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SPECIAL ISSUE ARTICLE

Movement of Goods under the TCA

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Abstract

For many people, trade is about goods and so the most momentous aspect of the Trade and Cooperation Agreement (TCA) is the provisions on goods. This article looks at the provisions on the trade in goods under the TCA and compares them with those on the Customs Union and the Single Market for goods under EU law (which still apply to Northern Ireland under the Ireland/Northern Ireland Protocol). It argues that the approach to the movement of goods in the TCA has much more in common with the World Trade Organization's (WTO) provisions on goods, on which the TCA draws heavily, than EU law. This shift to a 'WTO plus' approach (as opposed to an 'EU law minus') is because the UK government considered that the Brexit vote gave a green light for a total break with the EU's rules. Using four examples (the principle of non-discrimination; the significance of a '0, 0' agreement; regulatory barriers to trade; and mutual recognition), this article shows just how close the TCA Title on Trade in Goods is to WTO law – and how far it is from EU law.

1 | INTRODUCTION

The most comprehensive part of the Trade and Cooperation Agreement (TCA) concluded between the EU and the UK in December 2020 concerned the movement of goods. The aim of this article is to examine the approach taken by the TCA to trade of goods when considered in the light of the EU internal market regime. We argue that it would be entirely wrong to consider the provisions in the TCA as free movement of goods 'minus'. Rather, with the exception of the Ireland/Northern Ireland Protocol (NIP), which is part of the Withdrawal Agreement (WA), not the TCA, the approach to the movement of goods has much more in common with the World Trade Organization's (WTO) provisions on goods, on which the TCA draws heavily, than EU law. From a *political* perspective, this shift to a 'WTO plus' approach is because the UK government considered that the Brexit vote gave a green light for a total break with the EU's rules. From a *legal* perspective, the movement of goods between the UK and the EU is covered by the TCA's heading on trade, which is part of a free trade agreement (FTA),[1] not part of the EU's single market, with all the consequences which flow from membership of an FTA only.

The article is structured as follows. Section 2 will consider the UK's approach to negotiating its new trading relationship. Sections 3–7 will examine the TCA's approach to trade in goods, focusing on four key elements of the goods regime under the TCA: (1) the principle of non-discrimination; (2) the significance of a '0, 0' agreement; (3) regulatory barriers to trade; and (4) (absence of) mutual recognition. Section 8 will address the unique case of Northern Ireland. Section 9 concludes.

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2 | THE TCA PROVISIONS ON TRADE IN GOODS

International economic cooperation may take various forms ranging from a free trade area, a customs union through to a single market. In essence, the closer the economic integration, the greater the economic benefits but the less regulatory autonomy trading partners preserve. For the EU's single market (characterised by free movement of goods, persons, services and capital) to function properly, member states consent to abide by common rules which require them to relinquish significant parts of their (sovereign) powers and be subject to the jurisdiction of the European Court of Justice and the European Commission. In exchange, members benefit from free movement of goods within the EU (i.e. movement without tariffs, and without significant paperwork and checks). This has allowed the development of just-in-time production and also the availability of a vast array of goods to consumers. At the other end of the spectrum, for those states which are members of the WTO only, they largely retain their regulatory powers, but trade between them is subject to tariffs and technical barriers to trade including significant paperwork. As we shall see, the TCA provisions are much closer to the WTO end of the spectrum.

3 | NEGOTIATING THE FUTURE TRADE RELATIONSHIP

So, what type of a new relationship did the UK and the EU wish to frame following the UK's withdrawal from the EU? The choice was limited because of the UK's red lines which the government drew at the very start of the Brexit negotiations. The government's pledge to end the jurisdiction of the Court of Justice and to stop free movement of persons meant that the UK would no longer be part of the EU's single market.[2] Being part of the internal market for goods only was not an option either (except, as it turned out, for Northern Ireland), as the EU's 'no cherry picking' policy meant that, according to the EU, the four freedoms were indivisible. The UK's deire to do independent trade deals also ruled out staying in the Customs Union.

With the Single Market and Customs Union off the table, what was left? In May, 2019 Theresa May (then prime minister) outlined the key features of the UK's preferred trade relationship with the EU (May, 2019). The gist of it was that the UK would seek *as close* to frictionless trade in goods with the EU *as possible* while remaining outside the Single Market and ending free movement of persons. It was suggested that the UK would keep up to date with EU rules for goods and agricultural products (dynamic alignment) in order to reduce checks at the border. The UK's position was later modified to call for a looser trading relationship: an 'ambitious' relationship (as opposed to a relationship which was 'as close as possible'), 'on the basis of a free trade agreement' (Owen, 2019). When Boris Johnson replaced Theresa May as prime minister before the start of EU-UK trade negotiations, the position changed again. Johnson confirmed that the UK would not be aligning with the EU rules on competition policy, subsidies, social protection, the environment or 'anything similar any more than the EU should be obliged to accept UK rules' (Johnson, 2020a).

His Brexit negotiations focused on a free trade area, with some commentators referring to it as 'Canada plus plus' in reference to the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The latter is part of the EU's growing web of FTAs, including those with Japan, Singapore, Vietnam and other trading partners. These so-called 'new generation' FTAs not only remove or reduce tariffs in bilateral trade in a number of sectors but also cover other matters, such as investment protection, sustainable development and intellectual property. This is better than the position under the WTO, where tariffs can be levied by states provided the tariffs are non-discriminatory (i.e. the same tariffs apply to like goods imported from different countries). Tariffs on some products, like dairy products, can be very high (40 per cent plus) and so make imported products very expensive. Trade within a free trade area, however, is dependent on proving the goods' origin (i.e. place of manufacture). This requires the application of complex 'rules of origin'.

The revised political declaration setting out a framework for the future relationship between the UK and the EU established 'the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core' (European Commission, 2019). The political declaration further specified the expected arrangement of trade in goods:

> … With a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition.

With the goalposts set, the negotiations of the future relationship agreement commenced in March 2020, following the UK's official withdrawal of its membership of the EU, the terms of which had been agreed in the Withdrawal Agreement and the start of an 11-month transition period. Both sides produced their proposed drafts for the future FTA. In case of a failure to agree on a free trade agreement, the EU and the UK would have 'fallen back' on WTO rules, an outcome which many viewed as harmful to both sides. A no deal situation was avoided

at the 11th hour, as the EU–UK Trade and Cooperation Agreement was signed on 24 December 2020. The European Parliament approved the TCA on 28 April 2021 following four months of provisional application of the TCA.

So, what trade in goods arrangements were agreed under the TCA and where precisely did the TCA fall on the spectrum of different levels of economic integration? We will first consider the structure of the title on trade in goods under the TCA. It provides a first indication, albeit formalistic, that the TCA is modelled on the WTO framework. The essential differences between the EU rules on free movement of goods and the TCA trade in goods regime will then be highlighted (Sections 5–8).

4 | THE STRUCTURE OF THE TCA IN RESPECT OF GOODS

Trade in goods is governed by Title I (under Heading One, 'Trade', in Part Two of the TCA). The Title is divided into thematic chapters:

1. National treatment and market access for goods (including trade remedies).
2. Rules of origin (RoO).
3. Sanitary and phytosanitary (SPS) measures.
4. Technical barriers to trade (TBT).
5. Customs and trade facilitation.

The titles of the chapters closely resemble the different agreements of the WTO: the WTO Agreement on Rules of Origin, the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS agreement), the Agreement on Technical Barriers to Trade (the TBT agreement) and the Trade Facilitation Agreement (TFA). A similar structure for the trade in goods title was provided in both the UK's and the EU's draft proposals for a free trade agreement.

These chapter headings already indicate that the trade in goods chapter under the TCA is essentially different from the free movement of goods regime under EU law. While, as with EU law, tariffs and quotas on EU–UK trade are prohibited (the so-called '0, 0' deal), unlike EU law regulatory restrictions (i.e. the 'measures having equivalent effect' or 'MEEs' category) are not. As a result, there is no free movement of goods between the UK and the EU – imported goods must undergo regulatory checks at the border. In addition, goods originating in third countries which are imported to the EU through the UK must comply with the appropriate (and highly complex) rules of origin. This means that *all* goods – including those originating in the UK – must undergo a complex examination in order to verify their origin and to apply the right tariff – a zero tariff for UK goods and a particular Common Customs Tariff (CCT) for foreign goods.

Given that trade in goods under the TCA shows little, if any, resemblance to the free movement regime under EU law, the question then is how liberal is the EU–UK arrangement? In the following sections 5–8 we explore some of the features of the trade in goods Title under the TCA and compare them to the closest analogue in the EU's Treaty on the Functioning of the European Union (TFEU). This comparison will show that the TCA is very much modelled on the WTO framework, not a stripped-down version of the EU's rules on free movement of goods.

5 | THE PRINCIPLE OF NON-DISCRIMINATION

5.1 | The EU approach

The role of the principle of non-discrimination in international economic law varies under different frameworks for economic cooperation. Its significance within the free movement of goods regime under EU law is not straightforward (Diebold, 2011). The EU treaties, as interpreted by the Court of Justice in the *Dassonville* case,[3] and *Cassis de Dijon* on mutual recognition (Rewe Zentral, 1979) (Barnard, 2021; Schütze, 2021) prohibit *any* restrictions to free movement of goods (unless one of the derogations applies), the so-called market access approach (*Dassonville*, 1974). The *Dassonville* formula was criticized for being so broad that it meant Article 34 TFEU could be used to challenge national rules which circumscribe general commercial freedoms in various ways that are non-discriminatory, thus limiting member states' ability to pursue a variety of social purposes which do not restrict interstate trade (Barnard, 2019). As a response to this criticism, the Court of Justice eventually, in *Keck*, carved out a category of non-discriminatory national measures restricting certain selling arrangements (CSAs) from the scope of Article 34 TFEU (*Keck & Mithouard*, 1993).

The Court, however, returned to a market access approach in *Commission* v. *Italy (trailers)* (*Commission of the European Communities v Italian Republic (trailers)*, 2009), ruling that 'any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered' by the concept of MEEs and is thus unlawful under Article 34 TFEU unless one of the exceptions applies. The Court in *Trailers* thus reduced the role of the principle of non-discrimination in the context of free movement of goods under EU law because even those measures which are non-discriminatory but nevertheless hinder intra-Union trade may be found in breach of Article 34 TFEU.

The principle of non-discrimination within the free movement of goods may thus be considered as one of the conditions for free trade. However, the Court's

interpretation of the conditions for the creation and functioning of the Single Market requires more than elimination of discriminatory treatment – it is based on the prohibition of obstacles to trade, whether discriminatory or not. This approach, combined with high levels of EU harmonisation legislation, significantly limits the regulatory powers of the member states. For this reason the UK opted to be out of the EU Single Market and chose a more distant trade relationship with the EU. Trade in goods under the TCA is instead based on – and limited to – the principle of *national treatment*. The TCA does not eliminate non-discriminatory measures, nor does it establish the principle of mutual recognition, nor does it apply the market access principle as understood in *Trailers*.

5.2 | The national treatment approach

The principle of national treatment has deep roots in international economic law and is at the core of the multilateral trading system conceived after the Second World War. Together with the most favoured nation (MFN) principle (see below), it is the key principle of WTO law and has been the traditional approach since the 1947 General Agreement on Tariffs and Trade (GATT). National treatment prohibits discrimination between like imported and domestically produced goods. The principle, which is enshrined in Article III GATT, covers internal taxation and other governmental regulation. The first paragraph of Article III says:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Article 19 TCA incorporates Article III of GATT. It says:

> Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994 including its Notes and Supplementary Provisions. To this end, Article III of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, *mutatis mutandis*.

The incorporation of GATT Article III into free trade agreements is not unique to the TCA. It can also be seen in, for example, Article 2.3 CETA, Article 2.3 of the EU-Singapore FTA and Article 2.1 of the EU-Vietnam FTA. Given the direct incorporation of GATT Article III in the TCA it is likely that in case of dispute under the TCA, the principle of national treatment would be interpreted in line with the WTO jurisprudence. The same will apply to the exceptions in Article XX GATT, such as the protection of human, animal, or plant life or health (which themselves are broadly repeated in Article 36 TFEU). Article 412 TCA says:

> Nothing in Chapter 1 and Chapter 5 of Title I, Chapter 2 of Title II, Title III, Title VIII and Chapter 4 of Title XI shall be construed as preventing a Party from adopting or maintaining measures compatible with Article XX of GATT 1994. To that end, Article XX of GATT 1994, including its Notes and Supplementary Provisions, is incorporated into and made part of this Agreement, mutatis mutandis.

5.3 | MFN

The WTO agreements are also underpinned by the MFN (most favoured nation) principle. This means that countries cannot normally discriminate between their trading partners. So under WTO law states are entitled to levy tariffs on imported goods, provided those tariffs are the same, irrespective of whether the goods come from State A (a country with which the importing state has good relations) or State B (a country with which the importing state has less good relations).

The EU's new generation FTAs, including the TCA, do not include an MFN obligation. This means that the EU is not obliged to extend the 'zero tariff' treatment afforded under the TCA to its other trading partners. The absence of an MFN obligation under FTAs is logical – the very idea of negotiating preferential trade arrangements between two or more trading partners would lose its rationale if that same treatment would then have to be afforded to all other trading nations. The WTO does allow for a departure from the MFN principle in the case of preferential treatment under a regional trade agreement which satisfies Article XXIV GATT (this explains why negotiation of the new generation FTAs, including the TCA, is allowed under the WTO law).

6 | '0, 0' AGREEMENT

6.1 | Zero tariffs

National treatment applies only once a product has entered the market – it does not prohibit customs duties on imports. The TCA does, however, prohibit

customs duties both on imports (Article 21 TCA) and exports (Article 22 TCA) for goods originating in (and proved/able to be proved to be originating in (Art 52 TCA)) the UK and EU (Arts 37–53 and Annex 3). The zero tariff treatment on all products under the TCA distinguishes the TCA from other trade agreements – tariffs apply to trade between WTO members (but they cannot exceed the 'bound' rates, i.e. rates included in members' schedules)[4], while CETA eliminates tariffs on most but not all products (tariffs remain on poultry, meat and eggs).

However, all is not quite as it seems. If a French good comes into the UK from France it is not subject to tariffs (but still has to pay import VAT). If a French good comes into the UK from France and then is exported to Ireland, it will be subject to a tariff unless it has undergone processing. This has made 'groupage' (the consolidation of various consignments, often from multiple companies, on a single lorry) – difficult. The UK used to be a hub for groupage of products (using large distribution centres serving the rest of the UK and Ireland and from Ireland into the EU). But groupage does not count as processing and so does not confer UK/EU origin. Therefore, the goods then face tariffs on reexport to the EU (European Commission, 2021a).[5]

Even though the TCA is premised on zero tariffs, for some traders, proving origin to get the preferential (zero) tariff may be so burdensome or difficult that they opt instead to pay the UK/EU's MFN tariff (HM Revenue & Customs, 2020). The TCA requires the collection of data on so-called preference utilisation (i.e. how many traders use the preferential tariff in the TCA) (Art 31 TCA).

So far, we have been looking at the TCA; what about EU law? EU law also prohibits customs duties on goods moving between the member states, but the reach of Article 30 TFEU is greater and includes a prohibition not just on customs duties but also on charges having equivalent effect to customs duties.

6.2 | Zero quotas

One limb of the UK/EU 0,0 deal is zero tariffs, the other is zero quotas. This is found in Article 26 TCA which provides:

> A Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its Notes and Supplementary Provisions. To that end, Article XI of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, mutatis mutandis.

Again, the TCA relies on, and incorporates by reference, the relevant provision in GATT 1994, Article XI.

Under EU law, Article 34 TFEU also prohibits quantitative restrictions but goes further in its prohibition on measures having equivalent effect (MEEs) (i.e. non-tariff barriers). As the next section will show, in this respect there is a stark divergence between the TCA and EU law.

7 | TECHNICAL BARRIERS TO TRADE

While the TCA provides for 'zero tariff, zero quota' trade in goods, it does not eliminate another highly significant obstacle to interstate trade – regulations. Technical barriers to trade (TBT) and sanitary and phytosanitary standards (SPS)[6] are regulations and standards which producers must meet in order to be able to place their product in the importing state's market. These are non-tariff barriers to trade. TBT and SPS requirements pose a particular problem to trade liberalisation as domestic safety standards can be justified on the grounds of protecting public, animal and plant health but can also be misused as disguised protectionism. Prior to the UK's withdrawal from the EU, the double burden of complying with diverging technical regulations was avoided either through EU harmonisation or through the principle of mutual recognition, which ensured that normally producers would need to meet only one set of regulations, that of the home state. The combination of harmonisation and mutual recogntion means that in most cases manufacturers are obliged to meet only one set of technical requirements – EU-wide rules or, if rules are not harmonised, domestic regulations of the exporting member state. As will be explained below, the TCA does not provide for mutual recognition which means that UK producers will have to meet the TBT and SPS of each EU member state (and vice versa).

7.1 | The TCA: TBT

While, as we have seen, the EU largely eliminates TBT and SPS barriers to trade enacted by 27 member states through EU level regulatory harmonisation (or mutual recognition), new generation FTAs generally follow the WTO approach which allows states to regulate (almost) freely. Article 90 TCA incorporates Articles 2 to 9 of the WTO TBT Agreement. These TBT provisions allow states to introduce technical

regulations and standards, as well as conformity assessment procedures, including packaging, marking and labelling requirements. In other words, the WTO framework – and the TCA which is modelled on it – follows the principle that national regulation is 'allowed unless prohibited'. This is the direct opposite to the 'prohibited unless allowed' approach under EU law.

While the right to regulate is not absolute and must be, inter alia, non-discriminatory as between two like products, members may regulate as long as they do not impose 'unnecessary obstacles to international trade' (Article 2.2 TBT). Direct incorporation of the core provisions of the TBT Agreement into the TCA means that EU-UK trade will be subject to domestic product requirements. Accordingly, the principle of non-discrimination will be the main tool to limit the negative effects of technical barriers in EU-UK trade. This means that domestic product requirements are, though conditional on equal treatment and necessity, allowed, with the result that exported products will need to meet technical requirements of each host state market, resulting in a heavy burden on producers.

The TBT provisions cover a wide range of national rules. Annex 1 of the TBT Agreement – and the TCA through the incorporation of Annexes 1 to 3 of the TBT Agreement (Article 90 TCA) – defines technical regulations in broad terms as mandatory documents which lay down product characteristic or their related processes and production methods (PPMs). Defining the limits of the latter category has caused a debate among the WTO members, in particular in relation to non-product-related PPMs which do not affect the product's physical characteristics, but which distinguish ways in which they have been produced (e.g. whether members can discriminate between wood products derived from sustainably grown forest and wood where the production method is unknown, or goods produced using child labour).

In order to further eliminate regulatory obstacles to trade the EU has introduced a 'CE' marking which is required for many products (e.g. medical devices, machinery, radio equipment)[7] and shows that the product has been assessed to meet EU safety, health and environmental requirements. By placing the CE mark, the producer confirms that the product conforms with all the EU requirements and has undergone conformity assessment. The marking allows the manufacturer to sell products throughout the EEA, whether produced in the EU or abroad, without having to verify conformity separately in each importing market.

While the UK is keen to introduce its own UKCA mark (Hart, 2021), manufacturers want to continue using the CE marking (which they can do so long as the UK's rules do not diverge from EU rules); they were due to use the UKCA mark from 1 January 2021. However, the government has granted 'a major concession to British business by prolonging the deadline for companies to adopt a new 'UKCA' safety and quality mark for their goods after Brexit' (Foster & Thomas, 2021). Business had told the government that the UK lacked the testing capacity necessary for the introduction of the UKCA mark. They also feared that EU-based suppliers were in many cases not ready to obtain a UKCA mark in order to supply goods to the UK market and that 'where EU companies supplied only a small number of goods or components, they were not willing to bear the costs of certifying those products for a handful of UK businesses' (Foster & Thomas, 2021). The case of the CE marking is just one example of how the UK's rhetoric of regulatory autonomy collides with the reality of market size and geography.

7.2 | The TCA: SPS

As we have seen, the TBT agreement (and the TCA Chapter 4 which incorporates it) covers technical regulations and standards which are defined broadly and are not subject to purpose or sectoral limitations. The TBT agreement, however, does not apply to sanitary and phytosanitary measures which are governed by a separate SPS agreement. The SPS agreement covers requirements which aim to protect human or animal health from foodborne risks or animal or plant carried diseases, as well as animals and plants from pests or diseases.

As with the TBT regime, the TCA's SPS rules are modelled on the WTO framework: Article 72 of the TCA reaffirms the rights and obligations under the WTO's SPS agreement.[8] Under the WTO regime, members are free to choose the level of protection they deem necessary and to establish measures to implement the targeted protection level (Art 2(1) SPS). However, national standards must be based on standards developed by accepted and recommended international organisations (Art 3(1) SPS). While any stricter protection must be justified by a scientific risk assessment, Article 5(7) SPS allows countries to adopt SPS measures on the basis of 'available pertinent information' in cases where relevant scientific evidence is insufficient. Article 74 of the TCA says that the UK and the EU affirm their commitment under Article 5(2) of the SPS agreement to the need for scientific evidence in the assessment of risks.

So as with TBT, the starting point is members' right to regulate (and thus impose additional barriers to international trade). In order to reduce the negative effects of domestic regulation to interstate trade, the WTO framework recommends that members accept measures of other members as equivalent (Art 2.7 of the TBT agreement and Art 4 of the SPS agreement), even if these measures differ from their own, if the exporting member 'objectively demonstrates' to the importing

state that its measures achieve an 'appropriate level of sanitary and phytosanitary protection'.

While the SPS agreement further encourages states to enter into bilateral agreements on recognition of the equivalence of specified SPS measures (Art 4 SPS), the UK's call to include an equivalence regime under the TCA was rejected by the EU. The EU's rejection of equivalence under the TCA is a policy choice. The absence of equivalence under the TCA means that the UK agricultural exporters are obliged to meet all EU SPS import requirements (and vice versa), significantly restricting trade, especially in agricultural products.[9] Further, as the House of Lords noted, the UK negotiators failed to secure an agreement to reduce physical checks to a predetermined low level, of the kind found in the EU–New Zealand veterinary agreement. The level of random physical checks for SPS products imported to the EU is set between 30 per cent (for most meat, fish and dairy products) and 1 per cent for a small number of products including hay and straw (House of Lords, 2021).[10]

The result is that the TCA offers little more in terms of eliminating technical barriers to trade than the parties would have been subject to under the WTO rules in case of a no deal situation. This means significant paperwork to show that all of the EU's SPS regulations have been met. The House of Lords select committee report, *Beyond Brexit: trade in goods*, reproduces a diagram showing the level of paperwork now required post Brexit for the export to the EU of organic products of animal origin to the EU (Figure 1).

8 | MUTUAL RECOGNITION

8.1 | EU law

While equivalence is a tool developed under the WTO framework to reduce the negative effects of domestic regulation, free movement of goods under EU law is based on another highly significant trade liberalisation principle – that of mutual recognition. We explained above that under EU law free movement of goods is based on market access – national measures which hinder intra-Union trade are prohibited unless one of the derogations applies. In the landmark *Cassis de Dijon* (*Rewe Zentral*, 1979) case the Court of Justice established the principle of mutual recognition which replaced dual regulation of a product (by both the home and host state) with single regulation (home state) (Schütze, 2021). In this case the Court famously ruled that a product imported from another member state must in principle be admitted to the territory of the host member state if it has been lawfully produced. This means that it conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the exporting country.

8.2 | Mutual recognition agreements (MRAs)

Mutual recognition is immensely helpful to exporting producers because it reduces the burden of complying with different regulatory requirements of importing states. Given its significance to trade liberalisation, mutual recognition has become an instrument of economic cooperation in the EU in respect of, inter alia, professional qualifications and also passporting of financial services.

Its use has extended beyond the EU, particularly in respect of mutual recognition agreements (MRAs) (Leinarte & Barnard, 2021). MRAs between trading partners facilitate market access by allowing a product produced and certified in state A to be exported to state B without undergoing additional testing in state B. States parties to an MRA recognise the competence of a designated testing body in the exporting country to perform the assessment on the basis of technical requirements of the importing country, and vice versa. Thus MRAs avoid duplicate testing in global trade without the need for the states to harmonise their technical requirements. Mutual recognition may be part of a trade agreement (integrated in the text of a (regional) FTA or as a separate agreement),[12] or may constitute a standalone MRA (the preferred option in the majority of cases). According to 2016 OECD data, more than 130 MRAs have been concluded globally, most during the past several decades (Correia de Brito et al. 2016).

There are several types of MRAs. Most cover only conformity assessment, that is, as we saw above, they provide for the recognition of the competence of testing laboratories of state A (the exporting state) to issue certificates of compliance with state B's (the importing state) technical regulations and standards. This type of MRA, often referred to as 'traditional' MRAs of conformity assessment, does not provide for harmonisation of technical rules or recognition of each other's rules as equivalent.

In some limited cases, however, states negotiate 'enhanced' MRAs, which are based on equivalence or alignment of technical requirements. In this case, testing laboratories in state A approve products that meet state A's requirements, and State B recognises state A's requirements as equivalent (or, in case of regulatory alignment, state A and state B follow one same set of rules).

Mutual recognition of conformity assessment is in some cases included in the new generation EU FTAs. For example, CETA includes a protocol on the mutual acceptance of the results of conformity assessment which constitutes an MRA with the broadest sectoral coverage to date. Outside trade in goods, the EU's FTAs also include an arrangement for the future negotiation of an MRA of professional qualifications. For example, Article 11.3 of CETA provides that CETA's Joint Committee on Mutual Recognition of Professional Qualifications may

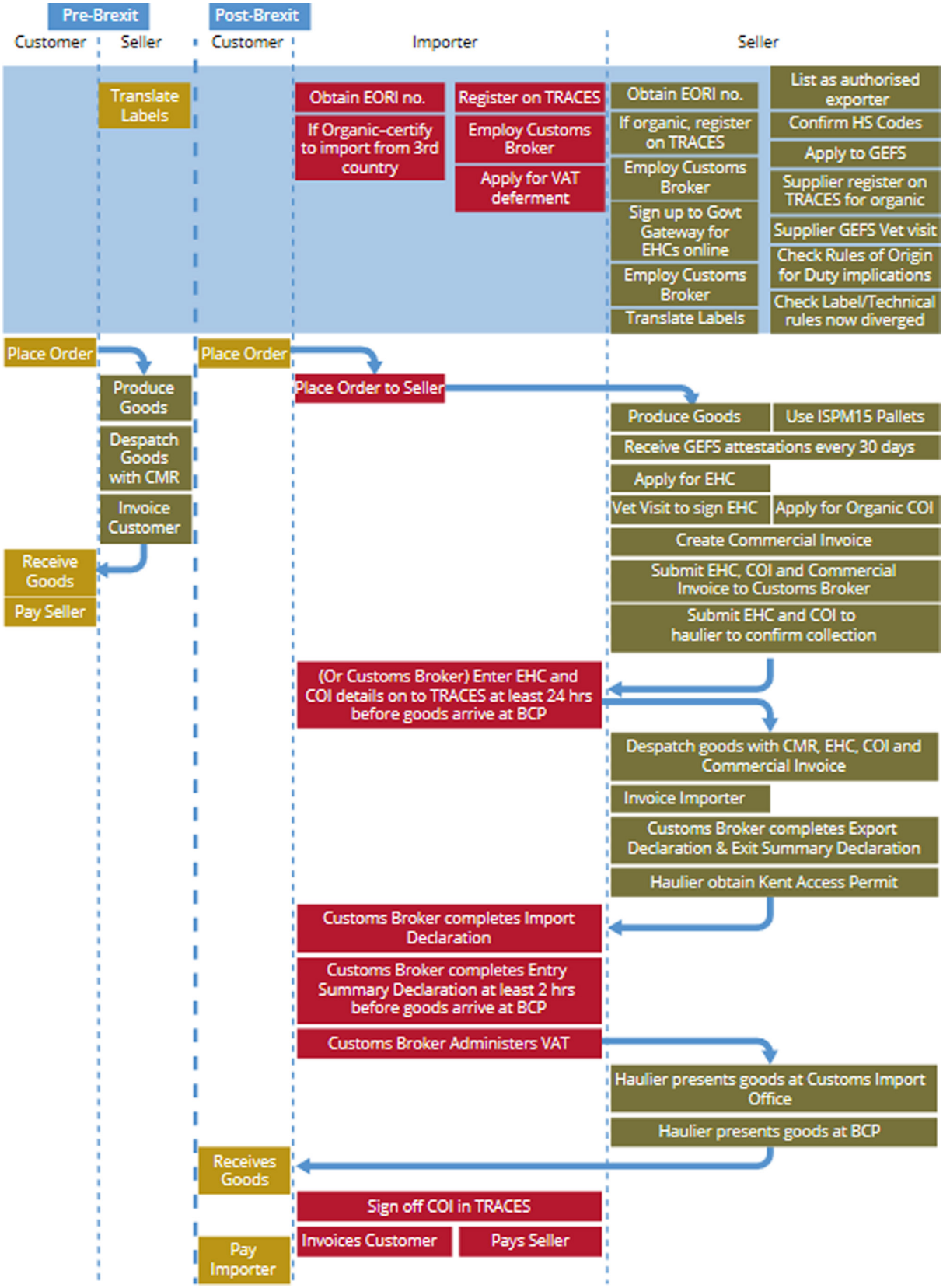

FIGURE 1 Pre- and post-Brexit order process for organic products of animal origin with some products from a third party.
Source: https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/249/249.pdf[11]

conclude an MRA of professional qualifications following a recommendation of sectoral professional bodies.

8.3 | The position under the TCA

Given the substantive benefits of mutual recognition to trade liberalisation it is of no surprise that the UK government wished to include an agreement on mutual recognition in the post-Brexit UK-EU trade relationship. An 'enhanced' MRA based on equivalence or alignment of technical requirements was not an option due to the UK's rejection of regulatory harmonisation (discussed above) and any role for the Court of Justice or the Commission. Prime Minister Boris Johnson did, however, call for the inclusion of a 'mutual recognition agreement focusing on conformity assessment, with full coverage of the relevant sectors' (Johnson, 2020b), that is, a standard MRA. In its draft FTA, the UK proposed to the EU that full mutual recognition of certification should apply to industrial goods (Annex 5-A).

However, as with its decision to refuse an equivalence regime for the elimination of technical barriers, the EU ruled out the possibility of offering the UK an MRA of conformity assessment (Crisp, 2020). As a result, the TCA does not include mutual recognition, placing a heavy burden on UK producers which will have to meet the regulatory requirements of each importing member state, as well as undergo testing of conformity in the EU by an EU accredited body, and vice versa (Ayele, 2021).

The TCA does, however, provide for a limited Supplier Declaration of Conformity (SDoC) regime. An SDoC is a written assurance by the supplier of a product of conformity with the applicable technical regulations of the import country (Fliess et al. 2008). The SDoC regime, however, is available only for low and medium risk products and only where this arrangement had existed prior to the TCA (Parliament, 2018). In addition, sectoral annexes provide specific measures 'designed to ease trade in the automotive, chemical, pharmaceutical, organic products and wine sectors' (Annexes 13–17). These provide 'mutual recognition of some practices or international regulations which in some cases remove the need for separate inspections, and in others simplify the required paperwork' (House of Lords, 2021, para 89). Further, in the chapter on customs and trade facilitation, Article 103(2)(g) TCA encourages the parties to develop cooperation in 'establishing mutual recognition of Authorised Economic Operator programmes to secure and facilitate trade'. AEO status is difficult to obtain and is a far cry from enhanced mutual recognition.

9 | PRELIMINARY CONCLUSIONS

The discussion above on some of the key features of the trade in goods regime under the TCA reveals just how far the TCA has moved from the EU notion of free movement of goods, with: (1) the focus on non-discrimination rather than market access; and (2) freedom to impose technical barriers to trade unlimited by equivalence and mutual recognition. These characteristics place the TCA closer to the WTO model than a single market model. The result of the Brexit negotiation should not, however, come as a surprise. Free movement of goods under EU law is based on the elimination of regulatory barriers, which requires states to give up significant regulatory powers. Given that regaining regulatory autonomy was a key promise of Brexit, no form of free movement of goods was ever going to be on the menu. But the price is considerable bureaucracy. Staying in the EU's Single Market would have been the only way to avoid this. However, the position in respect of Northern Ireland is different.

10 | THE NORTHERN IRELAND PROTOCOL

10.1 | The Brexit trilemma

The parties were all committed to support peace in Northern Ireland and, specifically, to support the Good Friday Agreement which meant, in particular, that there should be no hard border between the north and south of Ireland. While the UK and Ireland were both members of the Single Market this was relatively easy to do; following Brexit this became significantly more challenging. In essence, the parties wanted to achieve three conflicting objectives:

1. no hard border between the north and south of Ireland;
2. no checks at the border between Great Britain and Northern Ireland; and
3. the UK to leave the EU's Customs Union and the Single Market.

This so-called Brexit trilemma (Kelemen, 2019) was in fact irresolvable. Theresa May's solution, when she was prime minister, was to keep the UK as a whole in the EU's Customs Union (thus avoiding most of the border checks) and Northern Ireland in the Single Market for goods. This solution meant that the third aspect of the trilemma was not satisfied and was rejected by the cabinet.

When Boris Johnson became prime minister in 2019, he opted for a different approach. He agreed to Northern Ireland staying in both the EU and the UK Customs Unions but that Great Britain would leave the EU's Customs Union and the Single Market. This was put into law by the Ireland/Northern Ireland Protocol, part of the Withdrawal Agreement. However, this decision inevitably meant there would be checks at the GB/NI border, since

goods produced in Great Britain going into Northern Ireland would potentially end up in the south (and thus in the EU). These goods would need to be checked to ensure they complied with all of the EU's TBT and SPS rules. Johnson famously denied this would be the case (Daly & Baynes, 2019) (and thus, in his mind, resolved the trilemma). The reality has been checks on the border (HM Government, 2021) which have proved deeply unpopular with the unionist community who object to a 'border down the Irish sea' (BBC, 2021).

10.2 | Content of the Protocol

Article 4 of the Northern Ireland Protocol (NIP) makes clear that 'Northern Ireland is part of the customs territory of the United Kingdom' – part of the UK Customs Union. This means that 'nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol'. Being in the UK Customs Union also means that 'No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom' (Article 5(1) NIP) and that 'Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market'.

Less clear presentationally, but legally very clear, is the extent to which Northern Ireland is embedded not just in the EU Customs Union but also, in reality, in parts of the EU's Single Market for goods. In respect of Northern Ireland's membership of the EU's Customs Union:

- Article 5(3) provides that 'Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland'. This legal language disguises the (unpopular) reality (for some) that Northern Ireland remains in the EU Customs Union (because it is bound by Regulation 952/13, the Union Customs Code).
- Article 5(5) of the Protocol says that 'Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland'. This means that there will be no customs duties and no discriminatory or protective taxation on Northern Irish goods going into the EU and vice versa.

In respect of Northern Ireland's membership of the EU's Single Market for goods:

- Article 5(5) provides that 'Quantitative restrictions on exports and imports shall be prohibited between the Union and Northern Ireland' (albeit there is no reference to measures having equivalent effect)
- Article 5(4) says that 'The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.' Annex 2 lists over 300 measures – most of the goods Single Market legislation, including on CE marking (see above). And the list is dynamic. So Northern Ireland is bound by any new legislation too.[13] Article 7(1) adds 'Without prejudice to the provisions of Union law referred to in Annex 2 to this Protocol, the lawfulness of placing goods on the market in Northern Ireland shall be governed by the law of the United Kingdom as well as, as regards goods imported from the Union, by Articles 34 and 36 TFEU'.
- In respect of areas covered by the Protocol, Article 12(4) allows the commission to bring enforcement proceedings against the UK if there are breaches of EU law in Northern Ireland. Cases can also be brought in Northern Irish courts, as a result of the principle of direct effect (Article 4 WA); those courts can continue to make Article 267 TFEU references to the Court of Justice (Article 12(4) NIP). Northern Ireland courts are also bound to continue applying the case law of the Court of Justice in the areas covered by the Protocol, as they did before Brexit.

In addition, EU law applies in respect of electricity, VAT and excise (Article 8 NIP and Annex 3), and EU equality law (and perhaps some social law) will continue to operate directly (Article 2 NIP). The breadth of the rules on goods which apply to Northern Ireland and the fact that Northern Ireland is subject to the full range of EU enforcement, including direct effect, shows the level of integration of Northern Ireland into the EU Single Market.

10.3 | The operational problems with the Protocol

Inevitably, there have been problems with the operation of the Protocol since the beginning. Particular problems have arisen in respect of those goods imported from Great Britain to Northern Ireland which are 'at risk of subsequently being moved into the Union' (Article 5(1) NIP). The presumption in Article 5(2) NIP is that all goods are 'considered to be at risk of subsequently being moved into the Union' unless certain criteria are satisfied, including that the good will not be subject to commercial processing in Northern Ireland. Goods at risk may be subject to tariffs. The joint committee was given the power to take two decisions on application of customs duties under Article 5(2):

1. the conditions under which a good brought into Northern Ireland from outside the EU is considered not to be subject to commercial processing (taking

into account e.g. the nature, scale and result of the processing); and
2. the criteria for determining whether a good brought into Northern Ireland from outside the EU is not 'at risk' of being subsequently moved into the EU.

These issues were resolved by joint committee decision 4/2020 (HM Government, 2020) in December 2020, just before the Trade and Cooperation Agreement was concluded.

The joint committee also issued a number of non-legally binding declarations in areas outside those covered by the powers in Article 5(2) NIP, including a declaration on chilled meats which allows supermarkets to benefit from a six month grace period before having to comply with EU SPS rules for bringing in certain types of chilled meats, such as sausages, from Great Britain to Northern Ireland. At the time of writing, supermarkets have to bring these products through Border Control Posts (BCPs), have official certificates from UK authorities and carry a label saying 'these products from the United Kingdom may not be sold outside Northern Ireland' (Joint committee, 2021).[14] This grace period was extended by a further three months in June 2021 (European Commission, 2021b) and has now been extended indefinitely. The UK and the EU also agreed to a three month exemption for SPS paperwork (and checks) for supermarkets and their suppliers which the UK unilaterally extended until October 2021; they now have been suspended indefinitely.

The EU launched legal action against the UK government under Article 258 TFEU, as permitted by Article 12(4) NIP, and under the dispute resolution mechanism under the Withdrawal Agreement for breach of the duty of good faith because of the UK's decision to extend the grace periods unilaterally (European Commission, 2021c). It suspended those proceedings in July 2021.

The UK does not think the Northern Ireland Protocol is working well (HM Government, 2021). In essence, it thinks that NI is too much part of the EU's Single Market and not sufficiently part of the UK's internal market. It has made a number of proposals, including imposing the burden on traders to declare the destination of the goods for customs purposes, and, for SPS goods going to Ireland, it has proposed that the UK would undertake to enforce EU rules. It has also suggested a full dual regulatory regime: goods, whether manufactured or SPS, would be able to circulate in Northern Ireland if they met either UK or EU rules and were labelled accordingly. These proposals are being considered by the commission.

More radical suggestions have also been made. For example (Sargeant & Marshall, 2021):

- Some Northern Ireland political parties and the European Commission have proposed a UK–EU deal following the Swiss model. According to the EU, this would remove 80 per cent of SPS checks as well as administrative burdens on traders from Great Britain selling goods into the EU. However, it would require the UK to agree to align with EU law in these areas, and likely sign up to some kind of EU oversight – a longstanding red line for the UK government.
- The UK government wants to agree to a UK–EU equivalence agreement, like that between the EU and New Zealand, in which both sides certify their rules and regulations as being equivalent to each other to streamline border processes for agri-food. Such an agreement would not remove the need for paperwork or checks altogether: all products of animal origin would still require veterinary certificates and incur the associated costs, and EU bans on chilled meats such as sausages would also still apply. It could, however, simplify the process and reduce the frequency of physical inspections of products to around 1 per cent. The UK was hoping to reach such an agreement through the future relationship negotiations, which ultimately led to the TCA in December 2021, but was unsuccessful.

11 | CONCLUSIONS

This article has shown the extent to which the TCA's regime on goods differs from the EU's regime since it is a free trade agreement based largely on WTO rules. This has satisfied the eurosceptics. For business it is much less clear. As political commentator Rafael Behr succinctly puts it:

> There are signs of reality penetrating government. Plans to impose a UK-only quality mark have been postponed by a year. Keeping the European CE certification would be more practical for manufacturers, and rejecting it deters investment. But in Eurosceptic theology, recognising a Brussels standard would be an act of submission unworthy of a sovereign state. Since that is an article of faith for this government, these problems can only be deferred, never resolved.
>
> (Behr, 2021)

These problems become more acute when the question of Northern Ireland is factored in. It has an uncomfortable foot in both camps. The CE scheme will carry on operating there (although possibly in tandem with a UKCA mark if the EU accepts a dual regulatory regime approach, as proposed in the White Paper). Northern Ireland goods are also subject to an additional UK(NI) marking. The paperwork (much of which is done online) is a burden for business. This will become more acute now that the UK has introduced its own checks. Movement of goods is going to be interesting for a while.

ENDNOTES

1. In its legal form, the TCA was concluded as an association agreement under Article 217 of the Treaty on the Functioning of the European Union. However, due to the similarity of the TCA's trade chapters to free trade agreements, the TCA is typically analysed by comparing its trade rules with those under free trade agreements.
2. See Michel Barnier's famous 'staircase' diagram: Accessed 15th October 2021.
3. Famously, the Court ruled that MEEs are measures which 'directly or indirectly' hinder intra-Union trade, see para 5.
4. The 27 Member States of the EU are subject to one single schedule for the Union.
5. As the House of Lords notes, while these goods may be eligible for duty relief (allowing the trader to apply for a reimbursement for the cost of the tariff), or can be re-consigned under Transit (meaning that they are considered not to have left the EU's customs territory), we were told that these processes 'are burdensome and may not be a viable option for many firms'.
6. SPS measures differ from TBT in that they are limited to measures which are aimed at protection of human, animal and plant life and health, such as food safety regulations and standards.
7. The CE marking requirement applies to products covered by the New Approach Directives, see https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en (Accessed 15th October 2021).
8. 'The Parties reaffirm their rights and obligations under the SPS Agreement. This includes the right to adopt measures in accordance with Article 5(7) of the SPS Agreement.'
9. The UK was granted 'national listed status' separately from the conclusion of the TCA, which means that UK exports to the EU of live animals and products of animal origin can continue, albeit with greater customs formalities needing to be satisfied, see https://www.allenovery.com/en-gb/global/news-and-insights/publications/brexit-certainty-at-last-an-overview-of-the-new-eu-uk-trading-relationship Accessed 15th October 2021.
10. It also noted that 'The EU introduced full SPS controls on imports from the UK on 1 January 2021, whereas the UK is phasing in controls on imports from the EU. (para. 110).
11. CMR (Convention on the Contract for the International Carriage of Goods by Road' in English), GEFS (Groupage Export Facilitation Scheme: https://www.gov.uk/government/publications/groupage-export-facilitation-scheme-application), EORI ('Economic Operators Registration and Identification number) EHC (export health certificate), BCP (border control post), TRACES (trade control and expert system), COI (certificate of inspection: https://webgate.ec.europa.eu/cfcas3/tracesnt-webhelp/Content/E_COI/I.%20How%20to%20create%20a%20new%20COI%20.htm). See also https://www.gov.uk/guidance/transporting-goods-between-great-britain-and-the-eu-by-roro-freight-guidance-for-hauliers Accessed 15th October 2021.
12. For example, an upgraded New Zealand Closer Economic Partnership, which entered into force on 1 January 2020.
13. To be precise the applicable legislation and other acts are listed in Annexes to the Protocol. Where a listed act is amended or replaced by a decision of the EU, the act as amended or replaced automatically applies in the UK in respect of Northern Ireland. Where the EU adopts a new act deemed relevant to the Protocol, the EU and the UK decide whether to add it the relevant annex to the Protocol. This is done by Decision of the Joint Committee (https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProtocolMonitor/TheProtocolEUanddomesticlaw/JointCommitteeDecisionsandDeclarations/) Accessed 15th October 2021.
14. For a full list of the declarations, see https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProtocolMonitor/TheProtocolEUanddomesticlaw/JointCommitteeDecisionsandDeclarations/

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