McCann FitzGerald

Brexit:
An Overview of Legal and Regulatory Implications

INSTITUTE OF DIRECTORS IN IRELAND

Now that the UK has left the EU and the transition period ended on 31 December 2020, this briefing considers the key points of the legal and regulatory landscape from the perspective of Ireland.

This briefing was produced by the Institute of Directors in association with McCann FitzGerald for use in Ireland. McCann FitzGerald is one of Ireland's premier law firms, providing a full range of legal services to many of Ireland's leading businesses. Clients include international organisations, major domestic concerns, emerging Irish companies and clients in the State and semi-State sectors.

Deal or no-deal?

In effect, there is both. The December 2020 EU-UK Trade and Cooperation Agreement[1] (the "TCA") includes a 'deal' so far as concerns EU-UK trade in many types of good. However, the TCA makes little provision for trade in services and so, broadly, it is 'no-deal' as regards most types of service.

In this regard, important sectors, such as financial services, and some significant regulatory issues such as GDPR and data movements, remain to be addressed in more substantive ways. Developments in this regard are expected in spring and summer 2021 when the EU and the UK will resolve whether to make reciprocal decisions on equivalency (in some or all areas of financial services) and on adequacy for continuing data transfers (there currently is a transition period for such transfers, due to expire in April or, more likely, June 2021).

In these important ways, for example, the TCA is not merely partial (principally regulating trade in goods, with little impact on services) but also is subject to further developments: new provisions regarding financial services and data transfers may yet be introduced.

The unique position of Ireland

Among EU Member States, Ireland is in a unique position as regards Brexit in two important respects:

- While of course subject to and benefitting from the TCA, Ireland also has a Common Travel Area Agreement with the UK[2] and this is highly significant for

1 See https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en for the information and launch page and https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN for the TCA itself.

2 See https://www.dfa.ie/media/dfa/eu/brexit/brexitandyou/Memorandum-of-Understanding-Ire-version.pdf and the accompanying joint statement of the two governments (https://www.dfa.ie/media/dfa/eu/brexit/brexitandyou/Joint-Statement-CTA.pdf).

some business activities conducted on a cross-border basis between Ireland and the UK, and vice versa[3].

- The November 2019 UK-EU Withdrawal Agreement[4] (which entered into force in February 2020) includes the well-known "Protocol on Ireland / Northern Ireland" (the "Protocol"). As with the Common Travel Area Agreement, the Protocol also is highly significant for trade between Ireland and Northern Ireland and between Northern Ireland and Britain.

Further, Irish law[5] has made specific provision for some consequences of Brexit, such as in respect of:

- settlement finality, to ensure that the protections provided under the EU Settlement Finality Directive[6] and the European Communities (Settlement Finality) Regulations 2010 continue to apply to Irish market participants in UK-based settlement systems,
- a 15-year run-off period for insurance and reinsurance,
- a wide range of tax-related matters,
- road transport, to ensure the continuing operation of cross-border bus services, and
- market surveillance of construction products.

World Trade Organisation ("WTO") rules may apply to trade that is not regulated by the TCA and which is within the WTO framework.

The Common Travel Area Agreement

The inter-governmental Common Travel Area Agreement is nationality-based, not residence-based. Accordingly, the rights that it confers (see below) apply to Irish and UK citizens, irrespective of their place of residence. Equally, however, those rights are *not* conferred on the nationals of any other place, even if (for example) that person is resident in Ireland or the UK.

The subject-matter of the Common Travel Area Agreement includes:

- freedom of movement for Irish nationals within the UK, and vice versa,
- the right for Irish nationals to reside in the UK, and vice versa,
- the right for Irish nationals to work in the UK, and vice versa,

3 The Ireland-UK Common Travel Area also includes the Isle of Man and the Channel Islands.
4 See https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232&uri=CELEX%3A12019W/TXT%2802%29/
5 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. The 2020 Act is not to be confused with the 2019 Act of the same name, which was introduced in anticipation of a UK 'crash out' from the EU and little of which was ever commenced as it was overtaken by the November 2019 Withdrawal Agreement.
6 Directive 98/26/EC.

- the right of Irish nationals to access public healthcare in the UK on the same terms as UK citizens, and vice versa, and
- the right of Irish nationals to access education in the UK on terms no less favourable than those applicable to UK citizens, and vice versa.

The nationality basis of the Common Travel Area is important. It means that, for example, an Irish employer posting a Dublin-resident worker to the UK may do so in a straightforward manner under the Common Travel Area Agreement if the posted worker is Irish, but otherwise is subject to the detailed TCA rules if the posted worker is an EU national other than Irish. Of course, a posted worker of any non-EU nationality is subject to the UK immigration and work-permit rules for people of the relevant nationality in respect of the particular posting.

Similarly, a worker who is to be posted from the UK to Ireland or to another EU Member State would be subject to different rules according to whether the worker is an Irish national (who therefore may always return to Ireland), a UK national (who may travel to and work freely in Ireland), of an EU nationality other than Irish (who would be subject to the TCA rules on immigration and work permits) or is a nationality other than UK or EU (who would be subject to the relevant Member State's immigration and residency rules).

The Protocol on Ireland \ Northern Ireland

Embedded in the 2019 Withdrawal Agreement and not in the 2020 TCA, in large part the Protocol regulates trade in some goods between Ireland and Northern Ireland, and vice versa, and between Northern Ireland and Britain.

In order to ensure an open border between Ireland and Northern Ireland, the Protocol provides – in unsurprisingly complex ways – that Northern Ireland remains part of the UK VAT area *and* of the UK customs territory *and* has access to the EU Single Market. Therefore, Northern Ireland must apply EU customs rules, EU Single Market rules on goods coming in and out of Northern Ireland and EU VAT rules on goods traded in Northern Ireland.

In consequence:

- there is unimpeded access for Northern Ireland goods sent to Ireland, and vice versa,
- there is unimpeded access for Northern Ireland goods sent to Britain (but some checks are required on some goods being sent from Britain to Northern Ireland), and
- there are no tariffs on trade between Northern Ireland and Britain but there are checks on goods that are "at risk" of moving through Northern Ireland into the EU, most obviously to Ireland (rules of origin tests under the TCA).

Governance and dispute-resolution under the TCA

Implementation of, and adherence to, the TCA is subject to the oversight of a Joint Partnership Council comprised of EU and UK members. In the event of a dispute, the TCA provides for binding enforcement and dispute-settlement mechanisms, including arbitration. There also is the possibility of cross-sector or multi-sector retaliation in the case of a violation of the TCA.

Aviation

The TCA imposes new market-access requirements and new rules on aviation safety. EU airlines remain subject to strict ownership and nationality requirements and UK airlines no longer are entitled to fly between two EU destinations.

As regards aircraft leasing, 'dry leasing' generally is permitted but 'wet leasing' is subject to controls according to whether the lessor and lessee is a UK entity or an EU entity.

The EU and the UK may require leasing arrangements to be subject to approval by the relevant competent authorities for the purpose of verifying compliance with requirements in the TCA[7].

Road transport

The TCA provides for full transit rights for road hauliers (the so-called UK 'landbridge' from Ireland to the continental EU). However, the right of *cabotage* (the ability of an EU or UK haulier or a passenger-carrier to undertake services wholly within the other jurisdiction) is restricted.

The TCA provides for continuing common road haulage standards and conditions (such as driver hours) and, as mentioned above, international bus services are not affected.

Trade

Even if significant and much better than no-deal, the TCA is 'thin': it does not in any way permit frictionless, seamless cross-border trade. Broadly, the TCA removes tariffs and quotas between the EU and UK, assuming the exported product meets stipulated rules of origin criteria. However, it does little to eliminate non-tariff barriers (such as product standards), or negate the need for new bureaucracy and checks at the border or provide for meaningful rights or freedoms on cross-border service provision.

7 Article AIRTRN.13(7).

Competition Law and State Aid

The TCA requires both parties to maintain existing competition rules and ensure adequate enforcement thereof, so little change is expected on this front. An important *caveat* is that the UK's departure from the EU means that UK turnover will no longer count towards EU merger control thresholds. This means that more large UK / Ireland deals may be notified at national level.

As regards State aid, the UK successfully negotiated down the EU's ask on dynamic alignment. Nonetheless, the TCA provisions on subsidy control are detailed and far-reaching. In addition, Article 10 of the Protocol applies 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.

Data Protection and Data Movements

As mentioned in the introduction, the TCA deals with data movements and data transfers only on an interim basis. For a transitionary period that is likely to last until June 2021, or (if sooner) until an adequacy decision is taken by the EU in respect of UK safeguards on data protection, a transfer of personal data to the UK is not to be considered to be a transfer to a third country for GDPR purposes. Negotiations between the EU and the UK in respect of long-term reciprocal adequacy decisions are underway but, currently, no arrangement is in place for data transfers after the transition period ends although the EU has published draft adequacy decisions as part of those negotiations[8].

If no adequacy decision is made in respect of the UK, EU businesses who need or wish to transfer, or to continue to transfer, personal data to the UK will need to take appropriate measures to provide for such transfers in accordance with the GDPR. One option will be to adopt EU-approved "standard contractual clauses" to provide contractual safeguards for that transfer. Even in the case of standard contractual clauses, however, there should be a case-by-case assessment of the data protection risk posed by the transfer, including (for example) whether and in what circumstances public authorities in the destination country (such as the UK) may have access to the data.

For data transfers from the EU to the UK, but within a corporate group, Binding Corporate Rules ("BCRs") may be appropriate. BCRs are data protection policies with which members of a corporate group agree to comply and which facilitate intra-group transfers of personal data outside the EU. BCRs must include all general data protection principles and enforceable rights to ensure appropriate safeguards for data transfers to the non-EU entity. They must also be approved by a data protection authority in the EU and the time and effort involved in obtaining such approval can be a disincentive for some groups.

8 See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_661

Any UK organisation that doesn't have an establishment in the EEA (which includes the EU) but which processes the personal data of any data subject in the EEA in the offering of goods or services to individuals in the EEA, or which monitors the behaviour of individuals in the EEA, must appoint a representative in the EEA for the purposes of GDPR. That representative must be empowered, in writing, to act on the organisation's behalf regarding its compliance with GDPR, and to deal with any supervisory authorities or data subjects in this respect.

Financial Services Regulation

The provisions in the TCA which impact on financial services are to be found both in the general provisions governing investment and services, as well as in the specific section on financial services. In addition, the EU and UK have agreed a Joint Declaration on Financial Services Regulatory Cooperation (the "Joint Declaration"), and are expected, by the end of March, to enter into a Memorandum of Understanding establishing the framework for this cooperation.

By and large, the TCA's provisions on financial services are limited in scope, and fall far short of granting the type of access enjoyed by UK / EU firms while the UK was an EU Member State. In particular, UK / EU firms have lost the right to passport financial services into each other's territories on the basis of their home country authorisation. Moreover, while the Joint Declaration specifically provides that the EU and UK will discuss, inter alia, how to move forward on both sides with equivalence determinations, which would allow the provision of the relevant financial services between their respective territories, this is stated to be without prejudice to the unilateral and autonomous decision-making process of each side.

In essence, therefore, the future shape of the relationship between the EU and the UK remains to be determined

Employment Law and Business Immigration

Brexit does not have any implications for Irish employment law, nor will it have any immediate impact on employment law in the UK. Nonetheless, although Irish and UK employment law has to date been broadly similar in many respects, the UK's departure from the system of EU directives and regulations means that divergence in this area is likely in the medium-to-long term.

Non-regression protections are in place in the TCA with a view to ensuring that worker protections are not weakened, so divergence is likely to arise from one jurisdiction expanding worker protection at a faster pace than the other, rather than a rolling-back of EU-law-derived worker protections as had been initially indicated by the UK Government. However, the latter approach cannot be ruled out.

Undoubtedly, the end of free movement for UK nationals within the EU will create difficulties for some UK employers and may inhibit their ability to send employees

to work at client sites in the EU at short notice. Business travel to and within the EU will now require a degree of pre-planning for HR teams.

For UK nationals travelling to Ireland to work, the position is straightforward. As mentioned above, the Common Travel Area has been preserved and UK nationals retain the right to live and work in Ireland without the need for any pre-authorisation or permit, as Irish nationals do in the UK. However, restrictions are now in place for UK nationals travelling elsewhere in the EU for business purposes, with rules and duration limits for short-term business visits and new requirements for work authorisations / employment permits for longer stays.

Brexit may have additional implications for some individual employee contractual arrangements, particularly in relation to post-termination restrictive covenants such as non-compete and non-solicitation provisions. Employers should review existing arrangements with their key staff to ensure that any identified Brexit-related issues can be addressed.

Employers with a European Works Council and employees based in the UK should also review their EWC arrangements as changes will be needed to align them with EU law.

Cross-Border Litigation

The EU and the UK have not yet agreed a framework for civil justice and judicial cooperation after the end of the transition period. Therefore, some key EU instruments that provide a framework of rules in this regard have fallen away as far as disputes involving the UK as a Member State are concerned. This means changes in commercial dispute resolution in cases involving the UK.

For example, in the area of civil and commercial disputes, EU instruments provide a framework of rules covering a variety of aspects of civil justice and judicial co-operation, such as:

- determining which court will have jurisdiction over a dispute, and
- the basis on which judgments can be enforced as between EU Member States, as well as the procedure for enforcement.

In both cases, the recast Brussels Regulation sets out the rules that apply between the EU Member States. While there are transitional provisions for ongoing proceedings, those rules do not apply to proceedings involving the UK that are commenced after the end of the transition period as the UK now is a third country under that Regulation.

In addition, following Brexit the Lugano Convention no longer applies to the UK although the UK will apply its provisions unilaterally in some cases. The Lugano Convention sets out rules concerning jurisdiction and enforcement of judgments between EU Member States and EFTA states (except Liechtenstein). The Lugano Convention is very similar to an earlier incarnation of the recast Brussels Regulation which applied between EU Member States until a few years ago.

The UK is seeking to re-join the Lugano Convention in its own right but it needs the consent of the other contracting parties to that convention in order to do so. The EU has not yet indicated whether it will consent to the UK's accession. The position may become clear by April 2021.

The UK has also joined the 2005 Hague Convention on Choice of Court Agreements in its own right, from 1 January 2021, having previously been party to it by virtue of EU membership since October 2015. The key feature of jurisdiction and enforcement under the Hague Convention is that it gives effect to exclusive choice of court agreements in favour of contracting states and provides that the resulting judgment will be recognised and enforced in other contracting states. However, in general, the Hague Convention only applies where there is an exclusive jurisdiction clause entered into after the Convention came into force for the country whose courts are chosen. There are signs of potential disagreement between the EU and the UK as to whether the relevant application date for the UK courts runs from October 2015 or from 1 January 2021.

What happens in the case of a dispute involving the UK and none of these conventions applies? In that case, individual national regimes, such as the common law in Ireland, will apply to determine questions of jurisdiction and enforcement of judgments.

Cross-Border Insolvency

The TCA is largely silent on almost all issues relating to insolvency and restructuring. The most significant impact is that the European Insolvency Regulation Recast (2015/848) (the "EIR") no longer applies in the UK.

The EIR is the cornerstone of cross-border insolvency in the EU. The main purpose of this Regulation is to co-ordinate and harmonise cross-border insolvency and restructuring across the EU Member States. It provides for the automatic recognition of, *inter alia*, Irish liquidation and examinership proceedings in each EU Member State.

As the EIR is no longer applicable in the UK, Irish liquidation and examinership proceedings initiated after 31 December 2020 no longer are automatically recognised in the UK. If UK recognition of Irish proceedings is required, it now is necessary to bring a separate recognition application before the UK courts. Fortunately, in addition to being able to rely on UK common law rules for recognition and enforcement, there are two UK domestic law options of which Irish corporates can avail:

- the UK-Cross Border Insolvency Regulations 2006, which implemented the UNCITRAL Model law on cross border insolvency. Ireland, along with every other EU Member State, can rely on these Regulations, and

- section 426 of the UK Insolvency Act 1986 which allows the UK courts to give assistance to the courts of certain designated countries in relation to insolvency and restructuring matters. Ireland is the only EU state that is designated country for the purpose of this UK Insolvency Act. There is a basis to maintain that the recognition of Irish examinership proceedings under the UK Insolvency Act 1986, which seek to restructure debt that is governed by English law, can circumvent the English common law principle of "the Rule in Gibbs". This provides a significant advantage to Ireland over other EU states in terms of attracting foreign corporates and groups Ireland as a restructuring destination.

The ability to have UK insolvency and restructuring proceedings which are initiated after 31 December 2020 recognised in Ireland is less certain. There is currently no Irish domestic law which allows for recognition of UK insolvency and restructuring proceedings in Ireland. The only option for UK corporates is to seek to rely on Irish common law rules on recognition and enforcement.

Corporate Lending

Corporate lending (and other forms of finance) with a UK connection raise the following documentary and structuring points for consideration:

- *Jurisdiction clauses and enforcement of judgments*: arguably the most significant change is choices of UK jurisdiction and UK judgments no longer benefit from the Brussels Recast Regulation[9]. The impact of this is somewhat mitigated by the application of the Hague Convention[10] but this provides more limited recognition and notably does not expressly extend to the "asymmetric" jurisdiction clauses typically used in cross-border financing.
- *Bail-in provisions*: in many circumstances, it will be necessary to add a contractual recognition of the regulatory authorities' "bail-in" powers in relation to regulated financial institutions.
- *Regulatory issues*: the loss of financial services passporting rights needs to be considered and will sometimes complicate transaction structuring.

While Brexit undoubtedly adds complexity, Ireland remains an accommodating and flexible jurisdiction for non-EEA financing transactions, which now include the UK.

9 Council Regulation (EC) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

10 Convention of 30 June 2005 on Choice of Court Agreements

Capital Markets

There was 'no-deal' for the capital markets and, post-Brexit, the UK is a third country for EU capital markets law purposes with the London Stock Exchange's Main Market no longer being an EEA regulated market.

On 1 January 2021, the UK replicated the EU capital markets regime and adopted its own market abuse, prospectus and transparency rules mirroring the EU's Prospectus Regulation, Transparency Directive and Market Abuse Regulation. There is, however, no passporting or mutual recognition regime.

For those many Irish companies with shares admitted to trading in both Dublin and London, that means that there is a "doubling up". Such companies will have two sets of regulators and two sets of rules, and they and their shareholders will have two notifications to make under the market abuse and major shareholding regimes. Irish companies offering their shares to the public may require two prospectuses: one for the EEA and one for the UK. As matters stand, this is inefficient but there is the prospect of greater divergence over time between the two regimes which may prove to be more problematic.

Corporate

The fact that the UK is no longer within the EEA has Irish company law implications for certain corporate structures including the following:

- with certain limited exceptions, every Irish company requires one EEA-resident director; otherwise a company requires an insurance bond or a certificate from Irish Revenue that the company has a sufficient economic link with Ireland. Companies that previously relied on a UK-resident director for this purpose need to appoint an EEA-resident director or obtain the bond or certificate;
- any Irish company that wishes to file consolidated financial statements of its EEA holding company, rather than individual financial statements, can no longer do so where the holding company is established in the UK;
- cross-border mergers involving UK-registered companies are no longer permitted under the Cross-Border Merger Directive and implementing regulations; and
- a UK company that has registered a branch operation in Ireland has automatically become a third country company so the rules relevant to branches of third country (non-EEA) companies apply.

Following the signing of a Memorandum of Understanding on Reciprocal Arrangements (to assist UK and Irish statutory auditors obtain recognition of their audit qualification in both jurisdictions), an Irish company can continue to appoint an auditor qualified in UK.

For more information, see our Corporate Brexit briefing here.

Public Procurement

From 1 January 2021, UK tenderers' access to the European procurement market will be based on the WTO's Government Procurement Agreement ("GPA") rather than the more detailed European procurement Directives. The TCA adopts a "GPA plus" approach to procurement, capturing some additional sectors, and imposing some additional safeguards, over and above the GPA itself.

From the point of view of Irish contracting authorities, this will not have a significant impact on the running of above-threshold procurement processes. Irish and EU procurement law requires authorities to treat tenderers from GPA states no less favourably than tenderers from EU Member States. However, for contracts that are below threshold, authorities will likely have more flexibility.

Energy

In the lead up to Brexit, three concerns dominated in the energy sector:

- whether the I-SEM (the all-island wholesale electricity market) would survive,
- how trading across electricity and gas interconnectors would be managed, and
- security of energy supply.

There is good news on all three fronts. The I-SEM has survived. The Protocol has made core EU energy laws (*eg* the REMIT Regulation) applicable to the UK in the context of Northern Ireland. As a result, market participants in the UK who wish to trade in the I-SEM were required to register with an EU regulatory authority (including the Northern Ireland Utility Regulator) by 1 January 2021. The market operator user group have also confirmed that the Central Scenario (encompassing an interconnectors forwards market, a local day-ahead market and an intraday market operating outside EU intraday arrangements) is now in place[11].

Further interconnector-related developments are on the horizon as the TCA's Specialised Committee on Energy has been tasked with ensuring that the transmission system operators develop technical procedures for day-ahead trading.

The final piece of good news concerns security of energy supply. In making plans to address identified risks to gas supply, the TCA places an obligation on both parties not to endanger security of supply of the other Party[12]. In addition, neither party is to impose a higher price for exports of energy goods or raw materials than the price charged for those energy goods or raw materials when destined for the domestic market[13].

For more information, see our Energy Brexit Briefing here.

11 Market Operator User Group, Presentation (28 January 2021) accessible here.
12 Section 3 Network Development and Security of Supply, Article ENER.17 and 18.
13 Article ENER.27: Export pricing

Environment

At the moment there is convergence between EU and UK environmental law. While this may change in the future, any changes will be subject to the provisions of the TCA (particularly Title XI Chapter 7). This chapter deals with environmental levels of protection, specifically referring to:

- industrial emissions,
- air emissions and air quality,
- nature and biodiversity conservation,
- waste management,
- the protection and preservation of the aquatic environment,
- the protection and preservation of the marine environment,
- the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances, and
- the management of impacts on the environment from agricultural or food production, notable through the use of antibiotics and decontaminants.

Title XI Chapter 7 of the TCA contains a provision which essentially states that environmental and climate protection levels which were in place on 31 December 2020 are to be maintained, so as to not affect trade or investment between the UK and the EU[14].

In addition, the UK and the EU have reaffirmed their respective commitments to procedures for evaluating the likely impact of proposed activities on the environment, and where specified projects, plans and programmes which are likely to have significant environmental effects. As such, for anyone planning to engage in activities that are likely to cause significant adverse environmental impact on the UK (*eg* thermal power stations with a heat output of 300 megawatts or more; or large-diameter oil and gas pipelines) the requirement for transboundary environmental impact assessment will now have its foundation in the Espoo Convention, to which the EU and the UK are both party[15], rather than EU law.

14 Chapter 7 Article 7.2 (2) Non-regression from levels of protection.

15 Convention on Environmental Impact Assessment in a Transboundary Context (United Nations: 1991) ("the Espoo Convention").

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