

Inclusion of the Bailiwick of Jersey in the UK/EU Trade and Co-operation Agreement: Goods and Trade

Brexit Review Panel

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1. Executive Summary

Following debate on Jersey's participation in the UK-EU Trade and Cooperation Agreement ('TCA'), on 27th December 2020, the Brexit Review Panel was given clear instruction by the States Assembly to scrutinise the applicable provisions of the TCA relating to 'Goods', as set out in [P.170/2020 \(Amd.Amd\)](#).

The decision by the States Assembly to adopt P.170/2020 (Amd.Amd), was based on summary terms of the TCA and, as the final legal text was only provided on the morning of 24th December, there was insufficient time to consider it before a decision needed to be made on whether to agree to the TCA's extension to Jersey from 1 January 2021. Given the tight timescale for ratification of the TCA, the UK and EU agreed a 90-day period, during which Jersey, through the UK, would be able to terminate its involvement in the agreement. The 90-day period provided time for further consideration of the detailed terms, including the final legal text. However, it was recognised that, should Jersey wish to terminate its participation in the TCA, then it would need to be prepared to make that decision, and give notice, via the UK, to the Partnership Council (the central committee in charge of governing the agreement), in advance of the end of the 90 day period.

The Panel's review has focused specifically on Part Two: Title I (Trade in Goods) of the TCA which includes a number of 'principle based' chapters:

- **Chapter 1: National Treatment and Market Access**
- **Chapter 2: Rules of Origin**
- **Chapter 3: Sanitary and Phytosanitary Measures (SPS)**
- **Chapter 4: Technical Barriers to Trade**
- **Chapter 5: Customs and Trade Facilitation**

The Panel is satisfied that legal review of the content of these Chapters, their Protocols and Annexes confirms that the text is in accordance with Jersey's expectations as to the obligations that would be applicable.

Given this, and the External Relations Department's own analysis of the TCA, the Panel believes that the full legal text reflects what was anticipated within the summary of P.170/2020. Therefore, the Panel does not consider that it would be in Jersey's best interests to ask the UK to invoke the 90-day termination clause.

The Panel has found, however, that a number of areas should be considered further in relation to Part Two: Title I (Trade in Goods) of the TCA. The TCA contains its own mechanisms for developing trade policy on which Jersey will need to ensure the UK fully represents the Island's interests. The Minister for External Relations received an open letter from the Lord Chancellor providing a commitment that the UK Government will continue to work closely with Jersey, in positive collaboration in the context of the existing constitutional relationship and in the development of new trading relationships. The Panel looks forward to receiving regular updates from the Minister on how the relationship is progressing and what agreements are in place to ensure Jersey is adequately represented.

The TCA also recognises that the Crown Dependencies have separate competent authorities that are responsible for implementing customs or regulatory controls. However, the UK will ultimately be responsible under the TCA which, in the absence of direct access, may impact on Jersey's autonomy and ability to develop its own international identity. The Lord Chancellor also provided assurances to the Minister that the UK Government would work to strengthen the relationship with Jersey in line with Jersey's framework for developing its international identity.

It is noted that Jersey is not a part of the Authorised Economic Operators (AEO) or the VAT Protocol. It is understood that this was the position sought by the Channel Islands but on VAT a commitment was made which states that both the EU and 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*". It is noted that discussions will need to take place in order to secure Jersey's interests in this area.

The legal advice provided to the Panel emphasised 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. Going forward, the Panel anticipates that the Government of Jersey will need to increase its level of engagement with the UK in order to agree the most appropriate ways of working to ensure Jersey is well represented.

1. Chair's Foreword

Members will recall that, at the States sitting held on the 27th December 2020, the Assembly endorsed the decision of the Council of Ministers that, based on the summary terms of the UK-EU Trade and Co-operation Agreement, the Bailiwick of Jersey should consent to its inclusion in the Agreement. This was subject to giving further consideration to the full and final legal text within the 90-day confirmatory period there provided.

Further, the Brexit Review Panel and the Environment, Housing and Infrastructure Scrutiny Panel were requested within that same period to present a report to the Assembly giving the Panels' views on whether the final legal text reflects the terms of the summary agreement and their opinion as to whether or not they believed it to be in the interests of the Island to subscribe to the relevant terms of the Agreement. Pursuant to that proposition (P.170/2020 Amd.Amd), this report is the result of a review undertaken by the Brexit Review Panel in relation to that aspect of the Agreement as regards trading in goods, a separate review having been undertaken by the Environment, Housing and Infrastructure Scrutiny Panel in relation to fisheries.

It is to be noted that the Panel's review does not extend to the outcome of the Brexit negotiations as a whole and, in essence, is confined to the limited matters arising under the Agreement in relation to trading in goods. The Agreement (and hence the review) does not therefore cover such matters as financial services where Jersey is a third country in its relationship with the EU.

I am grateful to all those who participated in this review, ranging from individuals, business representatives and organisations to the External Relations Minister, his officers and those in the Law Officers' Department. I also thank my fellow Panel Members and in particular our Officers for enabling this review to take place and our report published within a very constrained time.

Finally, I draw your attention to the fact that proposition P.170/2020 as amended requested the Council of Ministers to bring the question of Jersey's inclusion in the Agreement to the Assembly for a final debate if, having regard to the legal text and the Scrutiny report, the Council concluded that the 90-day termination clause should be effected. In this regard, it will be noted that this Panel does not consider it to be in Jersey's best interests to ask the UK on its behalf to invoke such termination clause.



Deputy David Johnson
Chair, Brexit Review Panel

2. Key Findings

KEY FINDING 1: The Trade and Co-operation Agreement is drafted as a high level ‘legal framework’ as opposed to a detailed piece of Law. The technical detail that will inform future decision making on the applicable provisions within the TCA is yet to be established by the “Specialised Committees” that will operate under the framework of the TCA.

KEY FINDING 2: An analysis undertaken by Government Officials within External Relations has confirmed that nothing fundamentally alters Jersey’s position of participating in the Trade and Co-operation Agreement. Therefore, Officials have recommended to Ministers that Jersey continue to participate in the TCA and do not ask the UK to invoke the 90-day termination clause.

KEY FINDING 3: In order for the successful implementation and functioning of the relevant Trade and Co-operation Agreement requirements for the Crown Dependencies, legal advice has highlighted that it is important that their interests are properly and consistently considered, recognised and represented.

KEY FINDING 4: The Joint Partnership Council is the central committee in charge of governing the Trade and Co-operation Agreement. It will oversee the TCA and be co-chaired by a member of the European Commission and a UK Minister.

KEY FINDING 5: In terms of dispute resolution, it will be important to ensure that Jersey’s interests are safeguarded in any dispute within which it may become involved in.

KEY FINDING 6: Under the Trade and Co-operation Agreement, “Specialised Committees” will be established as mechanisms for developing trade policy and practices between the UK and the EU, through a series of Trade Committees. The Trade Committees will play an important role in determining the scope and application of future agreements.

KEY FINDING 7: In relation to Jersey’s involvement in the “Specialised Committees”, the Minister for External Relations and Government of Jersey Representatives are arguing for direct representation by Jersey in the relevant committees.

KEY FINDING 8: In relation to Part Two: Title I (Trade in Goods) of the Trade and Co-operation Agreement, legal analysis has confirmed that the legal text is in accordance with Jersey’s expectations as to the obligations that would be applicable.

KEY FINDING 9: Jersey’s autonomy over its customs operations, is subject to the requirement that any requests made by Jersey under the relevant provisions of the Trade and Co-operation Agreement, such as requests for any changes, must be fulfilled by UK customs authorities.

KEY FINDING 10: In relation to customs operations, the distinction between “goods” and “services” may not always be easy to determine. Therefore, the limited application of ‘goods’ to Jersey, may give rise to ambiguities in the future which should be kept under review.

KEY FINDING 11: Jersey may need to ensure that distinctions are made between where Jersey’s World Trade Organisation (‘WTO’) obligations on services end, and where the UK’s Trade and Co-operation Agreement obligations on services go beyond the minimum requirements of the WTO.

KEY FINDING 12: Jersey's participation in the Trade and Co-operation Agreement might be considered to impact on Jersey's autonomy and ability to develop its own international identity. The Minister for External Relations has received a commitment from the Lord Chancellor and Secretary of State for Justice that the UK would respect Jersey's constitutional position in the operation of the TCA.

KEY FINDING 13: The increased complexity of the export process is leading some smaller retail businesses in Jersey to stop deliveries into Europe because they are daunted by the large amount of administration and the VAT rules they need to navigate.

KEY FINDING 14: Rules of Origin determine where goods originate which has complicated the forward shipping of European goods for many large companies in the UK and Jersey.

3. Recommendations

RECOMMENDATION 1: The Minister for External Relations must ensure that an agreement is made with the UK (and then the EU) to set out the most appropriate procedures whereby Government of Jersey Representatives can be directly involved in any relevant dispute resolution process.

RECOMMENDATION 2: As the Trade Committees will play an important role in determining the scope and application of future agreements, the Minister for External Relations should ensure that Jersey is sufficiently represented in the relevant committees.

RECOMMENDATION 3: The Minister for External Relations should ensure that there is a UK-Jersey agreement that governs the undertaking of any requests made by Jersey on its customs operations.

RECOMMENDATION 4: In relation to customs operations, the Minister for External Relations should keep under review the distinction between “goods” and “services” in order to mitigate against any future ambiguities which might arise regarding the limited application of “goods” to Jersey.

RECOMMENDATION 5: In order to provide clarity and support for businesses regarding the difficulties they may experience due to the changes resulting from Brexit and the Trade and Co-operation Agreement, the Minister for External Relations should undertake further “Beyond Brexit” virtual sessions for businesses.

4. Introduction

Background and context

In June 2017, following commencement of formal Brexit negotiations between the United Kingdom and the European Union, the Brexit Review Panel was formed to scrutinise Jersey's policies towards Brexit.

Historically, Jersey's relations with the rest of Europe have been governed by Protocol 3 to the Treaty of Accession to the European Community of 1973. Following a period of negotiations, the UK formally left the EU on the 31st January 2020. On 24th December 2020, the UK and EU announced that a Trade and Co-operation Agreement ('TCA') had been reached.

Subsequently, a recommendation was made by the Council of Ministers that Jersey participate in the TCA. This recommendation was set out in a report accompanying the proposition (['P.170/2020'](#)), which was brought forward for debate and approved, as amended ([P.170/2020 \(Amd.Amd\)](#)) at a requisitioned sitting of the States Assembly on [27th December 2020](#).

The approval of the proposition is subject to a 90-day 'cooling off' period during which time Jersey can terminate its participation in the TCA. This will ultimately be decided by the States Assembly if, during the 90-day period, either of the Scrutiny Panels or the Council of Ministers do not believe it is in the best interests of the Island. In the event that the States Assembly votes to terminate Jersey's participation in the TCA, Ministers would communicate this to the UK Government, which would activate the clause at the TCA Partnership Council on behalf and at the request of the Government of Jersey.

The amendment, (which included an amendment to an amendment) requested that the Brexit Review Panel and the Environment, Housing and Infrastructure Scrutiny Panel present a report before the end of the 90-day "cooling off period".

The amendment asks the Panels to consider the final legal text of the TCA, having taken advice from the Law Officers' Department, in order to form a view on whether it reflects the terms of the summary agreement. The amendment also asks that scrutiny includes any other information that, in the opinion of the Panels, should be brought to the attention of the Assembly, including whether or not the Panels believe it is in the best interests of the Island to subscribe to the relevant terms of the UK-EU TCA.

The Panel's review

Following the approval of [P.170/2020 \(Amd.Amd\)](#), scrutiny work was split between the Brexit Review Panel and the Environment, Housing and Infrastructure (EHI) Scrutiny Panel. The EHI Panel has focused on fisheries and the Brexit Review Panel has focused on the 'Goods and Trade' elements of the TCA which are relevant to Jersey.

The Panel has undertaken this review within a short timeframe due to the need for a period of notice (probably 30 days incorporated into the 90-day period) to be given to the Partnership Council to act on a decision if Jersey were to terminate its participation in the TCA.

In light of the tight timescale, the methodology for the Panel's review has included:

- **Briefing** from the Law Officers' Department, 26th January 2021
- **Public Hearing** with the Minister for External Relations, 8th February 2021
- **Public and stakeholder engagement** across a number of industries both locally and internationally.
- **Ministerial and Departmental engagement** on matters of existing and future trade policy.
- **Research** on matters concerning the TCA and its application to Jersey.

This report firstly provides an overview of the TCA and the process for terminating Jersey's participation in the agreement. The next section focuses specifically on Part Two: Title I (Trade in Goods) and includes an overview of the views and concerns raised by stakeholders. The last section provides an overview of a number of areas within the TCA that, whilst not directly applicable, could have political or indirect effects on Jersey.

5. The Trade and Co-operation Agreement

In relation to Jersey, participation in the TCA will supersede its Protocol 3 relationship with Europe and contains provisions that are applicable to Jersey only in relation to:

“trade in goods, including customs tariffs and procedures, as well as certain recognition of regulatory standards in relation to agricultural and manufactured goods; and”

“fisheries access to Jersey’s territorial waters and adjacent waters of the European Union (i.e. those of France)”.

As the report in [P.170/2020](#) noted, the TCA is *“the legally binding agreement which will set out the basis for the UK and EU’s future trading relationship”*. However, whilst the report also noted that the TCA was limited in application to ‘Goods and Trade’ and ‘Fisheries’, legal analysis has informed the Panel that the TCA operates as a high level ‘legal framework’ as opposed to a detailed piece of law.

The operation of the TCA as a high-level legal framework has important consequences for the medium to long term practical implications for Jersey, because the technical detail that will inform future decision making on the applicable provisions, is yet to be established by the ‘specialised committees’ that will operate under the framework of the TCA.

When the Panel met the Minister for External Relations (“the Minister”) during a Public Hearing, he advised that Government of Jersey officials had been working *“hand in glove with UK officials, feeding directly into the negotiations that went on”*. And that for several years, work had *“culminated in a document which was agreed in the early hours of Christmas Eve”*.

The Minister emphasised that it was in Jersey’s best interests to subscribe to the TCA and stated *“Having the results of those negotiations -....it is clear to me, as it was clear to the Brexit ministerial group and the Council of Ministers, that the T.C.A. arrangement can be a positive and productive basis for our future relationship with our European neighbours.”*

The Panel also asked the Minister about how Jersey’s participation in the TCA could affect future External Relations policy making. The Minister advised that *“we are going to and we are spending more time in building our relationships in the capitals of Europe.”* And that *“we have a new E.U. directorate within the Ministry for External Relations; currently it only sits at 2 people.”* The Minister further advised that *“the people that we have had to recruit to help deliver Brexit, we will need to continue to employ them but their work will be focused on strengthening and building relationships across Europe”*

Termination of the TCA and the 90-day period

The decision by the States Assembly to adopt P.170/2020 (Amd.Amd) was based on summary terms of the TCA as, at that time, there had not been sufficient time to scrutinise the legal text received on 24th December 2020. Given the tight timescale for ratification of the TCA, the UK and EU agreed a 90-day period, during which Jersey, through the UK, would be able to terminate its involvement in the Agreement. The 90-day period provided time for further consideration of the detailed terms, including the final legal text, subject to notice period (probably 30 days) that must be provided to the Joint Partnership Council should Jersey wish to terminate its participation in the TCA.

In relation to the EU's right to terminate Jersey's participation in the TCA, the Minister emphasised at the Public Hearing that the agreement had been ***“reached after compromise, after 3 years or so of negotiation, and I cannot think of any good reason why the E.U. would wish to terminate this agreement only, so far, 30-odd days into the agreement.”*** In addition, the Minister explained that ***“my understanding is that there is nothing to date in that work that would warrant us seeking to terminate the agreement either.”***

The Panel wished to further understand the process that would be undertaken if the right to terminate Jersey's participation in the TCA was invoked. The Minister advised that ***“the terms of the 90-day confirmatory clause is that should either party wish to terminate it, then the Partnership Council would terminate it.”*** However, the Minister emphasised to the Panel that ***“It would be an extremely serious matter should an individual member state seek to terminate it against our desires and it would bode ill, I think, for many years to come.”***

The Panel received a TCA Analysis and Review paper which was produced by Government Officials within External Relations. The analysis included a review of the legal text to ensure it represented what had been agreed by the States Assembly on 27th December. The results: ***“confirmed that nothing fundamentally alters Jersey's position. Therefore, officers are recommending to Ministers that they continue to participate in the TCA as per the unanimous vote, and do not ask the UK to invoke the 90-day termination clause.”***

KEY FINDING 1: The Trade and Co-operation Agreement is drafted as a high level 'legal framework' as opposed to a detailed piece of Law. The technical detail that will inform future decision making on the applicable provisions within the TCA is yet to be established by the "Specialised Committees" that will operate under the framework of the TCA.

KEY FINDING 2: An analysis undertaken by Government Officials within External Relations has confirmed that nothing fundamentally alters Jersey's position of participating in the Trade and Co-operation Agreement. Therefore, Officials have recommended to Ministers that Jersey continues to participate in the TCA and do not ask the UK to invoke the 90-day termination clause.

Institutional Provisions

Part 1 of the TCA covers the main institutional provisions. Legal advice has informed the Panel that the institutional provisions do not expressly apply to the Crown Dependencies because they primarily aim to facilitate the successful workings between the UK and EU. In order for the successful implementation and functioning of the relevant TCA requirements for the Crown Dependencies, legal advice has highlighted that it is important that their interests are properly and consistently considered, recognised and represented.

Joint Partnership Council

The Joint Partnership Council is the central committee in charge of governing the Agreement. It will oversee the TCA and be co-chaired by a member of the European Commission and a UK Minister.

The EU and UK have agreed a [governance framework](#) in order to manage the UK-EU relationship and resolve any disputes. As noted earlier, within this governance framework are

numerous specialised committees and working groups assigned to specific parts of the TCA. The [result](#) of this is the absence of the European Court of Justice in UK-EU dispute resolution. The [Institute for Government](#) notes three stages to the new dispute resolution procedure that should apply:

1. **Consultations:** a process of diplomatic consultation in the Partnership Council, between the UK and EU;
2. **Arbitration:** referral to an independent arbitration tribunal, with up to 160 days to issue a ruling;
3. **Compliance:** failure to comply with a ruling of the arbitration tribunal, could result in the other party suspending parts of the TCA (cross-retaliation).

Legal advice explains that an important aspect of dispute resolution is to ensure the Crown Dependencies' interests are safeguarded in any dispute in which they may become involved. It is considered critical that Jersey makes an agreement with the UK (and then the EU) setting out the most appropriate procedures whereby the Crown Dependencies' authorities are directly involved in any relevant dispute resolution processes.

During the Hearing, the Panel asked the Minister for his views on dispute resolution. The Minister explained *“If something was happening in the committees or obligations were being signed up to in the committees, which were rightly a decision for Jersey Ministers, Government and Parliament, then of course we would object and we would relay our understanding of the situation directly to them. But we do, equally, have access to Brussels as well, we have a very active office in Brussels and, as we have seen with the fishing issue, we were able to have conversations with the United Kingdom Minister for the Environment but also directly with the E.U. relevant commissioner as well. I am confident that those channels remain open and we will be able to resolve any difficulties should they arise.”*

KEY FINDING 3: In order for the successful implementation and functioning of the relevant Trade and Co-operation Agreement requirements for the Crown Dependencies, legal advice has highlighted that it is important that their interests are properly and consistently considered, recognised and represented.

KEY FINDING 4: The Joint Partnership Council is the central committee in charge of governing the Trade and Co-operation Agreement. It will oversee the TCA and be co-chaired by a member of the European Commission and a UK Minister.

KEY FINDING 5: In terms of dispute resolution, it will be important to ensure that Jersey's interests are safeguarded in any dispute within which it may become involved in.

RECOMMENDATION 1: The Minister for External Relations must ensure that an agreement is made with the UK (and then the EU) to set out the most appropriate procedures whereby Government of Jersey Representatives can be directly involved in any relevant dispute resolution process.

In October 2019, the Withdrawal Agreement set out arrangements relating to the UK's exit from the EU and established a 'Joint Committee', under which sat six 'Specialised Committees', that covered parts of the Withdrawal Agreement relating to; 'Citizens Rights,

Other Separation Provisions, Protocol on Ireland/Northern Ireland, Protocol on Sovereign Air Base in Cyprus, Protocol on Gibraltar and Financial Provisions.

However, under the TCA, among other areas, the Specialised Committees will be established as mechanisms for developing trade policy and practices between the UK and the EU, through a series of Trade Committees. The Trade Committees will play an important role in determining the scope and application of future agreements.

During the Public Hearing, the Panel questioned the relationship between Jersey and the Specialised Committees. The Panel was informed by the Minister that ***“The detail of how those committees are going to function and who will quite sit where is - it will not be a surprise to you - still very much in its infancy.”*** The Panel was assured by the Minister that the Government of Jersey was arguing for direct representation by Jersey in the various committees and stated, ***“We will be making our case to be involved in relevant sub-committees...”***

The Minister also informed the Panel that the Government was ***“in discussions with the U.K. around that involvement and what it looks like and what form it will take.”*** and that the Government of Jersey will be ***“arguing for a structure that means that we will be informed when issues arise that would have an effect upon our participation in T.C.A. or any suggestions coming from the E.U.”***

In addition, the TCA also contains its own enforcement mechanisms. Legal advice notes that the position is consistent with the description of Jersey’s position within these Trade Committees, as set out in the accompanying report to [P.170/2020 \(Amd.Amd\)](#). As anticipated, Jersey will be ***“dependent on the UK to protect its interests in the Committees and in the event of any enforcement proceedings taking place, as these are only accessible by the sovereign state parties to the TCA”***.

The Panel was advised that there are important differences between the approach to the enforcement of obligations under Protocol 3 and EU Law that it made directly applicable on the one hand; and the obligations applicable under the TCA on the other. In relation to the former, the Panel understands that EU law was directly applicable in Jersey and was enforceable both by individuals in Jersey’s domestic courts, and also by Jersey in the courts of the Member States of the EU and the Court of Justice of the European Union. The Panel understands that as the Court of Justice of the European Union is not responsible for supervising the TCA, Jersey will no longer be able to make representations to that court or directly engage the dispute resolution and arbitration mechanisms in the TCA. Rather, Jersey will need to work closely with the UK to ensure its interests are represented in the Committees and the Council, including in the event of a dispute.

KEY FINDING 6: Under the Trade and Co-operation Agreement, “Specialised Committees” will be established as mechanisms for developing trade policy and practices between the UK and the EU, through a series of Trade Committees. The Trade Committees will play an important role in determining the scope and application of future agreements.

KEY FINDING 7: In relation to Jersey’s involvement in the “Specialised Committees”, the Minister for External Relations and Government of Jersey Representatives are arguing for direct representation by Jersey in the relevant committees.

RECOMMENDATION 2: As the Trade Committees will play an important role in determining the scope and application of future agreements, the Minister for External Relations should ensure that Jersey is sufficiently represented in the relevant committees.

6. Trade in Goods

[P.170/2020](#) acknowledges that TCA will apply to Jersey to a more limited extent than to the UK. The Panel's review has focused specifically on Part Two: Title I (Trade in Goods) of the TCA which includes a number of 'principle based' chapters, with headings categorising to which arrangement the provision relates, the objective of the chapter in terms of what it is working towards, its scope and its definitions:

- **Chapter 1: National Treatment and Market Access**
 - This Chapter contains general principles and requirements concerning trade in goods. It also provides for trade in goods to be tariff and quota free, subject to the other TCA provisions.
- **Chapter 2: Rules of Origin**
 - This Chapter relates to the criteria for determining the national origin of a product. The Law Officers highlight these rules as important, because the relief from tariffs granted under the TCA is only granted for goods that are treated as originating from within the Parties' territories, including from within Jersey.
- **Chapter 3: Sanitary and Phytosanitary Measures (SPS)**
 - This Chapter deals with food safety and animal and plant health standards. This part of the TCA requires that SPS regulations and checks must be based on science and they should only be applied to the extent necessary to protect human, animal or plant life or health.
- **Chapter 4: Technical Barriers to Trade**
 - This Chapter deals with the technical regulations and standards for manufactured products. The purpose of this chapter is to ensure that technical standards, testing and certification procedures adopted by the Parties (including Jersey) are based on internationally recognised standards. The Law Officers highlighted that standards vary from country to country which can create obstacles to trade.
- **Chapter 5: Customs and Trade Facilitation**
 - This Chapter deals with the administrative and practical cooperation between UK and EU customs authorities and the Crown Dependencies.

The Panel understands that the legal advice confirms that the text is in accordance with Jersey's expectations as to the obligations that would be applicable under Part Two: Title I (Trade in Goods).

KEY FINDING 8: In relation to Part Two: Title I (Trade in Goods) of the Trade and Co-operation Agreement, legal analysis has confirmed that the legal text is in accordance with Jersey's expectations as to the obligations that would be applicable.

Protocol 3

One of the objectives of the Government of Jersey throughout preparations for Brexit and the expiry of the Transition Period, has been to ensure as much continuity with the Protocol 3 arrangements as possible.

The Panel questioned the Minister about the Government’s intention to replicate the Protocol 3 arrangements where possible. The Panel noted a submission it received from a member of the public raising this issue and the Minister responded ***“I would say that we did, as far as it is absolutely possible. It was not possible in regard to whether we were going to become a third country or not. Any change and challenge around bureaucracy is quite simply because the U.K. and Jersey for goods have become a third country. It would not be possible for us to be treated as a member of the single market and continue to have the customs arrangement with the United Kingdom and be in the E.U. single market. As we said, 95 per cent of our trade is with the U.K., so it would have seemed a slightly strange negotiating position to say that we did not want to be in that customs arrangement with the U.K. for 95 per cent of our trade but to be in a single market with the E.U. for the 5 per cent of our trade. All of the barriers that we now face arise from that becoming a third country for goods”.***

The Panel was advised that in regard to trade in goods, Title I (Trade in Goods) of the TCA is comparable to the previous Protocol 3 arrangements, however they do contain some important differences, as set out in summary below.

Differences	Title I (Trade in Goods) (TCA)	Protocol 3
Scope of rights and obligations	<ul style="list-style-type: none"> • Applicable to customs; • Requires degree of cooperation in relation to the setting and monitoring of regulatory standards for all types of manufactured and agricultural goods 	<ul style="list-style-type: none"> • Only applied expressly to customs and trade in agricultural products.
Applicability of customs and regulatory standards	<ul style="list-style-type: none"> • TCA obligations need to be implemented separately in each jurisdiction. • TCA obligations will, to some extent which will be the subject of further discussion, need to be reflected in Jersey’s domestic legislation. 	<ul style="list-style-type: none"> • EU law relating to customs and regulatory standards in agricultural products was directly applicable to Jersey and enforceable in Jersey courts.
Development of trade policy, practices and enforcement	<ul style="list-style-type: none"> • Trade policy and practices to be expressed in technical detail, established by Trade Committees • Jersey dependent on UK to protect its interests in the Committees • Enforcement proceedings can only be initiated by sovereign state parties (i.e. UK and EU) • Absence of direct access to enforcement mechanisms, entails a degree of risk to Jersey’s autonomy and ability to develop international identity • Potential Memorandum of Understanding covering Jersey’s 	<ul style="list-style-type: none"> • Jersey had little or no input into determining the content of EU Law on customs and agricultural regulations that were directly applicable in Jersey pursuant to Protocol 3. • Jersey could make direct representations through the Court of Justice of the European Union (providing access to direct enforcement mechanisms)

	participation in the TCA, but it was not possible to develop this due to the lack of time, before a decision on participation needed to be taken	
Institutional implications	<ul style="list-style-type: none"> • Raise issues for the Crown Dependencies as to how they work with the UK authorities, principally; Her Majesty’s Revenue and Customs, Department for Environment, Food and Rural Affairs, the Department for Business, Energy and Industrial Strategy and the Department for International Trade. 	Raised some similar issues, but as the UK Government was also subject to directly applicable EU Law in a number of areas, its ability to develop independent policy was limited.

UK Customs Arrangements

The Panel notes that the legal advice identifies the advantages of being in a customs union with the UK, which includes the free movement of goods between Jersey and the UK, removing the need to demonstrate the origin of goods exported to the UK. In addition, Jersey benefits from the same conditions of trade with third countries as the UK, including bilateral agreements now agreed with the EU.

However, the legal advice also identified that some limitations on autonomy that have been accepted in order for the successful operation of the customs arrangement with the Crown Dependencies, including:

- Jersey Customs Law to correspond with that of the UK;
- Jersey Competent Authority ('JCA') will adopt practices and procedures for management of operations relating to Jersey’s Customs Law, correspondent with UK law;
- JCA will treat as binding rulings issued by the UK Competent Authority;
- UK Competent Authority will review Jersey’s systems and facilities to ensure adherence to the arrangements.

During the Public Hearing, the Minister emphasised that **“95 per cent of our trade is done with the United Kingdom”** and that **“It would not be possible for us to be treated as a member of the single market and continue to have the customs arrangement with the United Kingdom and be in the E.U. single market.”**

Jersey’s decision to remain in a customs union with the UK, means that it is treated as part of the ‘customs territory’ of the UK for goods and trade. For the purposes of the TCA and customs procedures, the UK will be responsible for high level maintenance of Jersey’s interests in the TCA, whilst Jersey retains autonomy over the management of its customs operations.

This has the following implications for Jersey:

- Jersey’s autonomy over its customs operations, is subject to the requirement that any requests made by Jersey under the relevant provisions of the TCA, such as requests for any changes, must be fulfilled by UK customs authorities.
 - Legal advice informed the Panel that it would be desirable to have in place a UK-Jersey agreement, that governs the undertaking of these requests;

- The Panel notes two observations made within the legal advice which may need to be monitored in future:
 - The first in relation to the “classical” distinction between goods and services which may not always be easy to determine. The Panel was advised that limited application of ‘goods’ to Jersey, may create ambiguities in the future and may need to be kept under review. Any future areas of uncertainty may need to be raised with the Specialised Committees or Partnership Council.
 - Secondly, Jersey may need to ensure that distinctions are made between where Jersey’s World Trade Organisation (‘WTO’) obligations on services end, and where the UK’s TCA obligations on services go beyond the minimum requirements of the WTO. These will need to be monitored.
- Some of the TCA obligations will need to be reflected in further developments in Jersey’s domestic legislation, policies and procedures.
- The Panel understands that Jersey traders will be subject to important changes, which would include additional record keeping requirements, for goods arriving directly from France or other EU countries. The Panel was also informed that it will be important for Jersey exporters to understand the process of making ‘statements of origin’ in a compliant manner.
- The Panel notes that further consideration will need to be given to implementing a monitoring process for low value consignments in Jersey.
- In order to ensure transparency and the exchange of information between Jersey, EU and UK trading partners, the legal advice emphasised that clear lines of communication would need to be established.

KEY FINDING 9: Jersey’s autonomy over its customs operations, is subject to the requirement that any requests made by Jersey under the relevant provisions of the Trade and Co-operation Agreement, such as requests for any changes, must be fulfilled by UK customs authorities.

RECOMMENDATION 3: The Minister for External Relations should ensure that there is a UK-Jersey agreement that governs the undertaking of any requests made by Jersey on its customs operations.

KEY FINDING 10: In relation to customs operations, the distinction between “goods” and “services” may not always be easy to determine. Therefore, the limited application of ‘goods’ to Jersey, may give rise to ambiguities in the future which should be kept under review.

RECOMMENDATION 4: In relation to customs operations, the Minister for External Relations should keep under review the distinction between “goods” and “services” in order to mitigate against any future ambiguities which might arise regarding the limited application of “goods” to Jersey.

KEY FINDING 11: Jersey may need to ensure that distinctions are made between where Jersey's World Trade Organisation ('WTO') obligations on services end, and where the UK's Trade and Co-operation Agreement obligations on services go beyond the minimum requirements of the WTO.

Trade Policy

The legal advice received by the Panel, again in a similar fashion to the report accompanying [P.170/2020 \(Amd.Amd\)](#), notes that the Crown Dependencies will continue to manage separate competent authorities, responsible for customs and regulatory controls. However, it is also noted that the UK is ultimately responsible under the TCA for developing trade policy with the EU, using the mechanisms in the TCA, including defending or pursuing any enforcement action.

The institutional and procedural provisions of the TCA confer responsibility for Jersey's compliance with the obligations in the TCA, on the UK. As set out in [P.170/2020 \(Amd.Amd\)](#), Jersey's participation in the TCA might be considered to impact on Jersey's autonomy and ability to develop its own international identity.

However, on 24th December, the Lord Chancellor and Secretary of State for Justice wrote an open [letter](#) to the Minister for External Relations providing a commitment that the UK would respect Jersey's constitutional position in the operation of the TCA ***"I am pleased to reaffirm the UK Government's commitment to the much valued and long-standing constitutional relationship between the UK and Jersey. I look forward to continuing to strengthen that relationship, in line with the Justice Select Committee Reports and Government responses of 2010 – 14; and the Framework for Developing the International Identity of Jersey, signed in 2007. The UK Government will continue to work closely with Jersey, in positive collaboration and in the context of our existing constitutional relationship, as we implement the Agreement and develop new trading relationships with other countries."***

KEY FINDING 12: Jersey's participation in the Trade and Co-operation Agreement might be considered to impact on Jersey's autonomy and ability to develop its own international identity. The Minister for External Relations has received a commitment from the Lord Chancellor and Secretary of State for Justice that the UK would respect Jersey's constitutional position in the operation of the TCA.

Impact on Business

During its process of stakeholder engagement, the Panel received views from industry representatives about Jersey's participation in the TCA. The Panel was provided with submissions from representatives of businesses and business representatives operating supply lines between Jersey, the UK and the EU. The Panel noted a number of concerns that emerged in respect of;

- additional administrative burdens concerning the 'rules of origin' requirements,
- cost increases from associated bureaucracy, with one large business in particular citing increases of 2-5% that they expect to be passed onto consumers,
- delays on product availability causing a reduction in consumer demand,
- difficulties exporting directly to EU consumers due to paperwork and VAT procedures,
- difficulties with EU and UK suppliers requesting Economic Operators' Registration and Identification numbers that do not apply to Jersey importers.

In addition, the Panel noted through a [submission](#) it received from Jersey Business that some small retail businesses have stopped deliveries to the EU due to the scale of administration and the VAT rules and that some EU businesses were no longer supplying goods to Jersey due to cost increases from extra checks and administration.

The Panel sought clarification about the payment of VAT on goods being sent to the UK. At the Hearing the Minister advised that goods arriving into the UK from Jersey should not be subject to UK VAT. However, the Minister later clarified in a [letter](#) to the Panel that, for example gifts being sent from Jersey to the UK valued under £39 can be posted to the UK without attracting UK VAT, provided the customs declaration is completed correctly. In addition, the Minister advised that the Import VAT Accounting Scheme makes arrangements for UK import VAT to be paid on all commercial consignments (except alcohol, tobacco and tobacco products) not exceeding £873 in value.

The Panel was informed by legal advice that Jersey will not participate in the Protocol on VAT and on areas concerning mutual assistance for the recovery of claims relating to taxes and duties. The Minister noted during the Hearing that ***“there were previous concerns around inclusion in the V.A.T. (value added tax) protocol, which were resolved earlier in that week or just the end of the preceding week (following the decision to adopt P.170/2020 (Amd.Amd)”***

In responding to the other concerns expressed by the business community, the Minister explained that ***“there will of course be bureaucratic requirements arising from necessary border checks and becoming a third country.”*** However, the Minister also believed that there were opportunities for Jersey businesses to ***“further expand and trade into the U.K. where European businesses now think that they do not want to deal with the border requirements”***. In addition, the Minister added that he believed there could be new opportunities for Jersey businesses in the EU ***“I think that the Jersey quality product in whatever area it is that is being produced could and can find new opportunities in the E.U. as well.”***

The Panel expressed concerns about the paperwork requirements of sending consignments to EU countries and wished to further understand what the consequences would be for Jersey residents and businesses. The Minister explained ***“That is the issue, of course declarations do now need to be signed or provided for posting items into the E.U. in a way that was not universally necessary previously; that is absolutely the case.”*** The Minister also advised that ***“Some of the details there and the coding that will be required for businesses is complicated and has to be done appropriately.”***

The Minister invited the Director of Law Enforcement for Customs and Immigration to speak on the issue, who advised the Panel that ***“I think perhaps one of the difficulties is that depending on where the item is to be sent into the E.U. there may be different requirements. But certainly, we can reach out to Jersey Post and ask if there are any issues that we can help with, but we have not been approached as yet in relation to the export of postal packets.”***

The Jersey Farmers Union provided an [overview](#) of the impact of the TCA on agricultural exports and imports so far. The Panel noted that; potato exports remained unaffected because at present the export season has not started. However, there was uncertainty about future of daffodil exports, small ‘plug plants’ were no longer viable for importation and that the industry was experiencing negative indirect effects of bureaucracy associated with ‘mixed ingredient’ goods. In relation to ‘mixed ingredient goods’, the Panel noted in legal advice, that mixed

goods which included parts or ingredients from inside and outside the EU, presented a particular challenge for local businesses.

The Minister emphasised that Jersey businesses can still export their product directly to the EU **“but they just have the bureaucratic barriers to now overcome.”** The Minister explained that Jersey had, **“historically an advantage to using the U.K. route when the U.K. route was absolutely aligned with the E.U. because it was a more globally recognised standard.”** However, the Panel was also informed by the Minister that the **“historic advantage may no longer be there because the U.K. may not over time remain aligned with the E.U. Therefore, there might be benefit in Jersey businesses dealing directly with foreign States.”**

However, businesses involved in supply lines to and from Jersey, generally agreed that having in place an agreement with respect to trade was preferable and that Jersey should play a direct role in representing the Island in the Trade Committees, with feedback relayed to the business community.

In addition, the Panel received a [submission](#) from Unite the Union (employee representative), who expressed a desire to ensure that the livelihoods of those individuals involved in supply line businesses were not jeopardised by the additional bureaucracy and associated administrative costs.

During the Hearing, the Minister noted the concerns of business leaders and stated **“I absolutely accept that it is more bureaucratic and that results from us now being a third country for goods. The Government and the various arms of Government stand ready to support those businesses where they can.”**

He went on to say, **“of course, you have got the work that Jersey Business are undertaking and the Chamber of Commerce as well of course supporting their members with this additional bureaucracy.”** And added that **“The Government and the various arms of Government stand ready to support those businesses where they can.”**

To provide further clarity for businesses about the support available, the Panel asked whether the Government was considering undertaking further ‘Beyond Brexit’ virtual sessions for businesses. The Minister advised that it was not something his Department **“thought about co-ordinating”** but noted that **“when you have completed your report - that is one of your recommendations - is something that I think I could respond to positively.”**

KEY FINDING 13: The increased complexity of the export process is leading some smaller retail businesses in Jersey to stop deliveries into Europe because they are daunted by the large amount of administration and the VAT rules they need to navigate.

KEY FINDING 14: Rules of Origin determine where goods originate which has complicated the forward shipping of European goods for many large companies in the UK and Jersey.

RECOMMENDATION 5: In order to provide clarity and support for businesses regarding the difficulties they may experience due to the changes resulting from Brexit and the Trade and Co-operation Agreement, the Minister for External Relations should undertake further “Beyond Brexit” virtual sessions for businesses.

7. Non-applicable provisions which may be relevant to Jersey

Following an initial briefing from the Law Officers' Department, the Panel was made aware of a number of areas within the TCA that, whilst not directly applicable, could have political or indirect effects on Jersey, these include:

- The Statement on Harmful Tax Practices;
- Transparency;
- Intellectual property;
- Data protection, including the UK's 'adequacy status', relating to the free flow of information between the UK and the EU;
- Passenger Name Records;
- Driving Licences and haulage.
- Financial Services

The Panel explored some of these matters with the Minister during the Public Hearing.

Tax Matters

During the Hearing, the Panel sought clarification about the relationship between Jersey's participation in the TCA and the previous dialogue on 'blacklisting' of jurisdictions with zero per cent tax policies. The Minister clarified that ***"we engaged directly with the previous Commissioner for tax matters"*** The Minister noted that ***"The Parliament is not the decision-maker on the listing process. It is well-known what the parliamentary view is; that has not changed over all of the years that I have been involved in Brussels"*** and that it was the ***"(Economic and Financial Affairs Council), so those Finance Ministers and the Secretariat under the Code of Conduct Group, do continue to review their listing process. I have no doubt that they will consider refinements to that process, but we have a positive relationship with them, and we will continue to engage directly with those decision-makers."***

The Panel wished to know whether the Minister believed that Jersey's participation in the TCA would provide ***"a measure of more support than it would do if we were outside T.E.C.A., in that if we were outside that might be seen as sort of cutting umbilical cord to a certain extent?"***. The Minister highlighted the importance of preserving formal relationships ***"I think it sends a very important message that we want to have a formal relationship with the E.U. across all of our community and economy and that we want to engage co-operatively and as a good neighbour."***

Data Protection

During the Hearing, the Panel asked the Minister about data protection matters. The Minister advised that ***"we have amended the Jersey legislation to extend the window for transfer of data up to the U.K"*** the Minister further advised that ***"I know it has been extended sufficiently, I think, until the end of this year or into next year. Our adequacy certificate was issued prior to the introduction of the G.D.P.R. (General Data Protection Regulation) legislation....There is an ongoing review around the continuation of that adequacy certificate that the E.U. is engaged in and we are engaged in answering their"***

questions in that regard....We cannot foresee any issues at this point but that is a normal process for a continuation of an issuance of an adequacy certificate.”

Driving Licences and Haulage

During the Hearing, the Panel also touched on the issue of driving in the EU. The Panel requested an update on the vehicle testing centre and the facility for inspections of Jersey residents' vehicles. The Minister advised that ***“The domestic legislation says that we will have in place provision for domestic vehicles no later than 2024. It was initially intended that that would have happened by 2021 but because of various reasons, as you can imagine COVID, trying to get the right approach, that has now been extended to 2024; that still meets the terms of the Vienna Convention.”*** The Minister added that ***“Islanders do not need to be concerned when they are taking their private car into Europe but of course they will currently need to have international driving licences because the issue of reciprocal nature or recognition of the Jersey driving licences is still one that is in negotiation.”***

The Panel wished to know whether international driving licences were relevant to the TCA. The Minister advised that whilst not directly relevant to the TCA, the UK had passed a separate agreement recognising UK driving licences. The Minister explained that ***“we were not included in that agreement and now we are seeking to see if it would be sensible for us to have that extended and be included but those negotiations are ongoing.”***

Financial Services

The Panel is informed that the existing relationships that Jersey has with the EU in relation to financial or other services will continue to be governed by third country adequacy or equivalent arrangements.

The Minister confirmed that Jersey had ***“agreed with the U.K. Government much earlier in this process that we were a third country for financial services under the previous settlement and, therefore, on balance we felt that it was appropriate for us to remain as third countries in the new settlement.”*** The Minister further explained to the Panel why it had not been possible for Jersey to be included in an agreement on financial services, ***“It quickly became apparent that it was going to be difficult for the United Kingdom to negotiate a deal for financial services, either based on passporting, which was their initial idea and then based on equivalence.”***

The Panel was informed that an agreement on financial services would ***“take longer to reach agreement on and would be a more detailed agreement.”*** The Minister informed the Panel that he believed ***“those talks have commenced but we are not party to those talks because we are a third country for financial services. There may in future down the line be an opportunity for us and the other Crown Dependencies to reconsider that decision but I think it is going to be quite challenging for the U.K. to reach an agreement that does not include some sort of dynamic alignment into the future.”***

Whilst financial services are not directly applicable, the Panel did note a number of concerns relating to termination of Jersey's participation in the TCA. The submission from [Jersey Finance](#) highlighted that there could be the potential for negative indirect effects on financial services and the risk of future exclusion or limited participation in important future agreements, if Jersey chose to terminate its involvement in the TCA. However, employee representatives

of finance industry workers, such as [Unite the Union](#), did express concerns about the TCA being 'silent' on financial services, which they argued could be 'stronger'.

The Panel asked the Minister about the issue of the competitiveness of Jersey's finance industry and the Minister advised that ***“there is always an element of competition between any finance centre but, equally, when the City is strong, we generally are successful as well.”***

8. Conclusion

Given the outcome of the legal advice, and the External Relations Department's own analysis of the TCA, the Panel believes that the full legal text reflects what was anticipated within P.170/2020 summary. Therefore, the Panel does not consider that it would be in Jersey's best interests to ask the UK to invoke the 90-day termination clause.

The review has found that a number of areas should be considered further in relation to Part Two: Title I (Trade in Goods) of the TCA. The legal analysis provided to the Panel outlines a number of areas that, although not having any material impact on Jersey participating in the TCA, will require further consideration by the Minister for External Relations:

- The TCA contains its own mechanisms for developing trade policy on which Jersey will need to ensure the UK fully represents the Island's interests. The Minister received an open letter from the Lord Chancellor providing a commitment that the UK Government will continue to work closely with Jersey, in positive collaboration in the context of the existing constitutional relationship and in the development of new trading relationships. The Panel looks forward to receiving regular updates from the Minister on how the relationship is progressing and what agreements are in place to ensure Jersey is adequately represented.
- The TCA recognises that the Crown Dependencies have separate competent authorities that are responsible for implementing customs or regulatory controls. However, the UK will ultimately be responsible under the TCA which, in the absence of direct access, may impact on Jersey's autonomy and ability to develop its own international identity. The Lord Chancellor also provided assurances to the Minister that the UK Government would work to strengthen the relationship with Jersey in line with Jersey's framework for developing its international identity.
- Jersey is not a part of the Authorised Economic Operators (AEO) or the VAT Protocol. It is understood that this was the position sought by the Channel Islands but on VAT a commitment was made which states that both the EU and 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". It is noted that discussions will need to be had on this matter in order to secure Jersey's interests.

In light of its advice, the Panel also considers 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. Going forward, the Panel anticipates that the Government of Jersey will need to increase its level of engagement with the UK in order to agree the most appropriate ways of working to ensure Jersey is well represented. The Panel notes the commitment made by the Minister to provide a structure for keeping Jersey informed of any relevant developments, which the Panel will continue to monitor.

10. Appendix 1: Panel Membership and Terms of Reference

Panel Membership



Deputy David Johnson (Chair)



Deputy Inna Gardiner



Connétable Mike Jackson



Deputy Mike Higgins



Senator Kristina Moore



Deputy Rob Ward

Terms of Reference

- 1) To undertake a review of the Trade and Co-operation Agreement (TCA) with a particular focus on the following areas:
 - a) To examine the final legal text of the TCA and ascertain whether it reflects the terms of the summary agreement.
 - b) To identify any matters where there is uncertainty, unease or work to be done relating to the practical implications of the TCA.
 - c) To consider the institutional provisions and processes of the TCA and whether they raise any issues for Jersey.
 - d) To provide an objectively informed assessment on whether it is in the best interests of Jersey to subscribe to the relevant Terms of the TCA.

Review Cost

The costs of this review totaled £143

Written Submissions

- [Public - David Moon – 15 January 2021](#)
- [Stakeholder – Jersey Finance – 26 January 2021](#)
- [Stakeholder – Jersey Farming Union – 28 January 2021](#)
- [Stakeholder – Sandpiper – 29 January 2021](#)
- [Stakeholder – Jersey Business – 29 January 2021](#)
- [Stakeholder – Jersey Electricity – 2 February 2021](#)
- [Stakeholder – Ferryspeed – 3 February 2021](#)
- [Stakeholder – Breakwells Transport – 4 February 2021](#)
- [Stakeholder – Unite the Union – 5 February 2021](#)