ARTICLES

A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law

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ABSTRACT: The withdrawal of the United Kingdom (UK) from the European Union (EU), commonly known as Brexit, resulted in the establishment of a new bilateral legal framework for the future development of EU-UK relations. The new framework is based on a Trade and Co-operation Agreement (TCA) in combination with more specific supplementing agreements concerning the exchange of classified information and the peaceful use of nuclear energy. Without entering into a detailed substantive analysis of these agreements, several innovative elements can be highlighted from the perspective of EU external relations law. This includes, in particular, the governance structure of the new legal framework, the use of art. 217 TFEU (on association) as a legal basis, the "EU-only" nature of the TCA and the provisional application without prior involvement of the European Parliament. It is argued that these key features are largely the result of an unprecedented process of negotiations under the time pressure of the expiry date for the transitional application of EU law in the UK.

KEYWORDS: Brexit – United Kingdom – TCA – association – provisional application – mixity.

I. Introduction

On 24 December 2020, European Commission President Ursula von der Leyen announced the successful conclusion of the negotiations on a new legal framework for the *post*-Brexit relations between the European Union (EU) and the United Kingdom (UK).[1]

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[1] Remarks by Commission President Ursula von der Leyen at the press conference on the outcome of the EU-UK negotiations, Brussels, 24 December 2020, ec.europa.eu.

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This involves a rather complex legal structure including a Trade and Cooperation Agreement (TCA) in combination with an Agreement concerning security procedures for exchanging and protecting classified information (the "Security of Information Agreement" (SIA)). In addition, a separate Agreement for cooperation on the safe and peaceful uses of nuclear energy accommodates the consequences of the UK's withdrawal from the European Atomic Energy Community (Euratom).[2]

In order to avoid the ramifications of a "no-deal" scenario, the Council quickly adopted the necessary decisions (by written procedure) allowing for the signature and provisional application of the new bilateral agreements from 1 January 2021 onwards.[3] The full entry into force of the new legal framework requires the consent of the European Parliament and a decision of the Council concluding the agreements.[4] With this procedure, a long and often frustrating exercise of unprecedented negotiations under a very tight time schedule comes to an end.

Without entering into a detailed substantive analysis of the deal, this contribution includes some reflections about the specific features of the new arrangement from the perspective of EU external relations law.[5] In particular, it focuses on the innovative legal structure of a TCA in combination with supplementing agreements (II), the use of art. 217 TFEU as a pragmatic legal basis for this new construction (III), the EU-only nature of the agreements (IV) and their provisional entry into force in anticipation of the consent of the

[2] The text of the TCA, SIA and the Agreement on Safe and Peaceful Uses of Nuclear Energy was published on 31 December 2020. After an exercise of legal scrubbing, a new numbering was adopted. See European Council Document of 19 April 2021 n. 5198/21. The final version was published in OJ (2021) L 149 and 159.

[3] Decision 2020/2252/EU of the European Council 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 ex-changing and protecting classified information; and Decision 2020/2253/EU of the European Council (Euratom) of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, 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.

[4] Art. 218 TFEU; art. 783 foresees the provisional application until 28 February 2021 but this date was changed to 30 April 2021 on the basis of Decision 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.

[5] On the *post*-Brexit EU-UK legal framework, see also: A 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 www.europeanpapers.eu 1105.

European Parliament (V). Finally, the contribution concludes with some general remarks about the broader implications of the new legal framework (VI).

II. A complex legal structure including a TCA and supplementing agreements

The new legal framework of EU-UK relations is more sophisticated than what may be derived from the initial announcement that both parties agreed on a TCA.[6] In fact, the TCA is only the core of a rather sophisticated legal structure defining the future bilateral relations between the EU and the UK. This can already be derived from the preamble and the first provisions of the TCA, which refer to the establishment of a "broad relationship" including also "supplementing agreements" forming part of the overall bilateral relations as governed by the TCA.[7] In other words, the TCA does not only cover the trade and economic dimension of the new relationship between the EU and the UK. It also provides for a general governance structure involving the establishment of an overarching bilateral institutional framework and rules on dispute settlement.[8]

This construction seems influenced by the EU's experiences with Switzerland. Following the latter's non-ratification of the Agreement on the European Economic Area (EEA) in 1992, EU-Swiss relations are based on a dense network of sectoral bilateral agreements without a common institutional framework. On several occasions, the EU recalled that this *lacuna* creates legal uncertainty for citizens and businesses.[9] In particular, the absence of horizontal provisions on dispute settlement and the lack of procedures to deal with the dynamic evolution of EU law revealed the limitations of this highly fragmented model of sectoral bilateralism.[10] A new EU-Swiss Institutional Framework Agreement, negotiated in 2018, is expected to solve these problems. However, the Swiss Federal Council still has to take the

[6] The term "Trade and (Economic) Cooperation Agreement" has been used in the past as a first step towards the development of closer bilateral relations and often in anticipation of more ambitious agreements at a later stage. This was, for instance, the case in the development of relations with the countries of the former Council for Mutual Economic Assistance (COMECON) at the end of the 1980s. See, in this respect, M Maresceau, 'Bilateral Agreements Concluded by the European Community' (2004) Collected Courses of The Hague Academy of International Law – Recueil des cours 309.

[7] See: arts 1 and 2 TCA.

[8] See "Part one: common and institutional provisions" and "Part six: dispute settlement and horizontal provisions" of the TCA. For comments, see: M Konstantinidis and V Poula, 'From Brexit to Eternity: The Institutional Landscape under the EU-UK Trade and Cooperation Agreement' (14 January 2021) European Law Blog europeanlawblog.eu.

[9] European Council Conclusions of 28 February 2017, EU relations with the Swiss Confederation.

[10] For a criticism of the Swiss model of sectoral bilateralism, see: A Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union' (2008) CMLRev 1433-1458.

necessary steps towards its signature and conclusion. In any event, the EU Council consistently emphasised that the conclusion of the new framework agreement is a precondition for the further development of the bilateral relationship with Switzerland.[11]

Against this background, it is not surprising that the European Council defined the existence of a solid governance system as one of the priorities for the management of future EU-UK relations.[12] From the outset of the Brexit-process, a sector-by-sector approach based on "cherry-picking" has been excluded. Instead, the EU consistently stressed the requirement of a "level-playing field" based on a balance of rights and obligations and including horizontal provisions on supervision, dispute settlement and enforcement. This commitment was also explicitly included in the joint Political Declaration accompanying the EU-UK Withdrawal Agreement.[13]

The overall management of the EU's relations with third countries is typically part of a comprehensive framework agreement – often explicitly called "Association Agreement" or "Partnership and Cooperation Agreement" depending upon the level of ambition. Such framework agreements embrace all areas of cooperation in a single document, including a wide variety of issues ranging from political dialogue to trade and sectoral cooperation. Recent examples are the Association Agreements concluded with countries such as Ukraine, Moldova and Georgia, the Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia or the Partnership Agreement on Relations and Cooperation with New Zealand.[14] An alternative approach is followed in the EU's relations with Canada. Instead of a comprehensive agreement covering all areas of cooperation, the EU's bilateral relations with Canada are based on separate agreements covering the trade and political dimensions respectively.[15] Under this model, every agreement is concluded under a separate legal basis and operates as a self-standing legal instrument with its own institutional provisions. The new legal framework of EU-UK relations does not easily fit in one of those existing models and has a number of innovative features.

First, the TCA and SIA are separate agreements which are nevertheless tied together in the sense that the SIA is "a supplementing agreement" to the TCA. Both agreements are concluded under a single procedure with art. 217 TFEU as the substantive legal basis (see *infra*). The separate EURATOM agreement on the peaceful use of nuclear energy constitutes another "supplementing agreement". Accordingly, the TCA forms the basis for "a

[11] European Council Conclusions of 19 February 2019, EU relations with Switzerland.

[12] European Council guidelines (art. 50 TEU), Brussels, 23 March 2018, EUCO XT 20001/18, see www.consilium.europa.eu.

[13] Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] 118.

[14] See the Treaty Office Database of the European External Action Service for an overview of the existing EU agreements with third countries, ec.europa.eu.

[15] The Comprehensive Economic and Trade Agreement (CETA) [2017] and the Strategic Partnership Agreement with Canada [2016].

broad relationship" allowing for the addition of new supplementing agreements in the future.[16] Such new bilateral agreements shall, in principle, also fall within the overall framework for bilateral EU-UK relations as governed under the TCA irrespective of whether they will be concluded by the EU alone or together with its Member States or on behalf of EURATOM.[17] Accordingly, the EU-UK bilateral relations can further develop under the common roof of the TCA governance structure.

Second, the special nature of the EU-UK legal framework implies that the TCA has a very peculiar structure. In essence, it combines a number of horizontal provisions which are applicable to all EU-UK bilateral agreements – including the ones that may be added in the future – and rather detailed substantive provisions governing the bilateral trade, transport, energy and fisheries relations as well as matters relating to citizens' security such as data exchange, fundamental rights and judicial cooperation in criminal matters. The result is a rather complex agreement which does not entirely follow the traditional structure of other framework agreements governing the EU's relations with third countries. For instance, bilateral framework agreements traditionally define the general objectives and "essential elements" governing the bilateral relations at the beginning and include a title on the institutional framework and dispute settlement at the end of the agreement. In the TCA, the common institutional framework is defined at the outset whereas the essential elements and the basic horizontal principles underpinning the bilateral EU-UK relations are only included at the end.

Third, the EU-UK legal framework does not include any particular provisions on "political dialogue" which is a typical component of bilateral framework agreements. This is a consequence of the UK's desire to keep issues of foreign policy, external security and defence cooperation out of the negotiations.[18] As a result, there is no legal arrangement to coordinate joint responses to foreign policy challenges, such as the alignment of sanctions. It appears that the UK prefers to opt for a more informal arrangement on foreign policy questions based on *ad hoc* consultations with EU Members States and the European External Action Service (EEAS). This is largely comparable to the EU's relations with the United States (US), which also lack a bilateral legal framework for the alignment of foreign policy decisions.[19]

Fourth, notwithstanding its title and despite public references by UK Prime Minister Boris Johnson to "a Canada-style trade deal", the TCA is not comparable to the EU's trade

[16] Arts 1 and 2 TCA.

[17] Art. 2(2) TCA.

[18] 'EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and cooperation in areas of mutual interest', in European Commission Press release IP/20/2531 of 24 December 2020.

[19] See, in this respect, V Szép and P Van Elsuwege, 'EU Sanctions Policy and the Alignment of Third Countries. Relevant Experiences for the UK?' in J Santos Vara, R Wessel and P Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020) 234.

agreements concluded with other third countries. In particular, the scope of the agreement goes far beyond what is included in traditional trade and cooperation agreements. It suffices to refer to the detailed provisions on transport, fisheries or judicial cooperation in criminal matters to see the difference. Another difference is the absence of provisions on Investor-State Dispute Settlement (ISDS), which is one the most contentious elements under the EU's Comprehensive Economic Trade Agreement (CETA) with Canada.[20] In other words, the scope of the EU-UK TCA differs in several respects from the EU's agreements with other trade partners.

Fifth, whereas EU agreements with neighbouring countries largely focus on a process of legal approximation, the approach of the TCA is essentially different. This is, of course, a logical result of the different starting points; rather than aiming at bringing diverging legal systems together, the EU-UK agreement aims to avoid a far-reaching divergence following the UK's withdrawal from the EU legal system. Accordingly, the EU-UK TCA allows for the adoption of remedial and rebalancing measures when subsidies or different legal standards in areas of social or environmental protection are capable of affecting the trade and investment climate between the parties.[21]

III. Legal basis: a pragmatic use of the Treaty provision on association (art. 217 TFEU)

The new legal framework of EU-UK relations is based on art. 217 TFEU, which allows for the conclusion of "agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".[22] This may be surprising, since no single reference to the word "association" can be found in the title or the text of the TCA or its supplementing agreements. Nevertheless, this is not unprecedented in the EU's treaty-making practice.[23] After all, the choice of the substantive legal basis for the conclusion of an international agreement is a purely internal EU matter which is, in principle, not subject to negotiations with the third party.[24] With respect to EU-UK relations, the use of art. 217 TFEU was in any event already envisaged in the joint Political Declaration. The parties explicitly noted that "the overarching institutional framework could take the form of an Association Agreement".[25] Whether or not the term "association" is mentioned in the title or text of the agreement may thus have a political significance but it is not essential from a legal point of view.

[20] CETA between Canada, on one part, and the European Union and its Member States, on the other part.

[21] See art. 760 TCA.

[22] Art. 217, consolidated version of the Treaty on the Functioning of the European Union [2016].

[23] An example is the Trade, Development and Cooperation Agreement (TDCA) with South Africa, which has been concluded on the legal basis of ex art. 310 EC (current art. 217 TFEU).

[24] This may lead to some unexpected surprises for the third countries. On the example of Switzerland, see: M Maresceau, 'Bilateral Agreements Concluded by the European Community', cit. 155.

[25] Political Declaration cit. point 120.

Art. 217 TFEU is a very flexible legal instrument. Whereas it implies the creation of "special, privileged links with a non-member country", the actual content of the established relationship is not pre-defined. As clarified by the Court of Justice in *Demirel*, art. 217 TFEU empowers the Union "to guarantee commitments towards non-member countries in all the fields covered by the Treat[ies]".[26] Depending on the outcome of the negotiations, the scope of an association agreement may thus vary from little more than a free trade agreement to a level of integration that comes close to membership.[27] The only limit is that third countries cannot be granted decision-making powers within the EU institutions.[28]

In the past, the EU has concluded a wide variety of association agreements with third countries in Europe and beyond.[29] Apart from the divergence in terms of their exact scope and objectives, also the form can differ significantly. Whereas art. 217 TFEU is mostly used for the conclusion of single, comprehensive framework agreements, different models are possible as well. A notorious example is the "sectoral association" of Switzerland under the so-called "Bilaterals I" package of seven sectoral bilateral agreements concluded in 1999. The Commission had originally proposed the relevant sectoral legal bases for the seven agreements but, for reasons of legal pragmatism, the Council concluded the Bilaterals I as a "horizontal package" on the basis of art. 217 TFEU.[30] Accordingly, a single Council decision was adopted for the joint conclusion of the seven agreements even though the word "association" had never been used in the negotiations. On the basis of a so-called "guillautine clause", all seven agreements entered into force simultaneously and the termination of one of them results in the termination of all seven.

It seems that this approach somewhat inspired the procedure for the joint signature and conclusion of the TCA and SIA through a single legal instrument with art. 217 TFEU as its legal basis. Both agreements are "intrinsically linked" implying that the dates of their entry into force and (potential) termination coincide.[31] The key difference with the EU-Swiss Bilaterals I is the inclusion of a horizontal governance structure in the TCA (see *supra*) as well as the envisaged dynamic development of bilateral EU-UK relations in the

[26] Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400 para. 9 and case C-81/13 *UK v Council* ECLI:EU:C:2014:2449 para. 61.

[27] W Hallstein, former Commission president, declared that "association can be anything between full membership minus 1% and a trade and co-operation agreement plus 1%", in: D Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press 1999) 23.

[28] K Schmalenbach, 'Art. 217 (ex-art. 310 EGV) [Assoziierungsabkommen]', in C Callies and M Ruffert (eds), *EUV/AEUV Kommentar* (Beck 2016) para. 7.

[29] For overview and typology, P Van Elsuwege and M Chamon, 'The Meaning of Association Under EU Law. A Study on the Law and Practice of EU Association Agreements', in Study for the AFCO Committee of the European Parliament, February 2019, www.europarl.europa.eu.

[30] M Maresceau, 'Bilateral Agreements Concluded by the European Community' cit. 415.

[31] Arts 779 TCA and 20 SIA.

sense that future supplementing agreements will be integrated in the established framework.[32] Accordingly, the EU-UK model of a combination between a broadly defined TCA and supplementing bilateral agreements falling under a common institutional framework is a rather innovative form of association.

The pragmatic use of art. 217 TFEU as the legal basis for the new EU-UK legal framework has important procedural consequences. In particular, the comprehensive scope of art. 217 TFEU – covering the entire range of EU competences – avoids the more complex exercise of determining the substantive legal bases for the TCA and SIA respectively. This would imply a "centre of gravity test" based on an analysis of the aim and content of the respective agreements. It is well known that this is not always an easy exercise, which frequently leads to inter-institutional conflicts.[33] Moreover, the outcome is often a rather complex combination of relevant Treaty provisions. For instance, the substantive legal basis of CETA is a combination of arts 43(2), 91, 100(2), 153(2), 192(1) and 207(4) TFEU whereas the separate EU-Canada Agreement on security procedures for exchanging and protecting classified information is based on art. 37 TEU. In combining the process for the signature and provisional application of the EU-UK TCA and SIA in a single document, based on the single legal basis of art. 217 TFEU, potential discussions on internal competence delimitation could thus be avoided. In addition, recourse to art. 217 TFEU requires unanimity in the Council,[34] which is an important safeguard for the protection of the Member States' interests when the latter are no contracting parties in their own right (see *infra* at IV).

Finally, it is noteworthy that the EU's neighbourhood clause, included in art. 8 TEU, did not play any significant role in the procedure leading to the adoption of the new EU-UK legal framework. Neither the Commission, in its proposal, nor the Council, in its decision on the signature and provisional application of the TCA and SIA, referred to art. 8 TEU. Nevertheless, the wording of art. 1 TCA is very similar to the text of art. 8(1) TEU with a reference to the establishment of "an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation". Even though art. 8(2) TEU provides that the Union may conclude "specific agreements" for this purpose, it appears that this provision cannot be used as an autonomous substantive legal basis. Its general wording and unusual location under Title I on "common provisions" of the TEU as well as the absence of specific procedural guidelines under art. 218 TFEU point in this direction.[35] As a result, art. 8 TEU operates as an essentially political provision defining

[32] Art. 2.

[33] P Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations: Constitutional Challenges* (Hart 2014) 117.

[34] Art. 218(8) TFEU.

[35] See on this discussion: P Van Elsuwege and R Petrov 'Towards a New Generation of Agreements with the Neighbouring Countries of the European Union? Scope, Objectives and Potential Application of art. 8 TEU' (2011) ELR 697.

the general framework of the EU's neighbourhood relations without affecting the EU's competence for the conclusion of international agreements as defined in the more specific provisions of the Treaties.[36]

IV. The option of an EU-only agreement and its consequences

Notwithstanding its comprehensive scope, covering areas of exclusive and shared EU competences, the TCA is an "EU-only" agreement implying that the Member States are not contracting parties in their own right. This is remarkable since Member States' representatives in the Council usually prefer the conclusion of a mixed agreement whenever non-exclusive EU competences are involved.[37] That the option of "mixity" was not used in relation to the EU-UK TCA is thus a political decision of the Member States, which is obviously connected to the specific features of the Brexit process. It is well known that the procedure for the conclusion of mixed agreements involves legal and practical hurdles, often due to delays in the national ratification process as a result of specific issues in single Member States.[38] Given the uncertainties related to the UK's withdrawal process and its implications for individuals and businesses, it appears that the advantages of the faster "EU-only" procedure played a crucial role in the Member States' decision to exceptionally drop their traditional insistence on mixity.

From a legal point of view, mixed agreements are only obligatory when exclusive Member State competences are at stake. When an agreement, such as the EU-UK TCA, only covers exclusive and shared EU competences, the Council can decide to exercise the shared EU competences so that the agreement is not mixed but concluded by the Union alone.[39] One of the main reasons for the Member States' usual reluctance to opt for this formula is that it may trigger an "AETR/ERTA effect" in the sense that subsequent agreements would

[36] On art. 8 TEU see also: S Blockmans, 'Friend or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon' in P Koutrakos (ed.), 'The European Union's External Relations a Year after Lisbon' (CLEER Working Papers 3-2011) 116.

[37] A noticeable exception is the Stabilisation and Association Agreement with Kosovo, which has been concluded as an EU-only agreement due to the non-recognition of the independence of Kosovo by five EU Member States. See: P Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilisation and Association Agreement between the EU and Kosovo' (2017) European Foreign Affairs Review 393.

[38] See, for example, the problems in the ratification process of the EU-Ukraine Association Agreements as result of a Referendum in the Netherlands. For comments, see: P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' in: S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements between the EU and its Eastern Neighbourhood* (Springer 2021) 95. See more generally on this topic also: G Van der Loo and R Wessel, 'The Non-ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) CMLRev 735.

[39] A Rosas, 'Mixity: Past, Present and Future: Some Observations' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity* (Brill 2020) 8.

then be considered as affecting the "common rules" established on the basis of the Council's exercise of shared EU competences in the procedure for the conclusion of the initial agreement.[40] It is precisely to avoid such a scenario that the Council Decision on the signature and provisional application of the TCA explicitly provides that the exercise of Union competence through this agreement "shall be without prejudice to the respective competences of the Union and of the Member States in relation to other agreements with third countries or supplementing agreements with the UK".[41] It is noteworthy that also the European Commission issued a statement on competence, included in the minutes to the Council Decision, in which it also considers that the exercise of shared EU competences through the TCA has no implications for other agreements.[42] In addition, Austria and Cyprus issued specific statements stressing the non-affection of Member State competences in areas of social security cooperation and air transport services.[43]

The most important consequence of the "EU-only" nature of the EU-UK TCA is the exclusion of a process of Member State ratifications, which requires the involvement of national (and regional) parliaments. It is well known that this may lead to several unexpected hurdles, often related to domestic politics – such as in the case of the Dutch referendum on the EU-Ukraine Association Agreement[44] – or specific national interests – such as the decision of the Cypriot parliament to halt the approval of CETA due the allegedly ill-protection of Halloumi cheese.[45] For EU-only agreements, the ratification procedure is limited to the adoption of a Council decision after the consent of the European Parliament implying that such domestic considerations are less likely to derail the swift conclusion of the agreements.

Whereas the avoidance of mixity thus has clear procedural advantages, the counterargument may well be that the side-lining of national parliaments affects the democratic scrutiny of an important arrangement such as the EU-UK TCA. However, this is not entirely correct in the sense that the democratic control at EU level is essentially the role of the European Parliament, which has to give its consent before the agreement can fully enter into force. In accordance with art. 318(10) TFEU, the European Parliament is to be "immediately and fully informed at all stages of the procedure".[46] Moreover, national parliaments can still play their role in controlling the position of their national governments

[40] *Ibid*.

[41] Art. 10 Council Decision 2020/2252 cit.

[42] Annex to Council Decision 2020/2252 cit., Communication CM 5525/20 of the Council of the European Union of 29 December 2020, 7, see data.consilium.europa.eu.

[43] *Ibid*. 4-5.

[44] P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' cit.

[45] B Moens, 'Haloumi Cheese Puts EU's Canada Deal to the Test' (4 August 2020) Politico www.politico.eu.

[46] See further below at section V on the interpretation of art. 218(10) TFEU and the role of the European Parliament in the procedure for the conclusion of international agreements.

in the Council.[47] In this respect, the requirement of unanimity in the Council for agreements concluded under art. 217 TFEU also provides a guarantee for the protection of Member State interests.

Finally, it is noteworthy that the Member States are given the right to send one representative to accompany the Commission representative, as part of the Union delegation, in meetings of the Partnership Council and of other joint bodies established under the TCA.[48] This *droit de régard* guarantees that Member States can be present during discussions with the UK, notwithstanding the EU-only nature of the TCA. Of course, the presence of the Member States cannot undermine the Treaty provisions on EU external representation. Pursuant to art. 17(1) TEU, this implies that the Commission is to represent the Union and to express the Union's positions as established by the Council. When the adoption of legally binding decisions is at stake, the EU's positions are defined in accordance with the procedure defined in art. 218(9) TFEU.

V. Provisional application and the role of the European Parliament

The strict time schedule as determined by the EU-UK withdrawal agreement with the perspective of a cliff-edge scenario on 1 January 2021 significantly complicated the normal procedures. Whereas the negotiation of international agreements usually takes several years, the EU-UK negotiations were finished in a record time of ten months. One of the consequences is that the normal process of "legal scrubbing", i.e. the final legal-linguistic revision of the agreed text of the agreements, could exceptionally not be done before the date of signature. This was solved pragmatically through the exchange of diplomatic notes at a later stage and with a proviso in the Council decision that the revised texts "shall replace *ab inititio* the signed versions of the Agreements".[49] Another consequence is that the European Parliament had insufficient time to appropriately scrutinise the agreements before giving its consent in accordance with art. 218(6) TFEU. For this reason, the agreement only provisionally entered into force on 1 January 2021 in anticipation of the finalisation of the EU's ratification process.[50]

The practice of provisional application has an explicit legal basis in art. 218(5) TFEU and is well-established with respect to the EU's international agreements. Moreover, it is a generally accepted procedure envisaged under art. 25 of the 1969 Vienna Convention

[47] In this respect, it is noteworthy that the Netherlands issued a statement to the Council decision on signature and provisional application clarifying that the Dutch parliament will be allowed "to further scrutinise the agreements and exercise its role prior to the adoption of the Council decision on conclusion of the Agreements". See: Annex to Council Decision 2020/2252 cit.

[48] This arrangement is foreseen in art. 2 of Decision 2020/2252 cit.

[49] *Ibid*. art. 12.

[50] Art. 783 TCA.

on the Law of Treaties (VCLT).[51] Whereas it is frequently used to overcome the lengthy national ratification process in the event of mixed agreements, provisional application can also apply in relation to EU-only agreements.[52] From this perspective, and taking into account the urgency of the situation with a transition period ending on 31 December 2020, the provisional application of the EU-UK agreements is a logical step in anticipation of their formal conclusion and full entry into force.

Due to the late finalisation of the negotiations, only few days before the expiry of the transition period, the Council Decision on signature and provisional application of the new EU-UK agreements was adopted without the prior involvement of the European Parliament. Whereas this state of affairs is perfectly legal and in accordance with the requirements defined in art. 218(5) TEU (see *infra*), it is nevertheless remarkable in light of the political commitments made by Commission President Von der Leyen. In her "guidelines for the next European Commission 2019-2024", she explicitly mentioned that "my Commission will always propose that provisional application of trade agreements take place only once the European Parliament has given its consent".[53] During the oral hearings in the European Parliament, the Commissioner-designate for trade (at that time Phil Hogan) made a similar commitment.[54]

The European Parliament's insistence on a right to give its consent before the Commission issues a proposal on provisional application must be seen in light of its long-term struggle to play a more active role in the procedure for the conclusion of international agreements.[55] Based on its "right to be immediately and fully informed at all stages of the procedure", laid down in art. 218(10) TFEU, the Parliament argues that it must have an opportunity to express its views on provisional application at an early stage. Without such an option, it fears to be confronted with a *fait accompli* in light of the far-reaching implications of withholding consent at a later stage.[56] For this purpose, the European

[51] See, on the practice of provisional application: M Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) EJIL 883 B Driessen, 'Provisional Application of International Agreements by the EU' (2020) CMLRev 741.

[52] An example are the EU's agreements on fisheries or civil aviation safety. See e.g., Council Decision (EU) 2019/2025 of 18 November 2019 on the signing, on behalf of the European Union, and the provisional application of the Protocol to amend the International Convention for the Conservation of Atlantic Tunas; Decision 2020/1026/EU of the European Council of 24 April 2020 on the signing, on behalf of the Union, and provisional application of the Agreement on civil aviation safety between the European Union and Japan.

[53] U Von der Leyen, 'A Union that Strives for More. My Agenda for Europe', Political Guidelines for the Next European Commission 2019-2024, ec.europa.eu.

[54] M Damen and W Igler, 'Commitments made at the hearing of Phil Hogan, Commissioner-designate Trade' (European Parliament Briefing PE.639.308, October 2019), www.europarl.europa.eu.

[55] R Passos, 'The External Powers of the European Parliament' in P Eeckhout and M Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 85.

[56] R Passos, 'Some Issues Related to the Provisional Application of International Agreements and the Institutional Balance' in J Czuczai and F Naert (eds), *The EU as a Global Actor - Bridging Legal Theory and Practice* (Brill-Nijhoff 2017) 383.

Parliament's Rules of Procedure provide that a parliamentary debate on provisional application may be organised and that the Council can be invited not to provisionally apply an agreement until the European Parliament has given its consent.[57]

In practice, the European Parliament is normally heard before the Commission initiates the procedure for the provisional application of an agreement. However, this cannot be regarded as a legally binding obligation in view of the text and purpose of art. 218(5) TFEU. This provision does not foresee an active role for the European Parliament in the process leading to provisional application. It is precisely a characteristic of the "provisional" nature of the application that the consent of the European Parliament is still pending and must be given at a later stage before the Council can adopt a decision on the conclusion of the agreement. Hence, requiring the formal consent of the European Parliament before an agreement can provisionally enter into force seems to be a bridge too far from the perspective of the EU's institutional balance.[58] Of course, the European Parliament needs to be informed in a timely manner so that it can perform its political control under art. 14(1) TEU but this does not involve decision-making powers beyond the scope of art. 218(6) TFEU.[59] In other words, the absence of the European Parliament's consent in the procedure leading to the provisional application of the EU-UK agreements is not a legal problem. Nevertheless, it is politically sensitive in light of the Commission's earlier commitments. It is, therefore, no surprise that the leaders of the political groups in the European Parliament and the President of the European Parliament, David Sassoli, stressed that the decision on the provisional application of the EU-UK agreements without the prior involvement of the European Parliament is to be considered as "a unique exception", which should not serve as a precedent for future procedures.[60]

VI. Concluding remarks: pragmatism and flexibility in EU-UK relations

Without entering into the substantive details of the new EU-UK legal framework, several specific features can be highlighted from the perspective of EU external relations law. First of all, the construction of a TCA in combination with supplementing agreements provides a rather innovative and flexible structure for the further development of EU-UK bilateral relations. The TCA provides a solid institutional basis for further cooperation, including horizontal provisions on dispute settlement and review procedures. The SIA and the EURATOM agreement on nuclear energy constitute the first supplementing agreements of a broader bilateral network which can be further expanded in the future. The

[57] Rule 115of the Rules of Procedure of the European Parliament, www.europarl.europa.eu.

[58] B Driessen, 'Provisional Application of International Agreements by the EU' cit. 764.

[59] *Ibid*. 760.

[60] 'European Parliament to scrutinise deal on future EU-UK relations', in European Parliament Press release of 28 December 2020, www.europarl.europa.eu.

existence of a single governance system avoids the multiplication of parallel structures and the creation of additional bureaucracy.[61] This is an important lesson, which seems to be drawn from the experience of EU-Swiss relations.

Second, the unprecedented nature of the withdrawal process in combination with a very tight schedule for negotiations required a pragmatic approach from all institutional actors. This resulted in rather exceptional practices such as the combined adoption of the TCA and SIA under the common legal basis of art. 217 TFEU, the preference for a facultative EU-only agreement and recourse to provisional application without the prior involvement of the European Parliament. Whereas these options are all possible from a legal point of view, they are nonetheless politically sensitive. In particular, the "EU-only" nature of the TCA is remarkable in light of the broad scope and political significance of the agreement. It is, therefore, not surprising that several Member States and also the European Commission clarified that this arrangement is without prejudice to any future agreements. Be that as it may, the example of EU-UK relations reveals how the legal toolbox of the EU's external relations is sufficiently sophisticated to address particular challenges.

Third, the adoption of the new EU-UK legal framework is not the end of the Brexit process. The TCA and the existing supplementing agreements constitute the basis for the further development of the bilateral relations in the coming years. Additional supplementing agreements on specific sectoral issues can be expected to be discussed in the (near) future. For instance, on financial services, the ambition was to agree by March 2021 on an additional Memorandum of Understanding establishing a framework for regulatory cooperation in this area. Additional arrangements are also envisaged for the mutual recognition of professional qualifications.[62] In this respect, the necessary measures can be discussed and adopted in the Partnership Council, which is the core institutional body established under the TCA.[63]

Finally, the absence of provisions on cooperation in the field of CFSP is a remarkable gap in the new legal framework of EU-UK relations. In contrast to traditional framework agreements, the TCA does not include a specific chapter on "political dialogue" nor are there any provisions on political cooperation or foreign and security matters.[64] Nevertheless, the option of a specific "Political Dialogue on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP)" was explicitly envisaged in the

[61] This feature was also highlighted in the Commission's Proposal COM (2020) 855 final of 25 December 2020 for a Council decision on the signing and provisional application of the TCA and SIA, 8.

[62] Art. 158 TCA.

[63] On the powers of the Partnership Council, see: art. 7 TCA.

[64] The only exception is a specific clause on 'future accessions to the Union' (art. 781), which implies a commitment from the EU to notify the UK about new requests for accession of a third country to the Union and the involvement of the Partnership Council as platform for discussion about its implications for the UK and for EU-UK relations.

joint Political Declaration setting out the framework for the future of EU-UK relations.[65] In addition, the exchange of information on the alignment of sanctions, participation to CSDP missions and operations and the exchange of intelligence were on the agenda.[66] Apparently, the UK did not wish to negotiate provisions in these areas at this stage.[67] As a result, there is currently no framework in place to jointly respond to foreign policy challenges such as the imposition of restrictive measures on third country nationals. This leads to a gradual divergence in the EU's and UK's sanctions regimes, which is already visible in the sense that 113 persons and entities which are on the EU's sanctions list were not subject to UK sanctions at the beginning of 2021.[68] Hence, it appears that the UK prefers a relationship which is largely based on informal cooperation in the field of foreign policy, security and defence. It remains to be seen to what extent this approach is tenable in the long term. It is probably one of the issues to be taken into account when the newly established bilateral legal framework will be evaluated as foreseen in art. 776 of the TCA.[69] Unavoidably, pragmatism and flexibility will remain important principles for the elaboration of the newly bilateral legal framework of EU-UK relation.

[65] Political Declaration cit. point 95.

[66] *Ibid*. points 97-104.

[67] 'EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and cooperation in areas of mutual interest' cit.

[68] M Lester, 'Which EU Sanctions Targets has the UK not Sanctioned?' (12 January 2021) European Sanctions www.europeansanctions.com.

[69] According to this provision, the TCA, its supplementing agreements and any matters related thereto will be jointly reviewed five years after the entry into force of the TCA and every five years thereafter.