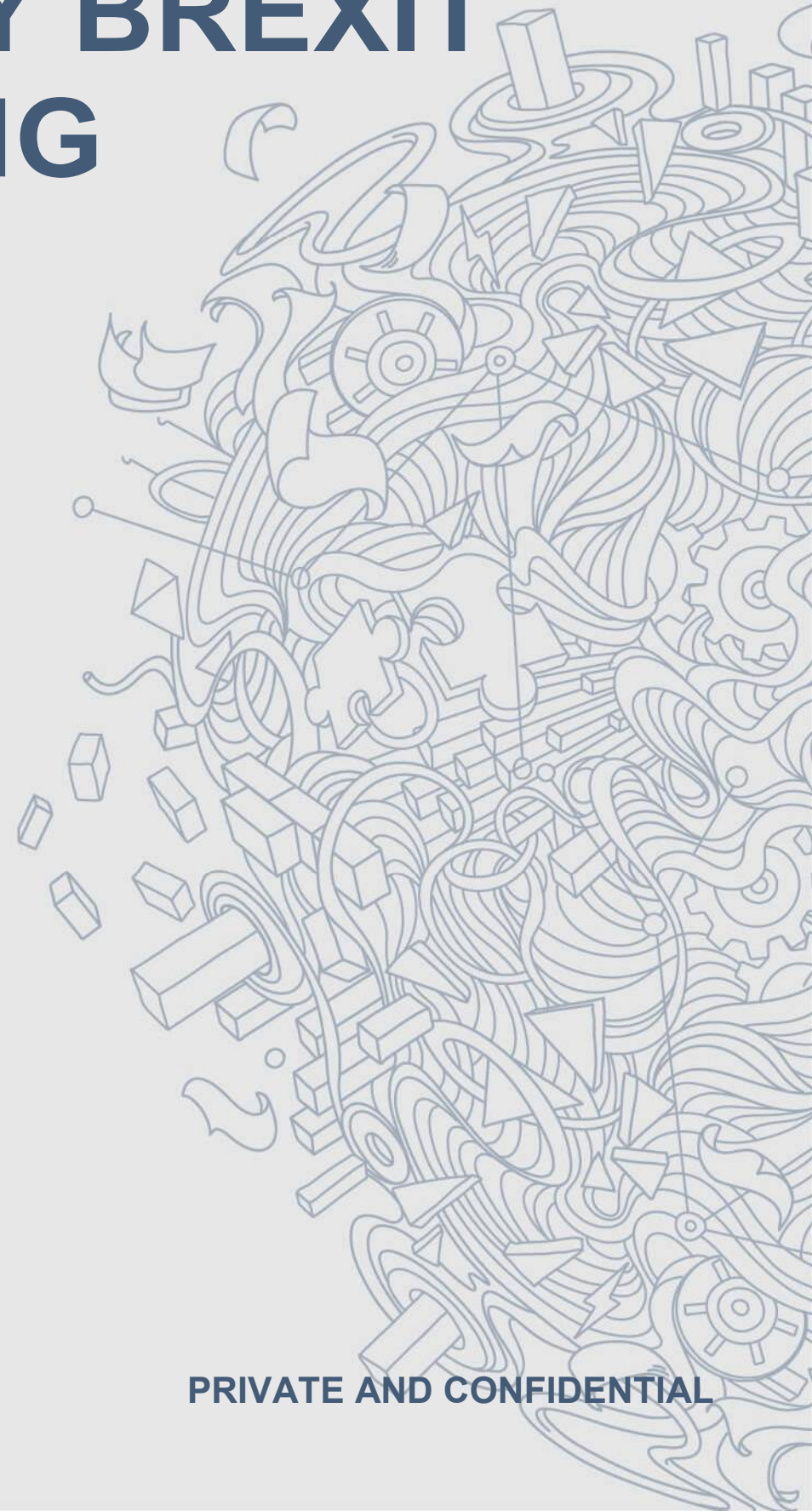


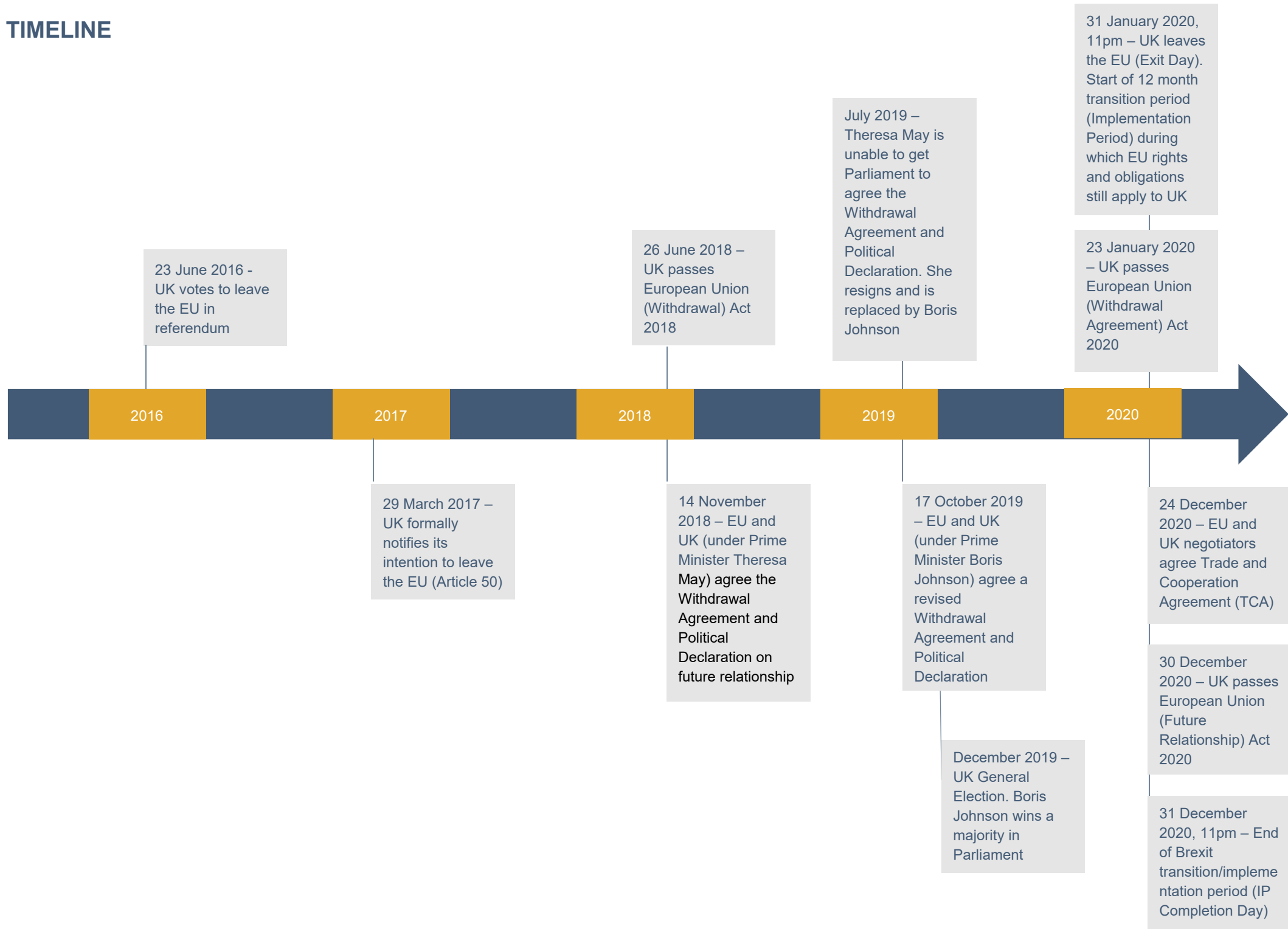
# INFRASTRUCTURE PROJECTS AND ENERGY BREXIT BRIEFING

---

12 January 2020



# TIMELINE



# BREXIT-RELATED PRIMARY LEGISLATION

There have been several Acts to date, but the two most important for legal purposes are the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020.

## EUROPEAN UNION (WITHDRAWAL) ACT 2018 (EUWA)

The EUWA (as amended by the WAA) includes provisions that:

- Repealed the European Communities Act 1972 (ECA 1972) on 'exit day'. The ECA 1972 enabled EU law to become part of UK law, and gave effect to the principles of direct effect and the supremacy of EU law.
- On exit day, saved the effect of most of the ECA 1972 (in modified form), and saved and modified EU-derived domestic legislation for the duration of the transition period.
- Create a new body of retained EU law at the end of the transition period – this is a snapshot of the EU law that applied in the UK as at 31 December 2020, which becomes part of the UK's domestic legal framework going forward. This means that the UK can start to amend this body of law as it sees fit, so UK law may start to diverge from EU law.
- Confer various powers on the government to make secondary legislation, including the correcting power in section 8 to make regulations to deal with deficiencies in retained EU law arising from the UK's withdrawal from the EU.
- Provide for the general implementation, through automatic incorporation into UK law, of the UK-EU withdrawal agreement and the UK's agreements with Switzerland and the EEA EFTA states; and enable rights and obligations arising under the withdrawal agreement, and EU law applied to the UK by the withdrawal agreement, to have supremacy over any inconsistent UK law.
- Address the use of CJEU rulings by UK courts when interpreting retained EU law, subject to the terms of the withdrawal agreement (section 6).

## EUROPEAN UNION (WITHDRAWAL AGREEMENT) ACT 2020 (WAA)

The WAA implements the following agreements into UK law, including through amendments to the EUWA:

- UK-EU withdrawal agreement, partly by express implementation, but also by regulations made under powers in the WAA and the amended EUWA.
- Separation agreement between the UK and the EEA EFTA states (Iceland, Liechtenstein and Norway), which sets out the arrangements for the UK's withdrawal from the EEA Agreement and from other EU agreements with the EEA EFTA states. The EEA EFTA separation agreement was signed on 28 January 2020, and relevant provisions were provisionally applied by the UK from exit day (although most of the agreement only applies from the end of the transition period). It enters fully into force in relation to the UK following ratification by the UK and at least one other party.
- Agreement between the UK and Switzerland on citizens' rights. This agreement was signed on 25 February 2019 and will take effect at the end of the transition period, when the EU-Swiss Free Movement of Persons Agreement stops applying to the UK.

## WITHDRAWAL AGREEMENT

You may recall that Theresa May managed to negotiate a Withdrawal Agreement with the EU in November 2018 and got the Cabinet to back it, but then couldn't get the whole UK Parliament to approve it. She resigned and was replaced by Boris Johnson, who revised the Withdrawal Agreement with the EU in October 2019. He then called a general election in December 2019 and successfully gained a parliamentary majority, which then ratified the Withdrawal Agreement in January 2020.

For the text of the Withdrawal Agreement and Political Declaration see <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> and for a summary see [this Commons Library briefing](#). Basically it provided for a transition period (implementation period) from the date the UK left the EU (1 January 2020) until 1 January 2021, during which time the UK would continue to apply EU law but would be negotiating a new partnership arrangement with the EU to apply after the transition period ended.

And as you know, those negotiations went down to the wire and were only finalised on 24 December 2020.

# EU-UK TRADE AND COOPERATION AGREEMENT (TCA) AND THE EUROPEAN UNION (FUTURE RELATIONSHIP) ACT 2020

On 24 December 2020, the UK Government and the European Commission announced a deal in principle on the legal terms of the future UK-EU relationship. A copy of the draft EU-UK [Trade and Cooperation Agreement \(TCA\)](#), was published, along with a number of associated declarations and agreements including a separate Nuclear Cooperation Agreement and an Agreement on Security Procedures for Exchanging and Protecting Classified Information (the **Agreements**).

For further information see [UK Government Summary on the TCA](#).

The Agreements were then implemented in the UK by the urgent passing of primary legislation in the form of the European Union (Future Relationship) Bill 2020 which was introduced to Parliament on 30 December 2020. Having completed all its Parliamentary stages in a single day, the Bill received Royal Assent as the [European Union \(Future Relationship\) Act 2020 \(the EU\(FR\)A 2020\)](#). Overall the EU(FR)A 2020 creates a framework through which the agreement can be implemented by regulations in due course, rather than implementing the agreement directly with immediate effect. Given the TCA is a complex 1200-page trade deal it is not unsurprising that this requires more than a single relatively short piece of primary legislation to implement it domestically. So lots more primary legislation to follow!

See also the Commons Library briefing note, [The UK-EU Trade and Cooperation Agreement: summary and interpretation](#). This has a useful summary of the key points.

Key features of the TCA include the following:

- **Trade:** There will be no tariffs or quotas on trade in goods provided rules of origin are met. There are increased non-tariff barriers, but measures on customs and trade facilitation to ease these.
- **Governance:** The Agreement is overseen by a UK-EU Partnership Council supported by other committees. There are binding enforcement and dispute settlement mechanisms covering most of the economic partnership, involving an independent arbitration tribunal. There is no role for the Court of Justice of the EU in the governance and dispute settlement provisions.
- Both parties can engage in **cross-sector retaliation** in case of non-compliance with arbitration rulings (through suspension of obligations, including imposition of tariffs). This cross-sector retaliation applies across the economic partnership.
- **Level playing field provisions:** Both parties have the right to take counter-measures including imposition of tariffs, subject to arbitration, where they believe divergences are distorting trade. There is also a review mechanism where this occurs frequently.
- **Subsidies/state aid:** Both parties are required to have an effective system of subsidy control with independent oversight. Either party can impose remedial measures if a dispute is not resolved by consultation.
- **Fisheries:** 25% of the EU's fisheries quota in UK waters will be transferred to the UK over a period of five years. After this, there will be annual discussions on fisheries opportunities. Either party will be able to impose tariffs on fisheries where one side reduces or withdraws access to its waters without agreement. A party can suspend access to waters or other trade provisions where the other party is in breach of the fisheries provisions.
- **Security:** A new security partnership provides for data sharing and policing and judicial co-operation, but with reduced access to EU databases. A new surrender agreement takes the place of the European Arrest Warrant. Cooperation can be suspended by either side swiftly in the case of the UK or a Member State no longer adhering to the European Convention of Human Rights.
- **EU Programmes:** Continued UK participation in some EU programmes: Horizon Europe (Research), Euratom Research and Training, ITER fusion and Copernicus (satellite system).
- **Review and Termination:** The TCA will be reviewed every five years. It can be terminated by either side with 12 months' notice, and more swiftly on human rights and rule of law grounds.

Note that the Agreements were also signed by the EU on 30 December 2020 ([EU Press Release: Signature of the EU-UK agreement](#)) on the basis that they will be applied provisionally by the EU from 1 January 2021 as the European Parliament and the Council of the EU still need to examine them fully before formal ratification.

## JOINT DECLARATIONS

Alongside the Agreements, the UK and the EU have agreed non-binding joint declarations in a number of areas ([UK-EU Declarations](#)). These include financial services, where the UK and the EU intend to establish structured regulatory co-operation, including agreeing a Memorandum of Understanding to establish the framework for co-operation by March 2021 and discussing

how to move forward with equivalence determinations. There are also declarations on subsidy control policies which cover transport projects (airports, roads and ports) and a declaration on Annex ENER-4 dealing with trading energy across interconnectors.

## MORE INFORMATION ON TCA

In addition to the [UK Government Summary on the TCA](#) linked above and the Commons Library briefing on [The UK-EU Trade and Cooperation Agreement: summary and interpretation](#), the following documents provide further information on the TCA:

- [European Commission Overview: Consequences and benefits of the EU-UK Trade and Cooperation Agreement](#);
- [European Commission Q&As: EU-UK Trade and Cooperation Agreement](#);
- [European Commission Brochure: EU-UK Trade and Cooperation Agreement - a new relationship, with big changes](#);
- [European Commission Infographic: From the UK referendum to a new Trade and Cooperation Agreement](#); and
- [European Commission Timeline: From the UK referendum to a new Trade and Cooperation Agreement](#).

## IMPACT ON DATA PROTECTION AND 'UK GDPR'

From IP completion day the EU GDPR will not apply to the UK. It will be saved in domestic law through section 3 of the EU(W)A 2018 and fall within the new category of law created by the EU(W)A 2018 known as 'retained EU law'. It will be renamed the 'UK GDPR'. The starting position is that data protection law in the UK will be the same as in the EU, subject to technical amendments to ensure the domestic operation of the retained regime.

The TCA referred to above agreed between the EU and the UK contains provisions relating to data protection, although a data adequacy decision from the EU remains pending. In the short term, the most significant from a compliance perspective is the temporary 'bridging mechanism', which allows the free flow of data from the EEA to the UK to continue after the Brexit transition period ends at 11 pm on 31 December 2020, until adequacy decisions for the UK can be adopted under the EU GDPR and Law Enforcement Directive.

Note that the bridging mechanism can remain in place for up to six months. Although adequacy for the UK is not guaranteed, this is clearly the envisaged outcome. UK to EEA data flows can also continue as normal. The UK has already deemed the EU to be adequate on a transitional basis under the Data Protection Act 2018.

The bridging mechanism could cease to apply if the UK took steps such as conferring UK adequacy decisions on third countries or issuing UK standard contractual clauses without the consent of the EU through the Partnership Council, which supervises the operation of the TCA. The bridging mechanism will cease to have effect if the UK either (i) amends its data protection regime, or (ii) exercises powers which might cause a divergence between EU and UK data protection law without the consent of the EU within the Partnership Council. It is extremely unlikely that the UK would take steps which would invalidate the bridging mechanism. The UK can, however, make changes to its data protection framework during the period when the bridging mechanism is in place if these changes involve aligning UK law with EU data protection law. For example, if the EU brings in new standard contractual clauses, the UK may issue new clauses which mirror the EU clauses.

## ENERGY ASPECTS

Energy is covered in Title VIII of Part Two of Heading One of the TCA, together with four annexes (at page 780 of the agreement).

### ENERGY TRADING OVER INTERCONNECTORS

The agreement commits both parties to develop and implement new electricity trading arrangements based on 'multi-region loose volume coupling' by April 2022, in order to maximise capacity on interconnectors and allow capacity and electricity to be sold together (called implicit trading). (These arrangements are set out in Annex ENER-3 of the agreement and relate to the day ahead timeframe only.) Temporary arrangements as agreed between the interconnector operators themselves will apply in the meantime. Gas will continue to be traded using the PRISMA platform.

### ENERGY AND ENVIRONMENTAL SUBSIDIES (ANNEX ENER-2)

The TCA contains specific provisions on energy and environmental subsidies that apply as part of the main subsidy control provisions of the agreement (in Title XI). The provisions include that:



- Subsidies for generation adequacy, renewable generation and cogeneration:
  - must not undermine a party's ability to comply with the provisions on wholesale markets or the efficient use of interconnectors; and
  - must be determined by means of a transparent, non-discriminatory and competitive process (unless, in the case of renewables and cogeneration, there is insufficient supply for a competitive process, the capacity is unlikely to have a material effect on trade between the parties, or for demonstration projects).
- Subsidies for generation adequacy must provide incentives to be available at times of system stress and may be limited to installations not exceeding a carbon dioxide emissions threshold.
- Subsidies for renewable energy and cogeneration must not affect obligations or opportunities to participate in electricity markets.
- Partial exemptions from energy-related taxes and levies for energy intensive users must not exceed the total amount of the tax or levy.
- Compensation for electricity intensive users due to increased electricity cost resulting from a climate policy instrument must be restricted to sectors at significant risk of carbon leakage.
- Subsidies for reducing emissions for industrial activities must reduce the emissions resulting directly from the industrial activity.
- Subsidies for improvements in energy efficiency of industrial operations must improve energy efficiency by reducing energy consumption, either directly or per unit of production.

## ENERGY REGULATION AND CO-OPERATION

The UK is no longer a member of the various EU energy regulation bodies (ACER, ENTSO-E and ENTSO-G) but the TCA creates a new Specialised Committee on Energy to oversee energy trading and balancing between the UK and the EU.

The TCA commits to a level playing field for energy suppliers and for capacity market mechanisms.

There will be a new forum to coordinate offshore renewable energy development in the North Sea. Its remit will include moves to develop an offshore grid, joint projects in the North Sea, maritime spatial planning and sharing best practice and information on new technologies.

## IRELAND

The Single Energy Market in Ireland will continue. This was provided for in the Withdrawal Agreement's Ireland/Northern Ireland Protocol. However, interconnectors between GB and Ireland (Moyle and East-West) are not covered specifically, so like the other GB-EU interconnectors they will be subject to interim trading arrangements until April 2022 when the new arrangements are due to be in place.

## CARBON PRICING: UK ETS

A UK Emissions Trading Scheme (UK ETS) replaced the UK's participation in the EU ETS as from 1 January 2021. The UK ETS was established through [The Greenhouse Gas Emissions Trading Scheme Order 2020](#) (note that this was amended in December 2020). There is [guidance](#) on how to participate in the UK ETS on the gov.uk website.

For background to the UK ETS and the government's consultation on the various options, see our article [The road to net zero: the UK Emissions Trading Scheme \(ETS\)](#).

The new UK ETS covers the same greenhouse gases and sectors as the EU ETS and it will hopefully be linked to the EU ETS soon: the TCA includes a provision requiring the UK and EU to cooperate on carbon pricing and "give serious consideration" to linking the two schemes.

## NUCLEAR

There is a separate [Nuclear Cooperation Agreement](#) between Euratom and the UK. This was negotiated separately to the TCA but came into force at the same time (31 December 2020, 11pm). It provides a framework for cooperation between Euratom and the UK in the peaceful uses of nuclear energy and covers matters such as safeguards, nuclear safety, nuclear transfers and trade facilitation, cooperation on nuclear R&D, exchange of information and technical expertise, and intellectual property.

# TRANSPORT ASPECTS

## WHAT THE TCA SAYS

The TCA has specific provisions on aviation and road transport.

### AVIATION

Title I, Heading Two on air transport sets out the arrangements for the operation of air transport services between the EU and the UK, including commitments to allow UK and EU air carriers to conduct passenger and cargo flights between the UK and EU, and ownership requirements for airlines to benefit from those commitments.

Title II, Heading Two on aviation safety includes commitments for mutual recognition of the parties' certificates and licences for air services. These provisions are supplemented by Annex AVSAF-1 on airworthiness and environment certification.

### ROAD TRANSPORT

Title I, Heading Three on transport of goods by road includes provision for operators to move goods to, from and through the parties' territories and sets out requirements that apply when undertaking journeys between the UK and the EU. These provisions are supplemented by Annex ROAD-1, and by a "Joint political declaration on road hauliers" in which the parties agree to facilitate the entry and temporary stay of road hauliers.

Title II, Heading Three on transport of passengers by road includes provision for operators to run occasional and regular services to, from and through the parties' territories. These provisions are supplemented by Annexes ROAD-2-4, which contain further detail on procedural documents.

### RAIL TRANSPORT

See this DfT Guidance – [Rail Transport: domestic and cross-border operations](#). In summary, most existing measures are in place until 31 January 2022, but after then EU-based train operators will need to have ORR documentation; and operators of cross-border services through the Channel Tunnel will need EU operator licences, safety certificates and authorisations as well as UK ones.

For more information see Guidance on [Railways interoperability: EU Exit regulations](#) and [Railway safety legislation: stakeholder guidance](#).

## SUBSIDY CONTROL

### STATE AID

On 4 December 2020 the UK passed the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, which disapplied the EU State Aid rules and meant that they wouldn't form part of retained EU law in the UK following the end of the transition period. This leaves the UK free to set up its own domestic subsidy control regime. For now it is following the WTO rules.

### TCA ARRANGEMENTS

Subsidy control is dealt with in Title XI, Chapter 3 of the TCA, plus Annex ENER-2 on energy and environmental subsidies (see the Energy section of this note for more detail on this). The TCA ensures that each party will have its own independent system of subsidy control in place, but includes some broad principles that shape the design of both sides' systems, aiming to ensure that the granting of subsidy does not have detrimental effects on trade between the parties. Both sides must be transparent about the subsidies they grant; and there is a reciprocal mechanism that allows either side to take rapid action where a subsidy granted by the other party is causing or at serious risk of causing significant harm to its industries.

### TECHNICAL GUIDANCE

On 31 December 2020, BEIS published [guidance for public authorities](#) on the subsidies chapter of the UK-EU Trade and Co-operation Agreement, WTO rules on subsidies, and subsidy control commitments in other international commitments, and on the application of Article 10 of the Northern Ireland Protocol.

The technical guidance sets out the key steps that public authorities should take when awarding subsidies after 1 January 2021.

As well, as the subsidy control commitments contained in the TCA, the UK is bound by commitments on subsidies arising from its continued membership of the WTO (as set out in the Agreement on Subsidies and Countervailing Measures (ASCM), the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture (AoA)) and by provisions on subsidies contained in Free Trade Agreements (FTAs) signed by the UK with other countries.

From 1 January 2021, UK public authorities who are considering giving subsidies must assess whether their measure meets the definition of a subsidy under all of these rules and, therefore, which international obligations apply, including whether the subsidy carries any appreciable risk of triggering a dispute with a trade partner under the terms of the WTO ASCM rules or the UK's FTAs.

## **FURTHER INFORMATION**

See the [AG Brexit Box](#) which brings together all our Brexit materials.



addleshawgoddard.com

Asia, Europe, the Middle East and the UK

© Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged. This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances. Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority and the Law Society of Scotland) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice), in Hamburg through Addleshaw Goddard (Germany) LLP (a limited liability partnership registered in England & Wales), in Paris through Addleshaw Goddard (Europe) LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority and the Paris Bar) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP, a Hong Kong limited liability partnership pursuant to the Legal Practitioners Ordinance and regulated by the Law Society of Hong Kong. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request. The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing based on their experience and/or qualifications. If you prefer not to receive promotional material from us, please email us at [unsubscribe@addleshawgoddard.com](mailto:unsubscribe@addleshawgoddard.com). For further information, including about how we process your personal data, please consult our website [www.addleshawgoddard.com](http://www.addleshawgoddard.com) or [www.aglaw.com](http://www.aglaw.com).