

THE LONG-AWAITED TRADE DEAL BETWEEN THE EU AND THE UK – EXPECTATIONS AND REALITIES

ANNEGRET ENGEL*

At long last, the EU and the UK have struck an agreement on their new relationship defining future trade and cooperation across the Channel. However, expectations and realities do not always meet and so it is in the particular case here. The TCA is not an ordinary international trade agreement, as it contains distinct features which may disappoint those expecting a CETA-style deal. In addition, Brexit has the potential of developing into a never-ending story as the TCA by no means puts an end to the debate. Many questions remain unanswered which will have to be dealt with in the following years or otherwise run the risk of creating further divergence in the longer term, ultimately undermining the entire agreement and keeping the threat of a 'no deal' scenario alive.

1 INTRODUCTION

With its referendum in June 2016, the UK decided to leave the European Union after more than four decades of membership.¹ The withdrawal process according to Article 50 TEU was officially initiated by formal notification in March 2017 and should have lasted only two years,² however was extended several times before Brexit was eventually completed with a Withdrawal Agreement on 31 January 2020.³ A transitional period of 11 months provided the necessary time frame to negotiate the conditions of the future relationship between the two parties.

Signed on 30 December 2020 by both the EU and the UK, the Trade and Cooperation Agreement (TCA) constitutes the official conclusion of the Brexit negotiations.⁴ It applies provisionally from 1 January 2021.⁵ According to Article COMPROV.1 of the TCA, the purpose of the Agreement is to establish a 'basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation'. The main parts of the TCA include arrangements for trade, transport, and fisheries (Part Two), law enforcement and judicial cooperation (Part Three),

* Senior Lecturer for EU Law, Faculty of Law, Lund University.

¹ The possibility of withdrawal was only introduced in the latest treaty reform, the Treaty of Lisbon, in the form of Article 50 TEU. Prior to that, EU Member States were not able to reverse the process of accession once this was completed.

² In an earlier publication, I have commented on the various constitutional and institutional hurdles in the Brexit process on the side of both the UK and the EU: Annegret Engel, 'The European Union and the Brexit Dilemma – A very British Problem?' [2019] 2(1) NJEL 24.

³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) [2019] OJ C384I/01.

⁴ 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 (TCA) [2020] OJ L 444/14.

⁵ Article FINPROV.11 of the TCA.

and dispute settlement and horizontal provisions (Part Six). These are embedded into common and institutional provisions under Part One and final provisions in Part Seven.⁶

This paper does not aim to provide a thorough analysis of the individual parts and provisions of the TCA as this is already done by other commentators.⁷ Instead, I will focus on the on two main questions in my elaborations. The first question relates to the TCA's distinct features and its overall characteristics as an international trade deal. Without going into too much detail on the substantive provisions, evidence will demonstrate the Agreement's *sui generis* nature. The second question will then focus on the potential for new disputes arising and old conflicts re-emerging under the TCA. The reality of a continued threat of a 'no deal' scenario even after the TCA's enforcement does not meet the expectation of a resolution to Brexit. A final part will provide some recommendations for improvement of the withdrawal process.

2 JUST AN ORDINARY INTERNATIONAL TRADE DEAL?

At first glance, the TCA resembles other international trade agreements the EU has concluded in recent years; the Comprehensive Economic and Trade Agreement (CETA)⁸ with Canada is often used as a reference point with what concerns extensive facilitation of trade and cooperation with a third country. Indeed, there are some similarities as to its content on the areas covered (trade in goods, dispute settlement, etc.) and the sheer complexity of the agreement.

And yet, the deal with the UK is of a *sui generis* nature. Obviously, every agreement between the EU and each third country is different, as it depends on the specificities of trade between the parties and their individual interest from such cooperation. In short, there is no blueprint for an international trade deal. However, there are a few common features that apply to most if not all of them – except the TCA. As such, I will be focusing on the main aspects which distinguish the TCA from other international trade agreements as for example CETA.

A first distinguishing factor is the timeframe under which the agreement was concluded. In a remarkable velocity of less than a year this trade deal was negotiated with the UK.⁹ By comparison, the negotiations for CETA took over five years. Admittedly, the starting point of the UK as a former EU Member State, thus fulfilling current EU standards, as well as the rapidly approaching end of the transitional period¹⁰ may have helped to speed up the process.

⁶ The remaining parts include provisions on health and cyber security under the thematic cooperation in Part Four and participation in Union programmes, sound financial management and financial provisions in Part Five

⁷ See eg the in-depth analysis edited by Issam Hallak 'EU-UK Trade and Cooperation Agreement: An analytical overview' (2021) European Parliamentary Research Service (EPRS) <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/679071/EPRS_IDA\(2021\)679071_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/679071/EPRS_IDA(2021)679071_EN.pdf)> accessed 29 July 2021

⁸ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23

⁹ Negotiations only started after the conclusion of the Withdrawal Agreement and the UK's exit from EU membership - see Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement [2020] OJ L 58/53

¹⁰ The UK refused to extend the transitional period for political reasons

As a former EU Member State, the UK does not benefit from facilitation or improved cooperation of any kind by removal of tariffs or the like. Rather, it is a significant step down from its previously held position under EU membership and could effectively be described as mere ‘damage control’ to prevent a much steeper fall onto WTO rules without this agreement. These ‘opposing directions of travel’¹¹ between the EU and the UK may create problems in the long term and hence differentiate this agreement from others, such as CETA, where the third country in question is aiming for further alignment with EU standards.

2.1 BRUSSELS EFFECT AND THE LEVEL PLAYING FIELD

Unlike any other ordinary trade deal between the EU and third countries, the TCA does not improve previous trade relations or increase cooperation.¹² Instead, it reduces the UK’s rights *vis-à-vis* the EU to a fraction of what its previous status under EU membership entailed.¹³ Paradoxically, this runs counter the UK’s efforts to actively shape certain policy areas, such as cooperation in criminal matters, where not only the UK has become a ‘rule taker’ after Brexit but is also being excluded from its own initiatives, such as the European Arrest Warrant, as well as from privileged cooperation with European agencies.¹⁴

Having said that, the UK will be still be subject to the so-called ‘Brussels’ effect’,¹⁵ even if under slightly different circumstances. Instead of a process of alignment through incentivising increased and facilitated trade, the mechanism under the TCA aims to prevent the UK from derogating from current EU standards in order to maintain the agreed privileges. This is called the ‘level playing field’ under the TCA, requiring ‘open and fair competition between the Parties [...] conducive to sustainable development’.¹⁶ The Parties acknowledge, however, that this does not mean harmonisation of standards between them.¹⁷

The agreed level playing field in the TCA aims to provide the possibility for autonomous regulatory determination desired by the UK in order to attract international trading partners, while at the same time ensuring that the high EU standards are not being undermined with cheaper products deriving from the UK. Essentially, this is flexibility with limits, a Brussels’ effect *de minimis*. The latter the UK was hoping to avoid, but would have

¹¹ I have previously made this observation with regards to the very crucial cooperation in criminal matters between the EU and the UK: Annegret Engel ‘The Impact of Brexit on EU Criminal Procedural Law – A new dawn?’ [2021] 6(1) European Papers 513

¹² Senior European Experts, ‘The UK-EU Trade and Co-operation Agreement 2020’ (2021) <<https://senioreuropeanexperts.org/paper/uk-eu-trade-co-operation-agreement-2020/>> accessed 29 July 2021.

¹³ See also André Sapir, ‘The double irony of the new UK-EU trade relationship’ (2021) <<https://www.bruegel.org/2021/01/the-double-irony-of-the-new-uk-eu-trade-relationship/>> accessed 29 July 2021.

¹⁴ See eg Valsamis Mitsilegas, ‘After Brexit: Reframing EU-UK Cooperation in Criminal Matters’, in Ricardo Pereira, Annegret Engel, Samuli Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order*, (Edward Elgar Publishing 2020); Thomas Wahl, ‘Brexit: EU-UK Trade and Cooperation Agreement – Impacts on PIF and JHA in a Nutshell’ (2021) <<https://eucrim.eu/news/brexit-eu-uk-trade-and-cooperation-agreement-impacts-on-pif-and-jha-in-nutshell/>> accessed 29 July 2021.

¹⁵ See Anu Bradford, ‘The Brussels Effect’ [2012] 107(1) Northwestern University Law Review 1.

¹⁶ Art. 1.1(1), Title XI, Part Two of the TCA.

¹⁷ Art. 1.1(4), Title XI, Part Two of the TCA.

been barred from access to the EU internal market otherwise. The result is evidence of the EU's market power through the concept of extraterritoriality.¹⁸

2.2 THE UNION'S EXCLUSIVITY VERSUS MEMBER STATES' FLEXIBILITY

The urgency of the negotiations due to the time constraints imposed by the transitional period may have also contributed to another very crucial distinction of the TCA from the likes of CETA: the choice of legal basis – Article 217 rather than Article 216 TFEU.¹⁹ The TCA thus constitutes an Association Agreement the EU typically concludes under its own competence with neighbouring countries, such as the Ukraine. The policy areas concerned fall under the Union's exclusive or pre-empted shared competence categories.²⁰

By contrast, CETA was concluded as an international trade agreement of a mixed nature which required the joint ratification of all EU Member States according to their own constitutional procedures. In general, the Court of Justice has held that the complexity of international trade agreements and the resulting variety of different types of competences involved would normally prescribe a joint approach between the EU and Member States.²¹

Such a joint ratification process, however, bears certain risks, as is evident from the ratification process under CETA. Here, opposition was formed in several Member States against the agreement, most notably in the Belgian region of Wallonia, which resulted *inter alia* in a preliminary ruling questioning the compatibility of the agreement with EU law.²² As could be argued, the involvement of Member States not only prolongs the process of negotiations and ratification, but also risks failure of the entire agreement.²³ Up to this date, CETA is not yet fully ratified in all Member States.

Such a scenario was to be avoided for the TCA with the UK and the lessons learned from CETA led to a different approach here. In view of its 'exceptional and unique character',²⁴ the TCA was adopted by the EU speaking with one voice under its own competence,²⁵ while leaving ample scope for Member States to regulate what falls within their competence individually and bilaterally as they see fit.

¹⁸ Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' [2014] 42 *International Review of Law and Economics* 158.

¹⁹ Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information [2020] OJ L 444/2.

²⁰ For an extensive discussion of the different types of competences and the potential conflicts arising therefrom, see Annegret Engel (2018) *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer International Publishing 2018).

²¹ Opinion 2/15 *EUSFTA* EU:C:2017:376. See also case comment by Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: opinion 2/15 of 16 May 2017' [2018] 14(1) *European Constitutional Law Review* 231.

²² Opinion 1/17 *Opinion pursuant to Article 218(11) TFEU (CETA)* EU:C:2019:341.

²³ As for example was the case with the failed TTIP agreement between the EU and the U.S.

²⁴ Council Decision (EU) 2020/2252 (n 19).

²⁵ Such an EU-only approach was previously taken in the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled from 2013 [2018] OJ L 48/3. Judicial review by the court found sufficient competence stemming from the EU alone to conclude the contested treaty without the need for further joint ratification by Member States, Opinion 3/15 *Marrakesh Treaty* EU:C:2017:114.

According to Article COMPROV.2 of the TCA, the conclusion of bilateral agreements between the EU, its Member States, and the UK shall supplement the TCA as ‘an integral part of the overall bilateral relations [and] form part of the overall framework’. Indeed, several provisions under the various policy areas throughout the agreement explicitly provide an option of further bilateral agreements to be concluded.

This is in line with Advocate General Sharpston’s opinion delivered in the EUFSTA case, suggesting the splitting of a mixed agreement which would otherwise fall under different types of competences, thus ensuring a swift ratification procedure for those parts within Union competence, while at the same time allowing for the necessary flexibility at intergovernmental level in due course without risking failure of the agreement as a whole.²⁶

As such, the above statement quoted from Article COMPROV.1 which reads that the Agreement ‘establishes *the basis* for a broad relationship between the Parties²⁷ indeed has to be taken literally: the TCA constitutes a mere starting point which will only take proper shape in the years to come when Member States and the UK will have added to it and filled in the gaps – if they wish to do so as this is not obligatory.

The inherent flexibility this approach provides is quite remarkable as it inevitably creates uncertainty over the final scope of the relationship between the EU and the UK.²⁸ In addition, it also creates a patchwork in the long term with different bilateral agreements in place and thus different rules applying for different Member States. Not only does this generate discrepancies within the EU, but it also remains open-ended for the foreseeable future.²⁹

2.3 THE CREATION OF A NEW INSTITUTIONAL FRAMEWORK

Another distinct feature of the TCA is the creation of a new institutional framework in order to solve disputes between the Parties at an early stage. According to Article INST.1, the TCA provides for the establishment of a Partnership Council, set up by representatives at ministerial level of the EU and the UK. The new Partnership Council shall meet at least once a year and has the power to *inter alia* amend the TCA or any supplementing agreements.

In addition to the Partnership Council, a range of Specialised Committees³⁰ and Working Groups³¹ are established by the TCA, which have monitoring powers over their respective areas. Further institutional cooperation may be established in the form of a Parliamentary Partnership Assembly according to Article INST.5 and the adequate participation of civil society is facilitated within the Civil Society Forum according to Article INST.8.

In particular the Partnership Council and the Specialised Committees are the first contact point in case of dispute between the Parties of the TCA. According to Article INST.13, ‘the Parties shall endeavour to resolve the matter by entering into consultations in good faith, with the aim of reaching a mutually agreed solution’. In a second step and only if

²⁶ Opinion 2/15 EU:C:2017:376, Opinion of AG Sharpston, para 567.

²⁷ Emphasis added.

²⁸ This situation is rather comparable to the relationship between the EU and Switzerland.

²⁹ ‘The UK-EU agreement did prevent the potentially disastrous consequences of a no deal but it won’t end the Brexit debate or division, it may just prolong them’ - Senior European Experts (n 12).

³⁰ Art. INST.2 of the TCA.

³¹ Art. INST.3 of the TCA.

such consultations have ended unsuccessfully an arbitration procedure may be initiated by establishment of an arbitration tribunal according to Article INST.14.

It is rather obvious from this new setup that consultation is the preferred mechanism as opposed to arbitration. The TCA thus provides quite a unique institutional framework with the aim of solution-oriented de-escalation. Admittedly, it could also be a sign of an actual anticipation of conflict arising between the Parties considering the often bumpy negotiations for the Withdrawal Agreement and the TCA itself.³² In any case, this institutional framework differs from what tends to be the rule under other international trade agreements, where dispute settlement via arbitration is the only option.

With this new setup, the EU has additionally managed to institutionalise its own unity since Member States are not Parties to the TCA and therefore are not represented in the Partnership Council or the Specialised Committees. This is also a result of the Agreement being concluded under the Union's own competences as discussed above. As was observed by Konstantinidis, this constitutes a 'dramatic departure from the days of the UK's membership' which thus 'solidifies the weakening of its position vis-à-vis the EU'.³³ As could be argued, this is also part of the reality of the UK finding itself outside of the EU after withdrawal where the EU has learned to speak more united and with one voice, while the actual debate amongst the EU-27 takes place prior to that and behind closed doors.

3 ALL'S WELL THAT ENDS WELL?

The mere existence of the TCA has to be called a success in itself. Apart from that, those who hoped for finality of the Brexit saga may be disappointed. Undeniably, the discussed flexibility for further supplements and amendments could be considered pragmatic and may be explained with the limited time available for its conclusion. Ultimately, flexibility is a virtue cultivated by the EU over time and gaps are meant to be filled.

What manifests, however, the inherent fragility of the Agreement is the potential for new disputes within it, the re-opening of Pandora's box, which imposes a continuous threat to the newly established relationship of being torn to pieces again. The following will provide an analysis of the ratification and review procedures provided under the TCA as well as the infringement proceedings against the UK for breach of its obligations under international law.

3.1 RATIFICATION AND REVIEWS

One concern is the pending ratification of the TCA by the EU. Due to the last-minute conclusion of the TCA's negotiations just before the end of the transitional period which did not allow sufficient time for ratification, the Parties agreed on a provisional application from 1 January 2021.³⁴ While the UK has already ratified the TCA by means of the European

³² See discussion below on the pending infringement proceedings against the UK.

³³ See eg Vasiliki Poula 'From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement' (*European Law Blog*, 14 January 2021) <<https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/>> accessed 29 July 2021.

³⁴ Art. FINPROV.11 (2) of the TCA.

Union (Future Relationship) Act 2020 which received royal assent on 31 December 2020,³⁵ the side of the EU has yet to ratify the agreement by consent in the European Parliament and decision by the Council according to Article 218 TFEU.

Originally, ratification by the EU was envisaged to be completed by 28 February 2021,³⁶ however, this was extended until 30 April 2021.³⁷ At the time of writing,³⁸ ratification by the European Parliament seems uncertain following the second-time infringement proceedings initiated by the European Commission.³⁹ In a previous statement, the European Parliament stressed the importance of the UK's compliance with its obligations under the Withdrawal Agreement; otherwise it would refrain from ratification of any trade deal with the UK.⁴⁰

Even if the current Northern Ireland dispute is eventually reconciled and the Parliament ratifies the TCA in due course,⁴¹ the agreement itself requires continued negotiations between the parties. According to Article FINPROV.3, regular reviews are to be conducted at five-year intervals and jointly by the Parties of the entire agreement and supplementing agreements. In other words, every five years the debate will re-emerge with the potential that the lights could just be turned off if one party deviates from its previous position.

Other parts, such as the trade and investment provisions under Part Two of the TCA may be subject to rebalancing measures according to Article 9.4, relating to common standards upon which the Agreement is founded, such as labour and social, environmental and climate protection. Divergences between the Parties which may very well occur in the longer term are thus placed under regulatory scrutiny upon request by either Party 'no sooner than four years after the entry into force' of the TCA,⁴² and in subsequent four-year intervals.⁴³

In addition, either party may terminate or suspend – in whole or in parts – the operation of the TCA or any supplementing agreement if it 'considers that there has been a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements'.⁴⁴ According to Article COMPROV.12, essential elements include democracy, the rule of law, and human rights,⁴⁵ the fight against climate change,⁴⁶

³⁵ European Union (Future Relationship) Act 2020.

³⁶ Art. FINPROV.11 (2)(a) of the TCA.

³⁷ 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) [2021] OJ L 68/227.

³⁸ Before 25 April 2021.

³⁹ See further below.

⁴⁰ European Parliament, News (11 September 2020) 'Statement of the UK Coordination Group and the leaders of the political groups of the EP', <https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders>.

⁴¹ Guillaume Van Der Loo and Merijn Chamon (2021) 'The European Parliament flexes its muscles on the EU-UK trade deal' (European Policy Centre, 5 March 2021) <<https://www.epc.eu/en/Publications/The-European-Parliament-flexes-its-muscles-on-the-EUUK-trade-deal~3c43bc>> accessed 29 July 2021.

⁴² Art. 9.4(4).

⁴³ Art. 9.4(7).

⁴⁴ Art. INST.35(1) of the TCA.

⁴⁵ Art. COMPROV.4(1) of the TCA.

⁴⁶ Art. COMPROV.5(1) of the TCA.

and the countering proliferation of weapons of mass destruction.⁴⁷ A serious and substantial failure exists if ‘its gravity and nature [is] of an exceptional sort that threatens peace and security or [...] has international repercussions’,⁴⁸ subject to proportionality and the respect for international law.⁴⁹

According to Article FINPROV.8, termination of the agreement can be done unilaterally by either party – the EU or the UK – by written notification. After a transitional period of eleven months, the agreement and any supplementing agreement then ceases to be in force. Part Three on law enforcement and judicial cooperation in criminal matters can even be terminated with immediate effect if the UK or any EU Member State denounces the European Convention on Human Rights.⁵⁰ Again, this is another example of how easy it would be for the entire TCA or parts thereof to be abolished even at a later stage after ratification, irrespective of the five-year review intervals. This, in effect, constitutes another source of legal uncertainty and the potential for a ‘no deal’ scenario much further down the line.

3.2 INFRINGEMENT PROCEEDINGS AGAINST THE UK

The TCA’s fragility can also be demonstrated by the willingness – or lack thereof – of both parties to be bound by and comply with their obligations arising from the agreement. According to Article COMPROV.13, the provisions of the TCA ‘shall be interpreted in good faith [...] in accordance with customary rules of interpretation of public international law’. As one would expect, both the EU and the UK would consider it self-evident to oblige.

However, the UK is on the verge of breaking international laws in relation to Brexit for the second time within less than a year. Also for the second time, the European Commission has thus initiated infringement proceedings against the UK, a situation which could potentially jeopardise the TCA’s ratification process as discussed above and thus the entire agreement itself.

The first part of the dispute began in September 2020, with the UK tabling the Internal Market Bill 2020 which envisaged disapplication of certain aspects of the Northern Ireland Protocol annexed to the EU-UK Withdrawal Agreement.⁵¹ While Article 16 of the Protocol provides for the possibility of unilateral safeguard measures, these have to be appropriate and only in case of ‘*serious* economic, societal or environmental difficulties’.⁵² The EU however, considered the UK’s actions in breach of the good faith provision in Article 5 of the Withdrawal Agreement and thus of its obligations under international law.

The controversial passages in the Internal Market Bill were only deleted after the EU initiated infringement proceedings in October 2020 if the UK were to maintain its position.⁵³ Despite the UK’s withdrawal from EU membership on 31 January 2020, the Commission’s

⁴⁷ Art. COMPROV.6(1) of the TCA.

⁴⁸ Art. INST.35(4) of the TCA.

⁴⁹ Art. INST.35(3) of the TCA.

⁵⁰ Art. LAW.OTHER.136 of the TCA.

⁵¹ Withdrawal Agreement (n 3).

⁵² Emphasis added.

⁵³ European Commission, ‘Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations’, Press release (1 October 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1798> accessed 29 July 2021.

powers under Article 258 TFEU continued to apply throughout the transitional period until 31 December 2020 on the basis of Article 131 of the Withdrawal Agreement in conjunction with Article 12 of the Northern Ireland Protocol. The infringement proceedings were paused after the final iteration of the UK Internal Market Act 2020⁵⁴ which was then in conformity with previously agreed international law.⁵⁵

Nevertheless, on 15 March 2021 and for the second time, the European Commission sent another letter of formal notice for breach of its obligations under the Northern Ireland Protocol as well as the good faith obligation according to Article 5 of the Withdrawal Agreement.⁵⁶ This comes after the UK's threat to unilaterally extend the so-called 'grace period', a transitional period allowing for staggered and initially much lighter controls on certain goods crossing the Irish Sea,⁵⁷ which was originally granted until 1 April.

Alongside the infringement procedure according to Article 258 TFEU, the Commission's proceedings have also triggered the consultations in the Joint Committee according to Article 169 of the Withdrawal Agreement in order to find a feasible solution. If unsuccessful, the dispute mechanism under the Withdrawal Agreement could take effect, resulting in the establishment of an arbitration panel according to Article 171, with consequences also for the ratification of the TCA as well as the Good Friday Agreement of 1998 and potentially the entire peace process in the region of Northern Ireland.

As could be argued, the UK's rather confrontational behaviour can be traced throughout the Brexit negotiations and there are no signs at the moment for a mending of tensions between the parties. Taking into account the continued riots in Belfast as a reaction to current developments, a more cooperative approach would be apt.⁵⁸ However, as can be argued, the UK's reputation as an internationally reliable partner has received scratch marks from its readiness to break obligations under international law.

4 A LESSON TO BE LEARNED?

As mentioned above, at the time of writing of this article, ratification of the European Parliament is still pending. However, it is expected that the EU will ratify the agreed TCA even if the current conflict continues for two main reasons. First of all, the TCA serves as an additional legal base, a ground to bring legal action according to the respective procedures therein once it is fully enforced. Second, the two agreements – the Withdrawal Agreement and the TCA – although they are two sides of the same coin, they are nevertheless separate

⁵⁴ United Kingdom Internal Market Act 2020.

⁵⁵ European Commission, 'Brexit: Withdrawal Agreement to be fully operational on 1 January 2021' (17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2478> accessed 29 July 2021.

⁵⁶ European Commission, 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland' (15 March 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132> accessed 29 July 2021.

⁵⁷ As part of the Agreement, Northern Ireland remains part of the Customs Union in order to avoid a hard border on the island of Ireland.

⁵⁸ See also Jess Sargeant, 'Cooperation not confrontation should be at the heart of UK-EU discussion on the protocol' (*Institute for Government*, 5 March 2021) <<https://www.instituteforgovernment.org.uk/blog/cooperation-northern-ireland-protocol>> accessed 29 July 2021.

legal documents which should not be conflated, neither in their ratification nor in their enforcement.

It goes without saying that the EU is not only allowed to, but also well advised to press legal charges and to utilise all possible means if the UK further diverts from its agreed commitments. The institutional framework (Partnership Council and Committees) set up in the TCA provides adequate control mechanisms to observe proper implementation and compliance with the agreement.⁵⁹ At the same time, further concessions should be avoided at all cost unless the UK is able to provide legally enforceable reassurances.

In addition, unity of the EU-27 is evidently the road to success. Since the UK's referendum in 2016, the EU has stood firm and united – almost unprecedented in its most recent history after enlargement – and must continue to do so. The UK's attempts to negotiate separately with some Member States⁶⁰ or its uncooperative behaviour during the COVID-19 pandemic⁶¹ are evidence of the UK's efforts to undermine this unity of the EU-27. Its loss would significantly weaken the Union's position in this regard *vis-à-vis* the UK as well as other international partners.

For the EU, one lesson has to be learned from the entire withdrawal process. While the expected 'domino effect' – of other EU Member States to follow suit the UK's exit – has clearly been stifled, not least because of the entire Brexit shambles and resulting uncertainties which thus worked as deterrence for similar ambitions in the short term,⁶² the EU should avoid repeating such a scenario in the longer term.

That is not to say that withdrawal should be made impossible. Rather, Article 50 TEU should be revised to provide for default fall-back options for transition unless and until an agreement is concluded. While a withdrawing Member State should clearly be able to completely cut all ties with the EU if it so wishes, this would then have to be explicitly stated in the agreement. The transitional period should not include a set end date for the purpose of evading the to and fro of extensions to be granted and the constantly lingering threat of an uncontrolled 'no deal'.

Ultimately, a default transitional period would be beneficial for businesses and citizens alike in the respective Member States, creating legal certainty for cross-border trade. Instead of merely acting as a deterrence from withdrawal, a revised procedure would build further trust in the EU and thus increase the benefits of EU membership itself.

5 CONCLUDING REMARKS

The conclusion of a trade deal regulating the future relationship between the EU and the UK has long been anticipated on both sides. The result is the lowest common denominator

⁵⁹ See discussion above.

⁶⁰ See eg Francesco Guarascio, 'Exclusive: EU says UK seeks to undermine its unity at trade talks: document', (Reuters, 5 March 2020) <<https://www.reuters.com/article/us-britain-eu-exclusive-idUSKBN20S11V>> accessed 29 July 2021.

⁶¹ Xinhua, 'World Insights: Britain-EU row over coronavirus vaccine likely to continue amid supply shortages' (*Xinhua*, 1 April 2021) <http://www.xinhuanet.com/english/europe/2021-04/01/c_139851977.htm> accessed 29 July 2021.

⁶² Simone Esposito, 'EU Parliamentary Projection: No Domino-Effect Caused by Brexit in Sight' (*Europe elects*, 31 August 2020) <<https://europeelects.eu/2020/08/31/august2020/>> accessed 29 July 2021.

without much margin for deviation. Any minor dispute in the future could have severe consequences and ultimately jeopardise the entire agreement.

As has been shown above, the TCA is unlike other international trade agreements as its starting point is a different one considering the UK's recent EU membership status. Thus, the aim is to prevent further divergence rather than encourage alignment with EU standards. In addition, the newly established institutional framework and the exclusivity of the EU's competences over the substantive provisions of the agreement are quite unique.

However, the discussion above has also highlighted the many questions which remain unsolved under the TCA. At best, this can be considered pragmatic flexibility, at worst it exposes the inherent fragility of the entire agreement – similar to a castle built in sand. Whether this castle will withstand the test of time will largely depend on the willingness of both sides to work with and not against each other. The already smouldering conflicts in the form of international law breaches and infringement proceedings constitute, however, not the most favourable omen.

For future reference, the EU should revise the procedure under Article 50 TEU in order to avoid a *déjà vu*. As has been suggested, this could include a default and open-ended transitional period until an agreement has been reached which would be less detrimental to the overall relationship between the parties after withdrawal and would guarantee more legal certainty in the process.

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