

Back to the future?

The UK's free trade agreements after Brexit

With the end of the Brexit-related transition period fast approaching, the United Kingdom has been involved in a flurry of negotiations concerning free trade agreements (FTAs) as it strives to avoid falling back on rudimentary World Trade Organisation (WTO) rules with many of its existing trade partners.

Ensuring that the UK's trading relationships continue on the same footing as now is vital as, in 2018, 49% of the UK's trade was with the EU, 11% with countries that are parties to EU FTAs and 40% with the rest of the world.¹ All businesses engaged in trade involving the UK that is impacted by the terms of an EU-third State FTA are potentially affected by the outcome of these negotiations.

In this article, we analyse the UK's changing ability to negotiate FTAs, the UK's progress in securing the continuity of its trading relationships with third States and the current state of play in respect of the UK's efforts to secure freestanding FTAs with the U.S., Australia and New Zealand, as well as the UK's "pivot to the Asia Pacific region".

The UK's ability to negotiate

As an EU Member State, the UK was unable to negotiate and conclude FTAs in its own right as such matters fall within the exclusive competence of the Union under the "common commercial policy".²

Since the result of the UK's referendum on its membership of the EU, and even prior to the UK's legal withdrawal from the EU on 31 January 2020, the UK has been negotiating trade agreements, despite the fact that this may have been in breach of the duty of "sincere cooperation".³ The UK's efforts included, for example, the signing of a number of "continuity agreements", which seek to replicate (or "roll-over") agreements concluded between third States and the EU.⁴ This move acknowledged that neither the UK nor the negotiating countries anticipated that the rights and obligations relating to the UK under the original EU trade agreements would continue automatically.

The UK's ability to negotiate trade agreements has been clearer during the Brexit-related transition period, as the "Agreement on the Withdrawal of the UK from the EU" expressly provides that the UK has the right to negotiate international agreements with other countries, which shall enter into force at the end of the period.⁵

Going forward, after the end of the transition period, the UK will have free reign to negotiate free trade agreements on the terms of its choosing, subject to any constraints imposed, for example, by WTO rules and the requirements of any EU-UK FTA.

With that policy and international law backdrop in mind, we will now consider the UK's progress in rolling over FTAs and negotiating freestanding agreements, in particular with the U.S., Australia and New Zealand.

1. These figures are taken from [here](#).

2. Article 207 of the Treaty on the Functioning of the European Union.

3. Article 4(3) of the Treaty on European Union. The duty of "sincere cooperation" requires, *inter alia*, that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties ... and refrain from any measure which could jeopardise the attainment of the Union's objectives".

4. See, for example, the agreement with Chile, signed on 30 January 2019 (available [here](#)) and the agreement with Iceland and Norway, signed on 2 April 2019 (available [here](#)).

5. Article 129(4) of the Withdrawal Agreement.

A roll-over of FTAs

One way for the UK to preserve the status quo in its trading relationships with third States that are party to an EU FTA is to roll-over the applicable FTAs. A roll-over enables an FTA's provisions to be replicated in a UK-third country agreement after the end of the transition period. This approach of replicating the current agreement does not necessarily preclude a fuller re-negotiation in the longer term to create more bespoke arrangements.

So far, the UK has agreed to roll-over the terms of 21 EU-third country trade agreements and is in further discussions to do so for trade agreements covering 17 further countries or blocs. In addition, the UK has entered into Mutual Recognition Agreements with Australia, New Zealand and the U.S.⁶ These steps are intended to maintain continuity of trade for UK businesses and ensure that they do not face higher (non-preferential tariffs) and regulatory burdens when trading with these third countries and vice versa.

Some important EU FTAs, such as with Canada and Singapore, have not yet been rolled-over. To date, the most significant trade agreements to be rolled-over by the UK are with Iceland and Norway,⁷ Israel,⁸ South Korea⁹ and Switzerland.¹⁰ To

illustrate the importance of this process, Switzerland is one of the UK's top ten trading partners with the total value of trade with the UK at GBP 34.7 billion in 2018 and Norway is likewise with the total value of trade with the UK at GBP28.9bn in the same year.¹¹

Notably, the terms of the UK's trade after the end of the Brexit-related transition period with Andorra, San Marino and Turkey will be influenced by the terms of the UK's relationship with the EU as they are in customs unions with the EU, so no agreements are in place yet with those jurisdictions.¹²

The UK-third country roll-over FTAs are generally in the form of short form agreements that incorporate by reference the relevant provisions of the underlying EU-third country agreement with relatively few modifications.¹³ Some roll-over FTAs have been drafted in long form such as those with South Korea,¹⁴ Georgia¹⁵ and the Caribbean States.¹⁶ Needless to say, whatever their form, these roll-over FTAs may be subject to further negotiation in the future to ensure that they capture the priorities of the UK's independent trade policy and the third country's longer term priorities.

In general terms, a number of points in relation to the roll-over FTAs should be noted:

- the territorial application of the underlying FTAs are amended so that they cover the UK and the territories for whose international relations it is responsible, rather than the EU;
- most institutional provisions and bodies in Association Agreements or EU FTAs are retained in the UK-third country roll-over FTAs, subject to some modifications to their composition and function (e.g. Association Council and Association Committee are renamed Joint Council and Joint Committee);
- amendment clauses have been added to the UK FTAs in order to create a mechanism for making amendments to the agreements in the future;
- provisions have been included to achieve a smooth transition at the end of the Brexit-related transition period under the UK-EU Withdrawal Agreement. The FTAs also provide for provisional application of the agreements even if formal ratification cannot be completed by the time the Brexit-related transition period ends; and
- where applicable, they replicate the trade remedies and dispute settlement rules in the EU-third country trade agreements.

6. See [here](#).

7. See [here](#). However, this agreement is not expected to come into force and the UK is continuing to engage with the Norwegian and Icelandic governments to determine the most effective way of maintaining and strengthening trade with them beyond the transition period.

8. See [here](#).

9. See [here](#).

10. See [here](#).

11. See [here](#).

12. See [here](#).

13. See, for example, the Trade Agreement between the UK and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru (available [here](#)) and the Agreement establishing an Association between UK and Jordan (available [here](#)).

14. See [here](#).

15. See [here](#).

16. See [here](#).

Not off-the-rack: the bespoke agreements

Separately, the UK Government is holding trade talks with the U.S.,¹⁷ Australia¹⁸ and New Zealand¹⁹ and has recently concluded its talks with Japan.²⁰ In relation to the latter three, the UK's Secretary of State for International Trade has highlighted the UK Government's intent to pivot towards the Asia Pacific as a tool to diversify UK trade and ensure that it is "less vulnerable to political and economic shocks in certain parts of the world".²¹ The U.S., Australia and New Zealand trade agreements will be bespoke as the UK is not currently a party to an FTA with those States through its membership of the EU.

The UK and the U.S. began negotiating an FTA in May 2020, with talks planned every six weeks.²² Although a key focus is on the trade of goods (with the U.S. reportedly seeking a relaxation of rules in relation to agriculture),²³ the UK is also looking to boost trade in digital and financial services.²⁴ The final terms of any UK-U.S. agreement will depend on the incumbent U.S. President following the November 2020 Presidential election.

The UK-Japan FTA negotiations concluded on 11 September 2020 to much fanfare by the governments of both sides. As of the date of this publication, the text of the new UK-Japan FTA is unavailable. However, whilst the agreement is reportedly based on the EU's agreement with Japan, the UK Government has stated that the deal goes beyond the EU's current trade deal with Japan in a number of important respects. By way of example, the deal is said to

contain new digital and data provisions, improved market access for UK financial services and tariff-free access for more UK goods. Importantly, from the perspective of Japan, the deal will result in reduced tariffs for car and rail parts supplying companies like Nissan and Hitachi in the UK.²⁵

Negotiations with Australia are ongoing in accordance with a tight schedule with both sides aiming for a trade agreement to be concluded by the end of 2020.²⁶ Australia is seeking to restore tariff-free market access for its agricultural sector, including beef, which it lost when the UK joined the then European Economic Community.²⁷ The timeline is less certain for the UK-New Zealand FTA, where negotiations that began in July 2020 are reportedly unlikely to conclude prior to 2021,²⁸ with similar areas of agricultural products (such as lamb and butter) particularly in contention.²⁹

Alongside these bilateral negotiations, the UK Government is clear that a key part of the UK's "pivot to the Asia Pacific region" is its prospective accession to the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP). The CPTPP reduces tariffs on 95% of goods between its members and creates rules in a number of areas including on digital trade, data, financial, professional and business services. The UK has already approached the 11 CPTPP member states who have reportedly welcomed the UK's interest in accession.³⁰

17. See [here](#).

18. See [here](#).

19. See [here](#).

20. See [here](#).

21. See [here](#).

22. See [here](#).

23. See [here](#).

24. See [here](#).

25. See [here](#).

26. See Simon Birmingham, Australia's Trade Minister's comments, reported [here](#).

27. See [here](#) and [here](#).

28. See [here](#).

29. See [here](#).

30. See [here](#).

Conclusion

The end of the Brexit-related transition period is likely to provide the UK with the largely untrammelled ability to negotiate and agree FTAs on its own terms. The immediate priority though, especially given the economic damage wrought by the Covid-19 pandemic, has rightly been on securing the continuity of the UK's trading relationships with third States. Whilst much work has already been done in that regard, a tremendous amount remains to be achieved by 1 January 2021 to secure that goal. The start of the UK's negotiations with the U.S., Australia and New Zealand is clearly a watershed moment for the UK's trade policy and yet, from a policy and legal perspective, the contours of those agreements remains highly uncertain.

For UK businesses and businesses that trade with the UK, even setting aside the complexities associated with the questions around the UK's future relationship with the EU, clarity on the future terms of business remains elusive. Consequently, at this moment, businesses should be analysing their dependency on the UK's existing terms of trade derived from its EU membership, as well as looking at how they can shape the trading environment in the future. There will be some uncomfortable compromises ahead as governments make the trade-offs often needed to get trade deals over the line. Businesses would be well advised to ensure their particular concerns are heard within government and that those concerns are reflected in the UK's and third States' trade policies and negotiating positions.

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