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Abstract

The UK left the EU, commonly referred to as ‘Brexit’, on 31 January 2020. From 31 December 2020, new EU law does not apply and the European Court of Justice no longer has jurisdiction in the UK. The new EU-UK relationship, which began on 1 January 2021, is explained. The majority of the provisions of the EU-UK Trade and Cooperation Agreement (TCA) came into force in the UK on 31 December 2020. Significant issues for the construction industry are detailed including supply chain concerns, the ‘level playing field’ implications, restrictions on the movement of people, limitations on the recognition of professional qualifications and different product standards. Regarding procurement, the TCA has mandated consideration of environmental, labour and social issues and that UK and EU suppliers must be treated equally in both the UK and EU. The UK is now an independent signatory to the World Trade Organization’s Agreement on Government Procurement. Northern Ireland, as an outcome of the Northern Ireland Protocol, has in effect remained in the EU’s single market for goods.
1. Introduction

The UK left the EU on 31 January 2020, widely referred to as ‘Brexit’. The author’s previous briefing (Charlson, 2021) identified terms in the EU-UK political declaration important to the UK and EU construction industries including workers’ rights, environmental protection, ending the freedom of movement people between the EU and UK, integrated supply chains and the intention of the UK to accede to the World Trade Organization government procurement agreement. This subsequent briefing examines the new EU-UK relationship which began on 1 January 2021. Most of the sections of the EU-UK Trade and Cooperation Agreement (TCA) came into force in the UK at 11pm on 31 December 2020. The TCA was provisionally applied by the EU from 1 January 2021. This briefing identifies significant issues for the construction industry in the TCA including supply chain concerns, the ‘level playing field’ implications, restrictions on the movement of people, limitations on the recognition of professional qualifications and different product standards. The new public procurement regime and the Northern Ireland Protocol are then explained.

2. New EU-UK relationship

In October 2019, the EU-UK political declaration incorporated provisions important to the construction industry including workers’ rights, environmental protection, the ending of freedom of movement of people between the UK and the EU, supply chain integration and the intention of the UK to accede to the World Trade Organization government procurement agreement (Charlson, 2021). Over a year later, the UK and the EU agreed the TCA (HMG

The UK Parliament passed the European Union (Future Relationship) Act 2020, in one day on 30 December 2020, to implement and ratify the TCA. The majority of the provisions came into force at 11pm on 31 December 2020 (implementation period completion day) by statutory instrument as authorised on the same day by Michael Gove, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office.

The Council of the EU has approved the TCA and the European Commission recommended provisional application of the TCA, from 1 January 2021, pending ratification by the EU Parliament by 28 February 2021. The EU Commission has deemed the TCA as an EU-only agreement such that only European Parliament ratification is needed and ratification by national or regional parliament Member States is not required (Dentons, 2020).

3. EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement (TCA), which was provisionally applied by the EU from 1 January 2021, is structured into seven parts (HMG, 2020c):

- Part 1 covers the common and institutional provisions;
- Part 2 covers trade and other economic aspects of the relationship, such as aviation, energy, road transport, and social security;
- Part 3 covers cooperation on law enforcement and criminal justice;
- Part 4 covers “thematic” issues, notably health collaboration;
• Part 5 covers participation in EU Programmes;
• Part 6 covers dispute settlement; and
• Part 7 sets out final provisions.

The author has selected key themes and provisions relevant to the UK construction from the TCA; including from a House of Lord article (Coleman and Newson, 2021), Engineering Council advice (Engineering Council, 2021) and solicitors’ practices’ analyses and guides.

3.1 Supply chain

The TCA provisions include tariff-free and quota-free trade in goods, where goods meet the relevant rules of origin, although the UK has left the EU customs union and single market. Different products have diverse rules of origin (Coleman and Newson, 2021).

Construction businesses dependent on international supply chains will need to assess the impact of the rules of origins. Companies will incur additional compliance costs to complete extra paperwork and declarations when moving goods across the EU/UK border. The UK has given importers a six month transitional period until 1 July 2021 but the EU has not made a similar concession. Construction participants will need to adapt to implement the new trading relationship between the EU and the UK (Francis and McGirr, 2020).

3.2 The ‘level-playing field’ – workers’ rights and environmental protection

The TCA includes ‘level-playing field’ provisions to prevent distortions to trade and investment for example, through state subsidies or reductions in labour or environmental regulation standards. Where a party believes that the other has taken action that could distort
trade and investment they may be able to take ‘rebalancing measures’ subject to certain consultation and arbitration procedures. These measures could include the imposition of tariffs (Coleman and Newson, 2021)

3.3 Movement of people

UK and EU citizens who established EU free movement rights before 31 December 2020 retain them, under the November 2019 UK-EU Withdrawal Agreement (European Council, 2019), if they have registered their settled status under schemes set up by the UK or EU by 30 June 2021. Alternatively, visa-free short-term business trips of up to 90 days in any 180 day period are allowed provided the activity is in the permitted list which includes meetings, research, training and commercial transactions. Otherwise, visas may be required for travel between the UK and the EU (Thorneloe, 2020). From 1st January 2021, travellers to the UK will be required to obtain a visa through a new points-based system to live, work or study in the UK. The “Skilled Worker” route requires specific skills and salary thresholds and mandates there to be a “genuine vacancy” (CMS, 2021).

3.4 Recognition of professional qualifications

The recognition in the UK of EEA/Swiss professional qualifications was governed, from 1 January 2021, by the Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2019. The TCA makes provision for mutual recognition agreements to be negotiated between the UK and all EU Member States. As no agreements have yet been implemented, from 1 January 2021, the recognition of outbound UK professionals has reverted
to individual EEA/Swiss Member State rules. Previous recognition decisions concerning UK professionals, that were made when the UK was a member of the EU, are unaffected (Engineering Council, 2021).

3.5 Product standards and services

Construction businesses will need to comply with two different product standard regulatory systems, including conformity assessments, in the UK and the EU. There are limited provisions on trade in services. General principles of market access are established but they are subject to many extensive reservations which are annexed to the TCA. UK providers operating in the EU need to verify if their service is subject to one of the exceptions and, if it is, whether there are national restrictions they are subject to in particular EU member states (Thorneloe, 2020).

3.6 EU programmes and intellectual property rights

The UK will continue to participate in specified EU programmes including scientific collaboration through Horizon Europe (Coleman and Newson, 2021). The EU and UK authorities are to cooperate in some areas including recognition and enforcement of registered intellectual property rights (Thorneloe, 2020).

3.7 Enforcing the agreement, review and termination

The TCA is governed by a Partnership Council assisted by specialised committees and technical working groups. New EU law will not apply in the UK and the European Court of Justice will no longer have jurisdiction in the UK (Coleman and Newson, 2021).
Disagreements between the UK and the EU can be referred to an independent arbitration tribunal for a binding ruling. Either party also retains the right, without waiting for an arbitration ruling in some circumstances, to impose some trade measures on the other. As an example, if one party considers that the other is in breach by state subsidising businesses, trade measures could be imposed. Similarly, a party can impose ‘rebalancing’ measures on the other party if it does not match its improvements to employment rights or environmental protection. Where such measures are imposed they may be subject to countermeasures. Therefore, if the UK government does exercise its new-found regulatory freedom to diverge from EU law, this is likely to have consequences to UK-EU trade (Thorneloe, 2020).

The TCA includes provisions for a review every five years and either party may decide to terminate the TCA with 12 months’ notice (Coleman and Newson, 2021).

4. Public Procurement

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 were made on 19 November 2020. Procuring entities are now mandated to publish notices on the new UK e-notification service called Find a Tender (FTS) instead of in the Official Journal of the European Union (OJEU). The procurement thresholds remain unchanged because they were previously set under the World Trade Organization’s (WTO) Agreement on Government Procurement. Specified supervisory powers have transferred from the European Commission to the Cabinet Office (Kotsonis and Taylor, 2021).

The WTO’s plurilateral Agreement on Government Procurement (GPA) applies to many of the world’s significant economies including the EU, the USA and Japan. The GPA requires
its signatories to guarantee fair and transparent public procurement and treat suppliers from other GPA countries equally as domestic suppliers for all applicable procurement. The UK is now an independent signatory to the GPA. Therefore, UK suppliers will continue to have access to global public procurement opportunities and GPA suppliers will continue to have access to most of the UK above-threshold public procurement contracts (Kotsonis and Taylor, 2021).

The TCA incorporates rules, additional to the GPA requirements, including that procuring entities may take into consideration environmental, labour and social issues during a procurement process and ensures an effective domestic review dispute resolution procedure. Furthermore the TCA confirms that, regarding procurement, UK suppliers established in an EU member state must be treated no less favourably than domestic suppliers and vice versa for EU suppliers established in the UK (Kotsonis and Taylor, 2021).

5. **Northern Ireland**

The Northern Ireland Protocol (the Protocol) (Cabinet Office, 2020), which came into effect at 11pm on 31 December 2020, protects the EU Single Market and the territorial integrity of the UK while upholding the Belfast (Good Friday) Agreement (Northern Ireland Office, 1998). The Protocol was brought into prominence when the EU announced and then retracted its intention to trigger article 16, which allows the UK or the EU to take unilateral action if application of the Protocol leads to serious ‘economic, societal or environmental difficulties’ which are liable to persist, during a dispute about covid-19 vaccine delivery shortfall (Curtis,
2021). The author has previously explored the impact of Covid-19 on UK construction law (Charlson and Dickson, 2021).

6. Conclusions

This briefing has explained the new EU-UK relationship, which began on 1 January 2021. New EU law is not applicable and the European Court of Justice no longer has jurisdiction in the UK.

Significant issues for the construction industry in TCA have been identified. Construction businesses will need to collaborate with their supply chains to ensure that they have adapted to the complexities and compliance issues of the new trading relationship between the UK and the EU. The introduction of state subsidies or lowering of labour or environmental regulatory standards could result in the introduction of tariffs. EU free movement established before 31 December 2020 is upheld subject to registration of settled status by 30 June 2021. Alternatively, visas may be necessary for travel between the EU and the UK. EEA/Swiss professional qualifications are acknowledged in the UK but mutual endorsement has yet to be agreed. There are now two disparate product regulation regimes and services are subject to controls. The UK will maintain engagement in designated EU programmes and there will be cooperation regarding registered intellectual property rights. The TCA includes enforcement, review and termination provisions.

Public procurement in the UK is supervised by the Cabinet Office. The UK is an independent signatory to World Trade Organization’s Agreement on Government Procurement (GPA). The TCA added consideration of environmental, labour and social issues during
procurement. Regarding procurement, UK and EU suppliers must be treated equally both the
UK and the EU. As a consequence of the Protocol, Northern Ireland has in effect remained in
the EU’s single market for goods.
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