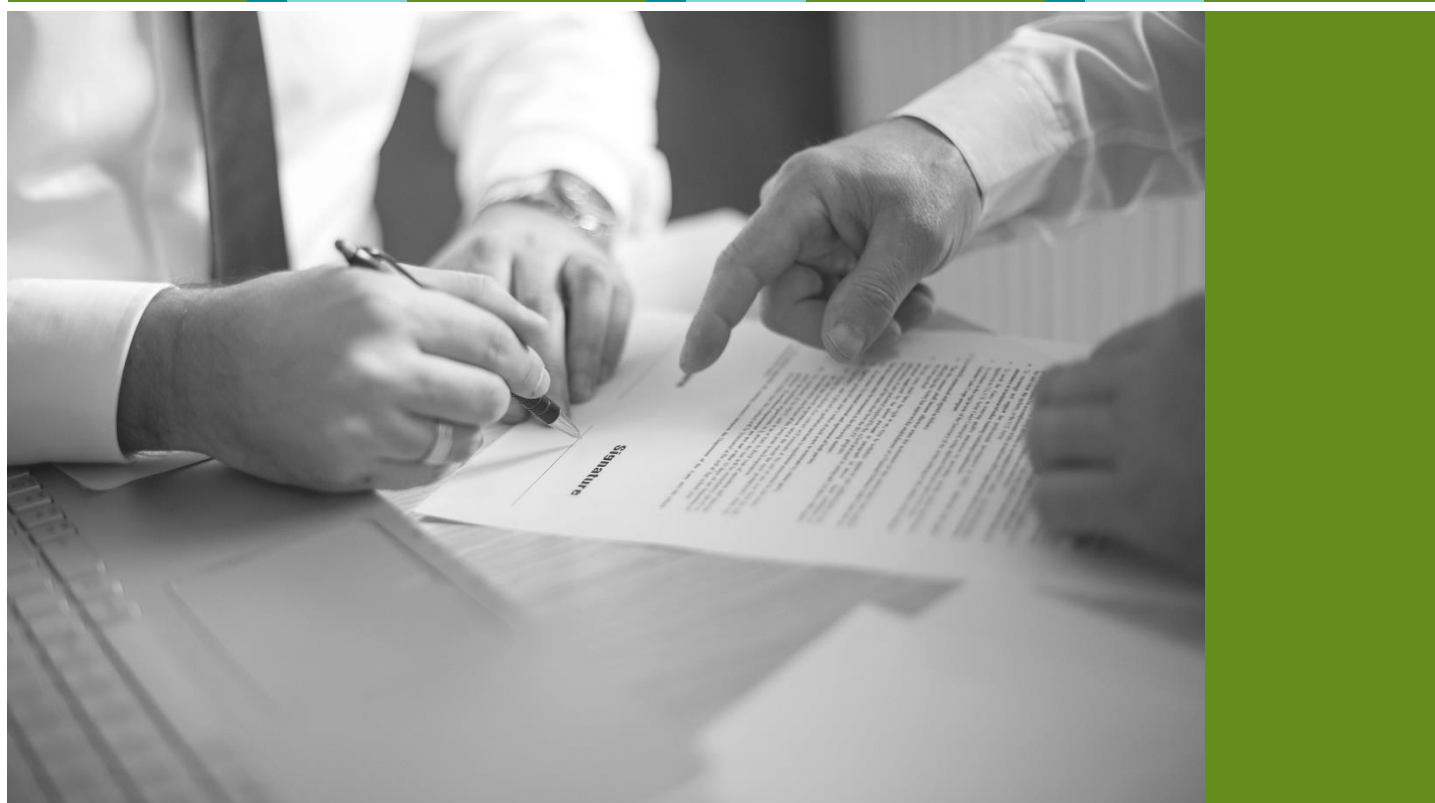


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Quickguides

The EU/UK trade and cooperation agreement

**KEY COMPETITION, STATE AID AND
PUBLIC PROCUREMENT IMPLICATIONS
FOR BUSINESS**



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Quickguide overview

This Quickguide provides an overview of the implications of the EU/UK trade and cooperation agreement for competition law, state aid and public procurement.

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The EU/UK trade and cooperation agreement

KEY COMPETITION, STATE AID AND PUBLIC PROCUREMENT IMPLICATIONS FOR BUSINESS

1. Introduction

On Christmas Eve 2020, after months of intense negotiations the EU and UK reached a Trade and Cooperation Agreement (TCA), which has been provisionally applied as of 1 January 2021. The TCA is expressed as an ambitious, wide-ranging and balanced economic partnership, which the parties recognise must be underpinned by a level playing field for open and fair competition and sustainable development. This includes arrangements in relation to competition law, subsidy control and public procurement.

To recap, the UK left the EU on 31 January 2020. However, under its Withdrawal Agreement with the EU, it continued to be subject to and benefit from substantially all obligations and rights of an EU Member State during a transition period, which ended at 11:00 pm on 31 December 2020. From that time the UK and EU became two distinct regulatory, legal and customs territories. Without the TCA, the UK and EU would now be trading on so-called "WTO terms". While many countries trade with the EU on these terms, the difference between being part of the EU Single Market and Customs Union on one day, and trading on WTO terms the next, would have been dramatic for businesses. The TCA sits somewhere between the EU Single Market and Customs Union, and trading on WTO terms.

However, the TCA does not just relate to trade, it covers a whole host of subjects that govern relations between the UK and EU. The TCA specifically covers anticompetitive conduct and mergers, subsidy control (also known as state aid) and public procurement. This update provides a summary of these elements of the TCA and the key implications for businesses.

2. Merger control

Objectives

The TCA requires the UK and EU to maintain a competition law that effectively addresses mergers (or "concentrations" for the purposes of EU law) between "economic actors" that "may have significant anticompetitive effects", irrespective of their nationality or ownership status.

Impact on UK and EU merger control

The UK's Competition and Markets Authority (CMA) and the European Commission already enforce systems of merger control that prohibit transactions that may substantially lessen (UK) or significantly impede (EU) competition in a substantial part of the UK or the EU respectively. Despite the differences in wording between the two regimes and the TCA for the assessment of mergers, no changes to the substantive assessment tests are envisaged under EU or UK law as a result of the TCA. Procedural guidance on 'live' cases (i.e. cases currently under investigation) has been updated by the [CMA](#) and the [European Commission](#).

EU merger control: It is important to note that the UK's withdrawal from the EU has no impact on the applicability of EU merger control to UK undertakings – as with any undertakings globally, if a transaction satisfies the EU Merger Regulation jurisdictional criteria, clearance from the European Commission must be obtained before closing. However, revenue generated in the UK will no longer be included as part of EU-wide turnover for the purposes of determining jurisdiction, and the UK will no longer form part of the EU internal market for the purpose of assessing the substantive impact of a transaction.

UK merger control: The UK is no longer subject to the "one-stop shop" system established under the EU Merger Regulation, which means that the CMA is now permitted to investigate transactions in

parallel with the European Commission. The UK jurisdictional criteria are unchanged and are likely to be satisfied by numerous transactions that are notified to the European Commission. It remains possible to close transactions without seeking CMA merger clearance, subject to the risk for the buyer that the CMA subsequently calls-in the transaction and imposes a hold-separate order, compliance with which can be very onerous.

Cooperation between UK and EU authorities

The TCA also envisages a future relationship of cooperation and coordination between UK and EU competition authorities in relation to competition policy and enforcement "*where doing so is possible and appropriate*". The CMA has previously indicated that it will endeavour to coordinate merger reviews with the European Commission and other competition authorities, although there are significant differences in their respective timetables.

The TCA also provides for the exchange of information between UK and EU competition authorities "to the extent permitted by law". In this regard, current draft amendments to the Enterprise Act 2002 (under the National Security and Investment Bill) will, if enacted, give the CMA greater ability to share information obtained in exercising its merger powers with overseas public authorities, including the European Commission or the competition authorities of EU Member States without the consent of the parties concerned (see our update on the [UK Government's new National Security and Investment regime](#)).

3. Anti-trust

Objectives

Under the TCA, both the UK and EU must:

- maintain a competition law which effectively addresses anticompetitive agreements and abuses of dominance by "*economic actors*" (i.e. undertakings), irrespective of their nationality or ownership status; and
- ensure enforcement of that competition law by independent authorities in a transparent, fair and non-discriminatory manner (Article 2.3 of the TCA).

Jurisdiction to investigate anticompetitive conduct

From 1 January 2021, UK authorities can no longer enforce Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU). However, these provisions continue to apply to conduct by UK companies which is implemented or produces effects within the EU. Such conduct can be investigated by the European Commission or the national competition authorities of EU Member States.

Where the European Commission initiated proceedings by 31 December 2020, it retains jurisdiction to take enforcement action under the EU competition rules in respect of conduct relating to UK markets. If the conduct has continued after 31 December 2020, the UK authorities can open their own investigations.

For new cases, where the same conduct affects competition in both UK and EU markets, parallel investigations by the Commission (under Articles 101/102 TFEU) and UK authorities (under Chapters 1 and 2 of the Competition Act 1998 (CA98)) are likely.

As was the case pre-Brexit, there is no "*one-stop shop*" for immunity/leniency. Potential applicants should therefore consider making separate applications to both the CMA and the Commission.

No changes to substantive competition rules

There has been no change to the UK's competition rules set out in Chapter 1 and Chapter 2 CA98. These are currently nearly identical in substance to Articles 101 and 102 TFEU, but may diverge in the future. UK authorities and courts are no longer required to interpret UK competition law consistently

with EU case law. Instead, UK authorities and courts may depart from pre-2021 EU case law where it is considered appropriate in the light of specified circumstances (for example, differences in UK and EU law prior to Brexit, differences between EU and UK markets, developments in the form of economic activity, generally accepted principles of competition analysis, and developments in EU case law). New EU case law is not binding on the UK courts and authorities.

Exemptions from competition rules

Under the TCA, the UK and EU may provide for exemptions from their competition laws, where these are transparent and proportionate to the pursuit of legitimate public policy objectives (Article 2.2(3) of the TCA).

There are already parallel exemptions under UK competition law for agreements falling within the scope of seven EU block exemption regulations, including those relating to vertical agreements, research and development and technology transfers. From 1 January 2021, these are preserved in UK law as "*retained exemptions*" from the UK competition prohibitions, subject to their current expiry dates. Existing UK agreements which have benefited from the parallel application of an EU block exemption will continue to benefit from the relevant exemption, as will new agreements which meet the relevant criteria.

Cooperation between UK and EU authorities

The UK is no longer a member of the European Competition Network. The TCA provides that the EU and UK competition authorities shall endeavour to cooperate and coordinate with respect to their enforcement activities and may exchange information to the extent permitted by each party's law.

The TCA also provides that the European Commission, Member State and UK authorities may enter into separate agreements on cooperation and coordination, including on conditions for the exchange of confidential information.

Private enforcement of competition rules

The TCA is silent on this subject. However, claimants who wish to pursue follow-on damages claims in UK courts will no longer be able to rely on European Commission decisions taken after January 2021 as binding findings of an infringement, and UK courts will not be required to treat infringement decisions of EU Member States as 'prima facie' evidence of an infringement.

4. Subsidy control

Definitions

The TCA contains detailed and far-reaching provisions on subsidy control. Although different terminology is used, the definition of "*subsidy*" closely tracks the definition of "*State aid*" in EU law. This means that the TCA covers a wide range of public sector interventions including grants, loans, guarantees, forgoing revenue otherwise due (e.g., tax waivers and debt write-offs), and transactions not on market terms.

Scope and exceptions

The scope of the subsidy control regime and the exceptions that have been provided for are again closely modelled on the EU State aid regime. For example:

- the TCA establishes similar compatibility criteria to those defined in Article 107(2) of the TFEU (namely subsidies having a social character targeted at final customers, and subsidies granted to compensate for the damage caused by natural disasters or other exceptional non-economic occurrences).
- the TCA reflects the *de minimis* aid exemption, although a higher threshold has been set (approximately €380,000, compared with the EU threshold of €200,000 over a three year period).

- the TCA sets out specific requirements with respect to subsidies granted to economic entities that have been assigned with a task in the "*public economic interest*", which corresponds to services of general economic interest in EU State aid law. The effect of these requirements is to avoid overcompensation and the cross-subsidisation of other activities unrelated to the assigned task.

Key differences with EU State aid regime

There are two novel aspects of the subsidy control regime to highlight:

- the TCA contemplates that subsidies may be granted on a temporary basis to respond to a national or global economic emergency, provided those subsidies are targeted, proportionate and effective.
- the TCA does not apply to subsidies related to the audio-visual sector.

Compatibility principles

The TCA defines a list of principles that need to be taken into account when determining whether subsidies may be granted. Those principles are similar to those applied by the European Commission as part of its "*balancing test*". In short, subsidies need to be designed to address specific public policy objectives and with a view to ensuring that the positive contributions of any subsidies outweigh their negative effects on trade and investment.

Prohibited subsidies

As is the case under the EU State aid regime, certain types of subsidies will be prohibited or subject to strict conditions. In this context, the TCA provides the following clarifications:

- subsidies in the form of unlimited guarantees are prohibited;
- subsidies must not be provided to rescue or restructure insolvent companies, unless there is a credible restructuring plan, provision for the current owners to contribute to the plan or social hardship or severe market failure consequent on business failure;
- subsidies must not be provided to banks, credit institutions and insurance companies exceeding what is needed to secure an orderly exit from the market unless there is a credible restructuring plan;
- export subsidies are prohibited, unless in the form of short-term credit insurance;
- subsidies contingent on the use of domestic over imported goods or services are prohibited;
- subsidies may be granted in the context of large cross border or international cooperation projects, providing those projects have wider benefit and spill over effects;
- subsidies may be granted either (i) to support the delivery of a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or (ii) to increase the level of environmental protection compared to the level that would be achieved in absence of subsidies, providing those subsidies do not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under any relevant laws; and
- subsidies must not be granted to air carriers for the operation of routes except where there is a public service obligation, where this funding provides benefits for society at large, or where funding is granted to start-ups opening new routes to regional airports.

Enforcement of a UK subsidy control regime

As a result of the TCA, the UK will need to consider how these new subsidy control obligations are implemented and enforced. There are a number of immediate issues that will need to be addressed. In particular, the UK will need to:

- maintain a public database of subsidies that have been granted, including information about the legal basis for granting subsidies, the names of the recipients of subsidies, and the amounts of

subsidies granted. That information will need to be made available within six months of the date of granting the subsidy;

- establish and maintain an operationally independent body to oversee its new subsidy control regime, which may be the CMA, although no confirmation on this has yet been provided;
- ensure that its courts are competent to review subsidy decisions, to grant remedies and to hear claims from interested parties in respect of subsidies; and
- establish an effective mechanism to enable the recovery of unlawful subsidies.

Remedial measures

While the provisions of the TCA apply to both the UK and the EU, it appears that the EU has retained broad rights to ensure that the UK applies the subsidy control rules. For example:

- the EU has retained the right to intervene in court actions in the UK concerning the subsidy rules;
- the EU can seek information and consultations regarding subsidies it considers cause or risk causing significant negative effects on trade and investment between the EU and the UK; and
- the EU can take remedial measures if there is evidence that a UK subsidy causes, or there is a serious risk that it will cause a significant negative effect on trade or investment between the EU and the UK.

Continued relevance of EU state aid rules on trade between Northern Ireland and the UK

Although not referred to in the TCA, Article 10 of the Northern Ireland (NI) Protocol applies the EU State aid rules in full to the UK in relation to measures that have an actual or potential effect on trade in goods between Northern Ireland and the EU. It seems, therefore, that some subsidy measures could be subject at the same time to both Article 10 of the NI Protocol and the UK's new subsidy control regime. This could potentially result in unpredictable outcomes in situations where there is divergence between the EU State aid rules and the UK's new subsidy control regime.

5. Public procurement

Objectives

The main objective of the TCA is to guarantee the reciprocal access of EU and UK suppliers to each other's public procurement opportunities. This would appear to limit significantly the ability of procuring authorities to discriminate in favour of domestic suppliers. In particular, the TCA appears to establish a broad obligation in any UK procurement to treat EU suppliers no less favourably than UK suppliers, with a reciprocal obligation for UK suppliers in EU procurements. The TCA also refers to the objective of enhancing the transparency of public procurement procedures.

Scope

The scope of the TCA provisions is not entirely clear. This is due to (a) the fact that the TCA uses different terminology from the EU public procurement directives and (b) the frequent cross-references to provisions of the WTO's Agreement on Government Procurement (GPA), with some of those provisions being out of date. The TCA nonetheless seeks to incorporate a range of principles that are already reflected in the UK's public procurement regulations, which transpose the EU directives (e.g., the requirement to invite a sufficient number of candidates to tender to ensure genuine competition, verification of abnormally low tenders, and the ability to take into account environmental, social and labour considerations when evaluating tenders).

In practice, the provisions of the TCA are expected to make it more difficult for the UK to diverge from the EU's public procurement rules, which had been proposed in the UK Government's green paper of

15 December 2020 entitled "*Transforming public procurement*" (see our update on [Transforming public procurement](#)).

Remedies

The TCA is fairly prescriptive in respect of the requirements of the public procurement remedies regime. In short, it would appear that the UK will be required to maintain many aspects of the EU remedies regime in the future. In particular, it seems that the UK will be required to:

- maintain the possibility of suppliers being able to obtain rapid interim relief upon bringing a challenge (e.g., automatic suspension of contract signature);
- provide for a standstill period between the contract award decision and contract award decision; and
- maintain substantially the same remedies (e.g., orders to rewind part of a procurement process, the setting aside of decisions, ineffectiveness, and damages).

The remedies provisions are of particular interest in the light of the UK Government's recent green paper, which aims to "*reduce the attractiveness of speculative claims*". Time will tell whether the UK's reforms will be constrained by the TCA provisions. However, it seems that the TCA provisions should not prevent the UK adopting its current proposals either to establish a procurement-specific test for lifting the automatic suspension or capping the level damages available to disappointed tenderers.

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