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- j. settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- k. provision and transfer of financial information, and financial data processing and related software; and
- l. advisory, intermediation and other auxiliary financial services on all the activities listed in points (a) to (l), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

The above and the TCA's provisions more generally as they apply to what it defines as "financial services" are subject to Reservations. Reservation 12, which begins on page 597 and Reservation 16, which begins on page 680 of the TCA sets out further EU-wide and Member State specific reservations that already apply under existing law – mostly concerning residency and qualification specifics as well as rules on types and scope of services that may be provided. The UK Reservations number 4 (page 723) and number 9 (page 729) set out measures, include notably a reservation for incoming firms to adopt a specific legal entity type. The same applies for a residency requirement for firms wishing to provide depository services in respect of investment funds. In keeping with existing principles, this TCA's UK Reservation states that:

"Only firms having their registered office in the UK can act as depositories of the assets of investment funds. The establishment of a specialized management company, having its head office and registered office in the UK, is required to perform the activities of management of common funds, including unit trusts, and where allowed under national law, investment companies."

More generally, the TCA permits both sides to develop their own standards as they see fit. The TCA states that notwithstanding the non-discrimination measures that are created in respect of financial services as well as the technical cooperation framework, nothing in the TCA shall prevent either or both of the UK and EU-27 from adopting or maintaining for "prudential reasons"²³ rules, provided they are not discriminatory, to protect "their":

- (a) investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial services provider; or
- (b) integrity and stability of the financial system.

The TCA also calls upon the UK and the EU to ensure that internationally agreed standards in financial services with respect to anti-money laundering, combatting terrorist financing and

²³ Which is taken to mean both conduct of business and prudential regulatory capital rules.

financial crime as well as tax evasion and avoidance are implemented in the respective jurisdictions.

This does not equate to equivalence but instead a continued maintenance of global standards both sides have previously agreed to. These existing commitments includes those standards adopted by the G-20, the Financial Stability Board, the Basel Committee on Banking Supervision, in particular the “Core Principle for Effective Banking Supervision” as well as the International Association of Insurance Supervisors, in particular its “Insurance Core Principles” and ; the International Organization of Securities Commissions, in particular its “Objectives and Principles of Securities Regulation” along with the Financial Action Task Force’s guidelines and the Global Forum on Transparency and Exchange of Information for Tax Purposes of the Organization for Economic Cooperation and Development.

What options do financial services firms have in terms of market access given the lack of equivalence arrangements?

Despite the TCA, the EU has made it clear that any granting of a financial services “equivalence decision” to the UK, which if granted might facilitate easier market access for UK firms, will remain a unilateral decision of the EU and are not subject to negotiation. See further coverage **“The Equivalence Decisions Framework of the EU and UK – Brexit and beyond”**.

The same is also true of data protection adequacy decisions, which will also remain unilateral decisions of the European Commission.²⁴ The EU has indicated it is in no rush to grant any equivalence decisions²⁵ and has only granted (at time of writing) this in respect of two financial activities (including re clearing and central counterparties for 18 months and six months for settlement of Irish securities) from January 1, 2021.

The EU expects the UK to deliver a series of clarifications explaining how its regulatory regime will diverge from EU rules after December 31. The UK has during 2020 and the lead up to the TCA indicated that from insurance, to asset management and banking, that its rules will diverge.

²⁴ The Joint Declarations that were equally published December 26, 2020 state nothing beyond an agreement to agree by an unspecified time period:

“The Parties take note of the European Commission’s intention to promptly launch the procedure for the adoption of adequacy decisions with respect to the UK under the General Data Protection Regulation and the Law Enforcement Directive, and its intention to work closely to that end with the other bodies and institutions involved in the relevant decision-making procedure.”

²⁵ Equivalence refers to a decision by one jurisdiction (such as the EU) to recognize another state’s (such as the UK) legal requirements for regulating a good or service, even though they may not be exactly the same. In practice, this means that a firm need only comply with one set of requirements in both states. This usually applies in a very specific area – for example, it is most often used in relation to aspects of financial services regulation. The EU has concluded equivalence decisions with a number of “third countries”. Equivalence is frequently related to other concepts of regulatory co-operation such mutual recognition and harmonization. Mutual recognition involves both sides recognizing each other’s standards or regulatory regimes rather than one side making a decision on the other’s standards or regulatory regimes. The only major example where broad-based mutual recognition has been established is within the EU single market. This is also supported by significant “harmonization” – a process whereby conflicting rules or standards are replaced by common EU ones. Where the EU grants an equivalence decision, it may benefit both jurisdictions and market participants seeking access to one another markets in that:

- it allows authorities in the EU to rely on supervised entities’ compliance with equivalent rules in a non-EU country
- it reduces or even eliminates overlaps in compliance requirements for both EU and foreign market players
- it makes certain services, products or activities of non-EU companies acceptable for regulatory purposes in the EU
- it allows less burdensome prudential regime to apply to EU banks and other financial institutions with exposures in equivalent non-EU countries.

EU financial services legislation contains around 40 equivalence provisions and the European Commission has to date taken over 280 equivalence decisions for more than 30 countries.²⁶

Having missed the June 2020 deadline to agree comprehensive equivalence decisions, both the UK and the EU have said that they could aim to agree by March 2021 a memorandum of understanding (**MoU**) on regulatory cooperation.²⁷ Such a MoU approach follows arrangements concluded by the EU with Canada and the United States.

Financial services firms thus, despite the TCA, still have the following options of market access to one another:

- (i) conduct business on the basis of reverse solicitation (which is subject to national rules as opposed to EU-27 wide harmonized rules) – although we note that the supervisory expectations including the SPoRs are rather critical of this as the basis of a sustainable target operating model over the longer term; or
- (ii) setting-up a third country branch – although this may be limited in what the branch can do with whom and where; or
- (iii) establishing a fully authorized and permissioned subsidiary in the respective jurisdiction that is treated no less favorably than any other domestic firm.

It should be noted that due to pending changes in the EU's regulatory regime certain financial services firms (notably banks) that are headquartered outside of the EEA, will from the second half of 2021, provided they meet certain quantitative and qualitative threshold require an intermediate parent undertaking (**IPU**) to be set up in the EU-27, either as a financial holding company (FHC) or a mixed-financial holding company (MFHC). Both of these IPU entity types will require authorization and a license from the European Central Bank, if operating in the EU's Banking Union, or national competent authorities, if operating in non-Banking Union EU Member States. For further details see [here](#).

Why timing matters - the TCA's provisional application until February 28, 2021

Both sides have to ratify the deal in order for it to take effect as until signed the default position is still No Deal. In theory, both sides could still fail to ratify the TCA. For the UK this will require ratification by both the House of Commons and the House of Lords (as early as December 30th, 2020 with Royal Assent to follow) and for the EU this requires ratification by the European Parliament²⁸, the Council of the European Union²⁹ and all of the parliaments of the EU-27 Member States. While all the EU stakeholders can review the deal in English, ratification cannot take place until the text of the TCA has been translated into the other 23 languages of the European Union.

As with other comprehensive trade deals that the EU has concluded, the ratification process would usually take time and can, as was the case with the ratification of CETA, be subject to delays by regional parliaments. Ratification in the EU normally takes several months even

²⁶ For further details see [here](#).

²⁷ The Draft Decision of the Council of the European Union on this matter was published December 26, 2020 available [here](#).

²⁸ By simple majority.

²⁹ By unanimous endorsement or qualified majority voting of all 27 Member States in the Council depending on the scope of the agreement, although Member States always aim to reach consensus regardless of the voting mechanics.

years.³⁰ The deal also needs to be subject to “legal scrubbing” whereby EU lawyers review the agreed text to ensure it complies with the EU Treaties.

Given the timing and the December 31st deadline and the exceptional circumstances following the December 20, deadline having been delayed, the European Commission, in its December 24, 2020 announcement³¹ proposed that the TCA will apply on a provisional basis until February 28, 2021. This would however mark the first time a trade deal with the EU would enter into force without approval from the European Parliament and thus set constitutional precedent.

To facilitate this provisional approach and 2021 ratification, the European Commission has committed to swiftly propose Council Decisions on the signature and provisional application and on the conclusion of the TCA.³² The Council, acting unanimously will then need to adopt a decision authorizing the signature of the TCA and its provisional application from January 1, 2021 to February 28, 2021. Following this the European Parliament will be asked to consent to the TCA and the Council must adopt a decision on the conclusion of the Agreement. If the TCA is not ratified then the UK would trade with the EU-27 on WTO terms and tariffs.

What does the TCA's governance and dispute resolution framework propose?

The TCA's governance framework, which aims to police compliance with its terms as well as to ensure the level playing field is kept somewhat level, is detailed. In view of the scope and complexity of the EU-UK TCA, the EU insisted on a single governance framework for the overall TCA. This was considered the only way to give legal certainty to businesses, consumers and citizens, while avoiding the additional bureaucracy of multiple parallel structures. A “Partnership Council” will oversee the TCA's implementation. Comprised of representatives of the EU and the UK, the Partnership Council will meet in different configurations depending on the matter at hand.

The Partnership Council will be the forum in which the parties will discuss any issues/disputes that might arise, with the power to take binding decisions by mutual consent. It will be assisted in its work by Specialized Committees and Working Groups. If a solution to a disagreement cannot be found between the EU and the UK, an independent arbitration tribunal can be established to settle the matter through a binding ruling. Importantly the Partnership Council will have the following powers (as supplemented by detailed Rules of Procedure for the Council and Committees) to:

- adopt binding decisions in respect of all matters where the TCA or any supplementing agreement so provides;
- direct recommendations to the UK and/or the EU on the implementation of the TCA or any supplementing agreement;
- amend the TCA or any supplemental agreement by way of decision including to correct errors or address omissions (such rectification power only within the first four years of operation);

³⁰ European Parliament's typical supervisory scrutiny time is 117 to 136 days.

³¹ Available [here](#).

³² The full list of draft Council Decisions were published December 26, 2020 and are available [here](#).

- delegate its powers to the Trade Partnership Committee or to a Specialized Committee or to dissolve such committees or to amend their mandate;
- direct recommendations to the UK and EU regarding the transfer of personal data in specific areas covered by the TCA or any supplementing agreement.

The text of the TCA calls for the Partnership Council to create a number of Specialized Committees including a:

- A. Trade Specialized Committee on Services, Investment and Digital Trade; and
- B. Trade Specialized Committee on Public Procurement;
- C. Trade Specialized Committee on Regulatory Cooperation, which addresses matters covered by Title X of Heading One of Part Two of the TCA; and
- D. Trade Specialized Committee on Level Playing Field for Open and Fair Competition and Sustainable Development.

The Trade Specialized Committees and the Specialized Committees shall be co-chaired by a representative of the EU and a representative of the UK. Unless otherwise provided for in the TCA, or unless the co-chairs decide otherwise, they shall meet at least once a year. Committees shall set their meeting schedule and agenda by mutual consent.

In summary, this horizontal dispute settlement mechanism covers most areas of the TCA, including level playing field and fisheries. It is accompanied by credible and robust enforcement and safeguard mechanisms, including the possibility to suspend market access commitments, e.g. by reintroducing tariffs and/or quotas in the affected sector.

Both the UK and the EU will furthermore be able to cross-retaliate if the other does not comply with a ruling of an independent arbitration tribunal. For instance, a breach by one party that concerns a specific economic sector will allow the other party to retaliate with measures in other economic sectors. Finally, any substantial breach of obligations enshrined as “essential elements” of the Agreement (the fight against climate change, respect for democratic values and fundamental rights, or non-proliferation) can trigger the suspension or termination of all or part of the entire TCA.

Lastly, the TCA permits the creation of a Parliamentary Partnership Assembly of members of the European Parliament and the UK’s Parliament as an additional forum for cross-border cooperation. This joint forum may make recommendations to the Partnership Council.

In turn, the TCA also creates an obligation for both the EU-27 and the UK to consult “domestic advisory groups/civil society organizations” including non-governmental organizations, business and employer organizations as well as trade unions on issues covered by the TCA and any supplementing agreement. Both the EU and UK shall promote interaction between “...their respective domestic advisory groups, including by exchanging where possible the contact details of members of their domestic advisory groups.”

Outlook and next steps

While the UK and EU-27 in concluding the text of the TCA and its ultimate ratification may be welcome, affected firms in the UK as well as those in the EU-27 will want to take quick action to ensure the provisions and opportunities are reflected appropriately in their strategic planning. This also includes looking at the terms for how to document engagement with their

respective counterparties and/or end-users of respective financial services in this new environment including with the eventuality that the EU will never take an equivalence decision with respect to the UK.

This is specifically the case given concerns from EU-27 supervisory policymakers and their interest in and assessment of certain business and booking models, notably the perceived over-use of reverse solicitation, which will remain regardless of the TCA. That heightened interest could turn to even sharper scrutiny than set out in the SPoRs or where such outcomes have been widened, including on say limiting the permitted use of back-branching by EU domiciled entities in third-countries—see standalone coverage on this from our Eurozone Hub.³³

2020 has certainly been a year to remember and Christmas Eve on December 24, 2020 marks a defining moment for the UK and the EU-27's future path forward. Either way, Brussels Sprouts may (rightly or wrongly) have a new meaning going forward yet the TCA still ensures Champagne can flow on tap and Mince Pies can make it across the Channel to the Continent and fishermen can fish.

If you would like to discuss any of the items mentioned above, in particular how to forward-plan any impacts on operationalizing compliance across documentation and non-documentation workstreams or how these priorities may affect your business or your clients more generally, please contact our [Eurozone Hub](#), other [Brexit Board](#) members or the listed key contacts.

³³ Available [here](#).