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The institutional framework of the UK/EU Trade and Cooperation Agreement

What are the most important powers of the Trade and Cooperation Agreement (TCA) Partnership Council and the different Specialised Committees and what could the practical impact of the exercise of these powers be?

1. The Partnership Council is the main joint UK-EU body responsible for implementing and managing the Trade and Cooperation Agreement (TCA). It is co-chaired by a member of the European Commission and a UK government minister. Its functions and powers are analogous to those of the Joint Committee under the Withdrawal Agreement (WA) and are outlined in Article 7 of Title III of the TCA. They include the powers to (a) adopt decisions on matters covered by the TCA or any "supplementing agreement"; (b) make recommendations to the parties regarding the agreement; (c) amend the agreement or any supplementing agreements; (d) discuss any matters related to the agreement; (e) delegate some of its powers to the Trade Partnership Committee or specialised committees; (f) change the composition of specialised committees; and (g) make recommendations relating to the transfer of personal data. These powers are similar to standard Joint Committees that help manage international treaties. What is unusual is the breadth of issues covered by the TCA (which will affect the work of the Council) and the potential interaction with the WA Joint Committee.

2. The specialised committees are responsible for managing the different chapters and parts of the TCA. There are 19 specialised committees covering a wide range of issues, from trade to energy and transport. Additionally, there is the Trade Partnership Committee, responsible for supervising the work of the specialised committees related to trade (nearly all of Heading One of Part Two). The Trade Partnership Committee has greater powers than the individual specialised committees and its primary role appears to unload the administrative burden from the main Partnership Council, given the number of specialised committees that would otherwise report to it directly. In practice, the work of the individual committees will differ widely; it will depend on the types of issues covered by the different chapters, their political salience, and the level of cooperation between working-level officials sitting in on the committees. The committees can be a powerful structure for managing the agreement so that it adapts to the changing circumstances over time and for preventing disputes. However, the effectiveness of these institutions will depend on the licence to act that the officials are granted by their political leaders. If political representatives allow the officials to be in a problem-solving mode, these structures can be an effective way of mitigating and resolving disagreements, exchanging useful information, and even deepening cooperation in areas of shared interest. By contrast, if political leaders create barriers to constructive bilateral engagement, the meetings of the committees will amount to little more than a talking shop. The single biggest factor that will determine the effectiveness of the institutions under the TCA will, therefore, be the attitude of political representatives of both the UK government and the European Commission to this relationship.

3. The manner in which these powers will be exercised is outlined in the rules of procedure, in an annex to the TCA. The institutions of the TCA can make decisions and recommendations only by mutual consent. When adopted, decisions are binding on both parties and recommendations are of an advisory character. There may also be a Secretariat for the Partnership Council. There is a significant degree of discretion within the rules of procedure to develop a function that meets the practical needs of this relationship. In my view, there is a case for establishing a standing joint secretariat staffed by a small number of officials between the UK government and the European Commission that would administer *both* the Partnership Council and the WA Joint Committee. The wide range of issues covered by the TCA and the WA, with the numerous meetings that will be required, will require both sides

to put in significant coordination. Just under the TCA, the specialised committees will have to meet at least once a year, meaning that there will be at least 24 committee meetings every year. It is likely that the some of the high-profile committees (e.g. on trade in goods, services, and SPS matters) will meet more frequently. Coordinating such a large number of meetings would be easier and more effective with a single joint point of contact whose rule would be to organise meetings, circulate papers, ensure consistency of minutes, and help with the exchange of communication. Crucially, having a single joint secretariat would strengthen working-level relations between the UK government and the Commission. It is easy to underestimate how essential are working-level relationships to the successful operation of agreements like this – even more so in the fractious political context like the one that has developed between London and Brussels in the first half of this year.

4. An important feature of the institutions under the TCA is that they can address only those matters that are within the scope of the TCA or any "supplementing agreements".[1] In other words, the bodies of the TCA are not able to address bilateral issues that do not fall in the scope of the TCA or the designated supplementing agreements. The implication of this is that the TCA is *not* a body for managing wider UK-EU political and economic relations; it is simply a body responsible for managing the agreement and the issues covered within the TCA. Nor is it a body for nurturing good diplomatic relations with the EU, or for addressing wider issues of shared interest, such as climate change, foreign policy, external security, that are not covered by the agreement. The institutions of the TCA are, in essence, about problem-solving, not about nurturing wider political relations between the UK and the EU on issues of shared interest. The most evident example of this is that, within the TCA, there are provisions for regular leaders-level political dialogue. This marks a departure from the types of fora that the EU typically seeks to include in Strategic Partnership Agreements with countries such as Canada and Australia.[2]

5. The absence of political-level dialogue is, in my view, the biggest gap in the institutional architecture of the TCA. Both sides would benefit from a summit-level forum, which would allow UK and EU political leaders to meet on a regular basis (e.g. at least once a year). This type of political events often provide an important opportunity to provide the impetus to resolving difficult political situations and to move forward an agenda of shared interests. There are many issues where the UK's and the EU's international objectives intersect – from the fight against climate change or external security – but no political-level forum that would allow the two sides to take forward constructive agendas on these issues. Of course, the lack of this forum does not prevent UK and EU political leaders from working on these issues, but those interactions take place on a more ad-hoc basis and, in practice, rest of the willingness of the individual leaders and officials to instigate those meetings. There is an enormous missed opportunity by not having a more structured political-level dialogue that would allow UK and EU leaders to take forward constructive agenda where their interests intersect.

How could the implementation of the TCA and the actions of the UK/EU joint bodies impact the operation of the Northern Ireland Protocol to the UK/EU Withdrawal Agreement?

6. It is useful to distinguish between the legal and practical ways in which the TCA and the WA interact. There is an important legal link between the TCA and the WA contained within Article 178 of the WA. Under this provision, the TCA and any future UK-EU agreements can be suspended for non-compliance with arbitration rulings of the WA, including for breaches of aspects of the NI Protocol.[3] Suspension must be proportionate to the breach of

[1] Supplementing agreements are specifically those agreements between the EU and the UK that meet the definition of Article 2.

[2]

[3] Article 178 of the WA applies only where the arbitration panel established under the WA has already ruled, under Article 177, that its prior ruling in a dispute has not been complied with.

obligations concerned and proportionality may be reviewed by the arbitration panel under Article 178(3). Any suspension of obligations is temporary and can be applied only until the breach has been remedied. Whether the breach has been remedies may itself be reviewed by the arbitration panel. Crucially, suspension can be of any provision of the WA (other than Part Two on Citizens' Rights) or of *"parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement",* under Article 178(2)(b). It is worth noting that, during the negotiation of the WA, Article 178(2) was added to the agreement at the EU's request, which was concerned that as many of the obligations in the WA become redundant over time, there would be more limited opportunities to suspend obligations as a result of non-compliance.

7. Whether and how it is possible to suspend any future agreement pursuant to Article 178(2)(b) appears to hinge on the meaning of the wording *"under the conditions set out in that agreement".* The dispute settlement procedure of the TCA, in Article 749(4), makes clear that "*where a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions referred to in Article 735*." Although the text of the TCA does not explicitly refer to the possibility of cross-suspension provided by Article 178(2), there is clearly an implicit reference to the WA. This provision therefore represents a powerful way of enforcing the obligations under the WA and the Protocol that allows either party to suspend obligations under the TCA even for breaches of the WA.

8. In more practical terms, the implementation of the TCA can impact the operation of the WA and the NI Protocol in a number of ways. First, the bodies of the TCA could amend the agreement in such a way that could, in theory, affect the practical exercise of the obligations of the Protocol. For example, should the Specialised Committee on SPS choose to amend the agreement in such a way that would ease the trade of products of animal origin, that would have implications for the practical requirements that apply to movement of goods from GB to NI. Second, the political atmosphere surrounding the implementation of one agreement will affect the implementation of the other. The lack of progress on issues around the NI Protocol might have spill-over effects for the work of the specialised committees and the Partnership Council. In discussing the structures, it is often too easy to underestimate how important is the trust among political leaders and officials to the successful operation of these agreements – and what are the consequences of the trust breaking down in one part of the relationship for another part.

What structures does the TCA provide to develop or deepen areas of cooperation such as mutual recognition of professional qualifications?

9. The structures of the TCA provide opportunities to develop cooperation in areas that are covered by the TCA or designated supplementing agreements, but not more broadly. In practice, of course, there is nothing that prevents UK and EU representatives from discussing issues not covered by the TCA in the meetings of the Partnership Council and its committees. But the crucial difference is that any decisions and recommendations taken in those discussions will not have the same status on the parties as the decisions taken within the legal framework of the TCA.

What are the key features of the dispute resolution procedures provided for in the TCA and what are the likely legal and policy implications of these for the UK? How closely do they follow precedent in other trade agreements and do they raise any concerns with respect to the UK's regulatory autonomy?

10. The dispute settlement procedures within the TCA does, on the on hand, resemble a very standard system included in most recent trade agreements, but on the other, they exhibit significant complexity. The design of the

dispute settlement system is relatively straightforward; it is modelled on standard FTAs and follows a two-step process, with political consultations and an arbitration procedure. There are non-compliance measures in the event of a ruling of the arbitration panel, which can take form of an offer for temporary compensation or suspension of obligations. The complexity comes in through the multitude of exclusions from the scope of dispute settlement. Unlike the dispute settlement procedure of the WA, which includes few variations and exclusions, the scope of the same procedure of the TCA is far more varied.

11. In principle, the dispute settlement procedure applies to all obligations of the agreement unless those that are excluded in Article 735(2). The exclusions that are listed in Article 735(2) are either subject to bespoke dispute settlement procedures (e.g. level-playing field provisions, fisheries) or non-enforceable under the agreement. Additionally, in the event of a breach of obligations, there are several exclusions from suspension of obligations (Article 749(3)), for example for financial services.

12. Within the TCA, there is a complex set of bespoke dispute settlement procedures for the level-playing field (LPF) provisions. Most aspects of the LPF rules can be referred to a panel of experts, nominated by the Trade Specialised Committee on the LPF in place of the arbitrators (Article 409). However, for disputes regarding labour and environmental chapters, there are additional dispute settlement rules (Article 410). In addition, there are special provisions for disputes relating to subsidies. The arbitration panel cannot rule on subsidies in individual cases or on the recovery of individual subsidy cases; however, there is a special process if a subsidy has caused a "significant negative effect on trade or investment" (Article 374). In such an event, the complainant can retaliate without a prior ruling of the arbitration panel. This is an unusually powerful provision which opens the prospect of retaliation.

13. Furthermore, there is a novel "rebalancing" mechanism that applies to LPF provisions. This mechanism allows both parties to impose temporary remedies if there are risks of "significant divergences" between the UK and the EU on future labour, environment or subsidy rules that have "material impacts on trade or investment" (Article 411). There is a clear process for such instances: consultation for 14 days; the rebalancing retaliation in the absence of a negotiated agreement; the possibility of a review of retaliation by the arbitration panel. This unusual mechanism reflects a compromise by the UK and the EU in the negotiations, offering an alternative to a ratchet clause that the EU had sought to include in the text. As such, this type of mechanism is novel and untested. Its scope is unusually broad and includes environmental, labour and subsidy rules. Its wording – "significant divergence" and "material impact" – leaves a degree of discretion for the parties to decide on what basis to trigger this provision. The more precise meaning of these provisions will be defined over time by the arbitrators. In terms of its impacts, this provision does not directly impact the UK's regulatory autonomy; it does not constrain the UK government from its right to regulate. Rather, this provision has a defensive character – it allows the complaining party to raise its concerns and, subject to a set of conditions, to impose temporary remedies upon the other party. Because the proportionality of these measures could be reviewed by the arbitration panel, this helps ensure a degree of impartiality in what would otherwise be a unilateral process with significant discretion left to individual governments.

14. The implications of these procedures depend on how frequently they are used. Although invoking dispute settlement procedures within standard FTAs is relatively rare, I would note that this agreement is qualitatively different from a standard trade agreement. First, it was concluded in the context of the UK's departure from the EU single market and the potential threat of the UK moving away from the EU's regulatory model. This means that the LPF provisions might be used more frequently than it would be the case under a standard FTA. Second,

trade agreements are usually pursued between countries with harmonious relations, with the political intent to avoid politically costly legal disputes.

How, ideally, should the transparency requirements around the meetings of UK/EU joint bodies, as set out in the TCA, be implemented both ahead of meetings and afterwards? How satisfactory are the requirements as currently set out in the Agreement?

15. The transparency requirements around the meetings of the institutions of the TCA are set out in the rules of procedure of the Partnership Council. The requirements are minimal and include making the provisional agendas public, publishing the minutes of the meetings, and each party deciding on the publication of the decisions and recommendations made within the Partnership Council. One notable difference with the WA is that there is a presumption in favour of confidentiality for the meetings of the Joint Committee, but for the Partnership Council, the "co-chairs may agree that the Partnership Council shall meet in public".

16. In practice, these requirements will give both parties a significant degree of discretion about what information to publish and at what frequency. While this lack of transparency is not unusual in the management of international treaties, there is a strong case for increasing transparency under the TCA. Given the volume of meetings that will take place under the specialised committees, limited transparency will mean that these meetings will favour stakeholders with existing access to the government ministers and officials. Others will find it costly to find out about the work of the bodies operating under the TCA. It would, therefore, be more beneficial for both sides to further develop ways in which to ensure equal access to information for all stakeholders. This could be done, for example, by mandating the Secretariat of the Partnership Council and the Joint Committee to act as a single point of contact; to adopt a consistent approach to publishing the minutes of the meetings; and to keep a written record of the stakeholders interacting with the institutions of the TCA which would be public.

How could the UK/EU TCA institutions be utilised by the UK and EU to raise and, where possible, address, concerns about legal and policy developments on the other side which are of importance to them respectively (e.g. for the UK, changes in EU regulation in key areas like financial services, pharmaceuticals and energy)?

17. Although the TCA contains no obligation to align to EU law, this does not mean that EU law will not continue to impact the UK going forward. There are several important ways in which present and future EU rules and regulations will continue to influence the UK. First, under the NI Protocol, Northern Ireland has to dynamically align with a body of EU law. Second, the devolved governments may choose to continue alignment to aspects of EU law in the areas of devolved competence. Third, UK firms operating on the EU market will continue to abide by EU rules and regulations. And, fourth, the market power of the EU will continue to incentivise businesses around the world, including in the UK, to abide by EU rules as a default (often referred to as "the Brussels effect"). All this means that it is in the interest of the UK government to actively monitor developments on the EU side and to respond to them adequately. Equally, we will find the EU and its member states actively monitoring how the UK is changing its domestic regulations after Brexit and, more specifically, in what ways this marks a departure from the EU's regulatory model.

18. Despite the obvious importance of monitoring policy and regulatory developments for both sides, there are few meaningful provisions that mandate active cooperation on regulatory matters within the TCA. There are provisions that aim to facilitate regulatory cooperation; however, these provisions are non-binding and largely voluntary. This includes a set of standard provisions, such as an early notification procedure (whereby each party is asked to make publicly available "*major regulatory measures"* within a year) and each side's commitment to

undertaking public consultation, impact assessment and retrospective evaluations of legislative proposals. Neither party can raise a dispute about the regulatory cooperation obligations (Article 354). The TCA sets up a Trade Specialised Committee on Regulatory Cooperation which aims to provide a forum for exchanging information on regulatory cooperation. It is noteworthy that these regulatory cooperation provisions in the TCA are less ambitious than in recent EU FTAs, for example EU-Canada FTA, where the Regulatory Cooperation body has a wider range of powers. This is regrettable since this is an area where the UK and the EU would clearly benefit from closer cooperation. The Regulatory Cooperation Specialised Committee would benefit from a clearer mandate and reporting requirements, at least once in 6 months.

19. In the absence of active cooperation on regulatory matters between the EU and the UK government, the Parliamentary Partnership Assembly (PPA) can act as an important forum to exchange information on upcoming legislative developments. One of the functions of the PPA could, for example, be to report on the legislative proposals on both sides on a regular basis and, thus, to address the obvious gaps in communication that might arise between the European Commission and the UK government. However, this will not be a substitute for the UK government developing a clear strategy for engaging with future regulatory changes on the EU side. The government will benefit from an internal function that continues to produce explanatory memoranda on EU legislative proposals.

What should the Government's approach to representing the UK in meetings of the TCA's joint bodies be? Should the Devolved Administrations be involved in discussions that relate to devolved competences? How should the Government ensure cross-departmental and cross-sectoral coordination of its positions in the various bodies established by the TCA?

20. The coordination of internal policy positions is a matter for the UK Government. But it is clearly in the interest of the UK Government to ensure that the devolved administrations are adequately represented and kept abreast of the discussions within the institutions of the TCA. In its absence, there is a particular risk that the devolved administrations will use their new regulatory and legislative powers, which they have gained as a result of the UK's departure from the EU single market, in ways that might undermine the UK's wider objectives with the EU. In a number of areas, such as food safety policy, the devolved government are able choose how closely to align to future EU laws and regulations. For example, the Scottish Government has already legislated through the Continuity Act to align to EU law in areas where it is in its interest to do so. The implication of this is that the positions and interests of the UK government and devolved governments with respect to future EU legislation may differ.

21. The obvious implication of this is the need for an internal function within the UK Government, similar to the now-defunct European and Global Issues Secretariat (EGIS) within Cabinet Office, that would coordinate not only cross-departmental policy positions within Whitehall, but also cross-governmental positions within the UK.

How is the EU approaching the implementation of the TCA and the work of the joint UK/EU bodies, and what are the potential implications of its approach?

22. One feature of the TCA's institutional architecture is that the European Commission is represented on the EU side. There is no direct involvement of EU member states. This is largely a consequence of not including regular summit-level dialogue where member states would be involved more directly (further discussed above).

23. It is notable that the European Commission has taken a decision to manage the political relations with the UK differently from other third countries. The Commission has given the responsibility for overseeing the relationship with the UK to one of its vice-presidents. A new Service for the EU-UK Agreements was established

directly under the Commission's Secretariat General and reports to one of the Deputy SGs. This marks a different approach from other third countries, where the EU External Action Service is primarily responsible for managing EU political and diplomatic relations with third countries and clearly reflects the importance of the UK as a strategic partner and a near neighbour.

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