The EU-UK Trade and Cooperation Agreement: an unfinished deal

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Wolfgang Weiß*

I. Introduction

On 1 January 2021, the new Trade and Cooperation Agreement (TCA) and other additional agreements between the EU and the UK (provisionally, finally from 1 May 2021) entered into force. While this avoided a so-called 'hard Brexit' and put future relations between the EU and the UK on a new footing, it remains questionable to what extent this agreement can establish a lasting framework, at least for peaceful trade relations between the partners.

This contribution will be limited to the TCA. This agreement is one that will go down in history as the first attempt by modern states to erect and build trade barriers with a major trading partner rather than to dismantle them.[1]

The intention of this Working Paper is first to give a general overview of the TCA, and then to assess its functionality. The fascinating issues surrounding the operation and functioning of the Northern Ireland Protocol to the Withdrawal Agreement will not be addressed. However, said Protocol demonstrates the difficulties of implementing a low-functioning, complex set of rules, which then triggers disagreements between the parties and gives rise to ongoing disputes and demands for treaty change. Therefore, also for the TCA the question becomes relevant as to whether at least the TCA will lead to a lasting stabilisation of trade and political relations between the EU and the UK, or whether, like the NI Protocol, it is rather a treaty that, due to its incompleteness, will continuously trigger disputes, although perhaps not to the same extent as the NI Protocol. While the TCA with its associated annexes and protocols is very voluminous (over 1400 pages, indeed over 2300 pages in the OJ.EU of April 2021), for much of its length it appears more like a mere framework agreement with broadly worded, non-specific rules that need to be further fleshed out by the parties in the Partnership Council. To this end, the agreement grants the treaty bodies mandates for the further development of the agreement's contents and for amendments. It contains a number of "evolutionary clauses" (see below sub VII.).

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[1] Kenny, Der inszenierte "Brexit" II: Endloses Feilschen und verfassungsrechtliche Zerreißprobe?, 2021 Europarecht, 375-415, 399.

Before starting with the overview, let us recall some key takes from the prelude to the TCA, in the (revised) Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019[2]. The EU and the UK established - in its para. 3 - that the future relation should be based on:

"an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation".

The red lines for each party are reflected in para. 4 of said Political Declaration: the EU wants to see the autonomy of its legal order be protected, which includes the indivisibility of its four (Internal Market) freedoms. The UK insisted on its sovereignty, the protection of its own internal market and clearly proclaimed its freedom to develop its own trade policy. We shall see that these red lines clearly found their way into the substance of the agreement.

II. Overview of the TCA

Formally, the Agreement consists of seven parts, supplemented by several annexes, protocols, and declarations. Northern Ireland is not mentioned in the Agreement[3]; the relevant rules insofar remain those of the pertinent Protocol to the Withdrawal Agreement.

In addition to the common and institutional provisions (Part 1), Part 2 deals with trade, transport, fisheries, and other arrangements. Law enforcement and judicial cooperation in criminal matters is covered in Part 3, cooperation in health and cyber security in Part 4, UK participation in EU programmes in Part 5. Dispute settlement and horizontal provisions (Part 6) and final provisions (Part 7) form the remainder. The Protocols relate to (1) administrative cooperation and the fight against fraud in the field of VAT and on mutual assistance for the recovery of claims relating to taxes and duties, (2) mutual assistance in customs matters, and (3) social security coordination.

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2 2019 OJ.EU C 384 I/178.

3 Apart from two smaller issues. First, bus services are allowed to pick up and set down passengers in both Ireland and Northern Ireland, enabling cross-border services to continue without restrictions. The second relates to cabotage; NI-based haulers are allowed to make two pick-ups in Ireland in any seven day period (whereas this is limited to one pick-up for the rest of the EU). See Hayward´s analysis of what the TCA means for Northern Ireland: http://qpol.qub.ac.uk/what-the-uk-eu-trade-cooperation-agreement-means-for-ni/, (accessed 31 December 2021).

Not surprisingly after what has just been mentioned, in many places one finds the commitment to autonomy and sovereignty (see Article 1 TCA), which was so important to the British and which forced them to make compromises and create special rules. This already starts with Article 1 of the TCA on its purpose:

"This Agreement establishes the 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, respectful of the Parties' autonomy and sovereignty."

The TCA seeks to strike a balance between the continued sovereignty of the UK and the *level playing field* that is so important to the EU. The UK's sovereignty is to be safeguarded by leaving the customs union and the single market and by not using the CJEU as a dispute resolution body. The level playing field is to be preserved by those TCA provisions that allow for a monitoring of deviations from achieved environmental, labour, or climate standards for their economic impact. A prohibition of retrogression applies. Should a party wish to deviate from the level reached in this respect and thereby achieve a competitive advantage, measures can be taken. I will revert to this below.

III. The TCA: An Association Agreement

A word on terminology: the TCA is called TCA, not association agreement, even though the EU entered into the TCA on the basis of Article 217 TFEU as an EU-only-agreement. According to Art. 217 TFEU, the EU has the capacity to enter into association with third countries establishing an association involving reciprocal rights and obligations, common action and special procedures. From the perspective of EU law, the trade parts of the TCA form a so-called free trade association. But for the UK, the term Association Agreement might not have been acceptable as an association "could have been perceived as a form of subordination or asymmetry in bilateral relations".[4]

The restriction to EU competences may also have contributed to the fact that in some areas not much remains of the particularly close relations between the contracting parties originally intended: foreign policy, security and defence issues are outside the EU-only competences.

[4] Lazowski, Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I, 2020 European Papers, Vol. 5, No 3, 1105-1141, 1122.

As is the case also with other recent EU trade and partnership agreements, TCA rules are not directly applicable. In the absence of direct application, national courts do not have jurisdiction.[5]

IV. The Basics

Part 1 contains very basic general provisions on purpose, good faith in implementing the Agreement, and principles about the interpretation of the Agreement. Furthermore, one finds the basic provisions on the institutional structure of the Agreement ("Institutional Framework", Article 7 et seqq. TCA) in the form of the Partnership Council, 19 special decision-making committee, of which the Trade Partnership Committee is the most important, as it assists the Partnership Council in its work and supervises the other specialised committees, (see Article 8 para. 2 TCA), and a joint parliamentary chamber: Article 11 TCA provides for a Parliamentary Partnership Assembly consisting of Members of the European Parliament and Members of the Parliament of the United Kingdom. The Assembly may request information and must be informed of decisions and recommendations of the Partnership Council only; this right does not cover decisions made by the other committees.[6] Moreover, a Civil Society Forum (with which a dialogue on the implementation of the trade rules of the TCA is to be conducted in Part 2, see Art. 14 TCA) and Domestic Advisory Groups (Art. 13 TCA, with which each Party shall consult on issues covered by the TCA) are established.

The Partnership Council and said Committees have equal representation from the EU and the UK and take decisions by consensus. Their decisions are binding. Their decision-making responsibilities follow from the mandates set out in detail in the TCA. The Council's and the Committees' task is to further develop the contents of the Agreement. Above all, the Partnership Council has the capacity of amending the Agreement, see for example Article 7 para. 4 TCA; Article 68 TCA; regarding Annexes 16 and 17 see Article 96 para. 8 TCA, where the Partnership Council also lays down rules for maintaining confidentiality and data protection when exchanging product warnings[7]; see also with regard to Annex 18: Article 122 TCA.

The institutional framework of the TCA already signals that the Agreement is designed to be further developed and supplemented by the decisions of the treaty bodies. In many areas, the

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5 This has been criticised by some, e.g. by Eeckhout, Brexit after the negotiation of the trade and cooperation agreement: who takes back control of what? 2021 *Revista de Derecho Comunitario Europeo*, 68, 11-22, 12, but it corresponds to the new habit of the EU for many years, at least in relation to trade agreements.

6 Craig, Brexit a Drama, The Endgame - Part II: Trade, Sovereignty and Control, SSRN paper, 21.

7 These Annexes can be found in 2021 OJ.EU L 149, p. 1187, 1188, which however only provide for a more or less blank page. In fact, these Annexes still do not exist.

content of the Agreement is incomplete; it will be supplemented, and in some areas more detail is yet to be agreed in the Partnership Council. The Agreement is a rather incomplete treaty. Thus, the institutional framework appears to have already been drafted with a view to this. From a legitimacy point of view, the high salience of the treaty bodies in amending and developing the TCA´s content is highly problematic as executive actors are in the driver´s seat, and the role of the parties´ Parliaments tends to be negligible as they traditionally are not involved in treaty body decision-making, but are merely informed.[8] The European Parliament, however, on the occasion of its consent to the TCA, postulated a stronger role[9] and is in the process of becoming a more active actor also in the implementation phase of EU agreements.[10] Thus, it is to be welcomed that Article 11 TCA does grant some rights of scrutiny over treaty-body decision making to the Parliamentary Assembly, even though these rights need to be expanded both in their scope and ambition.

The preamble of the Agreement already contains commitments to democratic principles, the rule of law and human rights, to combating the proliferation of weapons of mass destruction, and to combating climate change. These objectives, however, are not mentioned until further on, in Articles 524 or 693 TCA in Part 3, particularly then in Part 6, Articles 763 et seqq. TCA (in Title 2 "Basis for Cooperation" of Part 6 on Dispute Settlement and General Provisions), whereby essentially a close cooperation of the EU and the UK in this respect is aimed for, also at the international level. Accordingly, some objectives are defined as "essential elements" of the whole agreement (Article 771 TCA). Obligations referred to as essential elements are democracy, the rule of law, human rights, the fight against climate change (Article 764 TCA), and countering proliferation of weapons of mass destruction (Article 765 TCA). The consequence of a violation of essential provisions is laid down in Article 772 TCA:

"If either Party 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 in Article 771, it may decide to terminate or suspend the operation of this Agreement or any supplementing agreement

[8] For the legitimacy challenges of treaty body decision-making see Weiß, Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament, 2018 European Constitutional Law Review 532-566.

[9] The EP, in its resolution on the EU-UK Trade and Cooperation Agreement, confirmed its "full role in the monitoring and implementation of the Agreement" and insisted to keep it "immediately and fully informed of the activities of the … joint bodies" and to "involve Parliament in important decisions under the Agreement", EP resolution of 28 April 2021 on the outcome of EU-UK negotiations, P9_TA(2021)0141, para. 9.

[10] Weiß, The European Parliament´s Role in the Operation of Trade Agreements: Parliamentary Control and Executive-Legislative Balance in External Action, in Fromage/Herranz-Surrallés (eds.), Executive-Legislative (Im)balance in the European Union, 2021, 209-225.

in whole or in part." We will revert to this and its meaning for the repeal of the Human Rights Act below.

The Agreement also contains further provisions setting out specific objectives for certain policy areas, e.g. Article 15 TCA regarding trade in goods, Article 196 regarding the rules on digital trade, Article 276 TCA regarding public procurement, Article 580 TCA on Eurojust cooperation, and Article 734 TCA for dispute settlement.

The provisions on objectives fulfil different functions: they serve to disclose, but also limit an overall vision and programme meant for the implementation of the Agreement. They are significant for the interpretation of the rules and obligations of the Agreement. And some of them are particularly relevant for the maintenance, suspension or even termination of the Agreement, due to Article 772 TCA, as mentioned above.

V. The rules on trade

1. Overview of Part 2

Part 2 of the TCA focuses on trade relations, which are at the heart of the agreement. First, a brief thematic overview of the central topics of the trade section:

Heading One of Part 2 addresses trade and contains Title I on trade in goods (Articles 15 et seqq. TCA), Title II on services and investment (Articles 123 et seqq. TCA), Title III on digital trade (Articles 196 et seqq. TCA), Title IV on capital movements and payments (Articles 213 et seqq. TCA), that on intellectual property (Title V, Articles 219 et seqq. TCA), on public procurement (Title VI, Article 276 et seqq. TCA), on small and medium-sized enterprises (Title VII, Articles 295 et seqq. TCA), on energy (Title VIII, Articles 299 et seqq. TCA - this Title has a fixed expiry date; it expires on 30 June 2026, see Article 331 TCA), on transparency (Title IX, Articles 332 et seqq. TCA), on good regulatory practice and regulatory cooperation (Title X, Articles 340 et seqq. TCA) and the rules on the conditions of competition (Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development, Articles 355 et seqq. TCA). Title XII finally contains the general exceptions (Articles 412 et seqq. TCA).

Heading Two on Aviation (from Article 417 TCA) is then divided into titles on Air Transport and Aviation Safety (Articles 443 et seqq. TCA).

Heading Three regulates road transport (Articles 459 et seqq. TCA).

Heading Four brings the disciplines on social security coordination and visas for short term visits (Articles 488 et seqq. TCA), which contain in particular Title 2 with the rules on short term visas (Articles 492 TCA), where a basic visa exemption for short stays is provided for.

Heading Five then contains the rules on the important and highly contentious issue of Fisheries (Articles 493 et seqq. TCA).

2. The Rules on Trade in Goods and Services

In the case of trade in goods (Heading One, Title 1), the general tariff waiver continues to apply as in the times of the EU (Article 21 TCA) to the effect that there are no tariffs for EU and UK goods (but in contrast to pre-Brexit times, there are ones for third country goods traded between EU und UK). In all other respects, national treatment applies (Article 19 TCA). The admissibility of other import and export restrictions is determined by the rules of GATT 1994, some of which are repeated verbatim (Articles 20, 22 et seqq. TCA). However, despite maintaining duty-free treatment, import formalities are required, as the UK is now only a third country. Therefore, customs formalities must be fulfilled to prove that EU importation and market clearance requirements have been met by the imported goods, and that also the necessary excise duties have been paid. Thus, the TCA is full of rules on customs procedures (Articles 54, 101 et seqq. TCA: Chapter 5 on Customs and Trade Facilitation) and on cooperation in customs matters (Article 103 TCA) as well as rules of origin (Chapter 2, Article 37 TCA). Particularly rules of origin can prove to be significant barriers to trade, and usually are, since duty-free treatment applies only to UK goods and not to those from third countries. It must be ensured that UK goods (or those from the EU) have the necessary declarations of origin. However, under the TCA rules, registered traders can self-certify the origin of goods sold and benefit from 'full cumulation' (i.e. processing activities also count towards origin, not just materials used), making it easier to comply with requirements and obtain zero-tariff access. The TCA rules on origin are complemented by six annexes that contain further elaborations insofar.

There are then special provisions on sanitary and phytosanitary measures in Chapter 3 (Articles 69 et seqq. TCA) and technical barriers to trade in Chapter 4 (Articles 88 et seqq. TCA), which, as is usual in the newer FTAs, occupy quite a large space in the Agreement. However, the TCA does not provide for mutual recognition of equivalence in sanitary and phytosanitary (SPS) measures (a recognition of which would be important with regard to food safety issues). Consequently, the most burdensome and costly checks and controls between EU and UK

borders, but also between England and Northern Ireland, still do have to apply. The TCA is of no help in this respect.

These general provisions are supplemented by numerous annexes that deal, among other things, with questions of mutual recognition of standards and further detailed regulations. Specific facilitation arrangements do exist for wine, organics, automotive, pharmaceuticals and chemicals (Annexes TBT-1 to TBT-5/Annex 11 on MOTOR VEHICLES AND EQUIPMENT AND PARTS THEREOF (2021 OJ L 149/1119) till Annex 15 on Trade in Wine (2021 OJ.EU L 149/1173)).

In the area of services and investment (Heading One, Title 2, Articles 123 et seqq. TCA), the usual familiar rules apply, such as largely unrestricted market access (Article 128 TCA) and national treatment for investment (Article 129 TCA). For *services* (Article 134 et seqq. TCA), the market access rules known from the GATS apply (see Article 135 TCA similar to Art. XVI GATS), as do national treatment and most-favoured-nation treatment obligations (Articles 137 et seq. TCA).

Articles 140 et seqq. TCA provide for the entry and temporary stay of natural persons for business purposes. Insofar, the Agreement establishes differentiated rules which imply facilitations for short-term business trips and temporary secondments of highly skilled employees. Managers and specialists can stay in the UK/EU for up to three years, trainees for up to one year and business travellers for establishment purposes for up to 90 days within a six-month period. Short-term business visitors can also stay up to 90 days within a six-month period.

Even though the TCA provides for mutual non-discrimination, it is far from granting unrestricted access to services markets. The application of the non-discrimination rules merely means that service suppliers or investors from the UK are treated no less favourably than EU operators in the EU, and vice-versa. Thus, the rules on services are rather superficial and miss the crucial issues. Foreigners must, under the principle of equal treatment, meet the same requirements for service provision, particularly for the qualification of the service provider which apply to nationals. Thus, they must have e.g. the same qualification as a national. Their foreign qualifications are not recognised in principle; recognition is the central issue for the reality of the movement of services. The important details on the recognition of foreign professional qualifications are not provided in the TCA directly, but they do require further agreements. In this respect, the TCA foresees that the parties may develop "joint recommendations on the recognition of professional qualifications" through the Partnership

Council (Article 158 para. 2 TCA). The Partnership Council may, following such review, develop and adopt an arrangement on the conditions for the recognition of professional qualifications by decision, which then becomes an annex to the TCA, which forms an integral part of the relevant Title of the TCA (see Article 158 para. 3 TCA). Such arrangements provide for the exact conditions for recognition of professional qualifications acquired in the EU or UK relating to an activity covered by the TCA (see Article 158 para. 4 TCA).

This incompleteness can also be observed when looking into the issue of trade in financial services (Articles 182 et seqq. TCA), which is important to the UK. In the area of services, the TCA hardly contains any detailed obligations for the financial services that are important to the UK, beyond the general rules just outlined. As a third country, the UK is thus dependent on equivalence recognition by the EU for its financial service providers, so that British service providers can offer their services directly in the EU. The TCA, unlike other trade agreements, does not contain any obligations in this respect. A supplement on a coordinated approach to equivalence decisions, promised in the Joint Declaration on Financial Services Regulatory Cooperation, should clarify further issues of access to the EU for financial services. This supplement was agreed at technical level in the form of a Memorandum of Understanding at the end of March 2021. However, instead of binding legal requirements, this only provides for a "Joint EU-UK Financial Regulatory Forum" in which the parties will exchange views on equivalence recognition. Within this Forum, both sides will discuss how to move forward with equivalence determinations. Thus, the Forum is a mere platform facilitating dialogue on financial services issues. The Forum commits neither the EU nor the UK to any equivalence findings. Whether equivalence is granted with respect to specific areas of the financial services industry is basically a decision made by each Party individually according to domestic rules. The EU usually operates a "line-by-line" approach when assessing the equivalence of a third country's regulatory framework.

Even though currently financial services legislation in the UK may still conform to the EU's one, UK and EU regulatory frameworks are likely to diverge over time. The UK is reconsidering its regulatory approach to financial services and seeks to tailor it for UK markets.

Summing up, the bottom-line is that the UK has not really been able to achieve the fullest possible access to the single market for its goods and services. While tariffs remain abolished in principle, the movement of goods is not free of border and customs formalities; there is no customs union, and could not be, given the UK's objective of independence in its trade policy. The difficulties with border formalities are not likely to be confined to the early stages. In the

services sector, especially in financial services, important issues have been postponed until further negotiations. The commitments made hardly go beyond already existing WTO disciplines so that the TCA has rightly been termed a "WTO plus agreement, with a small plus".[11] And of course, there is no free movement of persons, with the exception of visa-free short-term tourism, and facilitations for short-term business visits.

Title III of Part 2 on digital trade removes unjustified barriers to digital trade. It bans data localisation requirements and ensures respect for data protection rules. The parties stipulated that the regulations on the protection of personal data and privacy even take precedence over all trade regulations.

The parties also agreed not to require prior authorisation for electronic services or the transmission of source codes (except in the case of judicial or administrative orders). Specific provisions simplify the use of electronic contracts, electronic authentication and electronic trust services as well as protection against spam. Protection and trust of online consumers is also an issue. Regulatory cooperation is also provided with regards to digital trade issues. However, this is largely limited to exchanging information on related regulatory issues.

To safeguard the flow of data between the UK and the EU, the parties have provided a transitional provision (Article 782 TCA[12]) that maintains the status quo. The mechanism ensured the applicability of the pre-existing rules and mechanisms for data transfers for six months after the entry into force of the Agreement, pending an adequacy decision by the European Commission.[13] Meanwhile, the EU adopted an adequacy decision for the UK to continue unhindered cross-border data flow.[14] Personal data can now flow freely from the EU to the UK, where it benefits from an essentially equivalent level of protection to that guaranteed

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[11] Eeckhout, Brexit after the negotiation of the trade and cooperation agreement: who takes back control of what? 2021 *Revista de Derecho Comunitario Europeo*, 68, 11-22, 13.

[12] Para. 1 reads: "For the duration of the specified period, transmission of personal data from the Union to the United Kingdom shall not be considered as a transfer to a third country under Union law, provided that the data protection legislation of the United Kingdom on 31 December 2020, as it is saved and incorporated into United Kingdom law by the European Union (Withdrawal) Act 2018 and as modified by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419) (the "applicable data protection regime"), applies and provided that the United Kingdom does not exercise the designated powers without the agreement of the Union within the Partnership Council."

[13] Articles 45 para. 3 of the EU General Data Protection Regulation 2016/679 and Article 36 para. 3 of the EU Law Enforcement Directive grant the Commission the power to decide, by means of an implementing act, that a third country ensures "an adequate level of protection", which means a level of protection for personal data which is essentially equivalent to the EU level of data protection. If a third-country has been found "adequate", transfers of personal data from the EU to the respective third-country can take place without any further conditions or restrictions.

[14] Commission Implementing Decision of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, C(2021) 4800 final.

under EU law. The adequacy decision includes strong safeguards in case of future divergence such as a ‘sunset clause', which limits the duration of adequacy to four years.

The decision is founded on the requirement that the UK's data protection system is based on the same rules as were applicable when the UK was an EU Member State. The UK has fully incorporated the principles, rights, and obligations of the EU´s General Data Protection Regulation 2016 into its post-Brexit legal system. Hence, the Commission will closely monitor how the UK data protection standards evolve in future, and the decision has been reinforced to allow for this and for an intervention if needed. Also, a repeal of the Human Rights Act by the UK might become an issue here.

3. In particular: The Level Playing Field

Regarding Title XI from Article 355 TCA onwards: besides EU fishermen's access to British waters, a major bone of contention right up to the end were the regulations on the "level playing field", which were very important to the EU. In essence, this is about ensuring equal standards in areas sensitive to economic policy and social law (i.e. a "level playing field") and thus preventing regulatory competition. The new rules in Title XI are intended to ensure that the level playing field between Brussels and London remains comparable and that the British do not set lower standards in the areas of social affairs, labour, competition, or environmental protection. The British, on the other hand, had insisted on their (legislative) sovereignty, i.e. their independence in determining the level of protection, which was also taken into account in Articles 356 and 411 TCA. The agreement now contains in Part 2, Heading One a separate Title XI on "A level playing field for open and fair competition and sustainable development", which stipulates the regulatory standards, particularly in the areas of labour and social standards as of 31 December 2020, as fundamentally inalienable (Article 387 para. 2 TCA).

The antitrust rules essentially reproduce the usual rules and thus continue the status quo (Articles 358-361 TCA). The rules on subsidies, however, are much more differentiated (Chapter 3 on subsidy control, Articles 363 et seqq. TCA):

Chapter 3 on subsidies in Title XI is composed of 13 articles (363-375) which include substantive rules on subsidies: definitions, scope and exceptions, services of public economic interest, principles, prohibited subsidies and subsidies subject to conditions, the substance of

which is closely resembling EU anti-state aid policies developed by the COM under Articles 107 and 108 TFEU.[15]

Furthermore, the chapter contains monitoring and enforcement rules and mechanisms (use of subsidies (Article 368 TCA), transparency obligations (Article 369 TCA)), provides for consultations in case of negative effects (Article 370 TCA), for the establishment of an independent surveillance authority (Article 371 TCA, it now is the CMA), and for courts and tribunals with mutual right to intervention (Article 372 TCA). Finally, the recovery of illegal subsidies is foreseen (Article 373 TCA).

Chapter 3 also contains rules on remedial measures (Article 374), dispute settlement; and provides for rights for competitors.

After granting a subsidy, the other party may first request *explanations* if the subsidy has a *negative effect on trade and investment* between the parties (Article 370 para. 1 TCA). In the next step, the party can request *consultations* in the Trade Specialised Committee on Level Playing Field for Open and Fair Competition (Article 370 para. 4 TCA), which is intended to reach a "mutually satisfactory solution" (Article 370 para. 5 TCA).

But there is more. Article 374 TCA provides for remedial measures. If a subsidy actually has or could have a "*significant* negative effect on trade or investment between the Parties", remedial measures may be imposed by the other party to the TCA within 60 days (Article 374 para. 3 TCA), limited to what is strictly necessary and proportionate to remedy the significant negative effect, Article 374 para. 8 TCA; the assessments of this party must be based on facts and reliable evidence, not mere allegations (Article 374 para. 5 and 6 TCA). The remedial measure is subject to arbitration (Article 374 para. 9 TCA, the arbitration tribunal cannot assess the application of the anti-subsidy principles set out in Articles 366 and 367 TCA, and must act quickly: only 30 days for decision-making, Article 374 para. 10 TCA. The arbitration has no suspensive effect, Article 374 para. 9 TCA, which means that despite pending arbitration, the party can proceed and adopt the remedial measures. If the arbitration tribunal finds against the respondent Party, this Party shall within 30 days deliver a notification to the other party of any measure that is taken to comply with the ruling (Article 374 para. 11 TCA). Hence, the TCA does not clearly provide whether a negative ruling requires the other party to terminate its remedial measures.

[15] See Eeckhout, Brexit after the negotiation of the trade and cooperation agreement: who takes back control of what? 2021 *Revista de Derecho Comunitario Europeo*, 68, 11-22, 13.

Arbitration under the general provisions of Part 6 of the TCA has only very limited application for this Chapter 3 (see Article 375 TCA). For the other chapters of Title XI, too, the general rules are largely excluded (Articles 384, 389, 396, 407 TCA) and replaced by consultations and a specific dispute resolution procedure before a panel (Articles 408-410 TCA).

In addition, Title XI deals with the areas of state-owned enterprises, enterprises with special rights or privileges and declared monopolies (Chapter 4, Articles 376 et seqq. TCA), taxation (Chapter 5, Articles 383 et seqq. TCA), labour and social standards (Chapter 6, Articles 386 et. seqq. TCA), environment and climate (Chapter 7, Articles 390 et seqq. TCA) and other instruments for trade and sustainable development (Chapter 8, Articles 397 et seqq.) in the agreement.

Also insofar, a fundamental standstill/non-regression provision applies, which constrains the parties' legislative leeway with a view to maintain at least the same level of standards as have prevailed on 1 January 2021, in the social, labour, and environmental areas, including environmental targets set in the EU up to 31 December 2020.

There is also a general rebalancing mechanism for the whole of Title XI, applicable to all of its chapters, contained in Art. 411 TCA, whereby a party may implement "appropriate rebalancing measures" whenever "*significant divergences*" in these areas covered by title XI (labour, social, environment climate, subsidy control) arise which lead to "*material impacts on trade or investment* between the Parties", (Article 411 para. 2 TCA). These measures must be confined to what is strictly necessary and proportionate in to remedy the situation (Article 411 para. 2 TCA) and require prior consultation (Article 411 para. 3 lit. a) TCA) and prior arbitration within 30 days. The respondent party may call for the intervention of an arbitration tribunal. At the request of a party, an arbitration tribunal shall decide whether such compensatory measures are necessary and proportionate to redress the balance. The party taking the compensatory measures must base its assessment on reliable evidence and not merely on conjecture or remote possibility.

If the arbitration tribunal does not deliver its ruling within 30 days, then the rebalancing measures can be adopted by the party which then can be answered by countermeasures by the other party, see Article 411 para. 3 lit. c) TCA.

These rules harbour a considerable potential for conflict because active regulatory competition can thus be directly sanctioned. The compensatory measures allow each side to directly sanction

a more than insignificant deviation from the standards. Here, it is foreseeable that the interpretation of the terms "significant divergences" and "material impacts" will be at the heart of the discussion. As a result of the openness of the terms, considerable potential for dispute is highly likely.[16]

Finally, a review of the operation of the whole Heading 1 on trade in Part 2 of the TCA (and of other headings) is foreseen in Article 411 para. 4 TCA, possibly resulting in the termination of cooperation under the entire heading.

4. In particular: Fisheries

Another contentious bone was the Heading Five Regarding Fisheries (Articles 493 et seqq. TCA). Part 2 of the TCA insofar provides for a transition period of 5.5 years during which reciprocal access rights to fish in each other's waters remain unchanged only basically, with gradual transfer of EU quotas to the UK, taking the need to preserve marine resources and the activities of fishing communities reliant on those waters into account. Prior to Brexit, 50% of the allowable catch in British waters were reserved for British vessels, and the other 50% for EU vessels, which is now being gradually reduced. It is exactly this gradual transfer which leads to annual debates and struggles about the exact tons of fish (the total allowable catch, tac) the EU vessels are allowed to extract from British waters, and vice versa. Article 498 TCA requires the parties to agree on the allowable catch each year.

The fisheries section of the TCA also contains a dangerous termination clause in Article 509 TCA which states:

"that each Party may at any moment terminate this Heading [i.e. Fisheries], by written notification through diplomatic channels. In that event, Heading One [on Trade], Heading Two [Aviation], Heading Three [Road Transport] and this Heading shall cease to be in force on the first day of the ninth month following the date of notification."

Thus, if the UK or the EU terminate the fisheries rules, then this will also apply to almost the whole of the trade part of the TCA. Hence, fisheries and the rest of EU UK trade are closely interlinked, and the UK has a tremendous threat in its hands. Thus, Article 509 TCA was rightly called a "guillotine clause"[17].

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[16] Terhechte: All's well that ends well? - Das EU/VK-Handels- und Kooperationsabkommen, 2021 Neue Juristische Wochenschrift, 417-424, 422.

[17] Lazowski, Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I, 2020 European Papers, Vol. 5, No 3, 1105-1141, 1127.

VI. Other Important Parts of the TCA in brief

1. Part 3 on law enforcement and judicial cooperation (Articles 522 et seqq. TCA):

In this part, we first find an explicit commitment to human rights and fundamental freedoms as the basis for cooperation, in particular the ECHR, for the EU additionally to the Fundamental Rights Charter, and to the protection of personal data. Operationally, this cooperation includes not only the exchanges of DNA, fingerprints, and vehicle registration data (Articles 527 et seqq. TCA) as well as the transfer and processing of PNR data (Articles 542 et seqq. TCA), but furthermore cooperation regarding the provision of operational information (Articles 563 et seqq. TCA). Articles 564 et seqq. and 580 et seqq. TCA additionally provide rules for cooperation with the competent authorities of the UK within the framework of Europol and Eurojust as the UK lost its membership. These rules are said to follow existing mechanisms on third party participation in Europol, and require, to attain full cooperation of the UK with Europol, additional working and administrative arrangements to be negotiated between the UK and Europol, and not the MS.[18] Articles 596 et seqq. TCA provide comprehensive obligations for an extradition system between the parties pursuant to an arrest warrant in accordance with the provisions of that Title. Articles 633 et seqq. TCA establish rulings on mutual assistance. Articles 643 et seqq. TCA enable the exchange of information from criminal records between the Member States on the one hand and the UK on the other hand. Articles 652 et seqq. TCA contain a short section on strengthening action to prevent and combat money laundering and terrorist financing. Articles 656 et seqq. TCA provide for cooperation regarding investigations and procedures for the freezing of property and its subsequent confiscation. Part 3 is then concluded with the titles "Other Provisions" (Articles 690 et seqq. TCA) and "Dispute Settlement" (Articles 695 et seqq. TCA), prescribing a specific settlement mechanism which avoids CJEU oversight. Special attention should be paid to Article 692 TCA, which provides for a termination of this part of the TCA. In Article 692 para. 2 TCA one impliedly finds that a reason for this might be a UK´s denunciation of the ECHR. Thus, the TCA implies that persistent adherence to the ECHR´s level of human rights protection having legal relevance also in domestic law are preconditions for cooperation.[19] As Lazowski rightly points out:

[18] Arnell et al, Police cooperation and exchange of information under the EU–UK Trade and Cooperation Agreement, 2021 New Journal of European Criminal Law, 12(2) 265–276, 273.

[19] Arnell et al, Police cooperation and exchange of information under the EU–UK Trade and Cooperation Agreement, 2021 New Journal of European Criminal Law, 12(2) 265–276, 267.

"Insofar, one could arguably claim that the repeal of the Human Rights Act 1998 could, if not followed by a legislative substitute, be considered as a deficiency big enough to trigger the suspension of Part 3 TCA."

As mentioned, should the section dedicated to fisheries be terminated, some other parts, including trade and aviation, would share the same fate.[20]

2. Part 6 on Dispute Settlement (Articles 734 et seqq. TCA):

In principle, dispute resolution is entrusted throughout to exclusive (Article 736 TCA, but see Article 737 TCA) intergovernmental arbitration mechanisms, in pursuit of the British objective of no longer being subject to the Court of Justice of the European Union (CJEU). First, there will be consultations aiming at a mutually agreeable solution (Article 738 TCA). Consultations usually take 30 days from the date of application but can be extended by consent. An arbitration tribunal will be established if consultations are not successful (Article 739 TCA). The arbitration tribunal consists of three arbitrators, a representative of the UK, a representative of the EU and a jointly agreed chairperson (cf. Articles 740, 752 TCA). The arbitral tribunal is to be established within ten days of the delivery of the request. The arbitral tribunal shall submit an interim report within 100 days, which may be extended to 130 days. The ruling must then be made within 130 days or 160 days if the time limit is extended (Article 745 TCA). However, a party may also request an urgent proceeding, in which the time limits are halved (Article 744 TCA). Under Article 746 TCA, if the arbitration tribunal finds that the respondent Party has breached an obligation under the TCA, that Party shall take the necessary measures to comply immediately with the ruling of the arbitration tribunal to bring itself in compliance with the covered provisions. Compliance with the ruling is set out in detail in the TCA in close resemblance of WTO DSU rules, which means that, after a certain period of time for the respondent´s compliance with the ruling has lapsed, the complainant can adopt temporary remedies in the sense of suspension of obligations which again can be referred to arbitration (see Article 749 TCA). However, the provisions of Part 6 do not apply to all areas of the agreement; exceptions include, for example, Part 3 on law enforcement and judicial cooperation in criminal matters, for which there is a separate mechanism (cf. Article 735 TCA). In addition, there are derogations and exceptions for some parts of the provisions on a level playing field (Part 2, Heading 1, Title XI, see above sub V. 3.).

[20] Lazowski, Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I, 2020 European Papers, Vol. 5, No 3, 1105-1141, 1134.

VII. Amendments and Termination

Amending the Agreement is the task of the contracting parties. In case possibilities of amendment, however, are already provided in the Agreement, it is the task of the Partnership Council to decide on them (Article 7 para. 4 lit. c) and d) TCA). It is also up to each of the Parties to terminate the Agreement according to Article 779 TCA by written notification. In this case, the Agreement will cease to have effect on the first day of the twelfth month following the date of notification. In addition to this general right of termination for the entire TCA, the Agreement contains with Article 441 TCA a specific right of denunciation relating to the 2nd Title on Trade in the 2nd Part of the Agreement, with the exception of the Regulations on Social Security and Short Stay Visas and the Protocol on the Coordination of Social Security Schemes. In such a case, a shorter period applies, so that the denunciation takes effect on the first day of the ninth month following its notification. Similar sectoral rights of termination are to be found in other areas, see, for example, Article 509 TCA on Fisheries; Article 458 TCA to the title on Aviation Security; or Article 472 TCA to the title on Road Transport.

VIII. Assessment

This rather brief look at some of the central chapters in the TCA has shown that the Agreement is in fact more of a framework agreement whose content and obligations require further elaboration and specification. It is unfinished business. This could be illustrated with the area of financial services, with regards to the mutual recognition of professional qualifications, and for fisheries, but also for the UK´s participation in Europol. The TCA´s institutional structure with the strong position of the Partnership Council, to which a very large number of decision-making powers have been delegated, proves that the parties were aware of this.

Overall, the lack of specific rules in large parts of the agreement will lead to a state of continuous negotiation with considerable ongoing conflict potential in many areas. The numerous general and specific termination and suspension clauses in the TCA may intensify this. It appears that the parties may have been aware of the continuous debates and struggles the implementation of the TCA rules will require and vested themselves with pressure potential by including several termination clauses. For the UK´s sovereignty objective, this will mean that in areas such as competition, environment, or criminal law legislative moves of the UK might face resistance from the EU side, curtailing the UK´s autonomy.

Hence, one must agree with Adam Lazowski who said that the TCA:

"is unlikely to be the final scene of the lengthy Brexit opera, but rather a relatively swift transition between acts. Arguably, before we reach some sort of closing *crescendo*, more acts are likely to follow in the years to come".[21]

The wording in para. 5 of the above-mentioned Political Declaration, which reminds us of the "interwoven past and future of the EU and the UK" could not be closer to the truth. The ongoing disputes are an unpromising foretaste of this interwoven common future. The parties, however, when drafting this language might not have dreamt of such type of very interwoven future which the TCA finally brought about: A future of continuous debates and struggles between the UK and the EU about how to implement, respect and supplement core TCA provisions.

[21] Lazowski, Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I, 2020 European Papers, Vol. 5, No 3, 1105-1141,1106.