Professor Silke Goldberg – Written evidence (EEH0036)

By Professor Silke Goldberg MA PgDL[1]

1. INTRODUCTION

1.1 In this paper I set out my reflections pertaining to the impact of the Trade and Cooperation Agreement ("TCA")[2] entered into between the United Kingdom ("UK") and the European Union ("EU") (the "parties"), and its impact on the energy sector.

1.2 Under EU law, the TCA is technically an Association Agreement – a type of agreement in accordance with its legal basis, Article 217 TFEU, which provides that "the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure". The EU has more than 20 association agreements, mainly with its neighbours, from Morocco to Ukraine.

1.3 Notwithstanding some exceptions (particularly the extensive unilateral phased transitional mitigations provided by the UK), new requirements and restrictions arising from the end of the status quo transition period apply immediately.

1.4 The TCA contains a number of governance, review and termination clauses that allow for the imposition of tariffs and quotas in the future and, in a worst-case scenario, a World Trade Organization ("WTO") exit; these arrangements ultimately render the TCA quite political and therefore unstable as the UK and the EU will find themselves in ongoing negotiations for various aspects of their relationship.

1.5 The TCA can be described as a classic free trade agreement, as, at its heart, it provides for tariff and quota-free trade in goods. The agreement in fact provides for little more than that, containing, as it does, few provisions regarding mutual recognition of standards, qualifications etc and only very limited commitments pertaining to services.

1.6 The governance provisions of the TCA are complex and include:

1.6.1 a Joint Partnership Council with over 30 sub-councils;

1.6.2 automatic reviews of the agreement every five years; and

1.6.3 the ability of either party to terminate the TCA on 12 months' notice.

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2 The full text of the UK EU Free Trade Agreement (the "FTA") can be found here: https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-857-F1-EN-ANNEX-1-PART-1.PDF

1.7 The termination clause can be triggered by either party at any time. Once triggered, the two parties, absent reaching a new agreement, would, following the elapse of the mandatory 12-month notice period, leave the TCA and fall onto WTO terms. This scenario would effectively be a "delayed No-Deal Brexit".

1.8 The TCA contains a fisheries-specific review clause under which it is implied that disputes over fisheries can trigger sanctions in trade. If the fisheries agreement is terminated, which is possible with nine months' notice by either party, then the trade, aviation, and road transport elements of the agreement also automatically fall away.

1.9 The TCA provides for some important mechanisms allowing for some flexibility regarding the energy sector: Article ENER.31 states that the Partnership Council may amend Annex ENER-1 and Annex ENER-3, and update Annex ENER-2 as necessary to ensure the operation of that Annex over time; whereas the Specialised Committee on Energy may amend Annex ENER-4 and make recommendations as necessary to ensure the effective implementation of the energy provisions of the TCA. In addition, Article ENER.32 directs the parties to establish a regular dialogue to facilitate meeting the objectives of the energy section of the TCA.

1.10 In line with the automatic reviews of the agreement, the provisions of the TCA related to energy are subject to an automatic review every five years, with the first being on 30 June 2026. The Partnership Council may thereafter decide on an annual basis if the provisions should continue to apply.

2. THE REGULATORY SCAFFOLDING OF THE NEW UK-EU ENERGY COOPERATION

2.1 The TCA establishes objectives regarding the energy market by providing, in Article ENER.1, that the TCA is to facilitate trade and investment between the parties in the areas of energy and raw materials, and is to support security of supply and environmental sustainability, notably in contributing to the fight against climate change in those areas.

2.2 In this section I will provide an overview of key aspects of the energy sector and how these are treated in the TCA. It is possible however that further detail may be introduced if the UK or the EU introduce any new legislation or amendments to existing legislation to implement their obligations under the TCA.

2.3 The energy section of the TCA reflects the overall 'skinny' nature of the TCA as a whole. Generally, the energy provisions are broad in nature and provide for a range of cooperation obligations and the prospect of their detailed arrangements being agreed to between the parties at specified times in the future.

Regulatory and TSO cooperation

2.4 With the aim of ensuring that the objectives of the TCA are met, the UK regulatory authority, ie Ofgem, and the Agency for the Cooperation of Energy Regulators ("ACER") must develop contacts and enter into administrative arrangements covering, among others, electricity and gas markets, access to networks, offshore energy, the efficient use of electricity and gas interconnectors, and gas quality and decarbonisation.

2.5 In the area of safe and sustainable energy, both parties are required to promote energy efficiency and the use of energy from renewable sources, and will promote cooperation in the development of international standards on energy efficiency and renewable energy.

2.6 In relation to transmission system operators ("TSOs"), the parties commit to the establishing of technical procedures for transmission, and frameworks for cooperation between the European Network of Transmission System Operators for Electricity and Gas, respectively ENTSO-E and ENTSO-G, and GB TSOs.[3] The TCA clearly states that these frameworks for cooperation will not involve, or confer a status comparable to, membership in ENTSO-E or ENTSO-G by GB TSOs.

2.7 Article ENER.19 however then commits the parties to ensuring that "transmission system operators develop working arrangements that are efficient and inclusive in order to support the planning and operational tasks associated with meeting the objectives of this Title [VIII], including, when recommended by the Specialised Committee on Energy, the preparation of technical procedures to implement effectively" the provisions of the TCA pertaining to:

2.7.1 Article ENER.13 [Efficient use of electricity interconnectors];

2.7.2 Article ENER.14 [Electricity trading arrangements at all timeframes];

2.7.3 Article ENER.15 [Efficient use of gas interconnectors];

2.7.4 Article ENER.16 [Network development]; and

2.7.5 Article ENER.17 [Cooperation on security of supply].

2.8 The working arrangements between the GB TSOs and the ENTSOs are to encompass, as a minimum:

2.8.1 electricity and gas markets;

2.8.2 access to networks;

2.8.3 the security of electricity and gas supply;

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3 Article ENER18

2.8.4 offshore energy;

2.8.5 infrastructure planning;

2.8.6 the efficient use of electricity and gas interconnectors; and

2.8.7 gas decarbonisation and gas quality.

2.9 At this early stage, the exact scope of these cooperation agreements is unclear, as is the detail of their implementation.

Third party access and unbundling - retaining key principles

2.10 Both third party access ("TPA") to the grid and unbundling were essential elements in the liberalisation of the European energy sector, and core tenets in both British and EU energy legislation. The TCA retains both concepts and commits the parties to safeguarding the principals of TPA and unbundling, albeit at a high level.

2.11 Article ENER.8 of the TCA includes broad obligations on the parties to ensure the implementation of a system of TPA to their transmission and distribution networks. The key obligations set out in this Article are essentially equivalent to the TPA principles established in Article 6 of Directive (EU) 2019/944 (the "EU Electricity Directive"), save as to, for example, provisions relating to the approval of tariffs. There is therefore little change in this regard to the previous regime as set out under the EU Electricity Directive.

2.12 Article ENER.9 of the TCA includes a broad obligation on the parties to implement arrangements to remove conflicts arising as a result of the same person exercising control over a TSO and a producer or supplier. Given the limited detail in the TCA, this obligation appears unlikely to add further restrictions in excess of the existing provisions in the EU Electricity Directive and the Electricity Act 1989. The TCA makes no reference to the various unbundling models of the Third Energy Package.

3. INTERCONNECTORS

3.1 The TCA commits the UK and the EU to cooperating to facilitate the timely development and interoperability of energy infrastructure connecting their respective territories (ie interconnectors).[4] The provisions of the TCA, in as far as they relate to electricity interconnectors, cover familiar territory in that they principally follow overarching principles set out in existing EU legislation governing electricity infrastructure (eg TPA, unbundling, congestion management).

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[4] Article ENER.16(1) TCA

3.2 The TCA includes a form of exemption regime that allows the UK or the EU to decide not to apply the its TPA or unbundling provisions of the TCA if the relevant conditions under the TCA are met (see below 3.15 to 3.17).

3.3 Importantly, the impact of these provisions on individual projects will depend on how they are implemented in UK and EU law. It is not clear how a decision by the UK or the EU not to apply the provisions of the TCA would impact the application of the existing requirements for interconnectors under UK and EU law unless the relevant regulations to implement the TCA are enacted.

3.4 The TCA is currently missing any form of administrative implementation rules and unless these are created speedily, further uncertainty for interconnectors under development will remain. For instance, the parties need to urgently designate the relevant authorities referenced in Article ENER.12 and create the cooperation fora referenced in the TCA to provide better certainty to the interconnector sector. This seems all the more urgent given the stated aim of the UK Government to attain 18GB of interconnection capacity by 2030 (ie, a threefold increase of current levels).[5]

Projects of common interest

3.5 The TCA is silent as to the treatment of projects of common interest ("PCIs"). Regulation (EU) No 347/2013 (the "TEN-E Regulation") has now been revoked within the UK (save for certain provisions relating to existing permit applications).[6] Unless separately revised by the EU, it appears that the TEN-E Regulation will continue to apply within the EU in its current form.

3.6 In that current form, the TEN-E Regulation allows that projects between an EU Member State and the UK (as a country that is not an EU Member State or a European Economic Area country) may still meet the criteria to be a PCI if it "*is located in the territory of one Member State and has a significant cross-border impact*"[7]. For electricity transmission projects, a significant cross-border impact means that the project increases the grid transfer capacity between that Member State and other Member States by at least 500MW.[8] Alternatively, a project may meet the criteria by involving "*at least two Member States by directly crossing the border between two or more Member States*"[9].

3.7 Existing GB interconnector PCIs will therefore be subject to different criteria when they are reassessed against the eligibility criteria (eg when the fifth PCI list is considered, expected to come into force in spring 2022).

3.8 PCIs are not considered in the TCA, and whether the expiry of the transition period impacts on the PCI status of projects will therefore turn

5 Energy White Paper, "Powering our Net Zero Future", November 2020, page 80

on the existing provisions of the TEN-E Regulation. In relation to the removal of projects from the PCI list, Article 5(8) of the TEN-E Regulation provides:

"*A project of common interest may be removed from the Union list according to the procedure set out in Article 3(4) if its inclusion in that list was based on incorrect information which was a determining factor for that inclusion, or the project does not comply with Union law.*"

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6 Regulation 152(1) and Schedules 3 and 4 of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019/530

7 Article 4(1)(c)(ii) TEN-E Regulation

8 Annex IV.1 TEN-E Regulation

9 Article 4(1)(c)(i) TEN-E Regulation

3.9 Considering this provision, the expiry of the transition period would not appear to impact on whether the information that led to a project's inclusion was incorrect (ie the information was correct at the point of inclusion). It therefore seems that any argument to remove a PCI from the Union list at this stage would need to be based on the concept that it does not comply with EU law. However, it is not clear to us how the expiry of the transition period would result in projects not complying with EU law.

3.10 On the face of it, there do not therefore appear to be immediate grounds for removal of a PCI from the Union list as a result of the expiry of the transition period. However, on 16 December 2020, the European Commission (the "Commission") wrote to ENTSO-E noting that the end of the transition period will have "*direct and immediate consequences on the EU-UK electricity interconnection projects*" and asking ENTSO-E to perform calculations which go to the PCI eligibility criteria for projects between Member States and third countries. While the intention is not entirely clear, if the Commission now intends to reassess the PCI status of UK-EU projects, the legal basis for this process is not clear to us and this should be clarified with the Commission.

3.11 Due to the change in the PCI eligibility criteria, it is possible that some existing PCIs between the UK and Member States will lose their PCI status and it will be more difficult for other UK-Member State projects to obtain PCI status.

3.12 While PCIs may exist between Member States and non-Member States, it is not clear how certain provisions of the TEN-E Regulation would be applied in relation to such projects. For instance:

3.12.1 in accordance with Article 12 of the TEN-E Regulation, a PCI may submit an investment and cross-border cost allocation request ("CBCA"). Article 12 goes on to describe the application and decision process involving the concerned National Regulatory Authorities ("NRAs"). However, in the case of a UK-EU interconnector PCI, Ofgem would not be bound by the TEN-E Regulation and there is therefore no legislated process for coordinating Ofgem's cap and floor regime in the UK with a CBCA in the EU;

3.12.2 Article 12(1) of the TEN-E Regulation suggests that efficiently incurred investment costs not recovered from congestion rents will be paid for through network user tariffs in the Member States where the project provides a net positive impact. Article 12(4) of the TEN-E Regulation goes on to discuss that NRAs will decide on the allocation of costs to be borne by each system operator and may decide to allocate only part of the costs. ACER recommends that 100% of the efficiently incurred investment costs should be allocated by the NRAs;[10]

[10] Recommendation No 5/2015 of the Agency for the cooperation of energy regulators of 18 December 2015

3.12.3 it does not appear to be contemplated in the TEN-E Regulation or the ACER recommendation that some of the costs could be incurred outside of the Member States concerned and it is therefore not clear how such a cost allocation would be resolved in relation to a PCI between a Member State and a non-Member State (although we note there is a possibility that the NRAs could decide to allocate only part of the costs);

3.12.4 the non-Member State would not be subject to the jurisdiction of ACER who is to decide on any such investment request where the NRAs are unable to reach agreement (or on referral). While pursuant to Article 43 of Regulation 2019/942, ACER may exercise certain tasks with regard to third countries if those countries have adopted relevant rules and mandated ACER to coordinate the activities, the UK has not – to my knowledge – given ACER any such mandate (and, in the context of Brexit, I would be surprised if politically it was acceptable for ACER to have jurisdiction over decisions that affect the UK); and

3.12.5 the NRAs are to refer the investment request to ACER if they have not reached an agreement on the investment request within six months or upon joint agreement. However, in the context of a GB-EU project where there is only one Member State involved, it may be more difficult to secure a referral to ACER. For instance, if the Member State involved does not consider the application to be complete (in which case the six-month period would not commence) or they refuse the investment request, a referral may not be possible.

3.13 It is worth noting that the Commission proposed a revised version of the TEN-E Regulation on 15 December 2020.[11] This proposal includes a new category for projects of "mutual" interest which may exist between a Member State and a third country (such as the UK) if they (i) increase the grid transfer capacity with other Member States and (ii) bring significant benefits to at least two Member States ("significant benefits" require that a project contributes significantly to sustainability and at least one of market integration, competition and system flexibility or security of supply). The threshold for a "project of mutual interest" may therefore be lower than that for PCIs if the Commission's proposal is adopted.

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on good practices for the treatment of the investment requests, including cross border cost allocation requests, for electricity and gas projects of common interest, p.12, available from: http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2005-2015.pdf

[11] European Commission, Proposal for a regulation of the European Parliament and of the Council on guidelines for trans-European energy infrastructure and repealing Regulation (EU) No 347/2013, COM(2020) 824, 15 December 2020, available from: https://ec.europa.eu/energy/sites/ener/files/revised_ten-e_regulation_.pdf with annexes available from: https://ec.europa.eu/energy/sites/ener/files/annexes_to_the_revised_ten-e_regulation.pdf

Existing exemptions

3.14 Article ENER.11 of the TCA requires the parties to ensure that existing exemptions granted to GB-EU interconnectors continue to apply. This is of particular importance for any UK energy projects currently benefitting from an exemption pursuant to Article 63 of EU Regulation 943/2009 or Article 36 of EU Directive 2019/944/EU or Article 22 of Directive 2003/73/EU, electricity regulation or the gas directive, respectively.

Exemptions for new interconnectors

3.15 The UK or the EU may decide not to apply Article ENER.8 (TPA) or Article ENER.9 (system operation and unbundling of transmission network operators) to (i) emergent or isolated markets or systems; or (ii) infrastructure that meets the conditions in Annex ENER-3 of the TCA (for reference, Annex ENER-3 is set out in full in the annex to this note).[12] Annex ENER-3 effectively introduces a new exemption regime in relation to GB-EU interconnectors, where the EU or the UK may decide not to apply the TPA or unbundling requirements if the relevant conditions are met.

3.16 It should be noted that this new "exemption" regime only applies in respect of the TPA and unbundling provisions in the TCA and is therefore narrower than the existing exemption regime in the EU Electricity Regulation (which may also apply in respect of regulations relating to use of congestion revenues and the approval of charging methodologies and access rules). The conditions for the grant of a new "exemption" under the Annex ENER-3 of the TCA are similar but less onerous than those in Article 63 of the EU Electricity Regulation. In the TCA, conditions relating to charging have been removed and a project is now only required to enhance competition or security of supply, instead of enhancing competition being an absolute condition. Annex ENER-3 allows the parties (ie the UK and the EU) to decide not to apply the relevant provisions of the TCA.

3.17 It remains to be seen how (and if) this will be implemented in UK and EU law and also how this might interact with the existing regulations. In this regard we note that Article 63 of the EU Electricity Regulation already provides an exemption regime for new interconnectors between GB and another country or territory. However, Article 63 of the EU Electricity Regulation presently only applies to new interconnectors between EU Member States. As the regime under Annex ENER-3 applies in respect of the obligations under the TCA, we do not think it would also grant exemptions from restrictions in UK and EU law unless such an effect is specifically provided for in UK / EU law.

Congestion management and transmission costs

[12] Article ENER.10 TCA

3.18 Consistent with Article 16 of each of the EU Electricity Regulation and the UK Electricity Regulation, the parties are to ensure that capacity allocation and congestion management on electricity interconnectors is market based, transparent and non-discriminatory, and that the maximum level of capacity of electricity interconnectors is made available to the market.[13]

3.19 Article ENER.13(1)(f) of the TCA requires the coordination of capacity allocation and congestion management between EU and GB TSOs, involving the development of arrangements for all relevant timeframes (forward, day-ahead, intraday and balancing). The parties are to ensure the conclusion between relevant TSOs of a multi-party agreement relating to the compensation for the costs of hosting cross-border flows of electricity. Such multi-party agreement shall aim to ensure that GB TSOs are treated on an equivalent basis to a TSO in a country participating in the inter-transmission system operator compensation mechanism. Until such time as this agreement is concluded, a transmission system use fee may be levied on scheduled imports and exports between the EU and the UK.[14]

4. ELECTRICITY TRADING

4.1 Following the end of the transition period, the UK is now treated as a third country in relation to the EU generally, and this includes in relation to the Internal Energy Market ("IEM").

4.2 As a result of this third country status, GB TSOs will no longer be party to the Inter-Transmission System Operator Compensation Mechanism and will be required to pay transmission system usage fees.[15]

4.3 GB TSOs will require certification to continue activities within the EU[16] and will cease participation in EUPHEMIA, the single allocation platform for forward interconnection capacity, the European balancing platforms such as TERRE and MARI[17] and the single day-ahead and intraday coupling mechanisms.

4.4 The UK market is now therefore de-coupled from the EU and has reverted to the situation which existed prior to market coupling in 2014.[18] This means, amongst other things, moving to new access rules and

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13 Article ENER.13 TCA
14 Article ENER.13(3), (4) and (5) TCA
15 Notice to Stakeholders, supra n.8. For more information, see: Annex A, point 7, Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging
16 Notice to Stakeholders, supra n.8, point 4 in the text.
17 The Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (EBGL) lays down detailed rules for the integration of balancing energy markets in Europe. For more information, see: https://eepublicdownloads.blob.core.windows.net/public-cdn-container/clean-documents/Network%20codes%20documents/NC%20EB/entso-e_balancing_in%20_europe_report_Nov2018_web.pdf
18 For more information on market coupling, see: https://www.entsoe.eu/network_codes/cacm/implementation/sadc/

losing access to the Joint Allocation Office[19], the single platform for allocation of long-term electricity transmission capacity to TSOs and short notice electricity balancing.

4.5 In order for cross-border electricity trade to continue between the UK and the EU once the UK became a third country, new access rules for all interconnectors needed to be approved in the UK and with the relevant EU member state authorities. In preparation for this, all operational interconnectors between the UK and continental Europe (France, Belgium and the Netherlands) had published their modified access rules for a no-deal Brexit, and Ofgem had approved the proposed modifications in each case.[20] Broadly, the modified access rules mean moving from the implicit day-ahead allocation under the IEM to explicit day-ahead allocation under the revised (no-deal) access rules of the relevant interconnector.

4.6 As of 1 January 2021, GB-EU interconnection capacity is now allocated explicitly which, according to the European Federation of Energy Traders ("EFET") has led to increased costs of energy trading. A further consequence, according to EFET, is that "cross-border capacity may not be optimally used because it will be priced too high or too low" on either side of the border between the UK and the EU.[21]

4.7 On electricity trading arrangements, the Specialised Committee on Energy, established under the TCA, will ensure that TSOs develop arrangements for technical procedures within specified timeframes - technical procedures must enter into force by 2022. The committee will keep the arrangements under review and, if not satisfied with the arrangements as put forward, can take decisions and make recommendations as necessary for each party to request its TSOs to prepare technical procedures in line with the timeframes.

4.8 By March 2022, it is envisaged that the GB and EU electricity markets will be connected by multi-region low volume coupling ("MRLVC"), a form of market coupling which was first discussed in 2009 and then discarded in favour of the more efficient price coupling. Forms of market coupling on the basis of volume coupling have been in place in, for instance, the Central West Europe region since the early 2010s, and at the time were a step towards the integration of the European electricity markets.

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19 For more information, see: https://www.jao.eu/aboutus/aboutus/overview

20 Ofgem has approved 'No Deal' access rules separately for each interconnector: For IFA, see: https://www.ofgem.gov.uk/publications-and-updates/approval-updated-access-rules-and-charging-methodology-ifa-interconnector-apply-case-uk-leaves-eu-without-deal; for Eleclink, see: https://www.ofgem.gov.uk/publications-and-updates/approval-modified-access-rules-and-modified-charging-methodology-eleclink-interconnector-apply-case-uk-leaves-eu-without-deal; for BritNed, see: https://www.ofgem.gov.uk/publications-and-updates/approval-modified-access-rules-britned-interconnector-apply-event-uk-leaves-eu-without-deal; for Nemo, see: https://www.ofgem.gov.uk/publications-and-updates/approval-modified-access-rules-nemo-link-interconnector-apply-event-uk-leaves-eu-without-deal

21 See: https://www.euractiv.com/section/energy/news/power-flows-with-uk-less-efficient-since-brexit-eu-says/

4.9 As the EU electricity markets have, successively since 2014, moved to a price-based market coupling for the day-ahead and intraday markets, they "have become increasingly resilient, efficient and liquid, and are more able to integrate renewables at a lower cost."[22] The anticipated MRLVC will therefore be out-of-step with the EU electricity markets. Whilst MRLVC may be more efficient than no coupling at all, it will nevertheless be less efficient than the price coupling from which the GB electricity market benefitted until the end of the transition period.

North Sea cooperation for renewable energy and offshore grid

4.10 Given the renewable energy potential in the North Sea, the parties will cooperate on establishing a specific forum for the development of renewable energy in the region and the development of an offshore grid. The parties' cooperation in relation to the development of renewable energy in the North Sea region will include hybrid and joint projects, sharing of information on new technologies, best practices on onshore and offshore grid planning and exchanges of best practices on rules, regulations and technical standards.[23]

4.11 This is an area that will be of particular relevance for the development of multipurpose interconnectors in the North Sea (eg, high-voltage direct current (ie HVDC), cables linking wind farms in different countries) and an area in which innovations in both UK and EU law will be necessary in order to accommodate such projects.

5. CARBON PRICING

5.1 The UK's participation in the EU Emissions Trading System ("EU ETS') had been suspended since the Commission decided[24], in coordination with Member States, to temporarily suspend the acceptance by the Union Registry of all processes for the UK relating to free allocation, auctioning and the exchange of international credits as of 1 January 2019. Consequently, since 1 January 2019, the UK has not been able to auction allowances, allocate allowances for free to operators or exchange international credits at national or EU level.

5.2 The adoption of the Withdrawal Agreement means that, from 3 February 2020, all processes for the UK in the Union Registry have been reinstated.[25]

5.3 In relation to climate change and carbon pricing, paragraph 70 of the Political Declaration[26] adopted by the UK and the EU on 17 October

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22 Commission report on the State of the Union, 2020 report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action, available here: https://ec.europa.eu/energy/sites/ener/files/annex_to_the_report_of_the_state_of_energy_union.pdf

23 ENER.23

24 Notice to stakeholders – withdrawal of the United Kingdom and the EU Emissions Trading System (ETS), available here: https://ec.europa.eu/info/sites/info/files/file_import/emissions-trading-system_en_0.pdf

25 See: https://ec.europa.eu/clima/news/lifting-suspension-uk-related-processes-union-registry-eu-ets_en

2019, merely provides that "[t]he [UK and the EU] should consider cooperation on carbon pricing by linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System".

5.4 Whilst the end of the transition period means that the UK will leave the EU ETS, UK participants in the EU ETS must continue to comply with their obligations under that system for the 2020 compliance year.

5.5 The TCA provides for the UK to introduce its own emissions trading system, ie the "UK ETS", from 1 January 2021.

5.6 Whilst it was intended for the UK ETS to commence operation from 1 January 2021, it is not yet operational and a number of technical questions still need to be clarified by the UK's Department for Business, Energy and Industrial Strategy, who will run the system. Such questions yet to be clarified include as to the level of free allocations; how many UK ETS allowances should be auctioned; and how exactly the auctions will work, including the auction schedule.

5.7 To date, the following elements about the UK ETS are known:

5.7.1 auctions will have a floor price of £15/tonne and are understood to commence in the second quarter of 2021;

5.7.2 ICE Futures will administer the auctions for UK ETS allowances and launch spot and futures contracts; and

5.7.3 the UK ETS will cover energy intensive industries and power generators as well as aviation with a threshold of 20MW thermal input.

5.8 The UK Government has previously stated that, in the event of a no-deal Brexit, it might introduce a carbon tax of £16 per tonne of CO_2;[27] the anticipated introduction of a carbon floor price of £15/tonne echoes this pricing level.

5.9 In the interest of providing clarity as to the carbon pricing mechanism to industry in the UK, it is important that the relevant technical arrangements are made without further delay. Linking the UK ETS (when functional) to the EU ETS should be considered urgently in order to provide access to a larger carbon market and better trade opportunities.

6. AN ATTEMPT OF AN OUTLOOK

6.1 The finalisation of the TCA just prior to the end of the transition period means that a hard Brexit has, for now, been avoided.

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[26] See: https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf
[27] See: https://www.gov.uk/government/publications/carbon-emmisions-tax/carbon-emmisions-tax

6.2 The TCA can justifiably be called unprecedented. The EU has concluded many trade agreements in the past and is likely to continue to enter into such agreements with other third countries in the future, however, all other trade agreements – bar the TCA – are predicated on the mutual desire to lower trade barriers, increase regulatory convergence and, generally, bring the relevant parties closer together. This is not the case with the TCA, which from the outset was designed as an agreement to facilitate the further separation and distancing of the two parties from a common basis, ie the acquis communautaire.

6.3 The TCA is couched in language that is generally broader and more political than legal, which in turn places a lot of emphasis on the willingness of the parties to breathe life into this political framework with concrete legal and administrative steps to provide certainty for the sector.

6.4 Due to the TCA's 'skinny' scope and its architecture, which provides for a series of regular review dates and interim deadlines to negotiate further issues, it is likely that the UK will continue to negotiate various aspects of its relationship with the EU on a near-permanent basis.

6.5 The provisions of the TCA related to energy are to cease to apply on 30 June 2026, but the Partnership Council (to comprise representatives of the EU and the UK) may thereafter decide on an annual basis whether these provisions should continue to apply.

6.6 The impact of the TCA energy provisions ceasing to apply will depend on how they are implemented by the EU and the UK, it is therefore too early to judge their full impact on the UK and EU energy markets.