

Government response to the Lords EU Committee's 21st Report of Session 2019-21

[Beyond Brexit: the institutional framework](#)

Conclusion and Recommendations:

The Story so Far

1. We note that the final text of the TCA has yet to be published, and that it has been provisionally applied on the EU side. We regret that the UK Government, in bringing forward section 36 of the European Union (Trade and Cooperation Agreement) Act 2020, chose to disapply the procedure for parliamentary scrutiny of the TCA that would otherwise have applied under Part 2 of the Constitutional Reform and Governance Act 2010. An agreement of such complexity and importance surely merited formal debates in both Houses prior to ratification. (Paragraph 8)
2. We also note that, at the time of writing, and in response to the UK Government's decision unilaterally to extend certain 'grace periods' under the Protocol on Ireland/Northern Ireland, the European Parliament has declined to set a date for its vote on the TCA—a vote that is a precondition for EU ratification. The threat of 'no deal' thus remains, and a 'no deal' that took effect on 1 May 2021 would carry just as much risk as one taking effect four months earlier. (Paragraph 9)
3. The current state of UK-EU relations underlines the importance of completing the process of ratifying the TCA. Whatever the imperfections of the TCA and the challenges presented by the text, and whatever the deficiencies of the process whereby it was implemented in domestic law, the TCA will provide a structure within which the UK-EU relationship can be managed and can develop. That structure is needed now more than ever. (Paragraph 10)
 - The final text of the TCA has now been published. It can be found at <https://www.gov.uk/government/publications/ukey-and-eaec-trade-and-cooperation-agreement-ts-no82021>
 - The Trade and Cooperation Agreement (TCA), along with the Security of Information Agreement (SOIA), and the Nuclear Cooperation Agreement (NCA), were provisionally applied by both the UK and the EU from 23:00 (GMT) on 31 December 2020, in time for the end of the transition period. The provisional application of international agreements pending ratification is a recognised practice and is provided for under Article 25 of the Vienna Convention of the Law of Treaties.
 - Under the UK's dualist legal system, it was necessary to pass legislation implementing the agreements in domestic law before provisional application was possible. This was largely achieved in the form of the European Union (Future Relationship) Act, which received Royal Assent on 31 December. This legislation also disapplied the procedures relating to Parliamentary scrutiny before ratification of the agreements under s.20 Constitutional Reform and

Governance Act, since Parliament had an opportunity to consider the treaties through the passage of the implementing legislation.

- On the EU side, processes for concluding and ratifying international agreements are set out under Article 218 of the Treaty on the Functioning of the EU. Under the terms of this, the TCA requires Decisions on Conclusion and Signature in the Council of the EU (voting by unanimity) and the consent of the European Parliament prior to ratification. In order to provisionally apply the agreements, the European Commission sought a Council Decision on 27 December 2020 on the signature and provisional application of the TCA and SOIA pending ratification, and a parallel decision covering the NCA.
- We are pleased that, since the publication of the Committee's report, the EU has completed its procedures necessary to ratification, including the European Parliament giving its consent. The agreements have therefore entered into force as planned on 1 May. We welcome the certainty that the completion of ratification has brought for individuals and businesses in the UK and across Europe.

Purpose, scope and underlying principles

- 4. We welcome the application of the TCA to the Crown Dependencies in relation to trade in goods and fisheries, guaranteeing as it does the continuation of tariff-free trade in goods, and serving as a sound basis for the Crown Dependencies' future relationship with the EU. By contrast, the exclusion of Gibraltar and the United Kingdom's other Overseas Territories from the scope of the TCA is striking. (Paragraph 43)**
- 5. The outlook for the other Overseas Territories, following their exclusion from the TCA, is more worrying. We note for instance the serious economic implications for the Falkland Islands of the imposition of tariffs and quotas upon its trade in fisheries (including Loligo squid) with the EU. We call on the Government to continue to defend the interests of the Falkland Islands and the other Overseas Territories. (Paragraph 46)**
 - During negotiations, the UK made clear to the EU that the Overseas Territories are an integral part of the UK family and our mandate included negotiating on behalf of the Overseas Territories. The European Commission maintained that they did not have a mandate to negotiate on behalf of the EU Overseas Countries and Territories and declined to negotiate a future relationship that included the UK's Overseas Territories. We sought to change the Commission's position, but it declined to do so.
 - We remain unwavering in our commitment to safeguarding the interests of the UK's Overseas Territories. We are supporting the Overseas Territories in adjusting to new post-Brexit arrangements, including supporting biodiversity with a £7m per year uplift over three years for the UK Darwin scheme.

- We are providing technical support to the Falkland Islands to help them manage the application of EU import tariffs, including a 6% tariff on their squid trade. UK Government officials have conducted a technical meeting with Falkland Islands officials to improve our collective understanding of the impact of EU tariffs and to support the Falkland Islands with their decisions on the appropriate actions required. The UK Government will continue to provide support to the Falkland Islands including on technical aspects if requested by the Falkland Islands.
- 6. We welcome the proposed framework for a UK-EU legal instrument setting out Gibraltar's future relationship with the EU, which was agreed by Gibraltar, the UK and Spain on 31 December 2020. We hope that this can be swiftly converted into a separate UK-EU treaty concerning Gibraltar. (Paragraph 44)**
- 7. We invite the Government to confirm whether a UK-EU treaty on Gibraltar will be a stand-alone agreement (as appears to be envisaged by Article FI NPROV.1(3) of the TCA), or whether it will be a supplementing agreement, and therefore subject to the same over-arching governance structure as the TCA itself. (Paragraph 45)**
- The final form of the agreement remains to be determined.
 - During his recent visit in March, the Foreign Secretary reiterated the UK's longstanding commitment to Gibraltar. As expressed in the Joint Ministerial Statement of 29 March 2021, the Foreign Secretary and the Chief Minister agreed that the UK and Gibraltar have a shared aim to secure future prosperity for Gibraltar and the surrounding region.
 - The framework agreed with Spain gives a clear basis for a treaty, and, in the forthcoming negotiations, the position taken by the UK and Gibraltar will follow the provisions agreed in that framework. The UK and Gibraltar are committed to work constructively and quickly with the intention of concluding a treaty in the coming months.
 - It is important that the agreement reflects the unique circumstances of Gibraltar and brings confidence and stability to the people of Gibraltar and its neighbouring communities. The treaty should contain arrangements to ensure it is governed in an effective and proportionate way, reflecting the nature of the treaty as well as the judicial autonomy of the parties.

The institutional framework

- 8. The EU-UK Trade and Cooperation Agreement establishes a complex but flat governance structure, which will sit alongside the structure already put in place by the Withdrawal Agreement. Such breadth and complexity are, in our view, likely to prove challenging. We also note the possibility that further agreements could in due course be brought under the same governance umbrella, adding still more breadth to governance. While initially we expect**

both sides will respect and adhere to the newly established structures, we recommend that the Government keep them under review—there may well be a case for simplifying and rationalising them in due course. (Paragraph 67)

- 9. One area of difference between the two structures is in the use of written procedure, which is prohibited in respect of the Joint Committee, by virtue of section 35 of the European Union (Withdrawal Agreement) Act 2020, but is permitted in respect of the Partnership Council. We call on the Government to explain the reasoning behind this difference of approach. (Paragraph 68).**
- 10. The Government will need to commit significant resource to support the governance structure. This resource should primarily be focused in Brussels and in Whitehall: the extent of EU competence is such that Brussels will remain the key forum for developing UK relations with the EU-27. We therefore urge the Government to ensure not only that dedicated resource is available across Departments, but, as we recommended in our 2019 report *Beyond Brexit*, that the UK Mission to the EU in Brussels is able to draw on additional resource to support it in monitoring and influencing developments in Brussels. (Paragraph 69)**
- 11. Although the Member States are excluded from the governance structure established under the TCA, they will have a major say on the policy positions adopted by the EU. It will therefore be important also to provide the resource needed to develop the UK's bilateral relationships with the Member States. (Paragraph 70)**
 - a. The TCA establishes an institutional structure that reflects the unusual breadth of the agreement, and the wide range of areas of cooperation it covers. At the top is the Partnership Council, which has oversight of the agreement as a whole, and is co-chaired by Lord Frost. The Partnership Council is supported by specialised committees, which are fora for technical discussion in particular areas of the agreement, and by a Trade Partnership Committee, which will oversee the trade relationship. It is for each Party to determine their own delegations for these structures. This is in line with standard practice in international agreements, and will help to ensure that the agreement is working smoothly and resolve any issues that might arise. This is inevitably a broad and complex agreement and we agree with the committee that significant attention and resource will be needed to make the structures work effectively (see also below).
 - b. Decisions may be made in the Partnership Council via written procedure in accordance with Rule 9 of the Partnership Council's Rules of Procedure. There may be circumstances where a decision is taken without a full meeting. For example, the Decision in February to extend the provisional application of the TCA, on which urgent clarity was needed, was taken by written procedure. Whilst the written procedure under the TCA may be used in such circumstances such as the above, in-person decision making will always remain the Government's preferred appropriate mechanism. That preference is formalised in the Withdrawal Agreement Act and reflects the specific

circumstances which resulted in the finalisation of the Withdrawal Agreement itself.

- c. We welcome your comments on the need to commit sufficient resource to support the workings of the TCA institutions. We can reassure you that this is the case. Lord Frost leads the UK's institutional and strategic relationship with the EU, supported by officials in the Cabinet Office and the UK Mission to the European Union in Brussels. We are committed to continuing our bilateral relationships with Member States under the new relationship.

12. There will also be a critical need to coordinate the Government's contribution to the governance structures of both the TCA and the Withdrawal Agreement. The close symmetry between these structures, and the overlap of personnel, is helpful, given the synergies between the two Agreements, particularly in respect of Northern Ireland: it should assist in coordination and may ultimately pave the way for a formal rationalisation of the current two-headed structure. We welcome the fact that, at a time when the crucial UK-EU relationship is developing rapidly, there will be a designated Cabinet level Minister charged with coordinating the Government's engagement with the EU and leading the UK's input into the governance of both Agreements. (Paragraph 71)

13. But this new ministerial role will bring with it increased accountability to Parliament. We welcome the recent decision that Lord Frost should answer questions in the House of Lords on a regular basis, and we underline the urgent need for effective mechanisms to allow the House of Commons to hold him to account. We also invite the Government to agree that any holder of the role to which Lord Frost has been appointed should appear at regular and predictable intervals before designated Select Committees of the two Houses. (Paragraph 72)

- The EU Secretariat has been established in the Cabinet Office to provide direction and coordination of the UK's relationship with the EU and its member states. Lord Frost is the lead Minister on the UK's institutional and strategic relationship with the EU and therefore oversees the work of the EU Secretariat.
- Lord Frost is committed to facilitating parliamentary scrutiny of his portfolio. In addition to answering regular questions in the House of Lords, he will do this through regular Parliamentary business, including attending Select Committee sessions to provide evidence as appropriate.
- The Paymaster General supports the portfolio in the House of Commons where there are regular opportunities for members of the House of Commons to scrutinise this work including through Cabinet Office Oral questions.

14. We note the absence of any provision in the TCA for regular summit-level meetings between the Parties. We note Lord Frost's confidence that such meetings will occur naturally and organically, but given the number of bilateral relationships that are subsumed within the UK-EU relationship, we regret this omission, and believe there would be huge benefit to the UK in adopting a

more structured approach. We invite the Government therefore to set out its plans for ensuring regular ministerial and Head of Government level dialogue with the EU-27 and the Commission. (Paragraph 73)

- We believe the institutional arrangements provided for in the TCA reflect what is necessary to ensure the smooth running of the agreement, and to ensure that both the UK and the EU have appropriate fora to raise any issues in its application. Lord Frost is the UK co-chair of the Partnership Council, given his ministerial responsibility for the UK's relationship with the EU. The Partnership Council is required to meet at least once a year.
- We are confident there will be the necessary regular political level engagement both with the EU institutions and bilaterally with the Member States at all levels. Indeed, UK Ministers have continued to meet their counterparts in EU Member States since the conclusion of the TCA.

15. The complexity of the governance structure underlines the need for both sides to commit to transparency. Although the TCA appears to establish a presumption in favour of transparency, its substantive provisions are weak, and unless further commitments to transparency are made it may be impossible for Parliament, the devolved legislatures, or wider civil society, to contribute effectively to the developing UK-EU relationship. Formal ministerial statements after meetings are not enough: we call on the Government to draw up a comprehensive mechanism to support document based scrutiny by designated select committees, and more generally to promote the transparent operation of the governance bodies established by the TCA. (Paragraph 74)

- The government is committed to transparency in its approach to the TCA institutions. This is reflected in the text of the Agreement itself, which makes a number of commitments to ensure transparency. This includes commitments to publication of the agendas and minutes of meetings of the TCA institutions, as set out in rule 10 of the Partnership Council Rules of Procedure.
- As the TCA institutions commence their work, Lord Frost has committed to facilitating parliamentary scrutiny of his portfolio. We will also work with the DAs on matters relating to implementation in areas of devolved competence and our relationship with the EU. We will also engage with business and civil society in the usual way, including on issues of TCA implementation.

16. Finally, we note with concern the Government's decision not to allow the governance structure established under the TCA to meet. We acknowledge that the agreement has yet to be ratified, and is currently only provisionally applied. But it is fully operational, and it is now, when the new arrangements are still unfamiliar, that problems are most likely to be encountered. We see no justification, particularly given the agreed extension of provisional application, for allowing such a complex and important relationship, affecting the security and livelihoods of over 500 million citizens in the UK and in the EU, to drift without the formal governance arrangements having been activated. (Paragraph 75)

- We have been clear that we did not consider that these committees should formally agree their work until the TCA had been ratified. Now that the TCA has been ratified, these committees will be up and running soon. We are in discussions with the EU about setting a date for the first Partnership Council.

17. We welcome the TCA's provision for a Parliamentary Partnership Assembly, bringing together Members of the Westminster and European Parliaments—there should be a presumption that any modern, multi-faceted international agreement of this kind includes an integral parliamentary dimension. In our view, the initial goal of the Assembly should be to help rebuild relationships between the UK and the EU and strengthen channels of communication between the two Parliaments. (Paragraph 87)

18. We note that the PPA will be particularly important, given that the European Parliament remains co-legislator in respect of all legislation affecting the EU Single Market in goods that applies in Northern Ireland under the Protocol on Ireland/Northern Ireland. MEPs will shape the laws that apply to the people of Northern Ireland: it is therefore vital that there should be a structure to enable parliamentarians in Westminster and Stormont to engage with MEPs throughout the EU's legislative processes. (Paragraph 88)

19. We note that the TCA does not mandate the Parliamentary Partnership Assembly, placing the onus for establishing it upon the two Parliaments. A similar provision in the UK-Chile Agreement has yet to be implemented, and we note with concern the Chancellor of the Duchy of Lancaster's view that this would be a matter purely for the two Houses, not the Government. The Government has extensive power of initiative in both Houses, and also has the power to frustrate committee-driven initiatives if it so chooses, simply through inaction. The Government should give impetus to the Assembly, by supporting Members and committees in bringing forward proposals, and by committing to table the relevant motions in both Houses. (Paragraph 89)

20. We note with regret that the wording of the relevant Article appears to preclude Members of the devolved legislatures from membership of the PPA. If this is indeed the case, it will be all the more important not only for other forms of direct engagement between the devolved legislatures and the European Parliament to be found, but for the legislatures of the United Kingdom to work together to support coordinated scrutiny of both intra-UK and UK-EU relations, in all their dimensions. (Paragraph 90)

- The TCA provides for the possibility of establishing a joint Parliament Partnership Assembly (INST 5) consisting of members of the UK and European Parliaments. The Government supports such dialogue. The Agreement properly considers that this is something for the Parliaments themselves to take forward and we are aware that plans to that effect are underway. The Parliamentary Partnership Assembly, if constituted, would be made up of members of the Houses of Parliament, which comprises members from all parts of the United Kingdom.

21. The provisions of the TCA on civil society engagement are relatively weak. In particular, we regret that the Civil Society Forum will essentially meet at the pleasure of the Partnership Council, and we therefore call on the Government to explain how it plans to give effect to this provision in facilitating the work of this new body. (Paragraph 91)

- The TCA provides for engagement with civil society through several mechanisms, including the establishment of a UK-EU civil society forum (Article 14), and through each party's respective domestic advisory groups (Article 13). With regards to the civil society forum, the agreement sets out that it must meet at least once a year. We are carefully considering how the civil society forum is brought together. This will require agreement with the EU, and we will set out such plans in due course.
- We will of course continue to engage with business and civil society in the usual way, including on issues relating to TCA implementation.

Dispute resolution

22. Within the dispute resolution provisions of the TCA, the Government has broadly achieved its aim of bringing the direct jurisdiction of the Court of Justice of the European Union to an end. However, there are some caveats to this conclusion. The first is that some remaining obligations under the Withdrawal Agreement will continue to be subject to the CJEU (most notably those under the Protocol on Ireland-Northern Ireland). The second is that cooperation with the EU agencies will still be subject to the oversight of the CJEU. Finally, the indirect effect of CJEU judgments should not be underestimated, particularly in the fields of law enforcement, judicial cooperation and data exchange. (Paragraph 129)

- The Government notes the Committee's comments. The TCA achieves what we set out to achieve: no role for European Court of Justice in the UK, and no role for EU law.

23. The ending of the direct jurisdiction of the CJEU, and the inherent breadth and complexity of the TCA, means that, as we envisaged in our 2018 report, Dispute resolution and enforcement after Brexit, it has been necessary to create a varied series of dispute resolution mechanisms to deal with the many areas of potential disagreement that could arise between the two Parties. (Paragraph 130)

- For the policy areas typically covered in an FTA, the arbitration mechanism is based on precedent and is in line with international norms. If there is a dispute between the UK and the EU, every effort will be made to solve it politically and amicably. We have provided for independent arbitration where it is appropriate, including on many areas in trade.
- In some areas, such as fisheries and aviation, we have provided for arbitration so that the UK and the EU can have confidence in the independence of the system in the event of a dispute. And in others, such as

labour, environmental and climate regulation, there are bespoke arrangements involving consultation and input from a panel of experts, which again is in line with international norms for managing disputes in those areas.

- Importantly, there is no arbitration where it is not suited to the nature of the cooperation. This includes law enforcement, where the dispute settlement mechanism is political in nature and only involves the Parties, with no arbitration or role for the CJEU.

24. This complex architecture is necessary to deal with the unique nature of the TCA—a ‘one size fits all’ method of dispute resolution was never likely to be sufficient. Many of the mechanisms, such as arbitration, are familiar from other free trade agreements. But other mechanisms, such as the proposed ‘rebalancing’ measures, are novel, untested, and without clear precedents. (Paragraph 131)

- The rebalancing measures were agreed as a compromise in place of the EU’s demands for ‘equivalence’ which would have tied us to aligning with EU standards in these areas, and which we could not accept.
- The rebalancing clause recognises that, as time goes on and the UK and EU systems naturally evolve, this divergence could impact on trade between the Parties. It therefore allows either side to adopt strictly limited and proportionate rebalancing measures to remedy any distortive impacts, subject to the approval of an independent arbitration panel.
- The rebalancing measures also provide scope for amending the deal so that the parties can adjust the balance of the economic elements of the agreement over time.
- The agreement sets out strict conditions for use of the rebalancing measures and, although it was necessary to include some novel elements in order to reach a deal with the EU, the agreement makes clear that the rebalancing measures can only be used to remedy the specific distortions to trade or investment in question.

25. Only time will tell if these novel approaches are workable in practice, or if they will have a destabilising effect. There is a risk that, if the Parties do not behave pragmatically and reasonably, some of the dispute resolution mechanisms could be used to trigger a broader renegotiation of the TCA—or even, in an extreme case, to justify termination of all or part of the agreement. (Paragraph 132)

- As noted above, if there is a dispute between the UK and the EU, every effort will be made to solve it politically and amicably. If not, the TCA provides for independent arbitration where appropriate. The inclusion of a robust dispute resolution mechanism in the agreement is designed to make the agreement more stable, as any disputes between the UK and EU can be resolved using mechanisms within the scope of the agreement itself, without having to resort to more disproportionate action, such as termination. The same is true for the

“rebalancing” mechanism, which enables a different balance in certain areas of the Treaty to be struck if it is clear that the original balance is causing difficulties.

- Additionally, the TCA only provides for cross-suspension in a limited set of circumstances. The EU wanted widespread cross-suspension, where a dispute in one area could have led to the suspension of a completely different area. This was unacceptable and would have resulted in an unstable agreement. We instead agreed a mechanism that allows cross-suspension only where this is appropriate to the nature of the breach in question.
- The UK or the EU can decide to terminate all, or in some cases parts of the agreements, if they give sufficient notice. This is standard in international agreements and means there is a way of ceasing cooperation if either party decides it wants to, as is its right.

26. We regret that it was not possible to find a means to protect the interests of individuals and small businesses under the TCA. The fact that the bulk of the arrangements are necessarily State-to-State means that access to justice will be restricted, and the interests of those who are unable to lobby effectively may be overlooked. (Paragraph 133)

27. We therefore call on the Government, in reflecting on the domestic consultation that will be needed to support the implementation and operation of the TCA, including the establishment of the domestic advisory groups provided for in Article I NST.7, to prioritise measures to mitigate this loss of access to justice. Mechanisms are needed whereby individuals and businesses (particularly SMEs) adversely affected by the operation of the Agreement can swiftly escalate issues to the Government, so that the Government can then pursue them. Even in the weeks since 1 January 2021, it has been clear that quick and effective resolution of issues experienced by individuals or businesses is essential if the wider Agreement is not to be brought into disrepute. (Paragraph 134)

- We agree that rapid escalation of problems in implementing the TCA is important. We will of course continue to engage with business and civil society in order to ensure this.

28. More specifically, we call on the Government to set out the safeguards and procedural rights available to those citizens in the UK who may be subject to extradition requests from EU Member States under the terms of the TCA, and in particular to explain how those rights have changed from those that were available before 1 January 2021, under the terms of the European Arrest Warrant. (Paragraph 135)

- The TCA enshrines protections for individuals who are the subject of extradition requests and complements the guarantees already available in UK domestic legislation (the Extradition Act 2003). The provisions set out explicitly that requested persons cannot be surrendered if their fundamental

rights are at risk, if extradition would be disproportionate, or if they are likely to face long periods of pre-trial detention.

- Additionally, the Agreement explicitly sets out that UK courts may seek additional guarantees from an EU Member State if there are concerns about respect for the requested person's fundamental rights and may also refuse a warrant if they believe it has been issued for the purpose of prosecuting someone because of their political views, their sexual orientation, race or religion.
- Finally, the Agreement provides additional detail on procedural guarantees applicable in extradition procedures, namely the rights of an arrested person to have access to translation, interpretation, legal advice and consular assistance for British citizens arrested abroad. These safeguards existed across various legislative instruments which applied horizontally to various fields of cooperation interacting with the European Arrest Warrant Framework Decision, but the inclusion of an explicit reference to these rights now provides additional legal certainty to suspects and accused persons.
- We will consider whether, and if so how, it may be useful to set out these rights and arrangements in a more visible way.