

Written evidence to the European Scrutiny Committee—John Bell, LLM

Introduction

1. This written evidence is in response to the European Scrutiny Committee's call for evidence as part of its inquiry into the institutional framework of the UK-EU Trade and Cooperation Agreement (TCA).
2. I hold an LLM (Distinction) from Queen Mary University of London. I was previously a Schuman Trainee at the European Parliament, within the Directorate for Legislative Cooperation and Conciliations, Directorate-General for Internal Policies of the Union (DG IPOL). With regards to my evidence on Part 3 of the TCA, I refer to my previous role at the Serious Fraud Office (SFO).
3. I will limit the scope of my evidence to the powers of, and transparency requirements in relation to, the Partnership Council (PC) and Specialised Committees.

The powers of the Partnership Council and the Specialised Committees

4. The PC is at the heart of the institutional framework of the TCA. The establishment of the PC represents a fundamental shift from the institutional approach of the EU Treaties to an intergovernmental approach governed by public international law. In replacing a structure comprising the Council of the EU, the European Commission, the European Parliament, and the Court of Justice of the European Union (CJEU) (none of which play any role in the TCA), the PC has the potential to be a powerful body.
5. The PC is co-chaired by a member of the European Commission and a UK Government minister. The current co-chairs are European Commission Vice-President Maroš Šefčovič, and Lord Frost, Minister of State in the Cabinet Office. The PC must meet at least once a year (TCA Article, 7(2)). The first meeting of the PC was held in London on 9 June 2021, and was followed by the [European Commission's press release](#) and the [Cabinet Office's press release](#).
6. TCA, Article 7(3) states that the PC shall 'oversee the attainment' of the TCA, and 'supervise and facilitate the implementation and application' of the TCA. In addition, both the UK and EU 'may refer' to the PC 'any issue relating to the implementation, application and interpretation' of the TCA. These are broad powers to ensure uniform interpretation and application of the TCA. In the absence of a role for the CJEU or any other court (the dispute resolution provisions of the TCA do not concern governance), the PC assumes an overarching quasi-judicial function without the attributes of an independent court. The faculty for parties to refer issues appears to be a matter of adding an item to the agenda of a PC meeting.

7. TCA, Article 7(4) sets out the concrete powers of the PC. The two main powers of the PC appear to be (a) the adoption of decisions, and (b) the making of recommendations. Decisions¹ of the PC can be made ‘in respect of all matters where [the TCA] so provides.’² Recommendations can be made to the parties ‘regarding the implementation and application’ of the TCA. In addition, the PC can ‘discuss any matter’ related to the areas covered by the TCA. These core powers reflect the PC’s role as the cornerstone of the TCA’s institutional architecture.
8. TCA, Article 8(1) establishes the Trade Partnership Committee and 18 separate Specialised Committees, to which the PC can delegate its powers (TCA, Article 7(1)(f)). Together with the PC, the Partnership Committee, Trade Partnership Committee, and the Specialised Committees form the institutional ecosystem of the TCA. Article 8(4) confers certain powers on all Specialised Committees, including the power to ‘monitor and review’ the TCA and ‘ensure its proper functioning’, assist the PC in the performance of its tasks, and adopt (like the PC itself) decisions where delegated by the PC or for which a provision of the TCA so provides.
9. Decisions of the PC, the Trade Partnership Committee, or a Specialised Committee are binding on the parties to the TCA, and all bodies set up under the TCA, including the arbitration tribunal. Recommendations are not binding (TCA, Article 10(1)). Whilst it is too early to say what the import of those decisions and recommendations would be, it is clear by the broad scope of powers listed in TCA, Article 7(4), and Articles 8(2)-(4) that the intention of the TCA is for the development (or equally their potential suspension, see below) of UK-EU future relations to be premised on these legal acts. As such, I recommend that the Committee scrutinises any decision of the PC, Trade Partnership Committee, and Specialised Committees both before and after their adoption.

The Specialised Committee on Law Enforcement and Judicial Cooperation

10. I wish to draw the Committee’s attention to the Specialised Committee on Law Enforcement and Judicial Cooperation (SCLEJC), which has a key role in the governance of Part 3 of the TCA on law enforcement and judicial cooperation matters. Part 3 establishes a new surrender mechanism replacing the previous European Arrest Warrant (EAW) mechanism based on mutual trust between EU member states, and fundamental rights. Part 3 is ‘based on’ respect for the European Convention on Human Rights (ECHR) and refers to the ‘importance of giving effect to’ the ECHR domestically (TCA, Article 524). Part 3 would be terminated if the UK denounced the ECHR (TCA, Article 692).

¹ For the first decision of the PC, which extended the date of provisional application of the TCA to 30 April 2021, see: Decision No 1/2021 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part of 23 February 2021 as regards the date on which provisional application pursuant to the Trade and Cooperation Agreement is to cease (2021/356), OJ L 68, 26.2.2021, p. 227–228.

² Taking two discrete examples, the PC has the power to amend Part 1, Chapter 2 on rules of origin (TCA, Article 68), and has an obligation to use best endeavours to establish an exchange of information arrangement between the Rapid Alert System for non-food products (RAPEX) and the market surveillance and product safety database established under the General Product Safety Regulations 2005 (TCA, Article 96).

11. In the event of ‘serious or systemic deficiencies’ regarding the protection of fundamental rights, Part 3 can be suspended by either party (TCA, Article 693). In addition to the core powers of the PC and SCLEJC described above, Part 3 of the TCA provides the SCLEJC with the power to recommend to the PC joint interpretations of Part 3, recommend ‘any appropriate action’ and ‘adopt appropriate adaptations’ to Part 3 which are ‘necessary to address the reasons underlying the suspension’ (TCA, Article 693(7)). Both the PC and SCLEJC are therefore responsible for avoiding the need to suspend Part 3. It is notable that the TCA devotes considerable detail to the powers of the PC and SCLEJC as regards the suspension of Part 3, as opposed to the lacunae left by the removal of mutual trust in the surrender mechanism.
12. Governance and human rights were contentious issues during TCA negotiations. As a result of the UK Government’s red line on CJEU jurisdiction, the PC and SCLEJC assume the previous interpretative functions of independent judicial bodies. This reveals a weak system of governance, which may be considered concerning where fundamental rights are concerned. In essence, a diplomatic forum is responsible for the human rights of those subject to arrest and surrender under Part 3 of the TCA.
13. For the reasons set out above, I submit that the Committee pays particular attention to the SCLEJC as part of its scrutiny of the activities of the PC and other Specialised Committees. The Committee may also wish to consider the potential role of the European Court of Human Rights in the governance of Part 3 of the TCA. My submission here should be read in conjunction with my submissions on proposed scrutiny and transparency requirements in relation to Part 3 of the TCA set out in paragraph 21, below.

Transparency requirements regarding meetings of the PC and Specialised Committees

14. Transparency requirements regarding meetings of the PC and Specialised Committees are set out in rule 10 of the Rules of Procedure of the Partnership Council and Committees (TCA, Annex 1). Rule 10(4) provides for the publication of provisional agendas of meetings of the PC and Specialised Committees before the meeting takes place, and the publication of approved minutes.
15. Both the Cabinet Office and the European Commission routinely publish provisional agendas before meetings of the PC and Specialised Committees, and approved minutes of those meetings. See: [Meetings of the EU-UK Partnership Council and Specialised Committees under the Trade and Cooperation Agreement](#).
16. Both the European Commission and Cabinet Office also issued public statements after the first meeting of the PC (see paragraph 5, above). It is unclear whether this is intended to be the practice for future meetings. Public statements are a welcome way of fleshing out approved minutes, giving the public a greater sense of the substance of what was discussed. It is not a practice specifically mandated by the TCA.

17. At [oral questions in the House of Lords on 29 April 2021](#) (ahead of the entry into force of the TCA on 1 May 2021), Lord Frost set out the Government’s approach to transparency requirements surrounding the TCA, stating that scrutiny arrangements would ‘mirror those for the Withdrawal Agreement Joint Committee as far as possible.’ Lord Frost committed to (a) ‘routine’ oral and written updates to parliamentary committees, (b) written ministerial statements (WMSs) ‘before and after meetings,’ and (c) sharing provisional agendas of the PC and Specialised Committees.
18. The Government’s approach is illustrated by [Written Ministerial Statement HLWS74](#), issued after the first meeting of the PC, and [Written Ministerial Statement HLWS64](#), containing the provisional draft agenda of the first meeting of the PC. However, these WMSs were not accompanied by oral questions or debate. Lord Frost’s statement to the House of Lords on 29 April 2021 lasted 11 minutes, including questions.
19. In a similar vein, the European Commission made a [statement on the role of the European Parliament in scrutiny arrangements for the TCA](#), confirming that ‘[...] the Commission will ensure that the European Parliament is immediately and fully informed of the activities of the Partnership Council, the Trade Partnership Committee, the Trade Specialised Committees and the other Specialised Committees [...].’ Mirroring Lord Frost’s statement referred to above, the statement also confirms that the European Parliament will have sight of draft agendas and minutes of the PC and Specialised Committees, and that the co-chair of the PC will ‘inform the European Parliament on a regular basis.’
20. That said, the European Commission statement goes into significant further detail on the role of the European Parliament in the scrutiny of the TCA than explicitly set out by Lord Frost in respect of the UK Parliament at the despatch box on 29 April 2021. Notably, the Commission commits to inform the European Parliament in advance of any EU proposal within the ambit of Part 3 of the TCA, as follows:
 - a) any decision to suspend Part 3 of the TCA in the event the UK no longer gives domestic effect to the ECHR (TCA, Article 693)
 - b) any other decision to suspend Part 3 of the TCA in accordance with TCA, Article 693, including consideration of a temporary solution to avoid suspension in accordance with TCA, Article 693(7).
21. As stated in paragraph 13, above, I recommend that the Committee uses the Commission’s statement as a model for the enhanced scrutiny I suggest is required of the SLCEJC (whether in its own right, and/or recommending action to the PC) in relation to Part 3 of the TCA. The potential impact of decisions of the PC (upon recommendation of the SLCEJC), in relation to Part 3 of the TCA, is the suspension the totality of the UK-EU law enforcement and criminal justice cooperation regime, with all the consequences that entails. As such, the UK Parliament should have at least equal scrutiny as the European Parliament.

22. TCA, Article 11 provides for the establishment of a Parliamentary Partnership Assembly (PPA) consisting of members of the European Parliament and the UK Parliament (it is unclear whether the drafter intended members of the House of Lords to be intended within the ambit of ‘Members of the Parliament of the UK’ in Article 11) as a forum for the exchange of views on UK-EU partnership. Article 11 would enable the PPA (if established) to request information from the PC on the implementation of the TCA, and to make recommendations to the PC, as well as an obligation to be informed of the decisions and recommendations of the PC.
23. The establishment of the PPA would be a welcome layer of scrutiny in holding to account the PC in the implementation of the TCA. In addition to strengthening transnational democratic dialogue, a PPA would be a logical consequence of the scrutiny requirements vis-à-vis the TCA committed to by both the Cabinet Office and European Commission. Indeed, democratic scrutiny would be arguably increased, since only the PPA established under TCA, Article 11 could make use of its treaty powers to make recommendations to, and request information from, the PC. It is notable that neither the UK Parliament nor the European Parliament has similar (legally binding) powers of their own volition.
24. I therefore recommend that the Committee urges the Government to update Parliament regarding any progress on the establishment of the PPA.

Summary of recommendations

25. In summary, I recommend as follows:
- a) that the Committee scrutinises any decision of the PC, Trade Partnership Committee, and Specialised Committees both before and after their adoption
 - b) that the Committee engages in enhanced scrutiny of the PC and SLCEJC in relation to Part 3 of the TCA, and considers the potential role of the European Court of Human Rights in the governance of Part 3 of the TCA
 - c) that the Committee advises the Government of the need to scrutinise any decision to suspend Part 3 of the TCA in the same way as the European Parliament
 - d) that the Committee urges the Government to update Parliament regarding any progress on the establishment of the PPA

John Bell, LL.M

London, 29th July 2021