
STATES OF JERSEY



CONCLUSION REPORT ON UK-EU TRADE & COOPERATION AGREEMENT – INCLUSION OF THE BAILIWICK OF JERSEY

**Presented to the States on 24th February 2021
by the Council of Ministers**

STATES GREFFE

REPORT

Introduction

This report is presented as per the agreement of the States Assembly to P.170/2020. On the 27th December 2020, the States Assembly debated and unanimously agreed that proposition (as amended), endorsing the Council of Ministers' recommendation that Jersey consent to its inclusion in the UK-EU Trade and Cooperation Agreement (TCA) on the basis set out in the accompanying report to P.170. This recommendation was subject to further, detailed consideration of the legal text of the Agreement during the 90-day confirmatory period. Within part (d) of P.170 it was agreed that the Council of Ministers would present the conclusions of that review to the Assembly, and as such those conclusions are set out in this report.

It should be noted that the relevant Scrutiny Panels have undertaken their own reviews and analysis in accordance with part (c) of P.170. This report includes an initial response to the Brexit Review Panel's recommendations and Ministers will respond in more detail as necessary following the usual protocols.

The Issue

On the recommendation of the Council of Ministers, States Members unanimously agreed on the 27th December 2020 to participate in the TCA as far as it would be extended to Jersey. This decision means that the Trade and Cooperation Agreement (TCA) is now in operation and will continue to be so unless either State Party (UK/EU) decides to invoke the 90-day termination clause – also known as the 'sunset clause'.

The 90-day termination clause was primarily included to allow all the Crown Dependencies the necessary and appropriate time to review and analyse the detailed legal text to ensure it represented what they believed had been agreed. This was a critical element in ensuring that Ministers could recommend that the Assembly agree to proceed with Jersey's inclusion in the TCA on such a tight timeframe at the end of December.

This report summarises the results of that analysis, taking account of policy and legal reviews. It confirms that nothing fundamentally alters Jersey's position. Therefore, the Council of Ministers has agreed that they are content to continue to participate in the TCA as per the earlier unanimous vote, and do not ask the UK to invoke the 90-day termination clause. This position, that the original decision remains correct, is therefore recommended to all States Members and, accordingly, no further action as provided for in part (d) of P.170 is required on the part of the Council of Ministers.

Background

The UK left the EU on the 31st January 2020 and entered into a Transition Period that allowed for both sides to negotiate a new trading arrangement. This Transition Period came to an end on the 31st December 2020 at 11pm after negotiations reached agreement on the new trading arrangement - the TCA.

The TCA was agreed on the 24th of December 2020, at the very end of the Transition Period. This left insufficient time for full review and analysis to be undertaken by Jersey (and indeed other Crown Dependency) officials, given that they had not been in the room during the negotiations. It was therefore agreed that for all three Crown Dependencies, a 90-day termination clause would be inserted to allow time for a thorough review of the legal text that extended the Agreement to them.

The structure of the 90-day termination clause is such that that it allows for either the UK – on behalf of one or more of the Crown Dependencies – or the EU, to unilaterally instruct what is known as the Partnership Council (the central committee in charge of governing the TCA) to remove one or more of the Crown Dependencies from the agreement. Any decision made by either party is not subject to the Partnership Council

deliberation. This was sought principally in order to avoid the possibility of the democratic decision of the Assembly (or any CD legislature) being undone. It was expressly recognised by all parties that the 90-day termination clause was primarily in place to allow the correct analysis and review of the legal text to be undertaken where it extended to the Crown Dependencies.

Summary of Analysis

This analysis has subsequently been undertaken, considering all the parts of the agreement that extend to Jersey, specifically:

- A. Title I (Trade in Goods), including:
 - I. Chapter 1: National Treatment and Market Access, plus its associated annexes
 - II. Chapter 2: Rules of Origin, plus its associated annexes
 - III. Chapter 3: Sanitary and Phytosanitary Measures, plus its associated annexes
 - IV. Chapter 4: Technical Barriers to Trade, plus its associated annexes
 - V. Chapter 5: Customs and Trade Facilitation, plus its associated annexes
- B. Heading Five – Fisheries, plus its associated annexes.

The analysis and review of these headings have been undertaken on two fronts. Firstly, a review was undertaken by policy leads responsible for the technical and specialist information provided under each of the headings which Jersey participates in. The objective of this analysis was to identify if there was anything unexpected in terms of substance included within the text of the TCA. If yes, it would then be to ensure it was not of detriment to Jersey and that the obligations were acceptable, and in accordance with the position set out in the report to P.170.

Secondly, as instructed by Ministers on behalf of the Government of Jersey, a review by the Law Officers' Department was completed to ensure the legal accuracy of Jersey's representation is correctly reflected in the TCA. The Law Officers have developed a detailed document titled 'Legal Advice on Jersey's participation in the TCA'. This document has been provided to the Council of Ministers and to the Scrutiny panels who are also conducting their own review as per part (c) of P.170.

The analysis and review were concerned only with the ultimate decision regarding the 90-day termination clause. There are of course other impacting factors on Jersey as a result of the TCA, and as a consequence of the UK's decision to leave the EU, but these are outside the decision on participation.

Review Findings

The conclusions of the policy review found that what was included in the substance of the final legal text was as anticipated and presents no reason to change the original recommendation to participate under these policy headings.

It was noted in respect of Title 1, Chapter 3 – Sanitary and Phytosanitary Measures that specialist investigation into some aspects was still ongoing and full operational and resource impacts are still being determined. Similarly, in relation to Heading 5 – Fisheries, there are a number of domestic pieces of work currently being completed to ensure full operational effectiveness, including packages to provide the necessary ongoing support to the industry. It should be noted that these more immediate operational challenges do not impact fundamentally on the ultimate legal obligations which are being made on Jersey in terms of this aspect of the TCA.

Although policy findings have not identified anything unexpected or of further concern, this does not change the fact that with the new trading arrangement comes change.

Jersey must continue to ready itself to apply the obligations of the TCA and those additional requirements, both from a legislative perspective and in terms of operational capacity.

The detailed legal analysis was broken down across several areas, however this summary focuses on those aspects that could have material effect on our ability to participate and that ultimately would have an influential part to play in deciding whether to invoke the 90-day termination clause; specifically:

- Application of the TCA to Jersey and interpretation;
- Substance of the obligations in relation to trade in goods;
- Substance of the obligations in relation to fishing;
- The potential influence of the UK's transparency and level playing field commitments on Jersey's obligations; and
- Institutional provisions and dispute resolution.

Application of the TCA to Jersey and interpretation – The application of the TCA to Jersey could be considered as a “chapter by chapter approach”, especially in relation to goods, with some variance in obligations relating to fisheries compared with that of the UK's. No areas of the TCA were identified that were not expected to be applied to Jersey, but there are two points that will need future monitoring.

- I. The link between goods obligations and services, particularly in relation to high technology products. This may cause a level of ambiguity in interpretation and practice as was the case with Protocol 3.
- II. The potential influence of transparency and level playing field commitments the UK have agreed to, affecting our own goods participation.

Substance of the obligations in relation to trade in goods – There are a number of key factors that should be considered in relation to Jersey's TCA goods participation, but which do not ultimately have any material effect on Jersey's decision to participate.

- I. The TCA contains its own mechanisms for developing trade policy which Jersey will need to ensure the UK fully represents our interests on.
- II. The TCA does recognise the CDs have separate competent authorities that are responsible for implementing customs or regulatory controls. However, the UK will be ultimately answerable under the TCA in relation to Jersey's obligations which, in the absence of direct access, does entail a degree of risk to Jersey's autonomy and ability to develop its own international identity. These risks will need to be mitigated.
- III. Two important aspects of the goods headings that Jersey is not a part of are the Annex on Authorised Economic Operators (AEO), and the Protocol on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties ('the VAT Protocol'). In both cases this was the position sought by the Channel Islands but on VAT a commitment was made which states that both the Bailiwicks “shall endeavour to

establish arrangements to cooperate with the European Union on the recovery of claims related to VAT, customs duties and excise duties within a reasonable time frame". These discussions will need to be handled carefully to secure Jersey's interests.

Substance of the obligations in relation to fishing – It was noted that it is particularly difficult with fisheries to assess, at this stage, the full effect of the provisions. This is partly due to the practical detail of the criteria relating to access to Jersey's waters requiring new administrative solutions. However, the key points for consideration were identified as:

- I. The TCA supersedes the Granville Bay Agreement (GBA), and subject to Jersey's continued participation at the conclusion of 90-day confirmatory period, the GBA cannot be reinstated.
- II. Access arrangements under the TCA are to the "extent and nature" of fishing activity that can be demonstrated to take place under preceding treaty arrangements. However, evidencing, demonstrating and limitations are yet to be made clear and this is something that Jersey will need to consider carefully as talks between the UK and EU continue to establish the licencing process. This licenced pool under the required evidence will remain static once finalised.
- III. Jersey will be in control of managing its waters. We will therefore be entitled to enact non-discriminatory management restrictions, on a scientifically justified basis, within the jurisdiction.
- IV. Sanctions may still be applied to Jersey after the 90 days if the EU believes a breach of the fisheries obligations has occurred. However, a number of procedural safeguards are in place along with oversight of the relevant Committee which includes both Parties to the TCA. Ultimately, this provision allows Jersey to exit the TCA later.

The potential influence of the UK's level playing field commitments on Jersey's obligations - Two key sections of text within the agreement were considered in order to determine the risk of level playing field commitments affecting Jersey's participation based on goods and access to waters.

- I. The first highlights helpful language for the Crown Dependencies', because it suggests that the level playing field (LPF) provisions are "self-standing" and are not, by implication, to be read as an integral part to other sections of the TCA e.g. trade.
- II. The second, however, recalls text that recognises the TCA LPF provisions have the aim of preventing distortions of trade or investment rather than to ensure any harmonisation of standards. This distinction is key, and Jersey will need to monitor and be mindful of the potential for TCA provisions on LPF to influence the interpretation of its specific obligations under the text, particularly where the obligations on LPF refer to other international standards to which Jersey is subject. These provisions might also give rise to discussions in the Partnership Council that will influence policies and decision making that will affect Jersey.

The analysis of these commitments concludes that although the LPF obligations undertaken by both Parties to the TCA largely look to existing international standards, arguments can be made to disagree strongly with any specific TCA requirements being imposed directly or indirectly upon Jersey. However, Jersey remains mindful of the various multilateral arrangements referred to in the LPF Chapters, which might be considered as “benchmarks” in the relevant sectors.

Institutional provisions and dispute resolution – There are some important examples of where these provisions and measures will be of relevance to Jersey. It is worth highlighting the significance of the term ‘Party’ and its reference only to the UK.

Although in itself the analysis of the text as set out does not present any issues to our participation, it does highlight the importance of appropriate governance arrangements being put in place between the UK and Crown Dependencies. Jersey will need this to utilise properly relevant protective provisions and also to ensure the correct functioning for Jersey as regards its participation.

It is considered that, for the successful implementation and functioning of the relevant TCA requirements in the Crown Dependencies, their interests need to be properly and consistently considered, recognised and represented. With this in mind, there needs to be a structured and constitutionally appropriate level of engagement with the UK whereby the most appropriate ways of working and engagement are agreed.

Accordingly, the review analysis does not present anything unexpected in the legal text from that envisaged when P.170 was debated and voted upon by the States Assembly.

Legal Advice

Law Officers are considering whether and how to best publish the full details of their advice which is summarised here but which has been provided in full to COM and Scrutiny panels. Whilst it is highly unusual for Law Officers’ advice to be published at all, in recognition of the exceptional nature of Brexit and the TCA, Law Officers are prepared to consider this once the 90-day period has passed. Arrangements can also be made for any States Members who wish to review the legal advice prior to 1st April 2021.

Report of the Brexit Review Panel

The Brexit Review Panel published its report on the Inclusion of the Bailiwick of Jersey in the UK/EU Trade and Co-operation Agreement: Goods and Trade (as required by part (c) of P.170/2020) on the 19th February.

The Council of Ministers recognises the time pressure under which the Scrutiny Panel completed its work and Ministers are grateful to the Panel for completing its work in time for the review’s findings to be considered prior to Minister’s submitting this report under part (d). The Council is pleased to note that the findings of the scrutiny review accord with the conclusions of the Government’s internal analysis and found no reason that the decision for Jersey to participate in the TCA should change.

The Panel’s report included 5 recommendations, which shall be covered separately in the Government’s formal response to the review. It is encouraging to note that Ministers are in broad agreement with all the recommendations and action is already underway to that effect. It is also worth noting in respect of recommendation 3 – “Establishing a UK-Jersey agreement that governs requests made by Jersey on its customs operations”, that the Customs Union Arrangement that Jersey already agreed with the UK came into effect at the end of the Transition Period at 11pm on 31 December 2020. This arrangement provides for the establishment of a committee which can consider operational issues such as requests in respect of the TCA.

In relation to agreeing dispute resolution mechanisms under the TCA, a Memorandum of Understanding between Jersey and the UK on this is in the last stages of being agreed and the text will be shared with Scrutiny. The Government is also in discussion with the UK Government to ensure Jersey, and Jersey's interests, are adequately represented within the new committee structures established under the TCA. The Government is also acutely conscious of the blurring between certain goods and services in the context of trade, and will bear this in mind, and a further "Beyond Brexit" communications campaign will be launch in the coming weeks.

Conclusion

On reviewing the policy and legal analysis, the Council of Ministers has agreed that nothing has been identified to warrant seeking to activate the 90-day clause and withdraw Jersey's inclusion within the TCA. It is therefore concluded that the decision of the 27th December remains correct and should continue to stand. The outstanding points of interest and those for future monitoring will be taken up by the policy owning departments, particularly led by External Relations in respect of governance arrangements and engagement with the new structures formed under the TCA.