What's in the UK-Australia FTA? Preliminary Reflections

The UK-Australia Free Trade Agreement (UKAFTA) is the first of the UK's new wave of FTAs since exit from the EU.[1] Some elements in the FTA are inspired by the Comprehensive & Progressive Agreement for Trans Pacific Partnership (CPTPP), to which the UK is currently acceding, though many are not. As such, it is of particular interest to parliamentarians, civil society, commentators, and policymakers.

FTAs are, however, complex, technical, and lengthy – often spanning a wide range of policy issues and sectors, from health care to agriculture, national security to digital trade. To support analysis of UKAFTA, on Friday 11 February 2022, the Trade & Public Policy (TaPP) Network hosted a virtual workshop, bringing together expertise from across the Network to consider the FTA. This report sets out the key

when it is noted that it is the CPTPP-type formulation which is used in the UKAFTA Agreement with regard to Enforcement of Labour Laws (Art 21.6).

Second, significantly, the chapter sets out lengthy commitments relating to modern slavery (Art 21.7). On one level cooperation in this field between these Parties is not surprising: both the UK and Australia have Modern Slavery Acts and, together with New Zealand, Canada and the US, in 2018 adopted Principles to Guide Government Action to Combat Human Trafficking in Global Supply. The commitments in Art 21.7 largely reflect the national Acts, notably relating to identifying and addressing modern slavery in supply chains. Yet, to include this level of commitment in an FTA is innovative: the extent of the Parties' commitments to impose obligations on private as well as public sector entities is particularly striking in this context.

Third, the chapter includes provision relating to non-discrimination and gender equality in employment (Art

It is specifically aimed at women business owners, entrepreneurs, and workers, and recognises that promoting equal opportunities requires workplace flexibility for people with care responsibilities in their private lives. However, UKAFTA stops short of addressing how trade agreements affect people of all genders in their roles as consumers, and as (unpaid) carers more widely. The Chile-Uruguay and Chile-Argentina FTAs, by contrast, integrate a number of ILO conventions (on discrimination in the workplace and workers with parental responsibilities, among others), in their gender chapters. This is a more progressive approach, from the perspective of gender equality.

Chapter 24 excludes 'all matters arising' under the chapter from dispute settlement, which raises the question of how this affects gender provisions in other chapters of the agreement that are covered by dispute settlement.

Although it provides a 'dialogue' between the Parties on matters pertaining to the chapter, it stops short of setting up a gender and trade committee, unlike Canada and Chile's model gender chapters (the other two countries that are driving the trend towards gender chapters in trade agreements). There is thus no institutional mechanism for ensuring that the Parties will cooperate on gender and trade matters in practice.

Financial services, including regulatory cooperation[13]

The structure and core elements of the financial services chapter (chapter 9) are familiar from recent trade agreements, especially the CPTPP. Financial services (FS) are carved out of the general chapters on cross-border trade in services and investment. This chapter applies to measures with respect to established FS supplier (what we think of as Mode 3, established via commercial presence), with respect to investors and investments in established FS suppliers, and with respect to another category called 'cross-border supply of FS'. This last category is a mix of Mode 1, Mode 2 (in territory of one party to a national of the other Party) and Mode 4 (by a national of one party in the territory of another) – the same format as found in CPTPP. The core disciplines of most-favoured nation, national treatment, and market access are as expected. The Agreement is largely negative list (identifying carve outs from liberalisation commitments) but national treatment and market access for Mode 1 cross-border trade in services is positive list (liberalising only those sectors identified). Chapter 30 dispute settlement applies in respect of disputes under the chapter subject to some modifications, e.g. regarding the expertise of panellists, and importantly, the prohibition of cross-retaliation outside the FS sector.[14]

Art 9.10 on 'transparency' contains most of what we see now in terms of enhanced transparency obligations in recent FTAs. Two brief comments. First, in line with other UK agreements, there is a requirement that authorisation decisions do not discriminate on the basis of gender – this is also found in other chapters and other agreements, but it is one of the contributions of UK practice, and it could be a significant achievement. Exactly what it means, and the circumstances in which it might be applied, is, however, an open question. Second, many of the specific transparency obligations are subject to language such as 'in a manner consistent

clearer framework for procedural and transparency requirements around some licencing, qualifications and technical standards than present in the CPTPP.

The four sectoral annexes draw from a combination of language from the CPTPP and the UK-EU TCA. In some instances, this synthesis works well. The Annex on express delivery services is an example of this for its clarity. In others, the merging produces uncertain results. This is the case with, for example, the provisions

Digital/innovation[16]

Provisions on digital (mainly in chapter 14) are more extensive than previous UK trade agreements and the CPTPP, and draw extensively on the Australia-Singapore Digital Economy Agreement (DEA) 2020 (see Table 1). Although the digital trade commitments aim at 'binding' existing practices and increasing cooperation rather than requiring changes to current regulations or policies, they nonetheless have substantial implications for the scope of future UK policy in important areas including data protection, online harms, regulation of AI, digital identities, financial regulation, and cyber security.

Digital trade facilitation: A series of articles aim at enabling all types of business to leverage efficiency gains from digitalisation in cross-border transactions, by helping economic actors move from analogue to digital systems and promoting interoperability. These include commitments not to impose customs duties on electronic transmissions (Art 14.3); to try an implement 'paperless trade' whereby customs and other trade compliance paperwork can be completed digitally (Art 14.8); to ensure that contracts made by electronic means have equivalent effect to their paper counterparts (Art 14.5); to facilitate the use of digital transferable records (Art 14.4); to facilitate the use of e-authentication and electronic trust services (Art 14.6); and to promote compatibility between regulatory regimes for digital identities (Art 14.7) and e-invoicing systems (Art 14.9).

Data governance: There is a strongly worded commitment not to 'prohibit or restrict' cross-border flows, including personal information (Art 14.10) and not to require the localisation of data (Art 14.11), subject to a public policy exception in both cases. While very similar to UK-Japan, CPTPP and DEA, the EU has not made an analogous commitment its trade agreements out of concern that the public policy exception is too narrow to safeguard the GDPR.[17] The article on personal information protection (Art 14.12) is weaker than EU trade agreements which aims to carve out personal data regulations from specific trade disciplines. In tandem with the FTA, the UK is considering whether to grant Australia data adequacy. If the UK grants adequacy and the EU does not, the UK will need to be careful not to undermine its own adequacy decisions from the EU through inadvertent onward transfers of EU data.[18]

Regulation of AI and emerging technologies: There is a prohibition on government measures that require companies to divulge their source code (Art 14.18), subject to a public policy exception. Although the wording provides slightly more leeway for regulators previous agreements, the carveouts may not be sufficient to enable policymakers to fully mitigate existing and potential risks that could emerge from the widespread use of algorithms.[19] UKAFTA is the first to have a stand-alone chapter on innovation (Chapter 20) which aims to spur innovation in AI and emerging technologies via specific cooperation activities (Art 20.4) and a government-to-government 'Strategic Innovation Dialogue' (Art 20.5) which will meet 'at least once every two years'.

Competition and consumer protection in the digital economy: Like other recent trade agreements, the emphasis is on the promotion of AI and commitments to address potential adverse impacts on competition and consumer protection are less developed. Notably the provisions in UKAFTA regarding competition policy are even less ambitious than the DEA as there is no explicit commitment to promote competition in digital markets. While there are general commitments to promote online consumer protection (Art.14.16), and limit spam (Art 14.17), unlike the Australia-Singapore DEA, no mention is made of the Parties cooperating to address online harms.[20]

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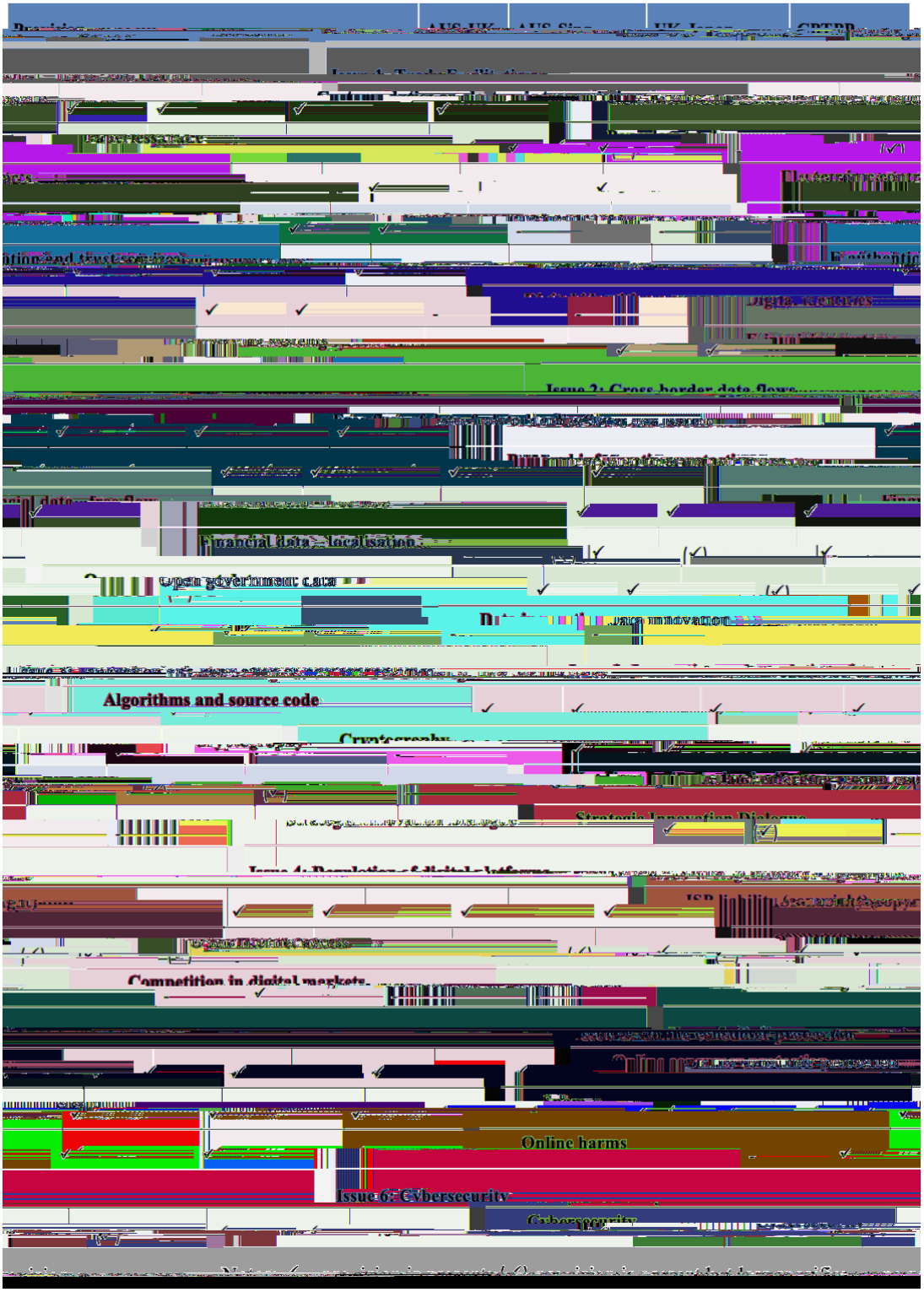
[16] Emily Jones, University of Oxford. For more detailed analysis see Jones, Garrido Alves, Kira, and Tavengerwei, 'Digital Trade Provisions in the AUS-UK FTA: Submission to International Trade Select Committee' (19 February 2022)

[17] Note that the UK-EU TCA contains a commitment not to impose localisation requirements (Article 201) but it includes no general commitment not to prohibit or restrict cross-border flows. See also Yakovleva and Irion, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10 International Data Privacy Law 201.

[18] Meyers and Mortera-Martinez, 'The Three Deaths of EU-UK Data Adequacy' (*Centre for European Reform*, 15 November 2021). See also G. Greenleaf, *Asia-*

Table 1: Comparison of UKAFTA provisions on digital trade with other recent agreements



Finally, it is interesting to find an article on environmental considerations in the destruction of seized counterfeit goods (Art 15.96) in an IP chapter. However, the article merely recognizes the importance of considering this, it does not create a clear obligation to destroy goods in an environmentally sound manner, nor does it clarify what that could be, so its significance in practice remains uncertain.

Competition policy and consumer protection[24]

Chapter 17 of UKAFTA covers competition policy and consumer protection and is almost entirely based on Ch 16 of CPTPP (itself cut and pasted from the draft TPP agreement with the same title). The UK-Australia text is not a word-for-word transplant but is fundamentally similar. It reflects US priorities which historically have been to exclude binding commitments on competition from trade agreements and rely on the muscle and extraterritorial reach of US Anti-Trust to address US concerns. The point of Ch 17 is not to address cross-border anti-competitive restraints to trade as is the focus of EU trade and competition proposals and FTA

UKAFTA also only provides for the bilateral cumulation of rules of origin which reduces the possibility of including inputs from third countries (though this will have a read across to any future commitments under CPTPP, where the rules on cumulation are more liberal). Finally, with respect to providing proof of origin to claim zero tariffs, the UK-AUS FTA provides two options: Self-certification provided by the exporter or producer or self-certification by the importer i.e., importers knowledge without the need to complete the declaration of origin, which is very similar with provisions in TCA or UK-Japan CEPA.

Technical Barriers to Trade (TBT)[29]

The TBT Chapter in UKAFTA reaffirms the rights and obligations of both Parties in the WTO TBT Agreement in Art 7.4. As with the institutional provisions of the SPS Chapter, the TBT Chapter includes executive cooperation provisions, with requirements to provide rationales for deviating from e.g. international standards, guidelines or recommendations (Art 7.6 (3)). Also, as in other agreements, private parties are able to participate in the development of technical regulations, standards, and conformity assessment procedures. The TBT Chapter incorporates at times highly technical details, e.g. on the permissibility of detachable labels and an Annex specifically addressing cosmetics, reflecting a more narrow sector-specific approach to the reduction of trade barriers than what is customarily found at the WTO, but is increasingly common in FTAs.

National security[30]

Art 31.2 UKAFTA presents broad security exceptions for the two Parties, far beyond that which is offered under the WTO. In 2019, two WTO dispute settlement panels reviewed the security exceptions of the General Agreement on Tariffs and Trade (GATT) and found that the exceptions were not entirely subject to the invoking WTO Member's determination. A Member could decide what actions were 'necessary' to take but needed to demonstrate that such actions fell into one of the listed circumstances for invoking the exceptions. In other words, the language of the exceptions required WTO panels to make an objective determination as to whether the Member invoked the exceptions properly, thereby justifying the Member's breach of the WTO rules.

Australia and the UK have removed the 'objectivity' of the GATT's security exceptions, suggesting that the governments seek to maximize their discretion when invoking the security exceptions. Whereas, for example, a panel had to review whether an invoking Member protected its essential security interests 'in time of war or other emergency in international relations', UKAFTA only states that a Party applies measures 'that it considers necessary for the [...] protection of its own essential security interests.' This phrasing is far broader than the exceptions found in other comparable agreements, such as the EU-Canada Comprehensive and Economic Trade Agreement (CETA). Coupled with the breadth of measures (defined broadly to cover any law, regulation, procedure, requirement, or practice), Art 31.2 may prove to be the exception that swallows the rule. It remains unclear how the Parties would assess measures with mixed motives – for example, regulations that address environmental protection *and* economic security goals. There remains no recourse to assess the good faith of the Parties when invoking the security exceptions, and a Party may withhold of 'any information' which may be 'contrary to its essential security interests.' Nor is there discussion as to how the Parties may review the measures in any way, rendering it impossible for the Parties to evaluate the temporal dimensions or internal supervision of these measures. Without temporal boundaries to the invocation of the security exceptions, Parties lack the means to assess whether actions were taken *before* or *during* a time where essential security interests were at stake.

The implication of Art 31.2 is that there is no way to monitor when actions simply become protectionist. With little clarity as to the reviewability of the security exceptions or the proper analytical framework, this may prove to be problematic for the Parties in the future. Ultimately, it appears the exceptions are meant to operate as a diplomatic tool rather than a legal exception. However, the history of the WTO experience proves that ambiguity on these issues may prove problematic if the security exceptions are invoked in a dispute. As a final word, Art 31.2 serves as an important model for other governments.

[29] Markus Wagner (University of Wollongong)
[30] Mona Paulsen (London School of Economics)