Brexit: The EU-UK TCA: COVID Vaccines and the "Level Playing Field"

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On 24th December 2020, the UK and the EU concluded the EU-UK Trade and Cooperation Agreement (the "TCA") on the legal relationship to apply between them when EU law ceased to apply to the UK on 31st December 2020. The 1400 page document covers of panoply of aspects of daily life for citizens, businesses and other organisations, including international trade.

One of the recurring themes in the TCA is that many of the arrangements are subject to change; in other words, future negotiations. Indeed some of the key aspects have been largely excluded from the agreement, such as financial services, and – for the time being at least – data protection. Furthermore, many of the key provisions covered in the TCA, such as limited visa-free travel, and the provisions on tariff-free and quota free trade, are specifically stated to be subject to review as a function of changing circumstances, and the application of the principle of the so-called "level playing field". The effect of this is to allow, indeed foresee, that each of these areas will surely be the subject of considerable ongoing negotiation.

The controversy that we have seen in early 2021 regarding the supply of COVID-19 vaccines, can therefore be seen not only as a teething problem provoked by the parties' lack of familiarity with the new post-Brexit regime, but perhaps the initial salvos in what could become a more protracted and wider trade dispute if this is not handled in a pragmatic and sensitive way.

The roots of the "Level Playing Field"

Part Two, Heading One, Chapter I of the TCA entitled "Trade in Goods", provides that, in general, cross-border trade in all goods is subject to no tariffs and no quotas provided that the goods originate in either the UK or the EU. The TCA sets out its own complex rules to define "Origin" which we shall analyse in another edition. The no-tariff, no-quota regime is however also subject to compliance with what is called the *Level Playing Field* principle.

During the negotiations to reach the EU-UK TCA, the UK had been insistent that, although prior to Brexit, UK trade had obviously been within the EU regime, the UK was not going to continue to be bound by EU regulations and standards in the future indefinitely, notably because this had been a key argument in the UK's Brexit referendum. The UK therefore fully anticipated a *divergence* of the respective regulatory standards over time, by adopting and imposing its own regulatory criteria, potentially at variance with those of the EU. In order to accept that position of regulatory independence, the EU therefore insisted that the ongoing relation should be subject to rigorous "Level Playing Field" conditions in order to protect against any market distortions created by unfair trading practices. In the coming months and years, the "Level Playing Field" is likely to become a crucial factor in the implementation of the TCA and its foreseeable evolution. That, in essence, defines the unique peculiarity of the EU-UK TCA; that whereas trade agreements are usually designed to encourage the parties' markets and practices to *converge*, here, the parties recognised that the purpose of the TCA is to facilitate the *opposite*.

The underlying principles of the "Level Playing Field" are introduced in Title XI Article 1:

> "The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promote the development of international trade and investment in a way that contributes to the objective of sustainable development."

It can be seen from the above that the roots of what constitutes a Level Playing Field lie in the economic, social and environmental arenas. This logically includes an enormous variety of factors that may potentially affect fair competition. These include but are not limited to, national government subsidies to sectors or individual businesses; the use or tolerance of potentially abusive employment or trading conditions and the use of non-sustainable technology or processes in commerce.

Interestingly, the TCA immediately follows this paragraph with an ambitious environmental target statement:

> "Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050."

The relevant factors to be looked at, for instance, in environmental and sanitary evaluations are numerous and indeed multi-dimensional. A good example is that of the importation of pesticide-treated food, where it is necessary to distinguish between:

— Firstly, the rules that apply directly to the product's characteristics *per se* as it passes a border control, for example in terms of the maximum permitted residual pesticide content in the imported food; and

— Secondly, the regulations imposed on the production of those food products in the exporter state, including the environmental requirements, labour law, health and safety etc, each of which can be raised as an area of evaluation in the level playing field mechanism.

Such objections can be brought at the instance of , not only the signatories, the UK and the EU, but also individual member states or even relevant third party organisations (something unusual in the context of the TCA which states that in general the agreement shall not create rights for private third parties according to its article COMPROV.16).

Alleged breaches of the Level Playing Field requirements of the TCA may be referred to a specific arbitration procedure, ultimately involving a panel of representatives from both sides as well as independent experts or judges. Interestingly, the TCA allows for unilateral enforcement sanctions to be applied in the event of breaches of the Level Playing Field principles, albeit subject to notice periods and only ultimately, to the arbitration panel if settlement is not reached. This so-called "rebalancing mechanism" consisting of tariffs or taxes on goods crossing borders may be imposed, and not necessarily in the same trade area where the dispute arises.

The rebalancing mechanism is set out in Article 9.4, and applies to labour and social standards, government subsidies, and environmental issues. This permits measures to be taken in order to restore the Level Playing Field in the event of *"material impacts on trade or investment between the Parties"* arising as a result of *"significant divergences between the Parties.."* Any rebalancing measures adopted are required to be *"restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation."* (Article 9.4, paragraph 2).

It remains to be seen how the above terms such as "material impact", "significant divergences" and "strictly necessary and proportionate" are going to be interpreted in the context of the TCA. Although, Article 9.4.3(g) of the TCA specifically excludes the invoking of *"the WTO Agreement or any other international agreement to preclude the other Party from taking measures pursuant to paragraphs 2 and 3"*, much of the language is reminiscent of the expressions used hitherto - and indeed extensively litigated in - World Trade Organization Agreement disputes. In any event, it appears that any complaint – or defence - made in this respect would have to be strongly evidence-based:

"A Party's assessment of these impacts shall be based on reliable evidence and not merely on conjecture or remote possibility."

So in practice, what would amount to a breach of the *Level Playing Field* principles? Would the principles apply to the supply of COVID Vaccines?

Currently, the field of COVID vaccination supplies is highly contentious (and no doubt other sectors will also become spotlighted in time). Could non-compliance with delivery deadline obligations by a private company (or say, a government's alleged failure adequately to regulate that company) be interpreted as a breach of the Level Playing Field principles in the COVID vaccine market?

— Or, likewise, the intervention of national medicines regulators to prohibit or limit use of a vaccine if such action is later shown to be unjustified or questionable?

— Or the reliance on (or rejection of) clinical trial statistical data to approve or suspend a product, when that data - albeit statistically significant, - is as yet incomplete and reliant on extrapolation?

— Or else a campaign or announcements to discredit a particular vaccine product on the basis of product safety concerns which are later shown to be unsubstantiated?

Large questions arise about how much and what sort of evidence would be necessary in order to demonstrate the above allegations. The TCA specifically provides that before a party can invoke rebalancing provisions, it is subject to the above requirement for assessments "based on reliable evidence". And in all of this, any potential complainant will of course be bearing in mind that a counter allegation - not necessarily in the same field or subject matter - may be brought by its opponent, therefore raising the spectre of commencing tit-for-tat commercial reprisals. Given the breadth of the possible areas under consideration under the TCA, such counter arguments will not be difficult to find.

Whatever the underlying aims of the TCA were, they were surely not to generate trade conflicts, and all the more so when there are thousands of human lives at stake, at home, abroad, and worldwide. If not sensitively handled by political leaders, trade friction can so easily escalate into full spectrum trade wars, and like all wars sadly, trade wars only have losers; the ultimate lose-lose. Accordingly, it must surely be incumbent on all concerned to strive towards a formula that will work not just satisfactorily, but concordially and optimally for all affected stakeholders.